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# Interdistrict School Choice: Clustering in Action?

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# **Interdistrict School Choice: Clustering in Action?**

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May 11, 2007

**Table of Contents**

Table of Contents ..... 1

Introduction..... 2

I. The Development of School Choice..... 8

    A. Post-Milliken Dynamics ..... 11

    B. Development of New Types of Urban Schools..... 15

    C. The Development of Interdistrict School Choice in Connecticut ..... 18

II. Cross-Boundary School Options in New Haven..... 27

    A. Who Attends Interdistrict Magnet Schools and What Motivates Attendees?..... 30

    B. Effects of the Exercise of School Choice on the New Haven Public Schools ..... 45

    C. Factors Motivating *Open Choice* Participants ..... 61

    D. Effects of Open Choice and the Interdistrict Magnet Schools on Suburban Districts  
..... 68

III. Frameworks for Evaluating New Haven’s Cross-Boundary Programs and Lessons for  
School Policy ..... 71

    A. The Benefits and Disadvantages of Expanded Choice ..... 72

    B. Bridging versus Bonding Social Capital ..... 80

    C. Tools from Political Economy ..... 83

        (i) *The Tiebout Critique and the Sheff Rejoinder*..... 84

        (ii) *Lessons from the Tiebout/Fischel Model on Political Viability*..... 88

        (iii) *Financial and Political Expense*..... 93

IV. Conclusion ..... 97

## **Introduction**

Recent years have seen the rise of new public school options in many of America's metropolitan areas.<sup>1</sup> Privately run charter schools, magnet schools that draw their attendees not only from different municipalities but also different neighborhoods, and open enrollment plans that allow children to attend school in another public school district entirely are changing the face of public education in America. The neighborhood public school, which long defined both the primary and secondary educational experience for most Americans, has become only one of many options available.

Reforms in the urban public education system have come in response to dismay about the decline in urban public school quality, as well as the legal and social pressure generated by the increasing segregation of low-income, minority students in city public schools. Policy attacks on segregation have focused on two main fronts: on school segregation itself, with attacks on the system of neighborhood-based schools as perpetuating racial separation, and on the underlying problem of residential segregation that creates segregated schools through neighborhood-based assignments.<sup>2</sup>

Historically, housing integration-oriented policies have been based on the assumption that minority and poor households would, if given the choice, prefer integration by class and race. For example, both the Fair Housing Act and tenant-based Section 8, the two most significant and long-standing federal policies designed to foster housing integration and an increase in housing options for poor and minority families,

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<sup>1</sup> See Heritage Foundation, School Choice: Greater Opportunities in Education, <http://www.heritage.org/research/education/schoolchoice/schoolchoice.cfm> (last visited May 8, 2007) (discussing current status of school choice in each state); Heritage Foundation, School Choice: Types of School Choice, <http://www.heritage.org/research/education/schoolchoice/typesofschoolchoice.cfm> (last visited May 8, 2007) (detailing various forms of school choice).

<sup>2</sup> See *infra* Part I.

can only serve an integrative purpose if prospective tenants and homebuyers make the choice to integrate—that is, to move into a neighborhood inhabited primarily by individuals of a different race and/or social class.<sup>3</sup> By contrast, school choice programs have frequently permitted only one-way integrative choices—for example, by only allowing minorities or whites to move to a school with a smaller percentage of minorities or whites, respectively, than their current school—yet participation in such programs generally remains voluntary and success remains dependent on parents choosing to integrate.<sup>4</sup>

The realities of individual preference, economics, and social pressure reflect a much more complicated dynamic than the assumptions behind these programs would suggest. The results of school choice policies in Connecticut provide a window into these complications. Like an increasing number of American states and localities, Connecticut has begun to experiment with voluntary cross-boundary school choice options, including the creation of schools in the city that both city and suburban residents

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<sup>3</sup> The Fair Housing Act makes it illegal for housing providers to discriminate in the provision of housing to otherwise qualified renters or purchasers on various grounds including race, but does not require housing providers to affirmatively integrate their housing, nor does it require renters or purchasers to affirmatively seek out integrated housing opportunities. Even if housing providers fully complied with the letter and spirit of the Act, the Act's integrative potential would still depend on the voluntary efforts of tenants and homebuyers. See Fair Housing Act, 42 U.S.C. §§ 3604 *et seq.* (2000); Thaddeus J. Hackworth, Note, *The Ghetto Prison: Federal Policy Responses to Racial and Economic Segregation*, 12 GEO. J. ON POVERTY L. & POL'Y 181, 181-82 (2005). Section 8 provides vouchers that subsidize rental housing to a limited number of eligible applicants; within the significant limitations of applicants' financial means and the willingness of landlords to accept the vouchers, applicants may choose where to live. See U.S. Housing Act of 1937, as amended, 42 U.S.C. §§ 1437 *et seq.* (2000); Brian Maney & Sheila Crowley, *Scarcity and Success: Perspectives on Assisted Housing*, 9-SUM J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 319, 325-329 (2000).

<sup>4</sup> See Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791 (2005). Not all programs that send children to schools other than the one in their neighborhood have been voluntary. Under court-ordered busing plans in the 1970s and 80s, many families had no choice in which public school their children attended, as children were bused out of their neighborhood to achieve racial balance in schools. In most cases, this program was enormously unpopular. See *infra* note 22 and accompanying text.

attend.<sup>5</sup> Enrollment data from the first decade of cross-boundary school choice options in Connecticut demonstrates that city and suburban white and African-American residents exercise their choices in different ways. In enacting the programs, policymakers assumed that creating special city magnet schools with places set aside for suburban residents would result in a flow of white, middle-class students into these schools.<sup>6</sup> Conventional scholarly wisdom, taking for granted that families of all races migrate from the city to the suburbs in large part to gain access to suburban educational opportunities, would have predicted that the programs would have few suburban participants from any racial group.<sup>7</sup> Neither side was correct. Instead, suburban African-American families have chosen to participate in large numbers; in particular, as compared with whites in the same districts, blacks living in heavily white suburban districts are much more likely than blacks who live in more integrated suburban districts to use choice to move their children into a more heavily minority school. Furthermore, across both wealthy and poorer suburbs, whites are exercising choice at much lower rates than blacks, and whites' exercise of choice to leave a suburban district is correlated with the poverty level of the children in that district's schools.<sup>8</sup> As a result, these programs generate outcomes, and have certain benefits and downsides, expected neither by their supporters nor their opponents.

These findings, while perhaps surprising to some, are consistent with and contribute to a growing literature about the complex attitudes held by many African-Americans towards integration, especially when "integration" means being a token

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<sup>5</sup> See *infra* Section I.C.

<sup>6</sup> See An Act Enhancing Educational Choices and Opportunities, 1997 Conn. Legis. Serv. Pub. Act. 97-290 (West) (setting out methods and rationales); Stan Simpson, *A Decade of Half Measures: 10 Years After a Hartford Mother and Son Forced City Schools To Integrate, Progress Has Dragged*, HARTFORD COURANT, July 23, 2006 (offering an extensive discussion of what policies have sought and what they have achieved).

<sup>7</sup> See *infra* note 203 and accompanying text.

<sup>8</sup> See *infra* Part II.

African-American in a predominantly white environment. As Sheryll Cashin points out, in an American system where opportunity is shaped by the racial and economic composition of the neighborhood in which one lives, blacks have recognized and even accepted that getting access to opportunity has required some amount of integration.<sup>9</sup> On the other hand, Cashin explains, “[M]any black people appear to have adopted a ‘post-integrationist’ mind-set, and now most value living among themselves . . . .”<sup>10</sup> This mind-set appears to be rooted in at least two partially contradictory sources: first, frustration with integration’s “unmet promises” that has motivated many blacks to look beyond integration, and second, the fall of certain discriminatory barriers that has allowed blacks to express a preference for living among other blacks, to acquiesce in “to the fundamentally human tendency to seek community among people who are familiar to us.”<sup>11</sup> The resulting development of black suburbs also has a dark side, however: even the wealthiest suburban black communities have not achieved the benefits of similarly situated white suburbs, including good job opportunities and good schools.<sup>12</sup>

Cashin’s work suggests that clustering may have an intuitive appeal as a partial explanation for the persistence of racial segregation in America. Yet measuring the degree to which clustering explains residential racial segregation—or its harms and benefits—has proven difficult, because it co-exists with continued housing discrimination and social class segregation in the housing market. Experiments such as *Moving to Opportunity* have attempted to assess the degree to which clustering explains racial segregation in American society, by studying how low-income families exercise housing

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<sup>9</sup> SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM*, at xvi-xvii (2004).

<sup>10</sup> *Id.* at 17.

<sup>11</sup> *Id.* at 12, 25.

<sup>12</sup> *Id.* at 134-35.

choices when given restricted and unrestricted vouchers.<sup>13</sup> *Moving to Opportunity* gave certain low-income minority residents of city public housing portable housing vouchers that allowed them to move anywhere; many individuals remained in areas with significant black populations, suggesting the force of clustering.<sup>14</sup> The program gave another group of public housing residents housing vouchers that could only be used in low-poverty neighborhoods.<sup>15</sup> Contrary to expectations that on a variety of indicators, participating children would be better off having moved to wealthier neighborhoods, researchers were surprised to find that those male teenagers who moved to wealthier areas actually did *worse* than male teenage members of the control group on thirteen out of fifteen indicators designed to track physical health, mental health, risky behavior, and education.<sup>16</sup> *Moving to Opportunity* calls into question the conventional assumption that

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<sup>13</sup> *Moving to Opportunity* grew out of the *Gautreaux* program in Chicago and is designed to test the effects of restricted and unrestricted housing mobility on poor families' well-being. In the initial set of studies, participants, all of whom started as project-based public housing residents, were divided into three categories: the first group received Section 8 vouchers enabling them to move anywhere, the second received vouchers enabling them to move only to low-poverty areas (census tracts with less than 10% of the population living below the FPL), and the third (control) group remains in public housing and does not receive vouchers at all. See John Goering, Judith D. Feins, & Todd M. Richardson, *A Cross-Site Analysis of Initial Moving to Opportunity Demonstration Results*, 13 J. HOUSING RES. 1, 4-5 (2002); MTO Program Design, <http://www.nber.org/~kling/mto/background.htm#Design> (last visited May 9, 2007). Members of three groups are then studied along a variety of economic and noneconomic indicators to assess their well-being and the power of such vouchers to have a positive impact on participants' lives. *Id.*

<sup>14</sup> See Goering, Feins, & Richardson, *supra* note 13, at 16 tbl.4 (noting that on average, MTO families receiving unrestricted Section 8 vouchers lived in neighborhoods that were 40.3% black, as compared with neighborhoods that were 48.3% black inhabited by the control group that did not receive vouchers). *Moving to Opportunity* could not definitively answer how much an affirmative desire to cluster shapes these families' choices; negative factors such as trouble accessing housing, unfamiliarity with other neighborhoods, discrimination from neighborhood residents, and discrimination in attempting to use the vouchers, may limit the ability of minorities to move into different neighborhoods despite having the newfound economic wherewithal to do so. It did find, however, that MTO participants who moved to lower-poverty areas did not experience "substantial, direct racial hostility" or "community opposition" in their new location. Goering, Feins, & Richardson, *supra* note 13, at 12-13.

<sup>15</sup> See *id.* at 4-5.

<sup>16</sup> Jeffrey R. Kling, Jeffrey B. Liebman, & Lawrence F. Katz, *Experimental Analysis of Neighborhood Effects*, 75 ECONOMETRICA 83, 90-91, 103 (2007)



simply placing a low-income, minority student—particularly a male teenager—in a wealthier school will be beneficial for him.<sup>17</sup>

This study seeks to build upon the *Moving to Opportunity* research with a goal towards further understanding how parents make choices about their children’s schooling in light of the dynamics that Cashin and *Moving to Opportunity* have identified. To better understand these dynamics, this study focuses on two interdistrict choice-based programs in Connecticut.<sup>18</sup> In particular, an examination of the rates of enrollment by racial group in New Haven’s interdistrict magnet schools helps answer some of the questions that the housing-based experiments leave unanswered. The unique configuration of these schools, which this paper discusses in detail, facilitates an almost natural experiment through which to examine the way clustering dynamics may affect where students, in a choice-based system, end up going to school. In focusing on schools as opposed to focusing on housing, this study hopes to contribute to current discussions on urban school policy, which nationwide continues to be in rapid flux.<sup>19</sup>

This paper proceeds in four parts. Part I situates the paper in its historical and social context. It discusses the evolution of urban education and school choice in America since 1970, with a focus on the development of interdistrict school choice in Connecticut and how school choice operates today. Part II offers a detailed exposition of

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<sup>17</sup> See *id.*; see also Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2389 (“[S]hipping black children to predominantly white environments has often proven detrimental to their well-being.”).

<sup>18</sup> One program has created publicly-funded schools, known as “interdistrict magnet schools,” that are located in the city but enroll students from multiple school districts. The other program, known in Connecticut as *Open Choice* and generically as open enrollment, allows students from one school district or municipality to enroll in the public schools operated by another district. In Connecticut, in contrast with most other states, students can only transfer between urban and suburban districts; transfers between suburban districts are not permitted through the program. See *infra* notes 86-94 and accompanying text.

<sup>19</sup> In the context of cross-boundary or location-oriented policies, a focus on school policy also seems particularly important because, as *Moving to Opportunity* has aptly pointed out, it is the teenage youth population that is most at risk from the adverse effects of their environment. See Kling, Liebman, & Katz, *supra* note 16, at 103.

the cross-boundary school choice options in New Haven, the Connecticut city that pioneered Connecticut's unique experiment in creating interdistrict schools. It explores how urban and suburban families exercise school choice options and reveals the surprising extent to which suburban black families, particularly those in districts where they are token in numbers, have chosen to send their children to magnet schools at rates much higher than those of similarly situated whites. Part III explores means of evaluating New Haven's cross-boundary programs and the lessons these programs can offer educational policy innovators. Drawing on frameworks from law and economics, social capital, and political economy, it assesses the normative implications and political feasibility of cross-boundary programs along a variety of dimensions. Part IV concludes.

### **I. The Development of School Choice**

For over a century, most Americans never thought of sending their children to any school other than the public school that served their place of residence. Though private schools have existed in America for centuries, the neighborhood public school, as homogenous as one's residential neighborhood, defined the primary, and sometimes, the secondary educational experience for most living Americans who came of age before 1970.<sup>20</sup> These public schools varied tremendously in quality along many dimensions, with racial divisions frequently tracking quality divisions. Where whites may remember an almost edenic ideal of a safe, welcoming, warm environment, blacks may recall a

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<sup>20</sup> See MEYER WEINBERG, RACE AND PLACE: A LEGAL HISTORY OF THE NEIGHBORHOOD SCHOOL (1967).

dilapidated physical plant, large classes, textbook shortages, and other results of chronic underfunding.<sup>21</sup>

Starting around 1970, in the wake of several seminal Supreme Court decisions, federal courts began to order many large city school districts to bus a portion of their students to schools outside their neighborhoods—what critics called “forced busing”—as a means of integrating city schools.<sup>22</sup> In affected city districts, busing signaled the end of neighborhood schools for a significant portion of district residents, at least until the decrees began to be lifted in the 1980s and 1990s.<sup>23</sup> Yet even in the early 1970s, it had already become apparent that achieving truly integrated schools would require mixing children from the city and the suburbs, since an ever-increasing portion of metropolitan areas’ white student populations was moving to suburbs, leaving behind an increasingly

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<sup>21</sup> See *id.*; see also Mark S. Davies, *Desegregating an Ideal: Neighborhood Schools, Urban School Systems, and Missouri v. Jenkins*, 11 ST. JOHN’S J. LEGAL COMMENT. 89 (1995) (arguing that judicial reasoning about schools assumes a particular image of a suburban neighborhood school). Reflecting common usage, throughout this paper, I employ the terms “black” and “African-American” interchangeably. With regard to classifications in the data, for school enrollment-related data, I have relied on the Connecticut Department of Education’s single-race classification system, which classifies each student as white, black, Hispanic, Asian, or American Indian, and does not provide for a multi-race category. I also employ data from the 2000 and earlier censuses, which employs a somewhat different system of racial classification. In particular, the census treats “Hispanic origin” as a binary (yes/no) variable separate from one’s race (white, black, Asian, etc.), and as of 2000, allows individuals to self-identify as being members of more than one racial group. For simplicity and in order to make the Census and Department of Education data more directly comparable, with regard to Census data I have considered those individuals of Hispanic origin, regardless of race, as “Hispanic.” “White” refers to non-Hispanics who identify as white alone. “Black” generally refers to non-Hispanics who identify as black alone, although in a few cases data for non-Hispanic blacks was not separately available, in which case “black” refers to all who identify as black alone. Because the Department of Education data does not include a multi-race category, to aid comparison, those non-Hispanics who identify as being of more than one race are not included in the analysis. This should not affect results too greatly: census data is generally only used for background; only rarely do I directly compare numbers from the Department of Education and Census; and in the 2000 Census, only 2.4% of New Haven non-Hispanic residents (1.5% of the New Haven region’s non-Hispanic residents) indicated being members of more than one race.

<sup>22</sup> The first Supreme Court decision to approve mandatory busing was *Swann v. Charlotte-Mecklenberg School Dist.*, 402 U.S. 1 (1971). Controversies over busing raged in many cities, most famously and intensely in Boston. For a good portrayal of the Boston busing controversy that situates it in a broader national and historical context, see RONALD P. FORMISANO, *BOSTON AGAINST BUSING: RACE, CLASS, AND ETHNICITY IN THE 1960S AND 1970S* (2004).

<sup>23</sup> See GARY ORFIELD ET AL., *DISMANTLING DESEGREGATION* (1996) (describing the history and end of desegregation decrees).

concentrated poor and minority student population in the city.<sup>24</sup> Reformers in Detroit convinced a federal court to require suburban districts to participate in a metropolitan area-wide desegregation plan.<sup>25</sup> The incensed suburban districts protested that they should not have been obligated to help desegregate Detroit's schools, and the U.S. Supreme Court agreed in *Milliken v. Bradley*.<sup>26</sup> In holding that a federal court could not implement a multidistrict school desegregation remedy absent a finding that the constitutional violation in one district produced segregation in the other, or that the school district boundary lines were established with the purpose of fostering racial segregation, the Supreme Court signaled that federal judicial remedies for school desegregation would stop at the city line.<sup>27</sup>

*Milliken* reflected and rested on two primary principles embedded in our constitutional tradition. First, it stood on the principle of federalism, reflecting a longstanding tradition of local and state control over education. Second, it reflected the principle that the judiciary's power to order a remedy against a particular actor stems from that actor's commission of a legal violation.<sup>28</sup> The Court's holding reflected the majority's understanding of both of these principles. In particular, it codified the legal relevance of school district boundaries rather than yielding to the respondents' suggestion that the Court recognize them as an artificial, historically contingent product with detrimental effects:

[T]he notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our

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<sup>24</sup> See *Milliken v. Bradley*, 418 U.S. 717, 759-62 (1974) (Douglas, J., dissenting).

<sup>25</sup> See *Bradley v. Milliken*, 345 F. Supp. 914 (E.D. Mich. 1972), *aff'd in relevant part*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

<sup>26</sup> 418 U.S. 717.

<sup>27</sup> See *id.*

<sup>28</sup> See *id.* at 741-43.

country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.<sup>29</sup>

The Court cited no empirical evidence for its reasoning that local autonomy of school districts enhanced the quality of the educational process, nor did it discuss the means by which the quality was so enhanced. Yet the majority drew upon the American cultural notion of the neighborhood school and local school district, instinctually reasoning that local autonomy and school quality were somehow related.

Reading the majority opinion's text, *Milliken* seems like an unremarkable decision: absent a finding that the suburban districts had themselves engaged in racial discrimination, a court could not enforce a remedial order against them. But the social and practical effect of the decision was dramatic; it "dealt a crushing blow" to efforts at urban desegregation in the growing number of northern and western municipalities where school district and town lines divided whites from minorities.<sup>30</sup> In the over thirty years since the *Milliken* decision, the majority's understanding that school quality depends on local autonomy has expanded its powerful hold over the American educational system. As James Ryan has pointed out, *Milliken* not only reflected but also enhanced the political power of suburbanites to maintain local control over their schools.<sup>31</sup>

#### A. Post-Milliken Dynamics

*Milliken* assumed a background system of state and local control over schools, and its converse, that one's place of school was intricately linked to one's place of

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<sup>29</sup> *Id.* at 741-742.

<sup>30</sup> James E. Ryan, *Brown, School Choice, and the Suburban Veto*, 90 VA. L. REV. 1635, 1645 (2004).

<sup>31</sup> *Id.* at 1646.

residence. A year before *Milliken*, the U.S. Supreme Court had decided *San Antonio Independent School District v. Rodriguez*, holding that unequal school financing within a state based on differences in local property tax revenues did not violate the Equal Protection Clause of the Fourteenth Amendment.<sup>32</sup> In the wake of these two decisions, suburbs and suburban residents could wash their hands of the problems of urban education as a matter of federal constitutional law.<sup>33</sup> In explicitly endorsing a “deeply rooted” tradition of local control over schools, the Court signaled to white families who could afford to move out of the city to the then-racially homogenous suburbs that by doing so, they could avoid sending their children to (or contributing to the financing of) integrated schools.<sup>34</sup> Transported from the city to the suburbs, the idyllic neighborhood school resettled into its comfortable foothold.<sup>35</sup>

As the site of high-quality public education shifted to the suburbs, giving minorities access to suburban schools and the benefits that accompanied them appeared to require opening up suburban housing opportunities to minority residents.<sup>36</sup> Even following the erosion of formal discriminatory barriers following the passage of the Fair Housing Act of 1968, exclusionary zoning and lingering discrimination tended to keep

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<sup>32</sup> 411 U.S. 1 (1973).

<sup>33</sup> See Ryan, *supra* note 30, at 1646. The rulings in *Milliken* and *Rodriguez* did not prevent state legislatures or state courts from implementing cross-boundary school attendance or redistributive school financing plans as a matter of state statutory or constitutional law. For example, the Connecticut Supreme Court’s holding in *Sheff v. O’Neill*, 678 A.2d 1267 (Conn. 1996), explicitly required the state to implement a cross-boundary remedy as a matter of state constitutional law. See *infra* Section II.C. Yet as James Ryan notes, as a practical matter successfully implementing cross-boundary school choice requires overcoming the formidable political legacy of *Milliken*. Ryan, *supra* note 30, at 1635.

<sup>34</sup> See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2052 (2002) (noting that suburban schools “would remain inviolable”); cf. Liu & Taylor, *supra* note 4, at 792 (2005) (noting that school segregation persists in America in part because suburbs have been largely immune from city-based school desegregation lawsuits since the *Milliken* decision in 1974).

<sup>35</sup> See Liu & Taylor, *supra* note 4, at 792 (noting that desegregation has not been tried in many suburban districts).

<sup>36</sup> Suburban residents also get the benefit of access to neighborhoods with lower crime rates, jobs, more expansive housing, and better government services.

suburban home prices high and otherwise out of reach of many minority families.<sup>37</sup> Furthermore, as economists have demonstrated, homes in high-quality school districts are relatively more expensive than similarly sized and situated homes in worse school districts because the value of good schools gets capitalized into home prices.<sup>38</sup> They are thus particularly out of reach for low-income persons. These phenomena led activists to form an “open suburbs” movement, which filed a series of housing integration lawsuits—most famously in Mt. Laurel, New Jersey—with the goal of requiring higher-income suburbs to accept a “fair share” of inexpensive housing for low-income families.<sup>39</sup>

Yet activists likely underestimated the ferocity with which suburban homeowners would resist this type of imposed integration,<sup>40</sup> and large gaps along social class lines remain today between cities and suburban communities in many American metropolitan areas.<sup>41</sup> However, suburbs have diversified considerably along *racial* lines over the past four decades, tempering the 1960s-era vision of the lily-white suburban “noose” around the black central city.<sup>42</sup> In the New Haven, Connecticut region,<sup>43</sup> on which this paper

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<sup>37</sup> See Margalynne Armstrong, *Desegregation Through Private Litigation: Using Equitable Remedies To Achieve the Purposes of the Fair Housing Act*, 64 TEMPLE L. REV. 909, 909-910 (1991) (noting continued race discrimination in housing in spite of Fair Housing Act, and the link between housing discrimination and school segregation); Harold A. McDougall, *From Litigation to Legislation in Exclusionary Zoning Law*, 22 HARV. C.-R. C.-L. L. REV. 623 (1987) (discussing practice of exclusionary zoning and litigation against it).

<sup>38</sup> See *infra* note 236.

<sup>39</sup> See Christopher Berry, *Land Use Regulation and Residential Segregation: Does Zoning Matter?*, 3 AM. L. & ECON. REV. 251, 255 (2001) (describing “open suburbs” movement and its lack of success); McDougall, *supra* note 37 (discussing *Mt. Laurel*)

<sup>40</sup> For details of such ferocious resistance, see Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.-R. C.-L. L. REV. 289 (2002). Schuck contends that the litigation has been extremely difficult because the principle the plaintiffs attempted to vindicate in the *Mt. Laurel* litigation, “equal access to suburban communities regardless of ability to pay,” enjoys little moral or political support in American society. Schuck, *supra*, at 294.

<sup>41</sup> See Hackworth, *supra* note 3, at 185-86.

<sup>42</sup> As Ingrid Gould Ellen points out, the disproportionate emphasis of social science researchers on evolving housing patterns in cities has obscured the development of knowledge about the full extent of change in suburban communities. INGRID GOULD ELLEN, SHARING AMERICA’S NEIGHBORHOODS: THE PROSPECTS FOR STABLE RACIAL INTEGRATION 65 (2000).

focuses, African-Americans owned homes in 89% of census tracts in 2000, as compared with 14% of census tracts in 1970.<sup>44</sup> The percentage of all African-American children attending public schools in the region who attend school *outside* of the New Haven School District has grown over time, reaching 26.8% in 1994-95 and rising to 33.6% in 2005-06.<sup>45</sup> Growing numbers of Hispanics and Asian-Americans have also contributed to diversification in suburbia. New Haven Hispanics have suburbanized at an even greater rate than African-Americans, with the percentage of the region's Hispanic schoolchildren attending suburban public schools rising from 28.2% in 1994-95 to 41.8%

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<sup>43</sup> For purposes of this paper, the New Haven region includes the City of New Haven and sixteen towns outside of New Haven that form the greater New Haven metropolitan area. There is no single definition of what towns make up the New Haven region. The South Central Connecticut Regional Council of Government includes New Haven and fourteen suburban towns. *See* South Central Regional Council of Governments, <http://www.scrkog.org/> (last visited May 6, 2007). In his seminal work on the evolution of New Haven in the twentieth century, Douglas Rae employs a narrower list of ten suburban towns when presenting comparative data. *See, e.g.,* DOUGLAS W. RAE, CITY: URBANISM AND ITS END 374 tbl.11.3 (2003). The magnet schools actually draw students from twenty-three suburban towns, though some far-away towns send only a handful of students. In order to better capture the full picture of the school choice dynamic in the region, I have chosen to use a slightly more inclusive definition of the region than either Rae or the Regional Counsel, though I have not included every town in New Haven County nor the towns that send a handful of children to the magnet schools but would not be considered part of the New Haven region by anyone's definition. This definition includes New Haven and sixteen suburban towns: Ansonia, Bethany, Branford, Derby, East Haven, Guilford, Hamden, Madison, Milford, North Branford, North Haven, Orange, Seymour, Wallingford, West Haven, and Woodbridge. Note that in Connecticut, school district boundaries never bisect town boundaries, and are essentially coterminous except in the few cases where several towns have joined together to form a regional school district. The New Haven region has one such district—Regional District Number 5—which includes the towns of Bethany, Orange, and Woodbridge for grades 7-12 only. Every other town operates its own, autonomous school district.

<sup>44</sup> Census 2000 data was generated using customized tables from "Census 2000 Summary File 1 (SF 1) 100-Percent Data," available at U.S. Census Bureau, United States--Data Sets--American FactFinder, [http://factfinder.census.gov/home/saff/main.html?\\_lang=en](http://factfinder.census.gov/home/saff/main.html?_lang=en) (follow "get data" hyperlink under "Decennial Census" heading) (last visited May 8, 2007) [hereinafter Census 2000 Data]. Census 1970 data was generated using customized tables from the Neighborhood Change Database (NCDB), contained in Geolytics, Census DVD Research Package. Census tracts comprise about 1,500 to 8,000 people each and are the best analogue to a "neighborhood" available from census data. *See* U.S. Census Bureau, Census Tracts and Block Numbering Areas, [http://www.census.gov/geo/www/cen\\_tract.html](http://www.census.gov/geo/www/cen_tract.html) (last visited May 8, 2007). My thanks to Adam Gordon for originally making me aware of this dramatic shift.

<sup>45</sup> Data calculated from Connecticut State Department of Education, Connecticut Strategic School Profiles, Strategic School Profiles by District 1993-94, available at <http://www.csde.state.ct.us/public/der/ssp/Dist9394/district.htm> [hereinafter Connecticut 1993-94 District SSP], and Connecticut State Department of Education, Connecticut Strategic School Profiles, Strategic Profiles by District 2005-06, available at <http://www.csde.state.ct.us/public/der/ssp/dist0506/district.htm> [hereinafter Connecticut 2005-06 District SSP]



in 2005-06.<sup>46</sup> Though these figures mean that around two-thirds of the region's African-American children still attend school in the city, this dramatic shift in suburban composition cannot be ignored. Though economic barriers to integration remain significant, American society has progressed significantly since the era of legally-enforceable racial covenants in many northern cities and suburbs in the first half of the twentieth century.<sup>47</sup>

Yet the removal of non-economic barriers to suburban entry has provided little comfort for the vast majority of America's minority families, for whom stark economic realities remain. Even following a widely-hailed decade of success in combating poverty, in 1999 the national poverty rate for black families was 24.9%, for Hispanic families 22.6%, and for non-Hispanic whites only 8.1%.<sup>48</sup> These divisions have played out in where children go to school, with urban public schools educating most of the low-income and minority children in American metropolitan areas, and suburban schools educating an increasingly diverse but generally wealthier population of whites and some minorities.<sup>49</sup>

### B. Development of New Types of Urban Schools

Besides pursuing opportunities to enable minorities to move to the suburbs, reformers continued their efforts to improve urban schools, particularly as white flight led

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<sup>46</sup> Data calculated from Connecticut 1993-94 District SSP and Connecticut 2005-06 District SSP, *supra* note 45. The percentage of white students (around 95%) and of students overall (around 75%) attending public school in the region outside the New Haven School District has remained largely unchanged since 1994-95. Data calculated from Connecticut 1993-94 District SSP and Connecticut 2005-06 District SSP, *supra* note 45.

<sup>47</sup> The Supreme Court held racial covenants legally unenforceable in 1948. *Shelley v. Kramer*, 334 U.S. 1 (1948). Apparently, residents of the New Haven region never employed racial covenants, the use of which was widespread in many other northern cities. But across the metropolitan area, blacks remained concentrated in a few city neighborhoods until recent years, as discussed above.

<sup>48</sup> Census 2000 Data, *supra* note 44, *reprinted in* U.S. CENSUS BUREAU, *POVERTY: 1999*, at 8 tbl.6 (2003).

<sup>49</sup> New Haven is no exception to this trend; for specific details, see *infra* text accompanying notes 134-137.

to them serving increasingly poor and minority populations. Once it became clear that in the wake of *Milliken*, *Rodriguez*, and the phenomenon of white suburbanization that future federal court lawsuits of the kind popular in the aftermath of *Brown* would have limited effect, reformers turned to state court litigation under the provisions of state constitutions and statutes. This litigation has evolved through several types of claims, including equal protection claims that focus on comparative school financing disparities and gaps in per-pupil expenditures and quality of facilities, adequacy-based claims that focus specifically on the need to improve failing schools, and most recently, isolation-based claims that focus on the harm caused by de facto racial and economic isolation of poor minorities in city schools.<sup>50</sup>

At the same time, policymakers and activists outside of the judicial realm began to articulate other solutions for the problems of failing city schools. In the years since *Milliken*, as cities have become increasingly minority and low-income, reformers have experimented with new types of schools or assignment plans, designed to balance goals of maintaining high-quality schools, keeping white families in the system, and staying financially afloat.<sup>51</sup> Over the past two decades, these reforms have increasingly taken place in the form of “school choice.”<sup>52</sup> Urban districts started themed magnet schools that drew their population from across the city as an experiment in diversifying and in providing a higher-quality educational experience that would be attractive to both white

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<sup>50</sup> See James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (1999); Aaron Saiger, Note, *Disestablishing Local School Districts as a Remedy for Educational Inadequacy*, 99 COLUM. L. REV. 1830, 1832 (1999).

<sup>51</sup> See, e.g., Eboni S. Nelson, *Parents Involved and Meredith: A Prediction Regarding the (Un)constitutionality of Race-Conscious Student Assignment Plans*, 84 DENV. U. L. REV. 293, 310-318 (2006) (discussing programs that public school districts have voluntarily implemented to remedy segregation).

<sup>52</sup> See *id.*

and minority city residents.<sup>53</sup> As early as 1980, Cambridge, Massachusetts and Montclair, New Jersey, experimented with disestablishing neighborhood schools in favor of a district-wide choice plan.<sup>54</sup> Minnesota pioneered cross-district choice with a statewide cross-district choice plan beginning with the 1990-91 school year.<sup>55</sup>

Choice-based reforms got a boost with the publication of John Chubb and Terry Moe's *Politics, Markets, and America's Schools* in 1990.<sup>56</sup> Though many of their ideas had been previously articulated in other places and forms, the book's publication heralded a turning point in thinking about solutions to the crisis in public schools.<sup>57</sup> Proclaiming that schools did better when principals and teachers had autonomy, they concluded that the existing system of bureaucratized public schools actually harmed school quality by limiting the autonomy of principals and teachers.<sup>58</sup> Though lawsuits continued to claim that funding disparities were the cause of poor schools, Chubb and Moe argued that money was not the only cause.<sup>59</sup> Drawing on ideas first articulated by Milton Friedman, they hypothesized that the competition created by public school options would lead to dramatic educational improvements.<sup>60</sup> Pointing to various experiments already in place, their argument that school choice would strengthen schools through

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<sup>53</sup> See Kimberly C. West, Note, *A Desegregation Tool That Backfired*, 103 YALE L.J. 2567, 2568-2571 (1994) (describing history, purpose, and functioning of magnet schools)

<sup>54</sup> See JEFFREY R. HENIG, *RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR* 111-12 (1994); RICHARD D. KAHLENBERG, *ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE* 116-30 (2001); U.S. DEP'T OF EDUC., OFFICE OF INNOVATION AND IMPROVEMENT, *CREATING STRONG DISTRICT SCHOOL CHOICE PROGRAMS* 41 (2004) (discussing the Cambridge plan).

<sup>55</sup> Ross Corson, *Choice Ironies: Open Enrollment in Minnesota*, AMERICAN PROSPECT, Sept. 21, 1990; Robert C. Bulman & David L. Kirp, *The Shifting Politics of School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 36, 45 (Stephen D. Sugarman & Frank R. Kemerer, eds. 1999) (noting Minnesota was first place to enact open enrollment). Other states put similar plans into effect during the 1990s.

<sup>56</sup> JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990)

<sup>57</sup> See Bulman & Kirp, *supra* note 55, at 45-46.

<sup>58</sup> CHUBB & MOE, *supra* note 56, at 23, 187.

<sup>59</sup> CHUBB & MOE, *supra* note 56, at 193.

<sup>60</sup> See BRIAN P. GILL ET AL., *RHETORIC VERSUS REALITY: WHAT WE KNOW AND WHAT WE NEED TO KNOW ABOUT VOUCHERS AND CHARTER SCHOOLS* 116-117 (2001) (discussing history of school choice).

creation of a competitive market set off a nationwide debate about the benefits that school choice might provide to problem districts, and a scramble to implement experiments.<sup>61</sup>

Implementation of choice-based school reforms, primarily by legislative initiative, accelerated through the 1990s and into the first decade of the twentieth century.<sup>62</sup> An extensive scholarly literature particularly focuses on the merits of charter schools and vouchers as school-choice options. Yet while the link between one's neighborhood of residence and where one goes to school has continued to erode as a result of choice-based reforms, those programs that are perhaps the most radical form of choice—"cross-boundary" programs that permit students living in one district to attend school in, and/or with students from, another district—remain relatively undiscussed in the scholarly literature. Though they constitute just one category among the ever-expanding menu of "choice" schools, they continue to expand across the country and deserve serious consideration.

### C. The Development of Interdistrict School Choice in Connecticut

Though it has not implemented open enrollment to the same extent as some other states, Connecticut has been at the national forefront in implementing cross-boundary school choice plans focused on providing better educational opportunities for low-income and minority students. In particular, Connecticut has created a new kind of cross-boundary school choice option—the interdistrict magnet school. Interdistrict school choice arose in Connecticut as the result of a lawsuit, *Sheff v. O'Neill*, and was ultimately

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<sup>61</sup> See Bulman & Kirp, *supra* note 55, at 45-46 (explaining that the policy world was eager to have a panacea at the time Chubb and Moe first contended that choice represented a panacea).

<sup>62</sup> See Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* *supra* note 55, at 13, 21 (noting that school choice has been growing nationally since 1990).

implemented by legislative initiative.<sup>63</sup> Litigated by a creative team of lawyers in Connecticut state court, *Sheff* remains the most path-breaking and novel case of the latest wave of education lawsuits.<sup>64</sup> Most previous court-ordered remedies to education lawsuits had taken a district's background composition for granted and focused on increasing funding for city schools, or had sought to implement some form of intradistrict choice to diversify schools. In most cases, they limited their remedies to the boundaries of the city school district.<sup>65</sup>

The *Sheff* plaintiffs charged that Connecticut's system of distinct urban and suburban school districts itself violated the state constitutional rights of children isolated in the Hartford school system. Breaking with the pattern of previous lawsuits, the plaintiffs contended the source of educational inadequacy came not only from funding disparities, but also from the ethnic, racial, and economic isolation of students in Connecticut's urban school districts.<sup>66</sup> The Connecticut Supreme Court agreed that isolation was the root of the harm.<sup>67</sup> The Court went on to conclude that though federal constitutional law would provide no remedy in this situation, the "unique provisions" and "constitutional imperatives" of the Connecticut Constitution entitled the plaintiffs to relief.<sup>68</sup> In its holding, the Connecticut Supreme Court explicitly broke with the tradition of *Milliken*. Where the U.S. Supreme Court twenty years before had looked to the "deeply rooted" belief in local control and the need for "local autonomy" to ensure public

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<sup>63</sup> *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996). For a vivid chronicle of the history of the *Sheff* case and the poor quality schools in the Hartford School District that inspired the case, see SUSAN EATON, *THE CHILDREN IN ROOM E4: AMERICAN EDUCATION ON TRIAL* (2007).

<sup>64</sup> See *infra* notes 71-74 and accompanying text.

<sup>65</sup> See Ryan & Heise, *supra* note 34, at 2050-58.

<sup>66</sup> See *Sheff*, 678 A.2d at 1271-72. Racial isolation is commonly cited as one of America's most serious, but also most intractable, social problems. See, e.g., Schuck, *supra* note 40, at 303.

<sup>67</sup> *Sheff*, 678 A.2d at 1270-71.

<sup>68</sup> *Id.* at 1270-71.

support for public schools and educational quality, the Connecticut Supreme Court found that the Connecticut constitutional right to “a substantially equal educational opportunity”<sup>69</sup> required the legislature to take affirmative steps to remedy de facto segregation in public schools, even if it meant violating the sanctity of district lines.<sup>70</sup>

The *Sheff* Court was the first modern state court case to identify *isolation*, rather than racially discriminatory state action, as the fundamental problem afflicting minorities in urban schools.<sup>71</sup> Most significantly, the court recognized that particularly in Hartford, a district that was 92% minority when the suit was filed in 1988-89, it would be impossible to achieve any sort of racial diversity absent a cross-boundary remedy.<sup>72</sup> Simply ordering increased funding would not be enough. Rather than doing so itself, the Court ordered the legislature to develop a remedy.<sup>73</sup> In negotiation with the plaintiffs’ attorneys, the state began implementing cross-boundary programs in the mid-1990s, and agreed, in a comprehensive settlement in 2003, that at least thirty percent of minority Hartford residents attending public school would do so in a “racially desegregated setting” by June 2007.<sup>74</sup>

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<sup>69</sup> *Id.* at 1275. Though not explicitly enumerated in the Constitution as such, the court had held in a previous case that three central provisions of the state constitution, when read together, impose such an obligation. “[A]rticle eighth, § 1, and article first, §§ 1 and 20, impose on the legislature an affirmative constitutional obligation to provide schoolchildren throughout the state with a substantially equal educational opportunity.” *Id.* at 1277 (citing *Horton v. Meskill (Horton I)*, 172 Conn. 615, 648-49 (1977)).

<sup>70</sup> *See Sheff*, 678 A.2d at 1289 (accepting finding of trial court that “[t]he single most important factor that contribute[s] to the present concentration of racial and ethnic minorities in Hartford [is] the town-school district system [codified at § 10-240] which has existed since 1909 . . .” and that the effects of the school districting scheme made it unconstitutional).

<sup>71</sup> *See* Nick Lewin, *The No Child Left Behind Act of 2001: The Triumph of School Choice Over Racial Desegregation*, 12 GEO. J. ON POVERTY L. & POL’Y 95, 129 (2005) (noting uniqueness of *Sheff*).

<sup>72</sup> *See Sheff*, 678 A.2d at 1289-91.

<sup>73</sup> *Id.* at 1290-91.

<sup>74</sup> Stipulation and Order, *Sheff v. O’Neill*, No. X03-89-0492119S (Conn. Super. Ct. Jan. 22, 2003). It appears that this goal will not be achieved. *See* JACK DOUGHERTY ET AL., A VISUAL GUIDE TO *SHEFF V. O’NEILL* SCHOOL DESEGREGATION 8 (2006).

Though the evidence presented in the lawsuit focused on Hartford, the legislatively-devised remedies that came out of *Sheff* apply to all of the state’s major metropolitan areas with racial disparity between the city and suburbs—principally Hartford, New Haven, Bridgeport.<sup>75</sup> Among Connecticut’s major cities, New Haven was the earliest to aggressively implement the *Sheff* remedies, particularly interdistrict magnet schools, providing an excellent case study for understanding the interdistrict dynamics that the remedies have fostered.<sup>76</sup> New Haven also forms an interesting case study because it retains a significant white middle class population in large part due to the educational and employment opportunities provided by Yale University. New Haven’s non-Hispanic white population constituted 35.6% of the total city population in 2000, larger than Bridgeport’s 30.9% and twice that of Hartford’s 17.8%.<sup>77</sup> All three cities have a sizable black middle class; New Haven’s African-American population is wealthier than that in Hartford but not as wealthy as that in Bridgeport:

% of black school-aged children living in households whose income is: (2000) <sup>78</sup>				
	above \$40,000	above \$50,000	above \$75,000	above \$100,000
<b>New Haven</b>	39.2%	26.8%	12.0%	5.2%
<b>Hartford</b>	34.6%	25.2%	9.9%	5.0%
<b>Bridgeport</b>	46.8%	36.2%	16.8%	7.0%

<sup>75</sup> These remedies include two major programs: interdistrict magnet schools and *Open Choice*. The original act implementing *Sheff* was entitled An Act Enhancing Educational Choices and Opportunities, 1997 Conn. Legis. Serv. Pub. Act. 97-290 (West). There is also a third program designed to foster cooperation between existing schools in different districts. See CONN. GEN. STAT. § 10-74d.

<sup>76</sup> However, Hartford has more students participating in *Open Choice*, and since 2003, has become more aggressive than in the past in creating interdistrict magnet schools as part of its obligations under the 2003 stipulation. See Stipulation and Order, *Sheff v. O’Neill*, No. X03-89-0492119S (Conn. Super. Ct. Jan. 22, 2003); *infra* notes 101-103 and accompanying text.

<sup>77</sup> Census 2000 Data, *supra* note 44.

<sup>78</sup> Census 2000: National Center for Education Statistics (NCES) data related to the population of school-aged children was generated using customized tables from “Census 2000 School District Tabulation (STP2) Data,” available at U.S. Census Bureau, School District Demographics System, <http://nces.ed.gov/surveys/sdds/datatools.asp> (last visited May. 8, 2007) [hereinafter Census 2000 NCES Data].

The interdistrict magnet schools comprise the largest and most rapidly growing part of the program. The state legislature has created tremendous incentives for districts to create these schools, including funding the full costs of the purchase, conversion, or construction of interdistrict magnet school facilities and equipment.<sup>79</sup> New Haven has created fourteen such schools, in some cases by converting already-existing schools to interdistrict magnets. These schools collectively educated 3,476 New Haven residents in 2005-06, about 15% of the New Haven school-aged population.<sup>80</sup> While located in New Haven and administered by its School Board, these schools draw their populations from the New Haven region as a whole. The New Haven magnet schools created under *Sheff* are *interdistrict*-oriented, with 70% of the spots targeted to students from New Haven, and 30% targeted to students from the surrounding towns.<sup>81</sup> Students from New Haven and surrounding towns apply to the schools and are admitted through a lottery system, and do not pay to attend.<sup>82</sup> To incentivize host districts to participate, and to ensure that the schools are being used to reduce “racial, ethnic, and economic isolation,” the state

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<sup>79</sup> CONN. GEN. STAT. § 10-264h. The provision for full reimbursement ended June 30, 2003; after that date, the state will reimburse 95% of the cost of interdistrict magnet school construction. *Id.*

<sup>80</sup> Data calculated from data provided by New Haven Public Schools, consisting of a table of all magnet school attendees for 2005-06 and 2006-07 with personal identifying information redacted, including school attended, grade, gender, ethnicity, city of residence, and free/reduced lunch status. [hereinafter New Haven Magnet School Data]. About 41% of the New Haven magnet school population, 1,959 students in 2005-06, attended one of six magnet high schools; the remaining 2,823 students attended one of eight magnet schools educating students in some combination of grades K-8. *Id.* For further detail, see Appendix A (providing details about each school, including racial and socioeconomic composition and number of city and suburban students).

<sup>81</sup> See New Haven Public Schools, Interdistrict Magnet Schools—New Haven, Connecticut, <http://www.nhps.net/IDM/Faqs/> (last visited May 9, 2007). In practice, actual enrollment fluctuates around these targets, though there is sufficient demand from both city and suburban participants to meet them. In 2005-06, the magnet schools enrolled 72.7% of their students from New Haven and 27.3% from the suburbs; in 2006-07, the magnet schools enrolled 68.5% of their students from New Haven and 31.5% from the suburbs. New Haven Magnet School Data, *supra* note 80.

<sup>82</sup> New Haven Public Schools, *supra* note 81. In 2005-06, students from 23 suburban towns, plus New Haven, enrolled in New Haven magnet schools, for a total of 1,306 suburban students. Suburban enrollment is largely concentrated in a few towns. Nine of the 23 suburban towns sent fewer than 10 students to a New Haven magnet school. Only 5 suburban towns, plus New Haven, sent more than 40 students each. New Haven Magnet School Data, *supra* note 80.



employs a complex funding formula based on how residentially and racially diverse a population the school enrolls.<sup>83</sup> The state funds transportation for the suburban students,<sup>84</sup> but in most cases suburban districts pay an additional \$2000 to \$5000 per student to the host district to cover the costs of educating that district's residents.<sup>85</sup> The suburban set-aside is meant to help fulfill *Sheff*'s purpose of ending ethnic, racial, and socioeconomic isolation in city schools, while New Haven's choice to restrict suburban attendees to around 30% of the school population ensures that the bulk of the beneficiaries of the program will be New Haven residents.

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<sup>83</sup> To receive state funding, magnet schools cannot enroll more than 80% of their students (75% for those that begin operations on or after July 1, 2005) from a single school district. CONN. GEN. STAT. § 10-2611(a). Those that begin operations on or after July 1, 2005 must also maintain a white population between 25% and 75%. *Id.* If they violate these rules they are ineligible to receive an operating grant from the state, but this provision can be waived for good cause for one year only. CONN. GEN. STAT. § 10-2611(b). Schools are eligible to receive a percentage of a state "foundation" grant, currently set at \$5,891 per student, based on how residentially diverse a population the school enrolls. CONN. GEN. STAT. §§ 10-262f(9) & 10-2611(c)(1). For each student from a district that constitutes less than 30% of the school's enrollment, the school gets 90% of the grant. For each student from a district that constitutes more than 30% but less than 60% of the school's enrollment, the school gets a percentage between 60% and 90% of the grant, varying in inverse proportion as the percentage of students rises. For each student from a district that constitutes more than 60% but less than 90% of the school's enrollment, the school gets a percentage between 0% and 60% of the grant, varying in inverse proportion as the percentage of students rises. CONN. GEN. STAT. § 10-2611(c)(1). Participating suburban districts also pay tuition for their students in an amount varying from \$2000 to \$5000 annually per student. *See infra* note 85 and accompanying text. The balancing of annual funding for the school is provided from the standard school revenues available to the hosting district, including locally-raised and state-provided revenue; construction and equipment costs, as well as transportation of suburban students, is separately funded by the state as discussed below.

<sup>84</sup> CONN. GEN. STAT. § 10-264i(a) (requiring state to give town of student residence actual costs, up to \$1,300 per student, for transporting or providing for transportation of students to interdistrict magnet schools in another town); CONN. GEN. STAT. § 10-2611(f) (requiring districts housing interdistrict magnet schools to provide transportation to students resident in that district on same terms in which it provides transportation to other public school students).

<sup>85</sup> *See* DAVID MACDONALD, THE FUNDING OF INTERDISTRICT MAGNET SCHOOLS IN CONNECTICUT: A FAILED APPROACH TO ADDRESSING THE *SHEFF V. O'NEILL* CONNECTICUT SUPREME COURT RULING? 11 (2005), available at [http://www.hartfordinfo.org/issues/wsd/educationfunding/Magnet\\_School\\_Policy\\_Analysis.pdf](http://www.hartfordinfo.org/issues/wsd/educationfunding/Magnet_School_Policy_Analysis.pdf) (citing Connecticut Office of Fiscal Analysis, OFA Fiscal Note on sSB-1311 (2005), available at <http://www.cga.ct.gov/2005/fn/2005SB-01311-R00-FN.htm>); *see also* *In Our Towns: Magnet School Tuition OK'd*, HARTFORD COURANT, Feb. 14, 2007, at B2 (discussing annual tuition at several Hartford area magnet schools ranging from \$2080 to \$3275).

The *Open Choice* program, though serving only about one-tenth the number of students as the magnet schools, also continues to grow.<sup>86</sup> Modeled on an earlier, smaller program in Hartford, *Open Choice* enables a limited number of New Haven residents to attend suburban public schools at no cost.<sup>87</sup> Run by a non-profit “regional service center” and funded by a state grant, the program coordinates placements, supports enrolled students, and provides state-funded transportation to school for each out-of-district attendee (at a cost of up to \$2,100 annually per student).<sup>88</sup> Like the magnet schools, *Open Choice* is also structured to incentivize districts to participate. Both the sending and receiving districts receive 50% of the general state aid (“ECS grant”) they would otherwise receive for a resident student; each receiving district receives an extra \$2000 annually per student it accepts in the program;<sup>89</sup> and districts receive a bonus of \$350,000

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<sup>86</sup> Data calculated from data provided by Area Cooperative Educational Services, which administers the *Open Choice* program for the New Haven Region, consisting of a table of all open choice attendees for every year of the program, with personal identifying information redacted, including school attended, grade, sex, race, city and zip code of residence, home language, special services received, year student entered the program, past schools attended through the *Open Choice* program, and free/reduced lunch status. [hereinafter *Open Choice* Data].

<sup>87</sup> CONNECTICUT STATE DEPARTMENT OF EDUCATION, PUBLIC SCHOOL CHOICE IN CONNECTICUT 2007-2008: A GUIDE FOR STUDENTS AND THEIR FAMILIES 34 (2007), available at <http://www.sde.ct.gov/sde/lib/sde/pdf/equity/choice/schoolchoice2007.pdf>. *Open Choice* also enables suburban residents to attend non-magnet New Haven public schools, though this is a much smaller component of the program. See *Open Choice* Data, *supra* note 86.

<sup>88</sup> CONN. GEN. STAT. § 10-266aa(e)-(f). The statute provides for the appropriation of state-funded transportation for participating students at an average annual cost of up to \$2,100 per student, with the potential for extra funds if needed. *Id.*

<sup>89</sup> CONN. GEN. STAT. § 10-266aa(h). In the aggregate, about half of the general funding for traditional public schools in Connecticut comes from the state while the other half comes from local property taxes. General state funding for traditional public schools is calculated through a complex formula known as “Education Cost Sharing” (ECS), which determines the percentage of the aforementioned “foundation” that a district receives. Basically, the amount of ECS aid a town gets is inversely proportional to the amount a town’s “wealth” falls below a statutorily set minimum. (Those towns whose wealth is above the minimum do not receive a grant). The “wealth” calculation starts from the town’s total property valuation and then is adjusted based on the town’s per capita and median household income relative to that of the wealthiest town in the state. There is additional weighting based on the number of needy students. The statutory minimum is set at 1.55 times the state median town’s wealth. See CONN. GEN. STAT. §§ 10-262f to 10-262j; see also Robert Brewer, Connecticut State Department of Education, Report Prepared for the National Center for Education Statistics, at 6-7, <http://nces.ed.gov/edfin/pdf/StFinance/Connecti.pdf>. There is separate state funding for transportation, special education, and various other programs, as well as for

for every school in the district that enrolls ten or more *Open Choice* students.<sup>90</sup> Governor M. Jodi Rell has proposed significant increases in state financing for both the interdistrict magnet schools and *Open Choice* program.<sup>91</sup>

Due to their extensive state funding, significant set-asides for suburban students, and innovative new schools, Connecticut's interdistrict magnet schools are largely unique on the American educational landscape. While a growing number of American jurisdictions feature interdistrict school transfer options like *Open Choice*, few of these programs are as explicitly focused on school integration as Connecticut's plan is.<sup>92</sup> Other states' programs, for example, frequently allow children to transfer among suburban districts. Most programs leave the provision of transportation up to the individual family; though a growing number will reimburse low-income families for the cost of transportation, the logistical and financial barriers in accessing these programs can remain prohibitive without funded transportation.<sup>93</sup> These programs generally feature

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special programs in Connecticut's fourteen neediest "priority districts," including New Haven. See Brewer, *supra*, at 8-12. Magnet schools are funded through a separate state grant, as detailed above.

<sup>90</sup> GOVERNOR M. JODI RELLE'S COMMISSION ON EDUCATION FINANCE, FINAL REPORT 2 (2006), available at <http://www.opm.state.ct.us/budget/EducationFinance/EduFinanceFinalReport.pdf>.

<sup>91</sup> See GOVERNOR M. JODI RELLE'S COMMISSION ON EDUCATION FINANCE, *supra* note 90, at 2-4.

<sup>92</sup> There are several other states that have integrated-oriented open enrollment programs, a few of which have existed much longer than *Open Choice*. The much older METCO program in Massachusetts, for example, has operated since 1966 and currently places 3,300 students from Boston and Springfield in suburban school districts. See Metco Program—Massachusetts Department of Education, <http://www.doe.mass.edu/metco/> (last visited May 9, 2007). St. Louis, Milwaukee, and Rochester, N.Y. also have historically had such programs. See, <http://www.csmonitor.com/2003/0318/p13s01a-lepr.html>. New programs continue to pop up around the country. For example, as a supplement to its statewide interdistrict school choice program, which began in 1990-91, Minnesota now has a special program through which urban students from Minneapolis can enroll in suburban schools. The new program, *The Choice Is Yours*, began in 2001-02 and operates similarly to Connecticut's *Open Choice* program. ELIZABETH A. PALMER, *THE CHOICE IS YOURS AFTER TWO YEARS: AN EVALUATION*, at i (2003). *The Choice is Yours* provides Minneapolis residents with the opportunity to attend suburban public schools in nine districts and, for those who qualify for free or reduced-price lunch, includes no-cost transportation. Minnesota Department of Education, School Choice & Innovation Brochure, Nov. 22, 2005, available at [http://www.education.state.mn.us/mde/Academic\\_Excellence/School\\_Choice/Public\\_School\\_Choice/index.html](http://www.education.state.mn.us/mde/Academic_Excellence/School_Choice/Public_School_Choice/index.html) (click on "School Choice & Innovation Brochure").

<sup>93</sup> See CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, SCHOOL CHOICE: A SPECIAL REPORT, at xvi, 15 (1992) (noting, in 1992, that statewide choice programs remained of limited use in part

significant limits on the ability of students to transfer, restricting them to “available spaces” or a maximum percentage of the receiving school. Some, like *Open Choice*, permit only those transfers that do not exacerbate segregation in urban or suburban schools.<sup>94</sup> Like other programs, *Open Choice* also suffers from a limited number of available spaces. Yet in bringing students from the city to the suburbs, providing financial support for schools and social support for students, coordinating placements, providing no-cost transportation to all participants, and with its specific focus on facilitating racial and socioeconomic school integration, *Open Choice* is more accessible for low-income families than most open enrollment programs.

Despite the novelty of programs developed after *Sheff* and the significant resources committed to them, critics have called *Sheff* a failure. They have emphasized that urban schools continue to be segregated and deride the state for its failure to achieve *Sheff*'s goal of creating a racially desegregated environment for 30% of urban minority

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because they did not provide participants with transportation, and that transportation will be “required” for such programs to succeed); GILL ET AL., *supra* note 60, at 121 (attributing relatively low participation rates in interdistrict choice programs to the need to travel, and noting that programs that provide transportation have higher utilization rates). The statewide programs in many states are not specifically focused on low-income or minority students, but in recent years, have begun to provide some limited transportation benefits in an effort to induce more low-income residents to participate. *See, e.g.*, IOWA DEPARTMENT OF EDUCATION, OPEN ENROLLMENT HANDBOOK AND APPLICATION, 2007-2008 SCHOOL YEAR 8 (2007), available at <http://www.iowa.gov/educate/content/view/649/636/> (click on “2007-2008 Open Enrollment Handbook and Application Form”) (noting that reimbursement for transportation available only for low-income students attending school in contiguous districts, at rate of \$339 annually in 2005-06); WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, FULL-TIME INTER-DISTRICT OPEN ENROLLMENT IN WISCONSIN PUBLIC SCHOOLS (2006-07), available at <http://dpi.state.wi.us/sms/pdf/oebroch.pdf> (noting that low-income parents can apply to have a portion of their transportation costs reimbursed).

<sup>94</sup> *See, e.g.*, CONN. GEN. STAT. § 10-266aa(c) & (e). The U.S. Supreme Court currently has under consideration two cases challenging the use of race as a factor in assigning students to public schools. Though the cases do not concern open enrollment programs explicitly, depending on how the Court holds, open enrollment programs that restrict participation along racial lines may also be vulnerable to constitutional challenge. *See* *Parents Involved in Community Schools v. Seattle School District No. 1*, 137 F. Supp. 2d 1224 (W.D. Wash. 2001), *aff'd*, 426 F.3d 1162 (9th Cir. 2005) (en banc), *cert. granted*, 126 S. Ct. 2531 (2006); *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub. nom.* *Meredith v. Jefferson County Board of Education*, 126 S. Ct. 2531 (2006). *See also* Robert A. Frahm, *Race-Based School Selection on Trial: U.S. Supreme Court Involving Integration Could Affect Sheff*, HARTFORD COURANT, Dec. 5, 2006, at A1.

residents by the end of the 2006-07 school year.<sup>95</sup> Yet the critics' focus on racial diversity in city schools alone masks the extent to which the *Sheff* remedies have significantly altered the public educational choices available to white and minority families in Connecticut's metropolitan areas. As this paper will show, *Sheff* has particularly improved the availability of desirable educational options—and indirectly, residential options as well—for middle-class African-American families. A number of lower-income African-American families have also benefited by having the option to attend socioeconomically diverse, small, high-quality public schools in their own cities. In spite of potential political opposition, which I discuss in greater detail in Part III, these programs have expanded to serve an increasing number of students each year. They also have experimental value: for policymakers elsewhere, these programs can provide valuable data on how families exercise interdistrict school choice options. After laying out my empirical findings about the programs in Part II, I will use those findings to inform a normative discussion of the programs in Part III.

## **II. Cross-Boundary School Options in New Haven**

This Part presents a detailed empirical analysis of Connecticut's cross-boundary programs as they operate in New Haven.<sup>96</sup> The primary focus of *Sheff* has been on the

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<sup>95</sup> See, e.g., Robert A. Frahm, *Sheff Backers Want Progress*, HARTFORD COURANT, Jan. 28, 2007 (describing supporters giving state a “failing grade”). Critics have charged that the state's implementation of voluntary cross-boundary plans has been half-hearted, and as compared with a more significant remedy like cross-district busing, is unlikely to remedy court-identified deficiencies in the state's educational system. See Ryan & Heise, *supra* note 34, at 2057. A report done by projects at Trinity College and the University of Connecticut using Connecticut Department of Education Data also criticized progress under *Sheff*, finding that actual percentages of Hartford minority public school students in racially integrated settings were 12.4% in 2004-05, 14.1% in 2005-06, and projected to be under 15% in 2006-07, up from 10% in 2002-03 but still far short of the goal of 30%. DOUGHERTY ET AL., *supra* note 74, at 8.

<sup>96</sup> The discussion focuses on the interdistrict magnet schools but incorporates a detailed study of *Open Choice* as well.

creation and aggressive expansion of interdistrict magnet schools in Connecticut's urban areas, and the enrollment and state spending figures reflect this fact. Even not taking into account state-funded construction costs, which totaled a cumulative \$255 million from 1994 through 2001,<sup>97</sup> the annual amount of state funding for interdistrict magnet schools has risen steadily from \$19.4 million in 1999-2000 to \$66.9 million in 2004-05.<sup>98</sup> In the same time period, *Open Choice* funding has risen from \$6.0 million to \$9.4 million.<sup>99</sup> In the 2005-06 school year, New Haven's fourteen interdistrict magnet schools enrolled 4,782 students and *Open Choice* enrolled 476 students; statewide, 14,790 students enrolled in forty interdistrict magnet schools, and 1,710 students participated in *Open Choice*.<sup>100</sup> Though the creation and expansion of interdistrict magnet schools in Hartford has gotten a boost since the 2003 stipulation of the state and *Sheff* plaintiffs that Hartford would move more students into magnet schools,<sup>101</sup> New Haven's interdistrict magnets pioneered the concept for Connecticut, enroll the most students,<sup>102</sup> and provide a more well-established field for study.<sup>103</sup>

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<sup>97</sup> CONNECTICUT STATE DEPARTMENT OF EDUCATION, DIVISION OF EVALUATION AND RESEARCH, INTERDISTRICT MAGNET SCHOOLS AND MAGNET PROGRAMS IN CONNECTICUT: AN EVALUATION REPORT 13 (2003).

<sup>98</sup> Connecticut State Department of Education, State Funding for Open Choice and Interdistrict Magnet Schools, [http://www.csde.state.ct.us/public/cedar/edfacts/choice\\_magnet/index.htm](http://www.csde.state.ct.us/public/cedar/edfacts/choice_magnet/index.htm) (last visited May 8, 2007).

<sup>99</sup> *Id.*

<sup>100</sup> Data calculated from Connecticut State Department of Education, Connecticut Strategic School Profiles, Strategic School Profiles by School 2005-06, *available at* <http://www.csde.state.ct.us/public/der/ssp/SCH0506/SCHOOL.HTM> [hereinafter Connecticut 2005-06 School SSP]; *Open Choice* Data, *supra* note 86 (New Haven *Open Choice* data); DOUGHERTY ET AL., *supra* note 74, at 8 (Hartford *Open Choice* data); Cooperative Educational Services: Open Choice, <http://www.ces.k12.ct.us/page.cfm?p=43> (Bridgeport *Open Choice* data). The figures for New Haven include participants from both New Haven and suburban towns; the statewide figures for the interdistrict magnet schools include interdistrict magnet schools operated by Regional Educational Service Centers as well as those operated by local school districts.

<sup>101</sup> Following this stipulation, the Hartford School District hired New Haven's magnet school guru, Edward Linehan, to assist in expanding the magnet school program there. He remained in Hartford for two years before returning to New Haven.

<sup>102</sup> Because interdistrict magnet schools operate in both Hartford and its suburbs, there are several possible ways to count the number of students in the Hartford interdistrict magnet schools. If one includes any

This Part’s empirical analysis proceeds in several sections. Section II.A. discusses the differential participation rates of urban and suburban students of various races, and analyzes the factors that influence differences in those rates. Though Asian-American, Hispanic, and American Indian students also attend schools in the New Haven region, the discussion focuses primarily on white and African-American students. It does so because Asian-American and American Indian students constitute too small a number of attendees to allow for meaningful analysis of their rates of participation,<sup>104</sup> and except where otherwise discussed, Hispanic students do not exhibit readily observable trends in participation to the extent that whites and blacks do. Section II.B. analyzes the effects that the exercise of choice by urban and suburban families has on who attends the New Haven public schools and the extent to which these schools are racially and socioeconomically integrated. Section III.C. discusses the *Open Choice* program and the extent to which *Open Choice* and magnet school participants make choices that appear to be motivated by similar factors. Finally, Section III.D. analyzes the effects of the

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interdistrict magnet school open to Hartford students, there are 6,042 students enrolled in “Hartford” interdistrict magnet schools, though many of these schools enroll less than one-third of their students from the Hartford school district. DOUGHERTY ET AL., *supra* note 74, at 7. By most other means of counting, though, the number of students in Hartford interdistrict magnets is below that of New Haven. Including only the eleven interdistrict magnet schools located in Hartford, the number drops to 3,428. Connecticut 2005-06 School SSP, *supra* note 100. Including a slightly different list of the interdistrict magnets that enroll over 50% of their students from Hartford, the number is 3,450. DOUGHERTY ET AL., *supra* note 74.

<sup>103</sup> Connecticut uses a variety of confusing terms for its interdistrict schools. The series of magnet schools operated by the Hartford School District, which enroll students from across multiple districts, are known as *host magnet schools*, while the identical program in New Haven calls itself *interdistrict magnet schools*. The statutory term for both is “interdistrict magnet school.” See CONN. GEN. STAT. § 10-264l. Further confusing the issue, there are some charter-type schools operated by non-profits which draw their students from multiple districts and are also called *interdistrict magnet schools*, while *charter school* is used to refer mostly to the privately-operated, state-funded schools that enroll children from only one district. In this paper and in datasets, except where otherwise noted, I use the term “interdistrict magnet school” to refer to schools operated by the New Haven school district that enroll students from the city and the suburbs while reserving 70% of their seats for New Haven students, and “charter school” to refer to state-funded schools operated by private entities, whether or not they enroll students from one or multiple districts.

<sup>104</sup> See Appendix A.

exercise of choice by participants in both programs on who attends the suburban public schools.

#### A. Who Attends Interdistrict Magnet Schools and What Motivates Attendees?

New Haven and suburban students of all races attend interdistrict magnet schools, but suburban blacks attend in much greater numbers than suburban whites and are motivated by somewhat different factors. The fourteen New Haven interdistrict magnet schools collectively educated 3,476 New Haven residents in 2005-06, about 15% of all New Haven residents enrolled in school.<sup>105</sup> By comparison, 66% of New Haven school-aged residents are in non-magnet New Haven public schools, 9% in private (including religious) schools,<sup>106</sup> 5% in charter schools, 2% in Open Choice, and 1% in the Sound Vocational Aquaculture School, which also draws students from across the metropolitan area.<sup>107</sup> Therefore, while they educate a non-trivial number of New Haveners and more than any other single school choice option, the likelihood of any particular New Haven resident attending a magnet school remains small:

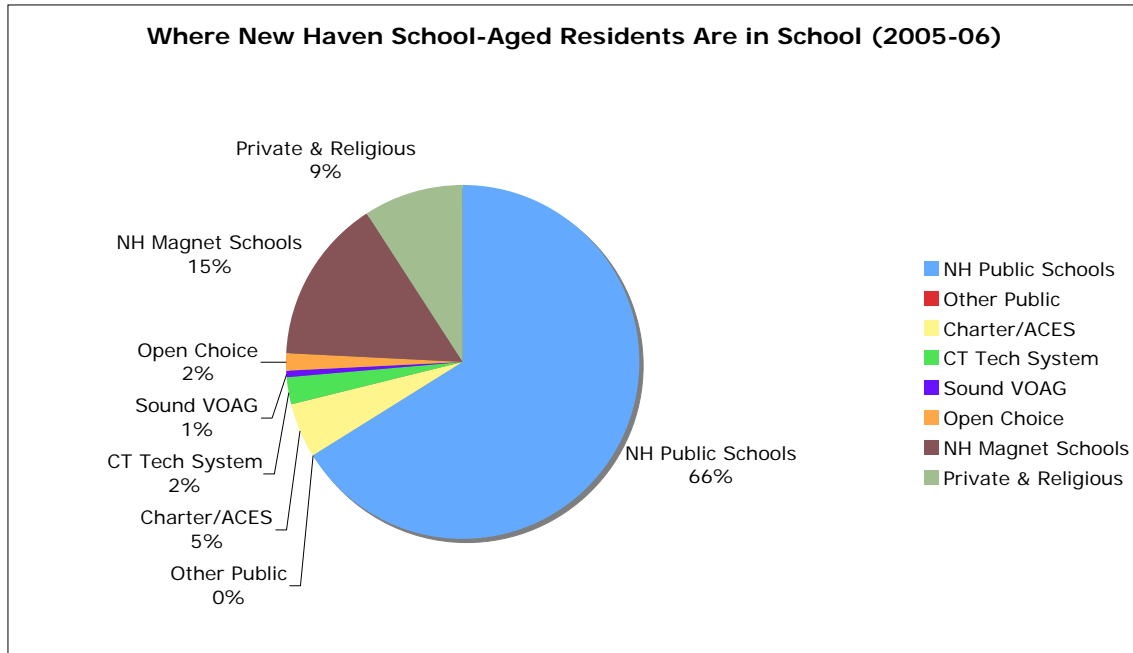
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<sup>105</sup> New Haven Magnet School Data, *supra* note 80; Data calculated from Connecticut State Department of Education, 2006 Public & Nonpublic School Enrollment by Town of Residence, <http://www.csde.state.ct.us/public/cedar/cedar/enrollment/enum2006/index.htm> [hereinafter Connecticut Public & Nonpublic Enrollment]. See Appendix A for a table detailing school-by-school data for each magnet school.

<sup>106</sup> Throughout this paper, the term “private school” will include both sectarian and non-sectarian private, tuition-charging schools.

<sup>107</sup> Data calculated from Connecticut Public and Nonpublic Enrollment, *supra* note 105.



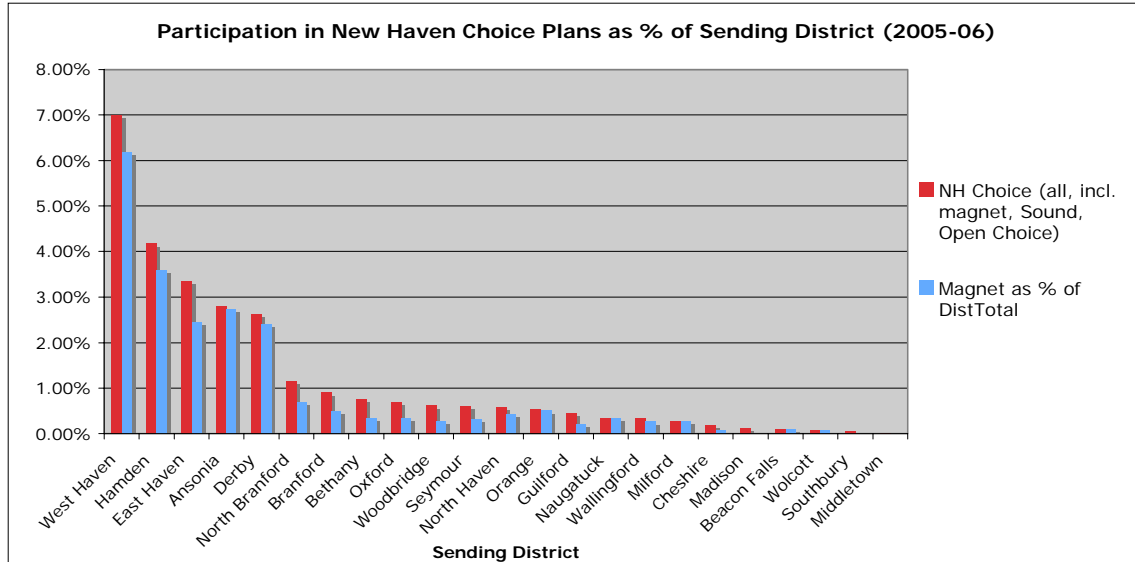


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In addition, 1,306 students from twenty-three suburban districts, 27.3% of the students enrolled in magnet schools, participated in the New Haven magnet school program in 2005-06.<sup>109</sup> The rates of suburban participation vary considerably across the twenty-three participating districts, with six nearby districts sending at least one percent of their resident school-aged children to receive a public education New Haven, mostly in the magnet schools—West Haven, Hamden, East Haven, Ansonia, Derby, and North Branford:

<sup>108</sup> *Id.*

<sup>109</sup> New Haven Magnet School Data, *supra* note 80.



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Families of suburban students in the magnet schools have chosen to locate in the suburbs and like other suburban residents, have free access to the suburban public school. Participation by suburban students in the program is completely voluntary. Why, therefore, might some suburban students choose to participate and not others? If families in a particular suburb universally considered the magnet schools worse than that suburb’s public schools, then there would be no reason why anyone from that suburb would enter the magnet school lottery at all. On the other hand, if they universally considered the magnet schools better, then it seems like a vast majority of the residents of close-in suburbs would choose to enter the lottery, or at least those entering the lottery would largely track the demographic of public school attendees in that suburb.<sup>111</sup> To the extent that public sentiment generally considered the schools equivalent, we would also likely

<sup>110</sup> Data calculated from Connecticut 2005-06 District SSP, *supra* note 45; Connecticut Public and Nonpublic Enrollment, *supra* note 105; New Haven Magnet School Data, *supra* note 80. The chart includes every town that sends even a single child to school in New Haven, including towns not otherwise considered part of the New Haven region for purposes of this paper.

<sup>111</sup> I do not have data on lottery applicants, but we can assume that the demographic of students who in fact attend the magnet schools largely tracks the demographic of those that apply, or at least that the lottery does not provide suburban blacks with any advantage given that magnet school administrators are under pressure to generate schools integrated by race. *See, e.g.,* Frahm, *supra* note 95.

observe no difference in the demographic of attendees as compared to the population from which they came, or differences would be idiosyncratic and vary from suburb to suburb. Yet an examination of the demographics of magnet school attendees from the participating suburban towns reveal that in reality, suburban blacks and suburban whites attend magnet schools at vastly different rates as compared with their attendance in suburban public school:

**Racial Composition of Public and Magnet School Attendees, by Town (2005-06)**<sup>112</sup>

TOWN	% in New Haven Choice	Magnet %White	Public %White	Magnet %Black	Public %Black	Magnet %Hisp.	Public %Hisp.
West Haven	7.0%	19.5%	51.2%	56.6%	25.5%	20.5%	18.7%
Hamden	4.2%	15.9%	52.7%	70.4%	30.7%	12.4%	11.3%
East Haven	3.4%	58.8%	84.5%	20.2%	2.2%	17.5%	9.4%
Ansonia	2.8%	52.2%	59.0%	37.0%	19.0%	10.9%	19.9%
Derby	2.6%	62.2%	67.1%	15.6%	11.6%	17.8%	18.2%
North Branford	1.1%	75.0%	95.5%	20.0%	1.2%	0.0%	2.1%
Branford	0.9%	52.4%	86.6%	19.0%	3.3%	23.8%	3.5%
Bethany, Orange, Woodbridge (Reg. Dist. No. 5) <sup>113</sup>	0.7%	79.2%	86.7%	8.3%	2.2%	12.5%	2.4%
Seymour	0.6%	100.0%	88.0%	0.0%	3.1%	0.0%	5.6%
North Haven	0.6%	31.6%	85.5%	57.9%	4.0%	10.5%	3.4%
Guilford	0.4%	100.0%	91.7%	0.0%	1.1%	0.0%	3.7%
Wallingford	0.3%	81.0%	84.8%	9.5%	2.5%	4.8%	8.8%
Milford	0.3%	73.1%	85.4%	23.1%	4.0%	3.8%	5.0%
Madison – no participation in magnets	0.1%		94.9%		0.7%		1.0%

16 New Haven Region towns listed in order of rate of participation in New Haven Choice schools

<sup>112</sup> Data calculated from Connecticut 2005-06 District SSP, *supra* note 45; Connecticut Public and Nonpublic Enrollment, *supra* note 105; New Haven Magnet School Data, *supra* note 80.

<sup>113</sup> Regional District Number 5, also known as Amity Regional, includes students from the towns of Bethany, Orange, and Woodbridge. Each town maintains its own schools for grades pre-K through 6, and the towns consist of one district for grades 7-12. (There are three schools in the combined regional district, two for grades 7-8 and one for grade 9-12). For the purposes of this paper, I have considered all the schools serving the three towns as part of one district, even though technically the schools serving grades pre-K through 6 are not part of the regional district. See Connecticut 2005-06 District SSP, *supra* note 45; Connecticut Public and Nonpublic Enrollment, *supra* note 105.

As the chart demonstrates, African-Americans are considerably *overrepresented* among the students who choose to go to the magnet schools as compared with the local public schools in every suburb except for two—Seymour and Guilford—where blacks constitute a small percentage of the population and don't participate in the magnet schools at all. The opposite holds true for whites, who are considerably *underrepresented* in all but the same two suburbs. Interestingly, Hispanics show no such dramatic differential. They attend both sets of schools at roughly similar rates, and are in fact overrepresented in five suburbs, plus in Regional District Number Five (three suburbs), and are underrepresented in seven suburbs. To better understand this dynamic, the remainder of this Section will focus in part on participation in the six suburban towns that send over 1% of their students to New Haven for public school, which together account for 85.6% of the suburban students in the magnet schools. Where useful or appropriate, I will include data from all sixteen suburban towns.<sup>114</sup>

The observed differences are dramatic, and cannot be explained by economic class distinctions alone. As I will discuss shortly, whites in wealthy school districts are in fact less likely to participate in magnet schools than whites in poorer school districts. It is possible that individual wealthy suburbanites, regardless of race or town of residence, are more reluctant to send their children to school in the city than their poorer suburban counterparts are given the greater income differential between them and the city residents

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<sup>114</sup> Twenty-three towns in all sent students to the New Haven magnet schools in 2005-06, but I have chosen to focus on the seventeen-town New Haven region for the purposes of discussion. *See supra* note 43. The sixteen suburban towns account for 96.2% of the suburban students in New Haven magnet schools; the seventeen towns including New Haven account for 99.0% of all magnet school attendees. Data calculated from Connecticut 2005-06 District SSP, *supra* note 45; New Haven Magnet School Data, *supra* note 80.

attending the magnet schools.<sup>115</sup> But the data belies this interpretation with regard to individual families. For four out of the top six participating suburbs, magnet school students from those suburbs are on average *less* likely to be receiving a free or reduced-price school lunch than their suburban public school counterparts, indicating that the suburban magnet school students tend to be wealthier than the suburban public school students in a given suburb.<sup>116</sup> The same holds true when comparing magnet school attendees from the city and suburbs; magnet school attendees from those suburbs are much less likely to be receiving a free or reduced-price school lunch than their poorer classmates who come from the city.<sup>117</sup> The city-suburb comparison data even holds true when disaggregated by race: black, Hispanic, and white magnet school students from the suburbs are all wealthier than their city counterparts of the same race.<sup>118</sup> Across racial groups, while white suburban attendees are wealthier than black or Hispanic suburban attendees, the difference is a small one, and suburban magnet school attendees of all three

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<sup>115</sup> New Haven has the lowest per capita income of any town in the region. In 2000, it was \$16,393. The per capita income of the region's suburban towns ranged from a low of \$20,504 in Ansonia to \$49,049 in Woodbridge. Census 2000 Data, *supra* note 44.

<sup>116</sup> Data calculated from Connecticut 2005-06 District SSP, *supra* note 45; New Haven Magnet School Data, *supra* note 80. Students who come from families with incomes at or below 130% of the federal poverty level ("FPL") qualify for a free lunch, while students from families with incomes between 130% and 185% of the FPL qualify for a reduced lunch. United Way of Connecticut, Infoline, School Lunch and Breakfast Programs, <http://www.infoline.org/InformationLibrary/Documents/School%20Lunch%20and%20Breakfast%20Programs.asp>. The FPL is also known as the *poverty guidelines*, and is calculated annually by the Department of Health and Human Services for use in determining financial eligibility in a wide variety of federal and state programs. See U.S. Dep't of Health and Human Services, The 2007 HHS Poverty Guidelines, <http://aspe.hhs.gov/poverty/07poverty.shtml>. For 2007, the guideline is \$13,690 for a family of one, and rises \$3,480 for each additional family member. *Id.* There have been some studies criticizing the use of statistics about free/reduced lunch status as a proxy for poverty, since participation in the lunch programs is voluntary and thus the statistics may not capture everyone who is eligible. It is conceivably possible that suburban magnet school attendees of a comparable income to their city counterparts would be less likely to apply for a price reduction, but it is unlikely that this phenomenon could account for the entire discrepancy. And it seems even less likely that magnet school attendees from the suburbs would systematically differ in their participation from suburban public school attendees, making that comparison even more reliable.

<sup>117</sup> Data calculated from Connecticut 2005-06 District SSP, *supra* note 45; New Haven Magnet School Data, *supra* note 80.

<sup>118</sup> *Id.* I do not have data on the racial breakdown of suburban public-school attending students who receive free or reduced-price lunch, though the comparison may hold true there as well.

racers are wealthier than city attendees from any of the three.<sup>119</sup> Economic comparisons at an individual level simply cannot provide an explanation for why even wealthy black suburbanites have disproportionate interest in the magnet schools, nor why the magnet schools might be more attractive than the suburban public school to even the poorest suburban black students that have both as an option.

The differing rates of attendance hint at the fact that some sort of clustering must be at work. But when the suburbs are compared with one another, the evidence becomes even more convincing. In none of the top six districts does more than 3% of the white public school population attend a magnet school, while the percentage of the black public school population attending magnet schools from the top six suburbs ranges from 3.9% to 21.3%:

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<sup>119</sup> *Id.*

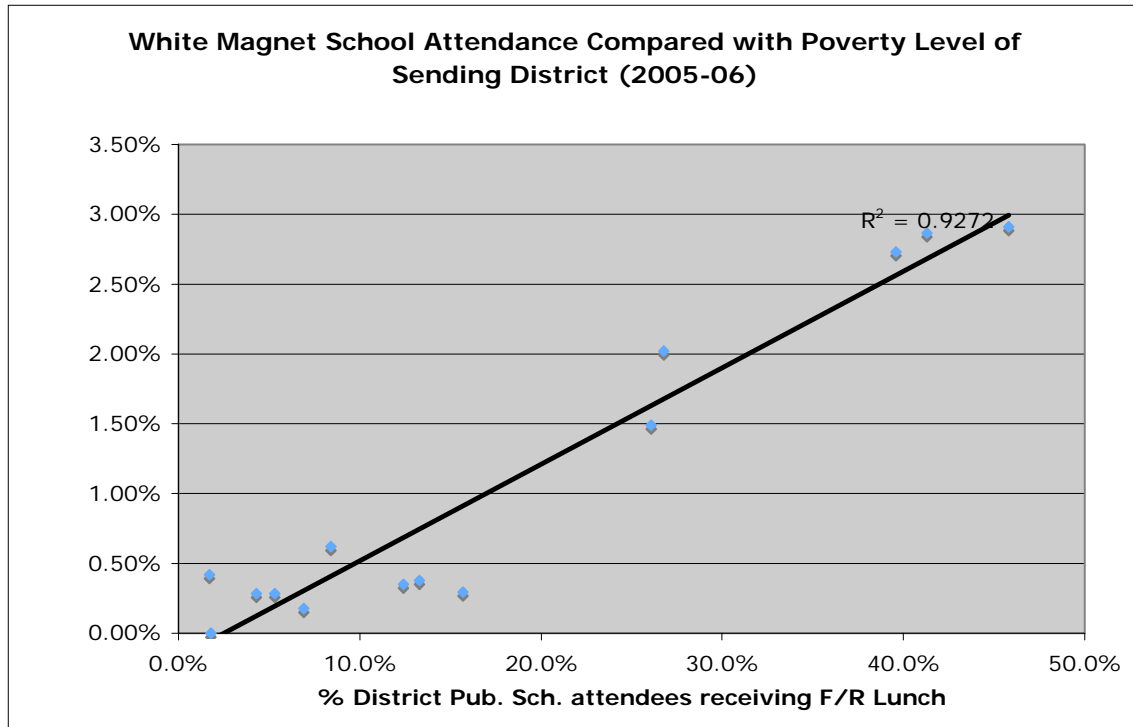
**Participation Rates in New Haven Magnet Schools, by Race and Town (2005-06)<sup>120</sup>**

<b>TOWN</b>	% in New Haven Choice	%Total Public School-Attending Whites in Magnets	% Total Public School-Attending Blacks in Magnets	Ratio of Black to White Magnet School Attendance	% of District's Suburban Pub. Sch. Attendees Receiving F/R Lunch	% District's Public School Attendees that are Black
<b>West Haven</b>	7.0%	2.86%	14.66%	5.13	41.3%	25.5%
<b>Hamden</b>	4.2%	1.49%	10.31%	6.92	26.1%	30.7%
<b>East Haven</b>	3.4%	2.02%	21.30%	10.54	26.8%	2.2%
<b>Ansonia</b>	2.8%	2.91%	6.18%	2.12	45.8%	19.0%
<b>Derby</b>	2.6%	2.73%	3.89%	1.42	39.6%	11.6%
<b>North Branford</b>	1.1%	0.62%	12.12%	19.55	8.4%	1.2%
<b>Branford</b>	0.9%	0.35%	3.23%	9.23	12.4%	3.3%
<b>Bethany, Orange, Woodbridge (Reg. Dist. No. 5)</b>	0.7%	0.42%	1.72%	4.10	From 1.7% to 3.5%	2.2%
<b>Seymour</b>	0.6%	0.38%	0.00%	0.00	13.3%	3.1%
<b>North Haven</b>	0.6%	0.18%	6.51%	36.17	6.9%	4.0%
<b>Guilford</b>	0.4%	0.28%	0.00%	0.00	4.3%	1.1%
<b>Wallingford</b>	0.3%	0.28%	1.12%	4.00	5.3%	2.5%
<b>Milford</b>	0.3%	0.29%	1.97%	6.79	15.7%	4.0%
<b>Madison – no participation in magnets</b>	0.1%	0.00%	0.00%	N/A	1.8%	0.7%

*16 New Haven Region towns listed in order of rate of participation in New Haven Choice schools*

Significantly, the relative importance of poverty levels and the presence of minority students in the public schools affects the school attendance decisions of blacks and whites differently. The rate at which suburban white students choose to attend magnet schools tracks the poverty level of the suburb, with whites in the poorest suburbs attending magnet schools at the highest rates:

<sup>120</sup> Data calculated from Connecticut 2005-06 District SSP, *supra* note 45; New Haven Magnet School Data, *supra* note 80.



121

Ansonia, West Haven, and Derby, the three poorest districts in the region as measured by the free/reduced lunch rate of their public school attendees, have the top three rates of white magnet school attendance. The five wealthiest districts in the region by the same measure—Madison, Regional District Number Five, Guilford, Wallingford, and North Haven—make up five of the eight districts that send less than one half of one percent of their white students to New Haven magnet schools. Other factors like distance may shape overall participation to some extent but do not explain the rate of white attendance as well as the poverty level of the district. The top senders of white students include close-in suburbs like West Haven and East Haven as well as further away suburbs like Ansonia, Derby, and North Branford. By comparison, the wealthy suburbs of Bethany, Orange, and Woodbridge send fewer students, even though they are closer to

<sup>121</sup> *Id.* The regression line was fit to the data using the standard least-squares method.



New Haven, than Ansonia, Derby, or North Branford, relatively poorer suburbs. Finally, it is possible that the non-presence of blacks in one's home district may make one less likely to attend a predominantly minority magnet school. Yet among the four districts that are more than 10% black, Hamden, the district with the highest percentage of African-Americans (30.7%) but also the wealthiest of the four, has the lowest rate of white magnet school attendance of the four. On the flip side, among the six districts that are fewer than 3% black, East Haven, the poorest among them, has the fourth highest overall rate of white magnet school attendance. The data therefore suggests that the percentage of whites in a given town who choose to attend a magnet school is shaped more by that district's poverty than by the racial composition of the district; as the chart illustrates, the poorer the home school district, the more likely its white students are to opt for city magnet schools.<sup>122</sup>

The story for African-American suburban students is more complicated. On the one hand, in all eleven districts in which blacks participate in the magnet school program at all, ranging from poor to wealthy, blacks participate in magnet schools at higher rates—sometimes much higher rates—than whites. This data suggests that at the very least, there must be something about the magnet schools that makes them more attractive to suburban black residents than to suburban white residents. On the other hand, while always greater than that of whites, the rate of black participation varies significantly from district to district among the eleven, from a low of 1.1% in Wallingford to 21.3% in East Haven, suggesting that there are some factors influencing black participation that vary from town to town. These factors may be similar to those influencing whites; as a

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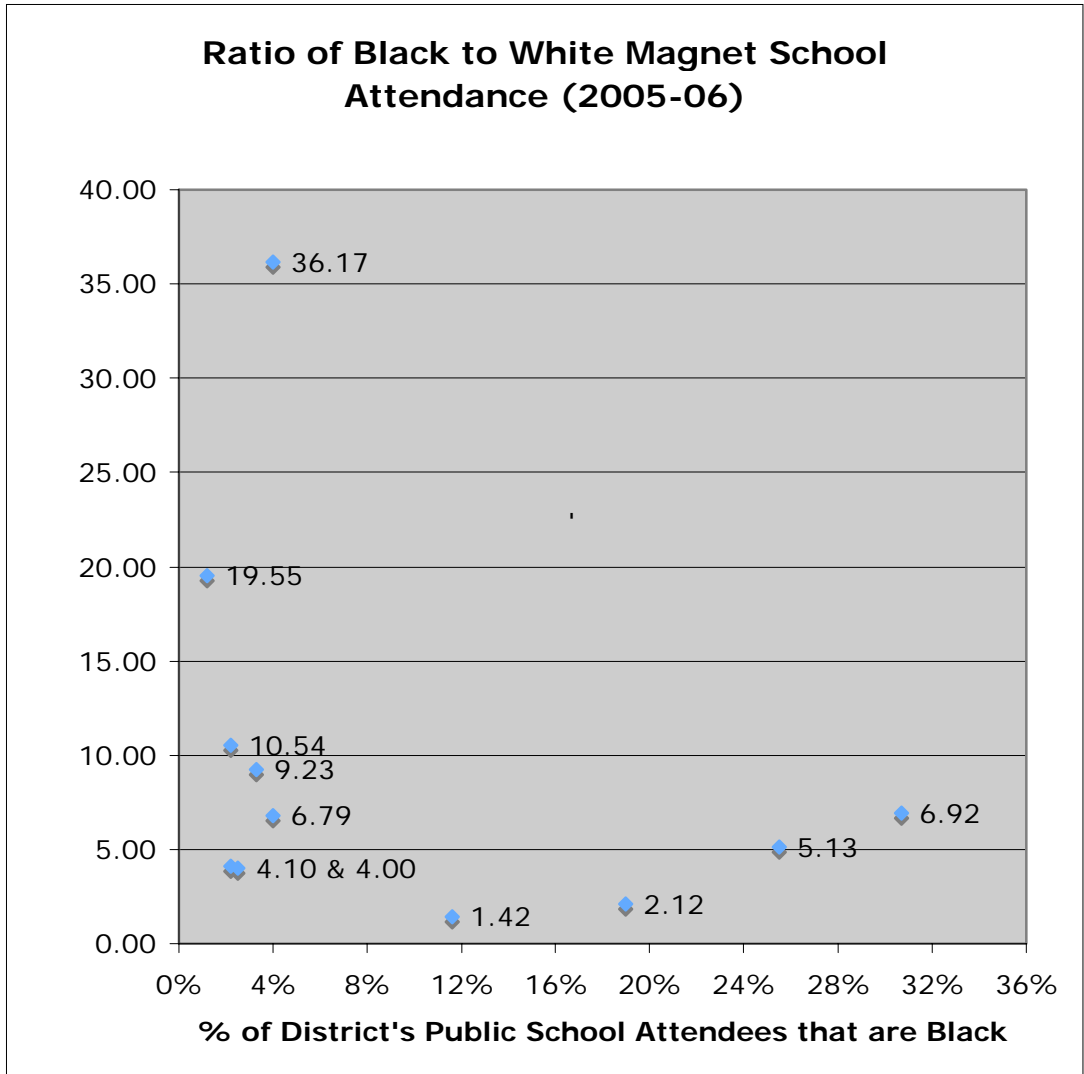
<sup>122</sup> Data in this paragraph comes from the table at *supra* note 121. Data calculated from Connecticut 2005-06 District SSP, *supra* note 45; New Haven Magnet School Data, *supra* note 80.

percentage of total black public school students, blacks tend to participate in small numbers in most of the districts where whites participate in small numbers, suggesting that like whites, they are also influenced primarily by the poverty level of their district and other factors, like school quality, that may correlate highly with poverty.<sup>123</sup>

To get at the factors that uniquely influence black attendance, it is therefore useful to examine the rate of black attendance in comparison to white attendance, specifically by examining the ratio of black to white magnet school attendance in each of the eleven districts that send blacks to magnet schools. This figure ranges from a low of 1.42 in Derby to 36.17 in North Haven (see chart above and graph below). In comparing this ratio with the percentage of a district's public school attendees that are black, a pattern emerges:

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<sup>123</sup> Data in this paragraph comes from the table at *supra* note 121. Data calculated from Connecticut 2005-06 District SSP, *supra* note 45; New Haven Magnet School Data, *supra* note 80.



124

Though the complexity of the data does not lend itself to a regression-type analysis, the visualization makes clear that a relationship exists between the rates at which African-Americans choose to attend magnet schools and the presence of other black students in the district. The four districts above a critical mass of 10% black have ratios ranging from 1.42 to 6.92, while the seven districts that are 4% black or fewer have ratios ranging

<sup>124</sup> Data calculated from Connecticut 2005-06 District SSP, *supra* note 45; New Haven Magnet School Data, *supra* note 80.

from 4.00 to 36.17—considerably higher.<sup>125</sup> This data suggests that black students who constitute a small minority in a public school district are even more likely to attend magnet schools at greater rates than whites, as compared with their black counterparts in districts where they constitute a critical mass.

The top six participating districts—West Haven, Hamden, East Haven, Ansonia, Derby, and North Branford—provide an interesting sub-field for study. Two of these districts—North Branford and East Haven—are on the left side of the chart, with few blacks. In North Branford, the wealthiest of the six districts and only 1.3% black, 12.1% of public school-attending blacks choose to attend magnet schools—a rate 19.55 times that of whites. Similarly, in East Haven, which is 2.7% black, 21.3% of public-school attending blacks choose to attend magnet schools, the highest of any suburb in the region and 10.5 times the rate at which whites there attend. The other four top districts comprise the right side of the chart, districts in which greater than 10% of the students are black. In all but West Haven, blacks attend magnet schools at lower rates than in North Branford or East Haven—ranging from 3.9% to 10.3%—and in some of the lowest ratios overall.<sup>126</sup>

Though not an exception to the general trend, West Haven is something of an exception among the top six suburbs, in that West Haven has a significant percentage of black students in its schools *and* high rates of magnet school attendance (though its ratio of black to white attendance, 5.13, is not anomalous). But West Haven may also be something of its own case. It has the highest overall rate of magnet school attendance as

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<sup>125</sup> No district in the region has a black population between 4.0% and 11.6% black, forming a natural division between districts that do and do not have a critical mass of black students. Connecticut 2005-06 District SSP, *supra* note 45.

<sup>126</sup> Data in this paragraph comes from the table at *supra* note 121. Data calculated from Connecticut 2005-06 District SSP, *supra* note 45; New Haven Magnet School Data, *supra* note 80.

a percentage of the district total (6.2%), close to twice that of any other district, and it has the second-highest percentage of both black (14.7%) and white (2.9%) attendees in the magnet schools, as well as the highest rate of Hispanic attendance (7.8%). This data suggests that there is a higher overall rate of cross-racial dissatisfaction with the West Haven schools as compared with other districts, though as the closest suburb to New Haven, it is unsurprising that it has the highest rate of attendance. Even still, the fact that blacks in West Haven, at 5.1 times the rate of whites and 1.9 times the rate of Hispanics, are leaving a suburban public school district that is 25.5% black for magnet schools that are 60.7% black, suggests that race has something to do with the choices of West Haven's black families.<sup>127</sup>

The overarching message of the data is clear: black students in the suburbs are more likely to choose magnet schools than their white counterparts, and black students in suburbs where they are token in numbers are *much* more likely to do so. Black students who reside in the suburbs have a higher rate of magnet school attendance in every one of the six districts with the highest level of overall participation than whites have in any of them. Across those six districts, blacks make up 20.4% of the suburban public school-attending population but constitute 52.8% of the population that those suburbs send to the New Haven magnet schools.<sup>128</sup> The same holds true more broadly; across the sixteen

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<sup>127</sup> Data calculated from Connecticut 2005-06 District SSP, *supra* note 45; New Haven Magnet School Data, *supra* note 80. Another explanation for this phenomenon could be that white families are also leaving at high rates, only they send their children to private schools instead of New Haven magnet schools. But the data suggest the unlikelihood of this scenario: 90.2% of the total student population of West Haven is enrolled in public schools, a *higher* rate than that of 4 out of the other 5 districts (only North Branford is higher, at 94.9%). See Connecticut 2005-06 District SSP, *supra* note 45. Even if whites still left at a higher rate for private school than blacks, though, that explanation would only serve to reframe the question into one with a similar answer: in a three-way choice between suburban public schools, private schools, and magnet schools, why do black families choose magnet schools at such greater rates?

<sup>128</sup> Data calculated from Connecticut 2005-06 District SSP, *supra* note 45; New Haven Magnet School Data, *supra* note 80.

suburban districts in the New Haven region (not including New Haven), blacks make up 9.8% of the suburban public school-attending population but are 48.3% of the population that those suburbs send to magnet schools.<sup>129</sup> It is possible, of course, to argue that blacks' choice of magnet schools is not based on blacks' own preferences but rather that black families are simply filling up slots from which whites own racism has kept them away. Yet because participation is voluntary, presumably suburban black families would not affirmatively choose to send their children to magnet schools if they did not view those schools as providing superior opportunities for their children. Furthermore, as shown above, whites' relative participation tracks the sending district's poverty much more closely than it does the racial composition of the whites' hometown, which might not be the case if racism kept white families from participating.<sup>130</sup>

Given that blacks participate at higher rates in every town where they participate at all, blacks on average must perceive New Haven magnet schools as superior to suburban public schools—at least for their children—in ways that whites and those of other races do not.<sup>131</sup> Given the existence of relatively good quality school choice

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<sup>129</sup> Data calculated from Connecticut 2005-06 District SSP, *supra* note 45; New Haven Magnet School Data, *supra* note 80. Even though many more students of each racial group in a given suburb attend a suburban public school as compared to a magnet school, magnet school attendance nevertheless has a modest negative effect on the percentage of African-Americans in the suburban public schools. The black population of the suburban public schools themselves in the six suburbs, not including the magnet school attendees, is 18.9% (compared with 20.4% overall), while in the sixteen suburbs it is 9.0% (compared with 9.8% overall). These differences may seem small, as indeed they are, though they are worth remarking upon insofar as the interdistrict school choice options themselves are quite small—only 6 districts send 1% or more of their students to New Haven, and no district sends more than 7% of its students there. Data calculated from Connecticut 2005-06 District SSP, *supra* note 45; New Haven Magnet School Data, *supra* note 80.

<sup>130</sup> For example, whites in white, working-class East Haven are more likely to send their kids to magnet schools than whites in relatively integrated, middle-class Hamden, which we would not expect were white racism the determining factor in white participation.

<sup>131</sup> In the aggregate, members of other races do not appear to value the magnet schools as superior in the way that blacks do. Among the top six districts, Hispanic rates of magnet school attendance, though everywhere higher than those of whites, trail those of blacks for all six. Asian rates of attendance trail those of blacks for all but one district, Derby, where 2 Asian magnet school attendees constitute 8.3% of

options for African-Americans who have chosen to live in the suburbs, the patterns in black families' choices suggest that the predominant factor driving higher rates of black participation in the magnet schools is a preference for their children to attend school with a critical mass of other black students. Of course, this preference is clearly not the only factor driving black families' choices, since wealthy suburbs exhibit relatively lower participation rates of both whites and blacks, and blacks in suburbs where they have attained a critical mass still participate at greater rates than whites there. Still, this overall trend, combined with the fact that the preference manifests itself at its strongest in those suburbs where blacks are token in numbers, suggests that African-Americans' preference for magnet schools is due to clustering—a desire to attend school with other African-American students that manifests itself most strongly but not exclusively among blacks in districts where they are token in numbers. I will further explore the implications of this phenomenon in Part III.

#### B. Effects of the Exercise of School Choice on the New Haven Public Schools

The *Sheff* parties assumed that the new interdistrict magnet schools to be created in Connecticut's urban areas would be racially and socioeconomically integrated.<sup>132</sup> Given that like Hartford, New Haven has by far the lowest per capita income of any town in its region,<sup>133</sup> and that in the 1994-95 school year, 94.9% of the New Haven region's white public school-attending students attended school outside of New Haven, while 73.2% of the region's black and 71.8% of the region's Hispanic students attended school

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the Derby's Asian public school student population, out of a total of 24 Asian students who live in Derby. Data calculated from New Haven Magnet School Data, *supra* note 80.

<sup>132</sup> See Stipulation and Order, *Sheff v. O'Neill*, No. X03-89-0492119S (Conn. Super. Ct. Jan. 22, 2003).

<sup>133</sup> Census 2000 Data, *supra* note 44.

in New Haven, it was hard to imagine that opening the door to suburban students could do anything but integrate urban schools.<sup>134</sup> The schools also had the potential to attract New Haven whites away from private schools, where 38.2% of New Haven school-aged whites attended school in 1990.<sup>135</sup> If the schools proved of equal interest to all racial groups enrolled in private and suburban public schools in the region, the fact that across the region, whites made up 87.4% of the suburban public school population in 1994-95<sup>136</sup> and about 80% of the private school population<sup>137</sup> meant that the suburban students entering the program would be predominantly white.

Yet as the discussion in Section II.A. makes clear, in comparison with whites, African-Americans living outside of New Haven have disproportionately chosen to leave suburban districts, in which they are the minority, and enroll in New Haven magnet schools, where they constitute a majority. As a result, more black students than white students from the suburbs enroll in New Haven magnet schools (631 versus 439 in 2005-06, or 48.3% as compared to 33.6% of the total suburban enrollment in the magnet schools),<sup>138</sup> even though blacks constitute a small fraction of the overall suburban population. Yet because the overwhelming majority of the white public school-attending population in the New Haven region resides in the suburbs (95.9% in 2005-06),<sup>139</sup> we might expect that reserving 30% of the spots in interdistrict magnet schools for suburban students would nevertheless lead to somewhat greater numbers of white students in those

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<sup>134</sup> Data calculated from Connecticut 2005-06 District SSP, *supra* note 45.

<sup>135</sup> Census 2000 NCES Data, *supra* note 78.

<sup>136</sup> Data calculated from Connecticut 1993-94 District SSP, *supra* note 45.

<sup>137</sup> Exact private school attendance data for the mid-1990s is not available; in the 1999-00 school year, whites made up 78.9% of population of private school attendees who lived in the 17-town New Haven region, including the city of New Haven. Census 2000 NCES Data, *supra* note 78.

<sup>138</sup> Data calculated from New Haven Magnet School Data, *supra* note 80. These percentages do not add to 100% since suburban members of other racial groups also enroll.

<sup>139</sup> Data calculated from Connecticut 2005-06 District SSP, *supra* note 45.



schools than would otherwise be in the New Haven public school system. Furthermore, we might also expect the schools to feature a greater level of socioeconomic integration, since we would expect suburban whites and minorities to be better off than their city counterparts, and that some middle class minority and white New Haven residents would also choose the magnet schools over their current option of private schools.

The data bears these suspicions out. Turning first to race, New Haven's interdistrict magnet schools have in fact managed to achieve a somewhat greater level of racial integration than other New Haven public schools, but the results are not nearly as dramatic as the *Sheff* proponents had hoped. Including students from both New Haven and the suburbs, white students constitute 9.7% of the non-magnet New Haven public school population but 15.4% of the magnet population.<sup>140</sup> The high schools show a sharper disparity: whites constitute 6.7% of the non-magnet New Haven high school population but 19.3% of the magnet high schools population, and the percent white population at 5 of the 6 magnet high schools is larger than that at any of the non-magnet high schools.<sup>141</sup> In fact, in 2005-06 more whites attended all magnet high schools combined (377—63.3% of the total), than attended traditional public high schools (218), even though traditional public high schools educated 1.67 times as many students as the magnet high schools.<sup>142</sup>

Helped by the fact that approximately thirty percent of their students come from the relatively wealthy suburban population, New Haven's fourteen interdistrict magnet schools are more socioeconomically integrated than New Haven's non-magnet schools.

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<sup>140</sup> Data calculated from Connecticut 2005-06 School SSP, *supra* note 100. For a detailed breakdown of all magnet schools and non-magnet high schools by race and free/reduced lunch status, see Appendix A.

<sup>141</sup> Data calculated from Connecticut 2005-06 School SSP, *supra* note 100. See Appendix A.

<sup>142</sup> *Id.*

All six magnet high schools and six of the eight elementary and middle schools have a lower percentage of students receiving free/reduced lunch than the New Haven public school average, 61.7%.<sup>143</sup> Again, the high schools provide a particularly dramatic contrast; the percentage at magnet high schools ranges from 49.5% to 61.1%, while at non-magnet high schools it ranges from 70.1% to 87.0%.<sup>144</sup>

For the 2005-06 school year, the data suggests that the magnet schools, as the most racially and socioeconomically integrated schools in New Haven, contribute to the integration of the New Haven public schools as a whole. But this is only true if we assume that the white and/or wealthy students in the magnet schools would not otherwise be in the New Haven public school system. Because over four times as many New Haven residents attend traditional public schools as opposed to magnet schools,<sup>145</sup> if the magnet schools are “skimming” a disproportionate number of wealthy and/or white students out of the system, then they may have the effect of further isolating low-income and minority New Haveners in the non-magnet public schools.<sup>146</sup> However, as I will

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.* Because the data on free/reduced lunch status only distinguishes between those making below a certain threshold and everyone else, *see supra* note 116, it cannot help discern whether any of the students in the non-free lunch category are members of the upper middle class or higher strata of the income spectrum. For example, children who come from families whose income is above 185% of the federal poverty level—\$38,202 for a family of four in 2007—would show up as ineligible for free lunch, whether their annual family income is \$40,000 or \$200,000. (To understand just how many people that encompasses, among children attending school in 1999-2000, 42% of New Haven residents, and 81% of suburban residents, lived in households with a household income above \$40,000. Census 2000 Data, *supra* note 44.) Therefore, the extent to which the magnet schools are *fully* socioeconomically integrated is unclear. The data does, however, support the conclusion that in New Haven, the average magnet school student is wealthier than the average traditional public school student, and that a few students from suburbs with average incomes at the top end of the regional spectrum choose to enroll. Yet among white students, the strong inverse correlation between rates of attendance and average income in a given suburb, discussed in Section III.A., suggests that overall the interdistrict magnet schools enroll very few of the region’s wealthiest students.

<sup>145</sup> Data calculated from Connecticut 2005-06 School SSP, *supra* note 100.

<sup>146</sup> *See Lewin, supra* note 71, at 96 (2005) (discussing study that found that 75-98% of students who transferred within a district pursuant to No Child Left Behind were top performers and came from higher income families); Note, *The Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality*, 109 HARV. L. REV. 2002, 2004-05 (1996) (discussing the problem of skimming

discuss, an examination of enrollment trends over time reveals that the magnet schools do not appear to be poaching students from the non-magnet schools. In fact, the magnet schools appear to have helped stem a longer-term decline in the number of white students in the New Haven public school system. I focus mostly on racial data in the remainder of this Section since the racial data is available at a greater level of specificity than the free/reduced lunch data.<sup>147</sup>

To understand the degree to which the magnet schools contribute to the integration of the system as a whole, it is first useful to separately examine the contribution made by students coming from the suburbs. First, they contribute to racial integration. Suburban whites constitute a majority—59.4% in 2005-06—of the whites in the New Haven interdistrict magnet schools, and they, like suburban minority attendees, would most likely would not be attending public school in New Haven were it not for the magnet schools program.<sup>148</sup> In assessing the degree that suburban students contribute to

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within and across districts). Skimming may be less of a potential problem with regard to high school-aged students, because only 1.67 times as many New Haven residents attend traditional public high schools as opposed to magnet high schools.

<sup>147</sup> In particular, the number of students at any given school who identify as members of a particular racial category is available from 1993-94 through 2005-06. The free lunch data is not as specific, identifying only a total percentage of students at each school receiving free/reduced lunch. Also, while the free/reduced lunch data may be useful for comparing the relative poverty of a given school with others in a given school year, it is not as helpful for comparisons over time. The free/reduced lunch data proves less reliable over time due to fluctuations—individual students may participate in the free/reduced lunch program in some years and not others, and changing economic conditions over time may shape broader trends as much if not more than shifting school enrollments. Because students presumably do not identify as different races from one year to the next, race provides an easier dimension along which to assess school integration over time.

<sup>148</sup> Data calculated from New Haven Magnet School Data, *supra* note 80. I say “most likely” because it is possible that some black families, who feel that their child or children would be harmed by being a token in their school environment, would be willing to live in the suburbs only because of the availability of interdistrict magnet schools, and were they not available, would choose to live in New Haven. Similarly, it is also possible that were interdistrict magnet schools not available, a suburban white family, desiring an integrated school environment for their children but otherwise inclined to live in the suburbs, would move from the suburbs to New Haven so that their children could go to school there. Nevertheless, the fact that these suburban students live in the suburbs and attend school in New Haven suggests that the weight of whatever non-school factors shape their families’ choice of residential decision has caused them to live in

the integration of the New Haven public schools, one must also take into account the black and Hispanic students from the suburbs, who in effect contribute “negatively” to integration in a majority-minority school system. Yet because they represent only 21.9% and 18.9% of the black and Hispanic students in the magnet schools, respectively,<sup>149</sup> if the suburban students of all three racial groups were removed from the New Haven schools, the percentage of minorities in the New Haven schools would rise.

Second, the suburban students make a positive contribution with respect to socioeconomic integration. The average student from each of these three racial groups comes from a higher-earning household than his or her New Haven counterpart.<sup>150</sup> The presence of suburban students therefore contributes positively to socioeconomic and racial integration of the New Haven magnet schools, and has no direct effect on the population of the traditional public schools. To the extent that socioeconomic isolation has been shown to be a more significant factor than racial isolation in school performance,<sup>151</sup> the discrepancies in income across each racial group’s city and suburban counterparts are a positive sign for New Haveners of all races who attend magnet schools.

Third, one can assume that some of the New Haven whites attending magnet schools would otherwise be attending private (including parochial) schools as opposed to a non-magnet public school, meaning that those students would not otherwise be

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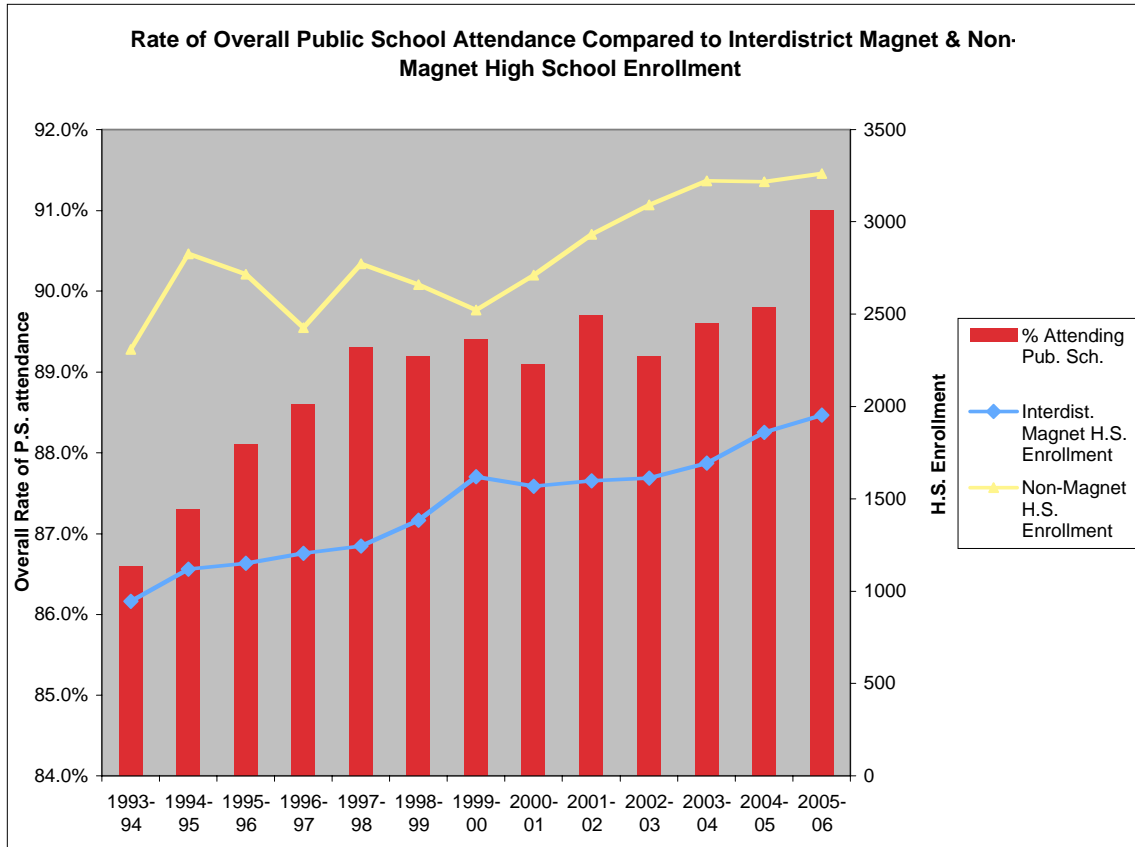
the suburbs, and it is likely that were the magnet schools not available, few of them would move to New Haven for the purpose of sending their child to a traditional public school there.

<sup>149</sup> Data calculated from New Haven Magnet School Data, *supra* note 80.

<sup>150</sup> Among magnet school attendees, 45.7% of New Haven whites and only 16.2% of suburban whites receive free/reduced lunch; 67.3% of New Haven blacks and only 30.4% of suburban blacks do; 77.4% of New Haven Hispanics and only 39.4% of suburban Hispanics do. Data calculated from New Haven Magnet School Data, *supra* note 80. Again, as noted above, these figures do not distinguish between middle class and upper middle class or wealthy families.

<sup>151</sup> See Lewin, *supra* note 71, at 97, 125-129.

contributing to racial integration in the New Haven public schools. The question of whether or not the magnet schools have attracted white or middle class students of any race who would not otherwise be attending public schools cannot be answered directly, but the data suggests that the magnet schools have had an overall positive effect on public school attendance. Looking first across all racial groups, the past decade has seen a significant rise in the percentage of New Haven school-aged children who attend public school, including magnet schools and suburban public schools through Open Choice. Public school attendance rates exhibited their sharpest increases in two distinct periods—from 1993-94 through 1999-00, and then again from 2002-03 to 2005-06, as the graph shows:



152

This chart focuses on the data for the magnet high schools—which accounted for 70% of all magnet school students in 2005-06—as well as the non-magnet high schools.<sup>153</sup> The data reveals that periods in which overall public school attendance rates (the bars) exhibited the sharpest increases—from 1993-94 through 1999-00, and then again from 2002-03 through 2005-06—roughly correspond to periods of development and expansion of the interdistrict magnet school program, suggesting that the magnet schools may have contributed to bringing in or retaining families in the public school system who might

<sup>152</sup> Data calculated from every available year of Connecticut State Department of Education, Connecticut Strategic School Profiles, Strategic School Profiles by District, *available at* <http://www.csde.state.ct.us/public/der/ssp/index.htm> [hereinafter Connecticut District SSP All Years], and Connecticut State Department of Education, Connecticut Strategic School Profiles, Strategic School Profiles by School, *available at* <http://www.csde.state.ct.us/public/der/ssp/index.htm> [hereinafter Connecticut School SSP All Years]

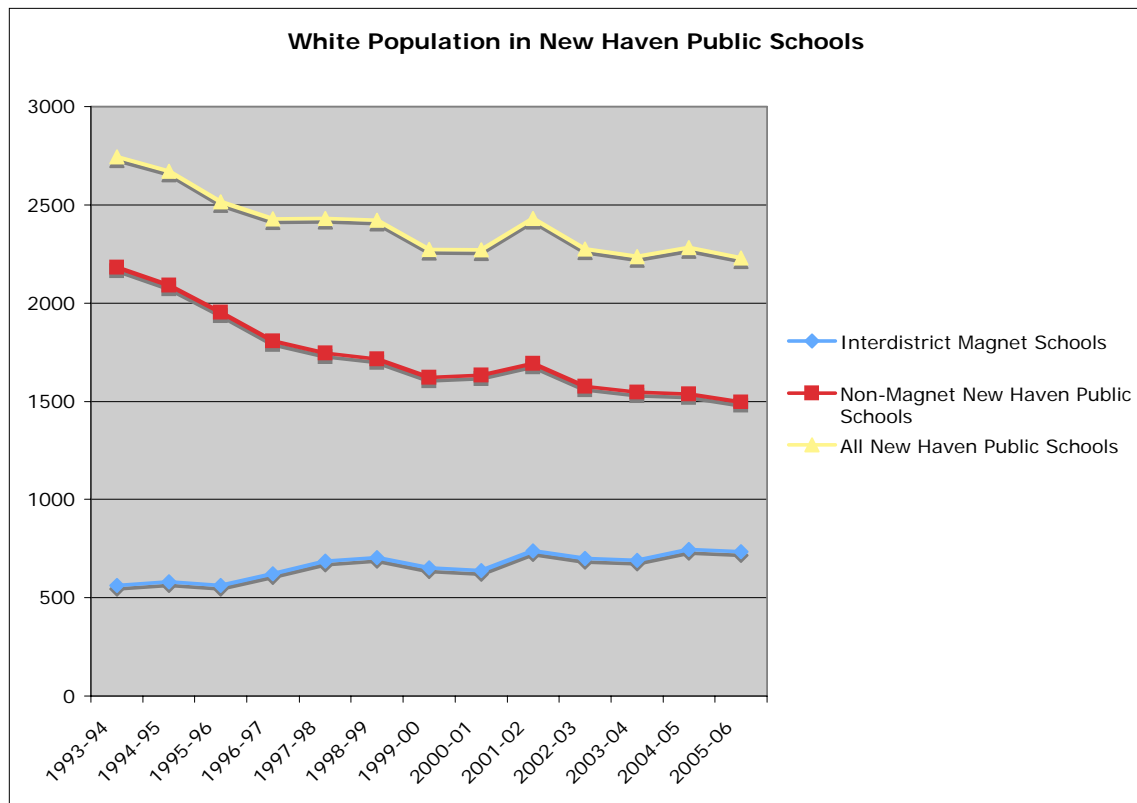
<sup>153</sup> Data calculated from Connecticut 2005-06 School SSP, *supra* note 100.

otherwise have sent their children to private school. The number of non-magnet high school students see-sawed between 1993-94 and 1999-00, corresponding to a period of high growth among the interdistrict magnet high schools, which suggests that some of the growth of the magnet high schools may have come at the expense of their non-magnet counterparts during this period. Since 1999-00, the non-magnet high schools have experienced steady growth, even though the overall rate of public school attendance seesawed between 1999-00 and 2002-03 and began steady growth again in 2002-03—exactly when the number of students in the non-magnet high schools were starting to level off. The fact that the periods of growth of the magnet high schools and overall public school enrollment coincide, while neither coincides with the period of growth of non-magnet high schools, suggests that while from 1993-94 to 1999-00 the increase in magnet school enrollment likely came at the expense of both non-public schools and traditional public schools, the growth in magnet school enrollment since 2002-03 has most likely come from students leaving non-public schools to enroll in magnet schools or entering the school system for the first time.<sup>154</sup>

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<sup>154</sup> Data in this paragraph comes from the table at *supra* note 152. Data calculated from Connecticut District SSP All Years, *supra* note 152; Connecticut School SSP All Years, *supra* note 152. Another factor supporting this conclusion, albeit indirectly, is that the rise in the number of students in the non-magnet high schools has likely been influenced by the large increase in the number of Hispanic students enrolled in the New Haven public schools across this period. In New Haven schools overall, the number of Hispanics rose from 4354 to 6866 across this twelve year period, a gain of 57%. Compared with other racial groups, New Haven Hispanics are disproportionately less likely to enroll in magnet schools; they constituted 37% of New Haveners in non-magnet public schools in 2005-06, but only 25% of the New Haveners in magnet schools during that period. As a result, the added presence of Hispanics in New Haven has increased the percentage of Hispanic students in the New Haven public schools at the expense of both whites and blacks (from 24.3% in 1993-94 to 33.9% in 2005-06, with blacks falling five percentage points and whites falling four), and has likely helped boost the overall rate of public school attendance *and* the number of students in the non-magnet high schools. The fact that increasing rates of public school attendance nevertheless still correspond with the increases in the number of students in the magnet high schools further supports the notion that as the magnet schools have expanded, they have not done so at the expense of students in the non-magnet public schools. Data in this paragraph calculated from Connecticut 1993-94 District SSP, *supra* note 45; Connecticut 2005-06 District SSP, *supra* note 45; Connecticut 2005-06 School SSP, *supra* note 100.

Looking across racial groups, however, does not reveal the extent to which the magnet schools may be drawing middle class white and minority families out of other New Haven public schools. Unfortunately, I do not have access to data that would enable me to do a cross-tabulation by income *and* race of students attending non-magnet public schools, so I have to look at these variables separately. The overall number of whites in the New Haven public schools declined over the first six years of the magnet school program but has stabilized over the most recent six years:



155

As the chart illustrates, the magnet schools have claimed an ever-greater percentage of total white enrollment over time, and as more whites in the public school system have shifted to the magnet schools, it is likely that the magnet schools have become an even

<sup>155</sup> Data calculated from Connecticut District SSP All Years, *supra* note 152; Connecticut School SSP All Years, *supra* note 152.



more attractive alternative for those whites remaining in the non-magnet public schools.<sup>156</sup> Yet the year-by-year trends in white enrollment suggest that the magnet schools have had at worst a neutral effect on the total number of whites in the non-magnet public schools, and at best, a positive effect in stemming further declines from the public school system as a whole. From 1993-1994 through 1999-00, the New Haven public schools on the whole continued to lose white students. In this time the magnet schools showed a modest increase, but even if that increase resulted entirely from students transferring from non-magnet public schools, most of the white departures from the non-magnet public schools can be attributed to exit from the system entirely, since whites left the non-magnet public schools at a much faster rate than new whites entered the magnet ones. It therefore appears that during this era the magnet schools merely held back what would otherwise have been a faster flow of white students out of the New Haven public school system.<sup>157</sup>

Starting in 1999-00, the overall pace of white student departures from the New Haven public school system has leveled off. In fact, there has been no net average

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<sup>156</sup> Studies show that as the proportion of whites in a public school declines, whites are further deterred from enrolling in that school. See Betsy Levin, *Race and School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* *supra* note 55, at 266, 280-81 (noting studies that show that the proportion of minorities in a public school affects whether or not whites choose to enroll in public school, and that in a choice regime, whites will choose schools with lower percentages of minority students). A conceivable exception to the trend towards magnet schools could be Wilbur Cross High School, which has a well-regarded honors track in which a majority of the students are white. See Nicholas Zamiska, *Tracking Proves a Volatile Issue in New Haven's Schools*, *YALE HERALD*, Oct. 27, 2000, available at <http://www.yaleherald.com/archive/xxx/2000.10.27/news/p5trackingnh.html> (noting in 2000 that whites make up 13% of the student body but a majority of students in the honors track). The percentage of white students at Wilbur Cross has see-sawed over time, declining from 19.7% in 1993-94 to 13.1% in 1998-99, before re-rising to 16.5% in 2000-01 and then dropping again to 10.6% in 2005-06. The school's population, though, has risen steadily through this time from 1197 students in 1993-94 to 1814 students in 2005-06, as the number of black and Hispanic students has increased considerably. In absolute numbers, therefore, white enrollment has remained within a narrow range, declining from 236 in 1993-94 to a low of 171 in 1996-97, before rebounding to a high of 250 in 2002-03 and declining again to 192 in 2005-06. Data about Wilbur Cross High School calculated from Connecticut School SSP All Years, *supra* note 152.

<sup>157</sup> Data in this paragraph comes from the table at *supra* note 155. Data calculated from Connecticut District SSP All Years, *supra* note 152; Connecticut School SSP All Years, *supra* note 152.

outflow since the 1999-00 school year, and 2004-05 white total enrollment (2282) is actually higher than 1999-2000 white total enrollment was (2274), though 2005-06 enrollment fell below 1999-2000 enrollment (2229).<sup>158</sup> The number of whites in the non-magnet public schools has continued to decline, albeit at a more modest rate, while the magnet schools have exhibited a slight increase in the number of students since this time. While this could suggest that the magnet schools may in fact be absorbing white students from the other public schools in recent years, one must also take into account the increase in the number of suburban whites attending New Haven magnet schools across this period. By 2005-06, suburban whites constituted 59.4% of the white students in the magnet schools, or about 19.5% of the total whites attending public school in New Haven.<sup>159</sup> But whether growth of suburban student numbers has been steady or sporadic since suburban students first entered the system in 1995-96, they account for a significant portion of increase in numbers of white students in the magnet schools over time that the graph illustrates.<sup>160</sup> Particularly given that other non-magnet schools attractive to whites like Wilbur Cross High School actually saw a 15-year peak in the number of white students as late as 2002-03,<sup>161</sup> it therefore appears that *in the aggregate*, the magnet schools are probably only absorbing a handful of white students who would otherwise attend a New Haven public school. On the flip side, though, and more speculatively, the

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<sup>158</sup> Data calculated from Connecticut District SSP All Years, *supra* note 152. The numbers appear to be in a period of fluctuation rather than steady decline. Though 2005-06 overall white enrollment is lower than the previous year, 2006-07 enrollment may well be larger. 2006-07 overall enrollment numbers were not available, but the magnet schools enrollment for 2006-07 increased by 39 whites, to 772 from 733 in 2005-06, after having fallen from 744 whites in 2004-05. New Haven Magnet School Data, *supra* note 80.

<sup>159</sup> New Haven Magnet School Data, *supra* note 80; Connecticut 2005-06 District SSP, *supra* note 45. Though few white suburban students enter the interdistrict magnet schools as compared with the total white suburban population, suburban whites still constitute a majority of the white students (though as of 2005-06, only 33.6% of the suburban students) in the interdistrict magnet schools. New Haven Magnet School Data, *supra* note 80.

<sup>160</sup> Unfortunately, I do not have data on the numbers of suburban students attending the magnet schools in the years between 1995-96 and 2005-06.

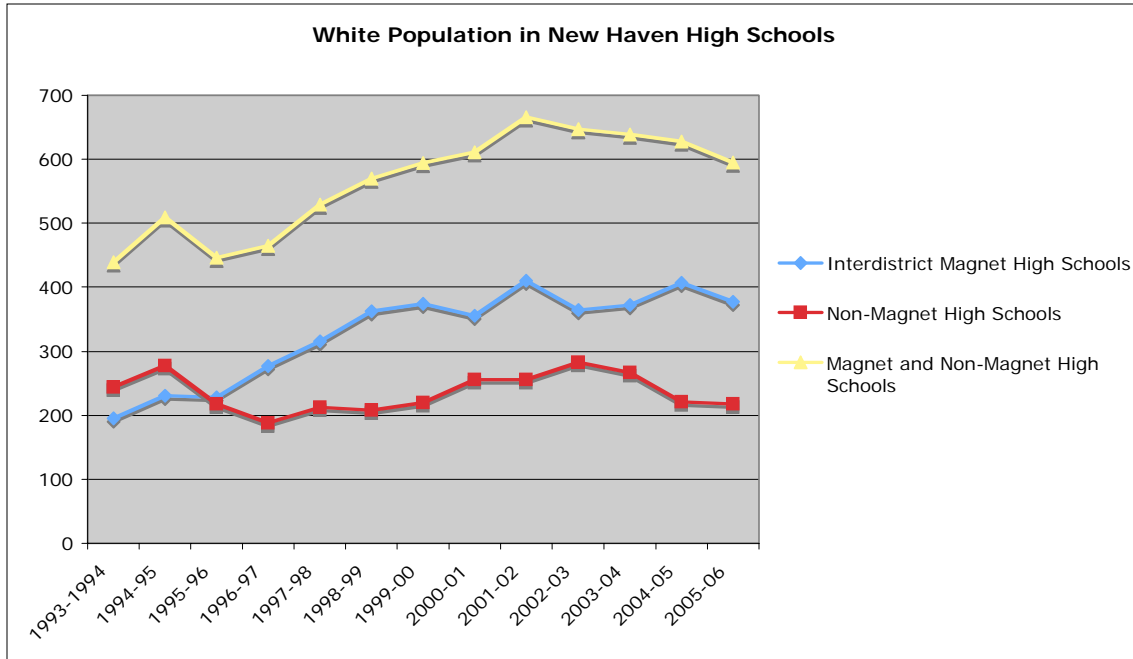
<sup>161</sup> See *supra* note 156.

data also suggests that magnet schools cannot fully stem the tide of white departures from the public school system; if the suburban students had not been present, the system likely would have continued to lose white students at a rate closer to that over the first few years shown on the chart.

Looking at the high schools alone—a subset of the population just discussed—helps further develop our understanding of school attendance dynamics over time. The magnet high schools appear to have played a significant role in retaining white students in the system, whose enrollment in New Haven high schools actually sharply *increased* through 2001-02 before modestly decreasing over the past several years.<sup>162</sup> From 1996-97 through 2001-02, white enrollment in both the magnet and non-magnet high schools increased. Since 2002-03, enrollment in the non-magnet high schools has declined somewhat while that of the magnet schools appears to have reached something of a steady equilibrium:

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<sup>162</sup> Connecticut School SSP All Years, *supra* note 152.



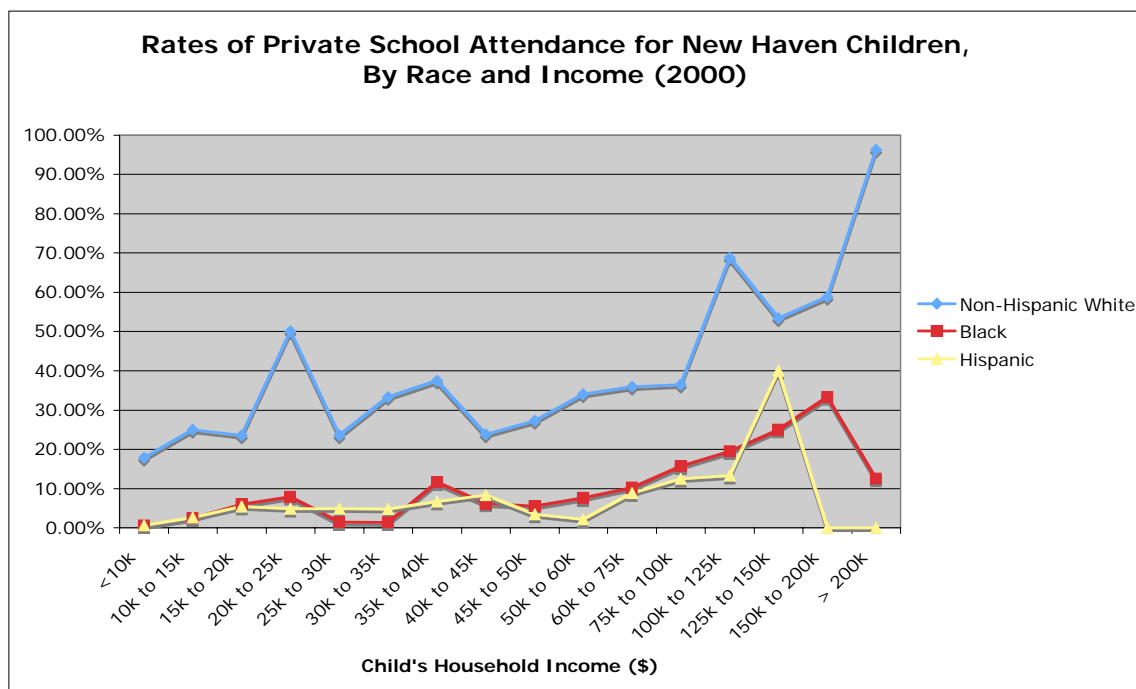
163

Though the rapid rise in white enrollment in the magnet high schools has contributed most to the retention of white high school students in the system, this retention has not come at the expense of the non-magnet high schools, whose numbers of white students continued to grow, albeit modestly, from 1996-97 through 2002-03, roughly the period when the magnet high schools also experienced their strongest growth. Only from 1995-96 to 1996-97 and 2002-03 to 2004-05, when the number of students in the magnet schools rose while that in the non-magnet high schools declined, did the magnet schools potentially gain at the expense of the non-magnet high schools.

Census data regarding the rates of enrollment in private schools by race supports the idea that the magnet schools did not poach white students from the public schools. As of the 1999-2000 school year, about 40% of New Haven white schoolchildren attended private schools, though only 7% of black and 5% of Hispanic schoolchildren

<sup>163</sup> *Id.*

did.<sup>164</sup> New Haven whites therefore sent their children to private school at a rate that vastly outstripped the national and New Haven region averages, while black and Hispanic families attended private school at much lower rates.<sup>165</sup> This data suggests that those New Haven whites who can afford it are much more likely to send their children to private school than a regular New Haven public school, either in the first instance or if they cannot get their child into a magnet school. Income differentials alone cannot explain the difference, as New Haven whites at all income levels are considerably more likely to send their children to private school than blacks or Hispanics at the same income level:



166

<sup>164</sup> Census 2000 NCES Data, *supra* note 78.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* Studies attempting to explain differential enrollment rates of whites and members of minority groups of similar incomes have found that whites are particularly sensitive to the proportion of minority students in the public schools. See GILL ET AL., *supra* note 60, at 173 (discussing a study that found that when the proportion of minority students in the public schools rose by one standard deviation, white, college-educated parents became one-third more likely to enroll their children to private schools).

Furthermore, the rate of private school attendance among whites does not appear to have changed significantly over time: in 1990, 38.2% of New Haven school-aged whites enrolled in private school, while in 2000, 39.6% did.<sup>167</sup> The fact that these numbers held steady even as white children continued to leave the New Haven schools in modest numbers suggests that the decrease in white students was shaped more by whites moving to the suburbs than by whites staying in New Haven and leaving the public schools for private schools, at least through 2000.<sup>168</sup> The data also suggests that the large increase in the white high school population through the second half of the 1990s, driven mostly by growth in the interdistrict magnet high schools, may be largely attributable to increasing numbers of suburban whites entering these schools, rather than New Haven whites leaving private school for these schools. Nevertheless, it is unlikely that white students will fully disappear from the public school system (including the magnet schools) any time soon; most poor and lower middle class New Haven whites do remain in public school, as the above chart shows. These individuals may not, for financial reasons, have access to the alternatives of private school or moving to the suburbs, and as a result may form a relatively immobile core constituency for the New Haven public, including the magnet, schools.

\* \* \*

As a result of the differential attractiveness of magnet schools to suburban whites and blacks, and of private schools to New Haven whites and blacks, the New Haven

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<sup>167</sup> Census 1990: National Center for Education Statistics (NCES) data related to the population of school-aged children was generated using customized tables from “Census 1990 School District Tabulation Data,” available at U.S. Census Bureau, School District Demographics System, <http://nces.ed.gov/surveys/sdds/datatools.asp> (last visited May. 8, 2007) [hereinafter Census 1990 NCES Data]; Census 2000 NCES Data, *supra* note 78.

<sup>168</sup> Though overall rates of public school enrollment as a percentage of the total student population are available for each year, data on rates of private school enrollment by *race* over time (except for 1990 and 2000) is not available.

magnet schools have a significantly greater percentage of black students, and a significantly lesser percentage of white students, than one would predict from looking at the potential applicant pool of New Haven and suburban students.<sup>169</sup> In Part III, I will explore some potential reasons behind and implications of this differential attractiveness.

### C. Factors Motivating *Open Choice* Participants

The *Open Choice* program, though much smaller than the interdistrict magnet school program, also constitutes a key component of the *Sheff* remedies. Data from *Open Choice* enriches our understanding of school choice dynamics in the New Haven metropolitan area. For several reasons, it is more difficult to draw conclusions from the Open Choice Data about the extent of school-based clustering in the New Haven metropolitan area. First, though expanding rapidly, the Open Choice program serves only about one-tenth the number of students as the magnet schools, or less than two

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<sup>169</sup> If urban and suburban public school-attending whites and blacks in the New Haven region applied and were admitted to magnet schools in numbers proportionate to their population, in 2005-06 the magnet schools would have been 40.3% black, 31.2% white, and 26.1% Hispanic, as compared with actual figures of 60.7% black, 15.5% white, and 22.5% Hispanic. Data calculated from Connecticut 2005-06 District SSP, *supra* note 45; New Haven Magnet School Data, *supra* note 80. Even with a disproportionate number of black applicants, the magnet schools are still more integrated than the New Haven public schools as a whole. On first glance, we might expect that the differential rates of attractiveness of magnet schools to whites and blacks would lead to the interdistrict magnet schools having a smaller percentage of white students than the New Haven public schools as a whole. But this is not the case, of course, for at least two reasons. First, even though whites are grossly underrepresented as compared with their proportion in the suburban population as a whole, whites still constitute 33.6% of the suburban students entering the magnet schools. New Haven Magnet School Data, *supra* note 80. Given that 30% of the spots in magnet schools are set aside for suburban students, the relative white magnet school population will be higher as compared with most other New Haven public schools than only draw their students from New Haven. Second, the same clustering and other forces shaping magnet school attendance among the suburban population will work in reverse among New Haven public school-attending residents. Whites and blacks will both be drawn to the magnet schools for some similar reasons, including smaller class size, a better physical plant, and better funding. But New Haven whites inclined to cluster will be especially interested in attending magnet schools, given their greater white population, while black New Haven residents with similar inclinations will not exhibit any particular preference for the magnet schools.

percent of the New Haven district’s students overall.<sup>170</sup> The small numbers make any conclusions from cross-district comparisons suspect. Second, participants from New Haven are spread around multiple districts (thirteen in 2006-07) based on the availability of placements, and individual students may only choose among available placements.<sup>171</sup> Districts in 2006-07 averaged about 33 students each, with four taking 10 or fewer:

**Open Choice Participants by Race and Receiving District (2006-07)<sup>172</sup>**

<b>Receiving District</b>	Black	Hispanic	White	American Indian	Asian	<b>Grand Total</b>
Wallingford	75	18	8			101
Hamden	88	7		1	1	97
North Haven	52	17	20	1	2	92
New Haven	31	10	11			52
North Branford	13	9			2	24
Milford	18	3				21
Branford	9	9	2			20
Orange	16	1	1		1	19
Cheshire	12	3	1			16
Reg. Dist. #5	6	1	4		1	12
Woodbridge	4	1	2	1	2	10
East Haven	6	1	1			8
Bethany	2	1				3
Ansonia	1					1
<b>Total</b>	333	81	50	3	9	<b>476</b>

As a result, a comparison between receiving districts with such small numbers may not be productive. Third, participants from New Haven must have been attending a

<sup>170</sup> *Open Choice Data, supra* note 86. Data for the *Open Choice* program is based on the 2006-07 school year, unlike the magnet schools and overall district data which comes from the 2005-06 school year. Therefore, direct comparisons between enrollment numbers of the *Open Choice* and the population of magnet schools or school districts are approximate.

<sup>171</sup> *See* CONN. GEN. STAT. § 10-266aa(e). The statute provides that the regional educational service center in charge of the program shall convene an annual meeting for school districts to report the number of available spaces for out-of-district students. The statute does not mandate that districts provide a minimum number of spaces or otherwise define availability, but it does require that once a receiving district accepts a given student, it must allow that student to remain in a district until he or she graduates from high school. *Id.*

<sup>172</sup> *Open Choice Data, supra* note 86.



New Haven public school at the time of application.<sup>173</sup> Some 40% of New Haven’s white students attend private schools;<sup>174</sup> therefore, many of the white students who might be most inclined to exercise a school choice option are prevented from participating in *Open Choice*. It is likely that most are unwilling to first send their child to a New Haven public school for a year in exchange for a small chance in a lottery to send their child to a suburban public school. The magnet schools, by contrast, accept applications from those attending private or charter schools at the time of application.<sup>175</sup> Fourth, the state’s *Open Choice* law requires that the lottery be structured in such a way that overall, the program preserves or increases racial, ethnic, and economic diversity, and that preference be given to children attending schools identified as “in need of improvement” under the Federal No Child Left Behind Act.<sup>176</sup> As a result, who participates in the program may therefore not be fully representative of who applies to participate.

Despite these caveats, the data from the *Open Choice* program still supports this paper’s broader conclusions about differential participation rates and clustering of African-American students. First, the data on participants in Open Choice from *outside* New Haven generally reflects differential participation in a similar way to the data from

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<sup>173</sup> Area Cooperative Educational Services, Open Choice—Q&A, [http://www.aces.k12.ct.us/services/programdevelopment/open\\_qa.aspx](http://www.aces.k12.ct.us/services/programdevelopment/open_qa.aspx) (last visited May 8, 2007).

<sup>174</sup> See *supra* notes 164-168 and accompanying text.

<sup>175</sup> See New Haven Public Schools, Interdistrict Magnet Schools—New Haven, Connecticut, *supra* note 81.

<sup>176</sup> See CONN. GEN. STAT. § 10-266aa(e). Despite this provision, white students are not systematically excluded from the lottery. Twenty New Haven schools were identified as “in need of improvement” in 2005-06. See Connecticut State Department of Education, No Child Left Behind—State, District and School NCLB Results, [http://www.csde.state.ct.us/public/cedar/nclb/dist\\_school\\_nclb\\_results/index.htm](http://www.csde.state.ct.us/public/cedar/nclb/dist_school_nclb_results/index.htm) (last visited May 8, 2007). It is unclear how much the lottery results deviate from random chance as a result of either of these provisions. The experience of other states, though, suggests that it might deviate significantly. See, e.g., Constance Hawke, Commentary, *The “Choice” for Urban School Districts: Open Enrollment or Desegregation?*, 115 ED. L. REP. 609, 612, 616-17 (1997) (noting that virtually all students who applied to transfer out of urban districts of Akron, Ohio, Omaha, Nebraska, and Des Moines, Iowa to the suburbs were white).

the magnet school participants.<sup>177</sup> Of the suburban participants, 59.6% are African-American, 21.2% are Hispanic and 19.2% are white.<sup>178</sup> Suburban blacks, and to a lesser extent suburban Hispanics, therefore over-participate in Open Choice at a rate even higher than that at which they over-participate in the magnet schools.<sup>179</sup> Clustering by race is further visible in the New Haven schools that the suburban participants choose to attend. Overall, about three-quarters (74.5%) of the suburban *Open Choice* participants attend the Conte/West Hills School.<sup>180</sup> All but one of the white students (90.9%) attends the Conte/West Hills School, which is 14.7% white.<sup>181</sup> By contrast, only 66.7% of the black and 72.3% of the Hispanic students choose to attend Conte/West Hills.<sup>182</sup> Instead, the remaining minority students attend Wexler Grant (1.4% white, with 7 minority *Open Choice* participants), James Hillhouse (1.6% white, 2 minority *Open Choice* participants), and Wilbur Cross (10.6% white, with 4 minority participants and the remaining 1 white participant).<sup>183</sup> Admittedly, the number of attendees is so small that one should be cautious about drawing strong conclusions from them; however, to the extent that one

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<sup>177</sup> Though 90% of the program's participants are New Haveners who attend school in the suburbs, the program also serves some students (52 in 2006-07) who come to New Haven from the suburbs to attend a New Haven school that does not participate in the interdistrict magnet school program. *Open Choice* Data, *supra* note 86. The *Open Choice* law provides that students from suburban districts may attend school in the "priority school district" (in this case, New Haven), provided that the participating students contribute to the racial, ethnic, and economic diversity of the priority district and do not increase the district's racial, ethnic, or economic isolation. CONN. GEN. STAT. § 10-266aa(c). Suburban students that participate in *Open Choice* cannot attend interdistrict magnet schools through the program, and are thus not counted among the population of interdistrict magnet school participants above.

<sup>178</sup> *Open Choice* Data, *supra* note 86. There are no Asian or American Indian participants from the suburbs.

<sup>179</sup> By comparison, the population of magnet school students from the suburbs is 48.3% black, 15.5% Hispanic, 33.6% white. New Haven Magnet School Data, *supra* note 80. It is unlikely that the *Open Choice* lottery, however structured, favors suburban minority students over suburban white students, since to do so would go against the statutory requirement that the lottery not exacerbate pre-existing ethnic, racial, or economic segregation.

<sup>180</sup> *Open Choice* Data, *supra* note 86. The Conte/West Hills Magnet School does not participate in the general interdistrict magnet school lottery but accepts some students from the suburbs (about 6% of its students in 2006-07) through the Open Choice program. *Id.*

<sup>181</sup> *Id.*; Connecticut 2005-06 School SSP, *supra* note 100

<sup>182</sup> *Open Choice* Data, *supra* note 86.

<sup>183</sup> *Id.*; Connecticut 2005-06 School SSP, *supra* note 100.

may draw conclusions, this data reflects the broader pattern of whites and blacks choosing schools based on the percentage of white or African-American students present there.

Data on New Haven residents' participation in Open Choice complicates the analysis, because black New Haven residents actually *over-participate* in Open Choice, even though this means leaving New Haven for a school district with a smaller percentage of African-Americans. Among participating New Haven residents, 71.2% are black, 16.8% are Hispanic, and 9.2% are white.<sup>184</sup> Compared to their overall participation rates in the New Haven public school system (including magnet schools), blacks are overrepresented (71% to 54%), while Hispanics are very underrepresented (17% to 34%) and whites participate at similar rates (9% vs. 11%).<sup>185</sup> Certainly, this data accords with the higher academic quality of suburban schools as a factor in school choice of members of all races. But does it accord with our expectation from the magnet schools data that blacks might be less interested than whites in attending suburban schools where blacks will be small in numbers?

I believe that it does. First, magnet schools are a limited option—only about 15% of New Haven residents get to attend a magnet school, and the magnet schools are oversubscribed.<sup>186</sup> Presumably, most of the black Open Choice participants did not have

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<sup>184</sup> *Open Choice Data*, *supra* note 86.

<sup>185</sup> *Id.*; Connecticut 2005-06 District SSP, *supra* note 45.

<sup>186</sup> I was not able to obtain data on the number of participants or acceptance rates for the magnet schools lottery in recent years. However, in 2000-01, approximately 800 New Haven rising ninth graders (about 60-65% of eligible public school-enrolled New Haveners) applied to attend a magnet high school. Adam Goldfarb, *New Haven's Interdistrict Schools of Choice: New Hope for Racial Integration* 25 (Apr. 15, 2002) (unpublished Senior Essay, Yale University) (on file with author) (citing Interview with Ed Linehan, Director, New Haven Magnet Schools (Nov. 28, 2000)). 270 of these students (34% of applicants) were granted admission, making admission to the magnet high schools quite competitive. *Id.* See also Joseph P. Viteritti, *Defining Equity: Politics Markets, and Public Policy*, in *SCHOOL CHOICE: THE MORAL DEBATE*

the option to attend a magnet school, and a suburban public school may seem, whatever its population, like a more attractive option than a non-magnet New Haven public school. Therefore, the data could still be consistent with an aggregate decision-making hierarchy among black families that values suburban public schools below New Haven magnet schools but above New Haven non-magnet public schools.

Second, *Open Choice* provides an alternative to prohibitively expensive private schools that may be attractive to both white and black New Haven families seeking an alternative to traditional public schools. As discussed, the 40% of New Haven whites who have already chosen private school as an option may not enroll in *Open Choice* unless they first attend public school for a year, which likely prevents them from realizing the advantage of this option. Because black and Hispanic families attend private school at much lower rates, they are more likely to be eligible for *Open Choice*.<sup>187</sup> Still, given that differences in private school attendance rates by race hold when income is taken into account, it appears that even for those New Haven African-American families who could afford private school, a well-regarded suburban public school may be relatively more attractive to an African-American family than a private school, as compared with an *Open Choice*-eligible white family of similar income facing the same choice.

While the above discussion explains why African-Americans might participate in *Open Choice* programs to secure a better education despite the racial make-up of the suburban schools they enter, a clustering analysis would still predict that, within the confines of availability, blacks participating in *Open Choice* would be more attracted to

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13, 22 (Alan Wolfe ed., 2003) (noting “significant unmet demand for expanded public and private school choice” around the country, and that most forms of school choice have long waiting lists).

<sup>187</sup> See *supra* notes 164-168 and accompanying text.

those schools with a larger African-American population.<sup>188</sup> The data on where Open Choice participants from New Haven actually choose to attend school bears this conclusion out.<sup>189</sup> Hamden, one of the top three receiving districts in the *Open Choice* program, has the highest percent minority student population among the top three participating suburban districts.<sup>190</sup> Consistent with clustering, more black Open Choice participants go to Hamden than any other district (29.1% of black participants).<sup>191</sup> Additionally, whites go most frequently to North Haven (51.3% of white participants), significantly the district among the top three with the smallest percent minority population.<sup>192</sup> No whites go to Hamden through Open Choice.<sup>193</sup>

Looking beyond the top receivers of black and white students complicates things a bit, but not inexplicably so. Blacks do send their children, after Hamden, to the predominantly white districts of Wallingford (24.8%) and North Haven (17.2%).<sup>194</sup> Yet even though Wallingford and North Haven have small black populations, Hamden, Wallingford, and North Haven are the top three participating districts, and participating students are at the mercy of which suburban districts decide to make slots available. The

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<sup>188</sup> Cf. Hawke, *supra* note 176, at 620 (discussing a study that speculated that urban minorities in Iowa participated less in open enrollment than white students out of hesitation to attend mostly white schools and a lack of information about the program).

<sup>189</sup> The racial breakdown of the suburban districts discussed here includes current Open Choice participants. I have chosen to include them since a new student choosing to participate in Open Choice would perceive the district's racial composition as it is with the Open Choice participants, not without them.

<sup>190</sup> The three largest receiving districts are Wallingford (101 students), Hamden (97 students), and North Haven (92 students), which together educate 68% of the 424 New Haven residents who participate in Open Choice. No other district takes more than 24 students. *Open Choice Data, supra* note 86. Hamden's school district is 52.7% white, 30.7% black, 11.3% Hispanic, and 5.2% Asian. Connecticut 2005-06 District SSP, *supra* note 45.

<sup>191</sup> *Open Choice Data, supra* note 86.

<sup>192</sup> *Open Choice Data, supra* note 86. North Haven's school district is 85.5% white, 6.9% Asian, 4.0% black, and 3.4% Hispanic. Connecticut 2005-06 District SSP, *supra* note 45.

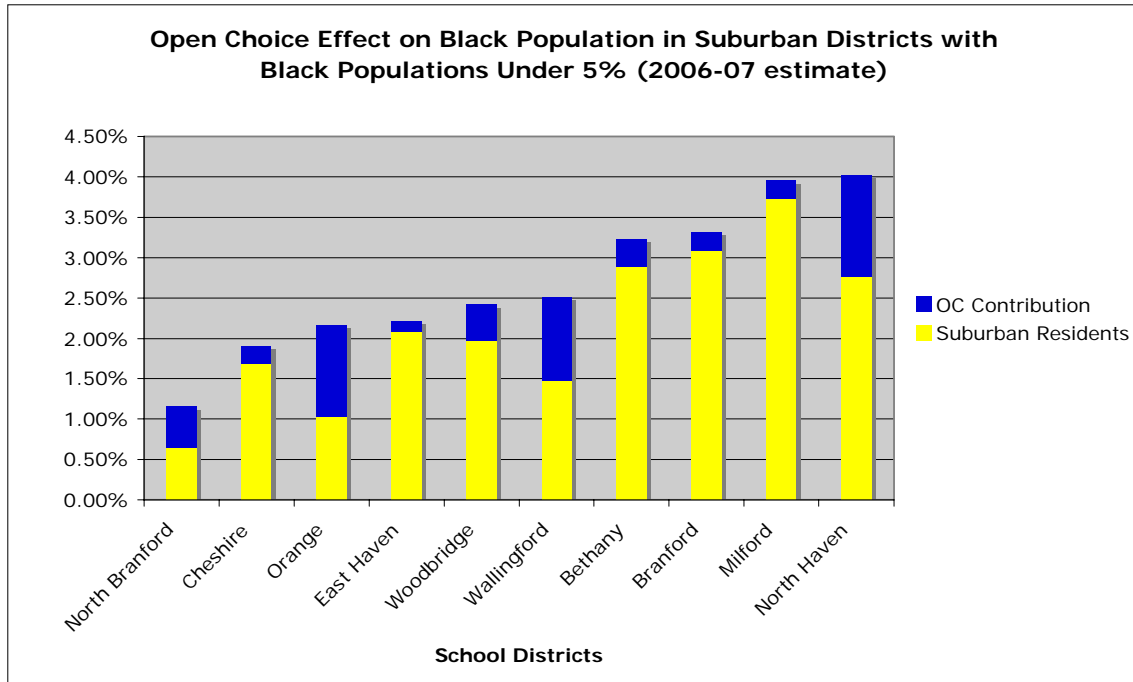
<sup>193</sup> *Open Choice Data, supra* note 86.

<sup>194</sup> *Open Choice Data, supra* note 86. Whites' second choice is also Wallingford, where 20.5% of participating New Haven whites attend. *Id.*

fact that close to a third of the black students go to Hamden, while not a single white student does, suggests that when given the choice among suburban districts, blacks will be much more likely than whites to send their children to a district with a critical mass of blacks. Also, because not all participants can go to Hamden, some black families will take advantage of the opportunity to send their child to a relatively wealthy suburban district even if it does not have a critical mass of blacks. In other words, black choice likely reflects the interplay of three constraining factors, while white choice likely reflects only the first two: a) the available number of slots; b) the wealth of the district; and c) whether or not a critical mass of blacks exists in the district. Overall, the observed pattern demonstrates that even within the constraints of a small number of participants and a small handful of participating districts, there are observable differences in the way school choice gets exercised among white and black participants.

#### D. Effects of Open Choice and the Interdistrict Magnet Schools on Suburban Districts

Even though it involves many fewer students, *Open Choice* may be more radical than the magnet schools because of its potential effects on school integration in suburban districts. Though students attending a suburban public school through *Open Choice* constitute only 1-3% or less of the suburban districts' total student population in participating districts, the program has nevertheless caused a significant increase in the population of black students in several of the suburban districts where the black population of the school district is less than 5%:



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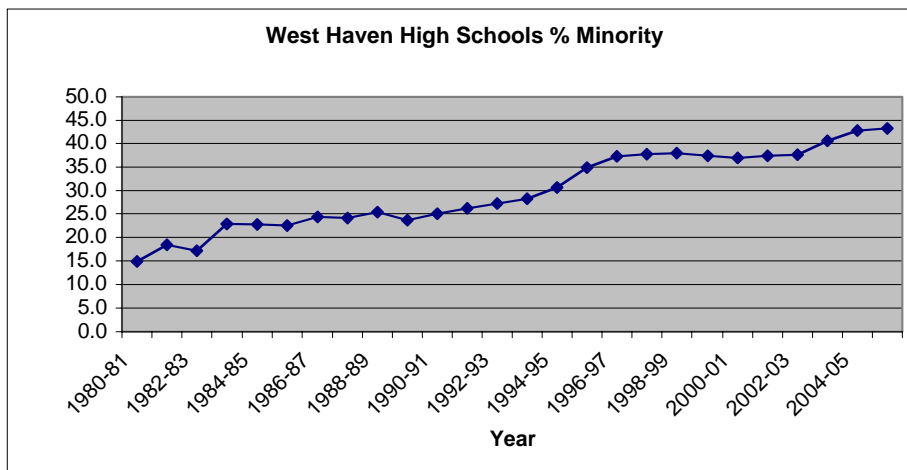
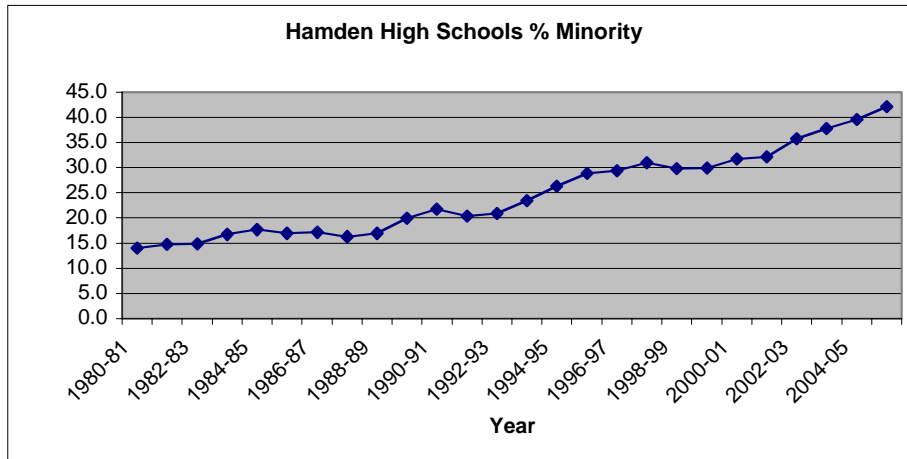
Even with such small numbers, *Open Choice* can help expose suburban students to a range of diverse classmates with whom they would not otherwise come into contact. Over time, as *Open Choice* continues to expand, it may help facilitate the advent of a critical mass of black students in suburban districts beyond the four in the New Haven region—Hamden, West Haven, Ansonia, and Derby—that already have a significant black presence.

For a time, it looked as though the interdistrict magnet schools may have had a stabilizing—that is, anti-integrative—effect on the minority population in certain suburban districts. A study by Adam Goldfarb examined the populations of the high schools in West Haven and Hamden, the top two participating districts and the districts with the largest minority populations.<sup>196</sup> Goldfarb concluded that after a period of

<sup>195</sup> Data calculated using *Open Choice* Data, *supra* note 86, and Connecticut 2005-06 District SSP, *supra* note 45.

<sup>196</sup> Goldfarb, *supra* note 186, at 66-67.

significant growth in their minority populations after 1990, the percentage minority in both districts appeared to level off starting in 1995-96, the year that the first New Haven interdistrict magnet schools opened their doors to suburban students:



197

Recent data, however, as detailed in the charts, reveals that any leveling was only temporary. Minority growth in the West Haven school system did cease for about six years, and in Hamden for about three years, but since around 1999-00 in Hamden and

<sup>197</sup> These charts, with data through the 2000-01 school year, originally appeared in Goldfarb, *supra* note 186, at 66-67. Included in the “% Minority” are all non-white students. Goldfarb surmised that the minority population of these two districts had “leveled off” thanks to the availability of interdistrict magnet schools. *Id.* I have expanded these charts through the 2005-06 school year, the latest data available, which reveals that any such stabilization was only temporary. See Connecticut 2005-06 School SSP, *supra* note 100. My thanks to Adam Goldfarb for permission to use and expand upon his charts.



2002-03 in West Haven, the minority population has started to rise again. Therefore, while the interdistrict magnet schools may have had a temporary stabilizing effect on the minority student population of these inner suburban districts as the magnet schools absorbed some of the districts' students, the most recent trends suggest that the minority student population in these districts will likely continue to grow over time.

### **III. Frameworks for Evaluating New Haven's Cross-Boundary Programs and Lessons for School Policy**

In Part II, I present an empirical analysis of cross-boundary school choice programs as they operate in New Haven, Connecticut. This analysis finds that with regard to the interdistrict magnet schools, suburban white and black residents participate at significantly different rates. Across districts, suburban blacks and whites are guided by some similar motivations in choosing whether or not to participate, but blacks are disproportionately more likely to participate in every district, particularly in those districts where they are token in numbers. As a result of these choices, interdistrict magnet schools have greater levels of racial integration than traditional New Haven public schools, but not nearly as much as would be expected were race not a factor governing participants' determinations of whether or not to participate. Part II also looks at the factors motivating *Open Choice* participants. Like magnet school attendees, *Open Choice* participants want to attend good schools, and where given the choice, black *Open Choice* participants seek out schools where they will not be token in numbers. Given Part II's findings, this Part seeks to normatively evaluate the cross-boundary programs, employing frameworks from law and economics, social capital, and political economy to help make sense of the observed phenomena and to illuminate the potential and

limitations of the contributions that cross-boundary school choice programs can make to education policy.

#### A. The Benefits and Disadvantages of Expanded Choice

Law and economics provides a useful framework for assessing the value to be placed on individual choice. As a descriptive starting point, this utilitarian perspective assumes that individuals will generally make self-maximizing choices that are most beneficial to themselves, based on their own exogenous preferences.<sup>198</sup> The law and economics perspective also assumes that under most circumstances, individual self-maximizing choice will result in collective benefit. It also acknowledges, however, that individuals may sometimes not fully take their own interests into account, or that their choices may have harmful effects on society that individual interest does not take into account. Where individuals do not take their own interests into account, society should exercise paternalistic restrictions on individual choice to benefit that individual;<sup>199</sup> where the effects of individual choice result in negative externalities that are not internalized by the individual making the choice, society may need to restrict that choice to avoid societal harm, or at least find a way to make the individual internalize the externality.<sup>200</sup>

The exercise of school choice has many potential benefits. Proponents have argued that school choice can make schools more efficient through competition; give children an opportunity to attend a superior school they would not otherwise be able to

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<sup>198</sup> See A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 10-11 (3d. ed. 2003).

<sup>199</sup> See Joel Feinberg, *Legal Paternalism*, in PATERNALISM 3, 3 (Rolf Sartorius ed., 1983) (“[T]he principle of legal paternalism justifies state coercion to protect individuals from self-inflicted harm or, in its extreme version, to guide them, whether they like it or not, toward their own good.”).

<sup>200</sup> The concept of externalities is famously treated in Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

attend; provide a greater level of autonomy for children and parents; improve parental and student satisfaction; remedy structural flaws in the over-bureaucratization of public education; and give low-income parents a form of choice that wealthy families have always had.<sup>201</sup> The potential for these benefits exists in most forms of choice, including in the case of Connecticut’s cross-boundary school choice options.

Connecticut’s cross-boundary remedies have additional, particular benefits for the well-being of black children in schools. Suburban black families may choose to have their children exit a situation where they are token in numbers to avoid having them be an isolated and discriminated-against minority in a suburban public school. Suburban schools, however great the academic opportunities they may offer, can be a situs of racial prejudice and violence, and racial dynamics in even a well-regarded suburban school may nevertheless prove detrimental to the mental health and achievement of an isolated minority student.<sup>202</sup> Of course, some suburban dwellers may scoff at the idea that a student would voluntarily choose to attend a New Haven magnet school over a suburban public school.<sup>203</sup> But the observed exercise of preference suggests that for certain black students, attending a New Haven magnet school constitutes a superior school option as compared with facing racial isolation in a suburban public school.

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<sup>201</sup> See PETER TICE ET AL., NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEP’T OF ED., TRENDS IN THE USE OF SCHOOL CHOICE: 1993 TO 2003, at 40 (2006); Stephen Eisdorfer, *Public School Choice and Racial Integration*, 24 SETON HALL L. REV. 937, 940 (1993). Wealthy families have historically exercised choice through moving or sending their children to private schools, two options that may not be available to lower-income families. Eisdorfer, *supra*.

<sup>202</sup> See Barnes, *supra* note 17, at 2387 (contending that black kids in suburban schools often experience “prolonged isolation” and “denigrating racial imagery,” as well as “tracking, low expectations, or race hatred.”);

<sup>203</sup> See Ryan & Heise, *supra* note 34, at 2049 & n.17 (“[M]any suburbanities select the suburbs precisely because they want to separate themselves from urban residents and urban problems . . . including problems in urban schools.”).

Relatedly, school choice provides options for families to individualize their children's education. Moving to Opportunity found—dishearteningly for its researchers—that not all African-American children were better off for having moved from city to suburban neighborhoods. Indeed, African-American males fared worse in suburban environments than in their original city environments.<sup>204</sup> By providing school choice for suburban African-American residents, the Connecticut plans give middle-class black families the valuable option of moving to the suburbs and continuing to send one or more of their children to a high quality public school in the city. An individual family can even send different children to different places, or send an individual child to one place for elementary school and another place for high school. If a family believes that some or all of its children will do better in a predominantly minority educational environment but nevertheless prefer other benefits of suburban life like safety or high-quality housing, it no longer needs to choose between the two.<sup>205</sup>

Even if they do not fear that their children will do poorly in a suburban school, black families may also be choosing to have their children exit a situation where they are token in numbers out of a desire to have their children grow up with and socialize with other African-American children. Undoubtedly owing in part to being victims of group-based historical and ongoing discrimination, researchers have found that African-

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<sup>204</sup> Kling, Liebman, & Katz, *supra* note 16.

<sup>205</sup> Even with the availability of magnet schools, suburban living may still not be ideal for some African-American middle class families. As Barnes points out, middle class blacks who move to middle class white environments often find the longed-for security elusive. Barnes, *supra* note 17, at 2391. A family may regret its move but having purchased a house, may not consider it viable to return to the city. The magnet schools may provide such a family with a more ideal learning environment for its children as it adjusts to the benefits and disadvantages of suburban living. See Barnes, *supra* note 17, at 2391-93; cf. ELLEN, *supra* note 42, at 54-55 (explaining that households with children are less likely to move rapidly than other households).

Americans exhibit a high level of cultural and community-based cohesion.<sup>206</sup> For example, researchers have documented that even as African-Americans have migrated in increasing numbers to the suburbs, many will return to the city to attend church services.<sup>207</sup> This finding complements the arguments of Sheryll Cashin and others, discussed above, that middle class black families value the benefits of suburban life such as safety and high quality housing stock, but also want to maintain close ties with other black families. Like the choice to attend a city-based church, suburban black families may deliberately choose the option of magnet schools for their children because such schools provide African-American families who have moved to the suburbs an opportunity to maintain a strong connection with the black community. If true, this phenomenon suggests that the creation of these school attendance options for their children allows suburban African-American families to take advantage of the benefits of suburban life without losing ties to the African-American community.

Having the choice to attend school with suburban students also benefits the New Haven residents who participate in *Open Choice* and who make up a large majority of the population (70%) of the interdistrict magnet schools. The addition of the suburban population increases the socioeconomic diversity of the magnet schools, bringing them closer to being “middle class” schools and benefiting the New Haveners that attend

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<sup>206</sup> See Timothy Bledsoe et. al, *Residential Context and Racial Solidarity Among African Americans*, 39 AM. J. POL’Y SCI. 434 (1995) (analyzing factors contributing to black racial solidarity). Bledsoe’s analysis shows, however, that suburban blacks in integrated areas exhibit lower levels of black solidarity than those who remain in more segregated areas. *Id.* at 449.

<sup>207</sup> In this way, they may retain ties to the traditional heart of the black community in the city. As one scholar points out, “For black professionals who worked in overwhelming white settings, the cultural comfort of these [inner-city] black churches provided therapeutic relief from the micropolitics of being black in a white and unpredictably hostile world . . .” Cheryl Townsend Gilkes, *Plenty Good Room: Adaptation in a Changing Black Church*, 558 ANNALS AM. ACAD. POL’Y & SOC. SCI. 101, 108 (1998).

them.<sup>208</sup> *Open Choice* gives an opportunity to a limited number of students who could not afford or do not want to move to the suburbs but nevertheless desire to attend school there.

Despite the benefits of interdistrict school choice, there may nevertheless be reasons to restrict such choice because the individuals exercising it may not fully take their own or society's interests into account. First, integration in suburban schools has a social benefit, and by contributing to segregation, the choice of black families to have their children leave the suburbs to attend school may harm those children and white children who remain in suburban schools, as well as have negative effects on the racial polarization of American society more broadly.<sup>209</sup> Second, being a token in a largely-white suburban district may be difficult and undesirable, but once a district attains a critical mass of black students, opportunities are created for many more black students in the future. Thus, individual choices may have a negative externality in that these choices may harm future black students by depriving them of the opportunity to comfortably attend the suburban school.

The data lends some support to these fears. As Part II demonstrates, black families living in suburban districts where blacks have attained a critical mass exercise school choice somewhat differently than those in non-critical mass districts. In particular, their choices about whether or not to send their children to an interdistrict magnet school tend to mirror those of whites much more closely than in districts where

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<sup>208</sup> See Appendix A for details on the individual interdistrict magnet schools. Studies show that students of all races and socioeconomic levels perform better in “middle class” schools—that is, schools where fewer than 50% of the students come from low-income families. Lewin, *supra* note 71, at 97, 125-129.

<sup>209</sup> See CASHIN, *supra* note 9, at 81 (contending that integration, though not necessarily assimilation, provides best route to equal opportunity for everyone); Liu & Taylor, *supra* note 4, at 791-92 (arguing for the virtues of desegregated public schools and noting that for education to serve its purposes, it cannot take place in a “legalized caste system”).

blacks have not achieved a critical mass, suggesting that once blacks achieve a critical mass in a suburban district, the desire to exit that district to attend an interdistrict magnet school is no longer as disproportionately attractive. For blacks, achieving critical mass in a suburban district may thus bring a social benefit not unlike that gained by attending an interdistrict magnet school—the end of isolation and the chance to interact with other black students in the school environment. Achieving a critical mass may also help change white attitudes, facilitating increased opportunities for black students in the long run.<sup>210</sup> For whites, having a critical mass of black students in a district will provide them with exposure to black students and the opportunity to form relationships that help undermine the stereotypes that hold back broader racial progress.<sup>211</sup> Yet blacks who choose to leave suburban districts in which they are not a critical mass to attend interdistrict magnet schools help delay the achievement of a critical mass and its associated benefits in that town, and in the short term burden those black students who remain in that town’s public schools. For this reason, it may be in the long-term interests of blacks and whites alike for society to restrict the exercise of interdistrict choice by suburban dwellers.

Though interdistrict magnet schools provide a new twist, liberal critics of school choice plans have long predicted that school choice options, if not structured or restricted by race, will exacerbate segregation and further isolate poor African-Americans in failing city schools. School choice does have an ignominious history in this regard. In the South in the wake of *Brown*, school boards developed “freedom of choice” plans that

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<sup>210</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 329-333 (2003) (discussing the extensive benefits of having a critical mass in educational institutions).

<sup>211</sup> See *id.*

exacerbated segregation in the guise of fulfilling (white) parental preferences.<sup>212</sup> When the Supreme Court held these plans insufficient to comply with *Brown*'s mandates and federal district courts began to force southern public schools to desegregate, whites created a series of relatively inexpensive private schools in order to give white parents a segregated school choice option.<sup>213</sup>

A chorus of scholars continues to voice fears about the segregating effects of school choice plans. In a recent article on the school choice provisions of the No Child Left Behind Act of 2001, Nick Lewin explained that freer choice will inevitably lead to increased segregation a result of several sets of interconnected choices. Lewin and others predict that under choice plans, white parents will tend to send their children to schools with more white, wealthier students, while minority parents will choose schools in lower-income neighborhoods with poorer, lower-income students.<sup>214</sup> He contends that poor and minority students would be less likely to transfer schools even as the most talented students at the top “skim[]” themselves off to better schools.<sup>215</sup> Because students of all races and socioeconomic levels perform better in “middle class” schools, allowing uncontrolled choice and the inevitable self-segregation that accompanies it will harm those students who remain behind in the failing schools.<sup>216</sup>

On balance, though, the fears of critics appear not to support restricting the ability of suburban families to choose interdistrict magnet schools. In the short run, some of their fears may be correct, insofar as transfers to attend interdistrict magnet schools may

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<sup>212</sup> See Eisdorfer, *supra* note 201, at 939; Levin, *supra* note 156, at 266-69. The Supreme Court held these plans inadequate to fulfill the constitutional requirements of *Brown* in *Green v. County School Bd. Of New Kent County, Va.*, 391 U.S. 430 (1968).

<sup>213</sup> Ryan, *supra* note 30, at 1637

<sup>214</sup> Lewin, *supra* note 71, at 113; *see also, e.g.*, Hawke, *supra* note 176; Levin, *supra* note 156, at 280-81.

<sup>215</sup> Lewin, *supra* note 71, at 114, 121.

<sup>216</sup> *Id.* at 97, 125-129.



decrease the diversity of suburban districts. Yet unlike the zero-sum intradistrict choice contemplated by Lewin (and the No Child Left Behind Act), interdistrict choice has the positive benefit of increasing the racial and socioeconomic diversity of the New Haven city school district by bringing relatively wealthy white and minority suburban students who would not otherwise be attending city schools into the New Haven school system. Additionally, the option of magnet schools may actually incentivize some African-Americans to move to the suburbs from the city,<sup>217</sup> further integrating suburban towns and districts in the long run. If a black family with multiple children moves to the suburbs in part because of the availability of interdistrict magnet schools, and sends some of its children to a suburban public school and others to an interdistrict magnet school, it contributes more to the achievement of a critical mass in that suburban district than if the family had not moved at all. Even if a black family moves to the suburbs and sends all of its children to interdistrict magnet schools, the increased presence of black families in the town may make the town a more desirable location for other black families<sup>218</sup> who themselves may then choose to send one or more of their children to the suburban public school.<sup>219</sup>

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<sup>217</sup> Cf. Henig & Sugarman, *supra* note 62, at 13-16 (explaining that American households with young children move at particularly high rates, and that school selection is a primary driving factor behind families' residential choice decisions).

<sup>218</sup> See ELLEN, *supra* note 42, at 56-58 (explaining that blacks choosing neighborhoods in which to move often cluster in locations where there are other blacks, a phenomenon which may be driven to an extent by the desire of blacks to avoid neighborhoods where they will feel unwelcome).

<sup>219</sup> By improving school options available to city residents, interdistrict magnet schools may also incentivize middle class families of all races to *remain* in the city. School choice advocates have frequently stressed this rationale for expanding choice options in urban districts. See GILL ET AL., *supra* note 60, at 161 (“[T]he most visionary advocates of choice hope that it will help to undermine residential segregation and reverse middle-class flight by giving families in all neighborhoods a number of high-quality educational options.”). As discussed in Part II, the New Haven interdistrict magnet schools may in fact have helped slow down the exodus of white families from the public school system. However, given that at present demand for the New Haven resident slots in the interdistrict magnet schools significantly outstrips supply, middle class families in New Haven will not be able to count on the availability of a magnet school slot for their children absent considerable expansion of the magnet schools. At present, therefore, it is

## B. Bridging versus Bonding Social Capital

The concept of *social capital* also provides a useful framework for identifying some of the potential benefits and harms of cross-boundary programs. Though the term has no consensus definition, *social capital* generally refers to the value that social networks and associational groups provide in fostering democracy and human productivity through bringing people together for social relations, community building, and the achievement of common purposes.<sup>220</sup> Exploring the present-day state of American associational life in *Bowling Alone: The Collapse and Revival of American Community*, political scientist Robert Putnam drew on the work of earlier theorists in highlighting and exploring two constituents of social capital: *bridging social capital* and *bonding social capital*.<sup>221</sup> Bonding social capital refers to the cohesion that forms internal to a particular group, while bridging social capital refers to the networks of bonds across groups. Both are interdependent and necessary for individual and societal well-being, yet inward-looking bonding social capital can also cause harms when it reinforces “exclusive identities and homogenous groups,” or creates “out-group antagonism” that operates to the detriment of society, even if it has some benefits for the individuals involved.<sup>222</sup> Putnam notes these negatives, but also recognizes that bonding social capital contributes to collective well-being by helping individuals affirm personal identities and commitments.<sup>223</sup>

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unlikely that the availability of interdistrict magnet schools will incentivize families to remain in New Haven unless they have already secured a spot for their child(ren) in those schools.

<sup>220</sup> See ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 18-19 (2000).

<sup>221</sup> *Id.* at 22.

<sup>222</sup> *Id.* at 22-23.

<sup>223</sup> *Id.*

In a society that still remains quite segregated, the magnet schools help mitigate what may be a high social cost of moving to the suburbs for some African-American families. In the language of Putnam, for some suburban Africans-Americans their capacity to fully participate in an activity that fosters bridging social capital—helping to integrate a suburb—may depend on them having access to a sufficient level of bonding social capital so they can, in Cashin’s words, partake in the “fundamentally human tendency to seek community among people who are familiar to us” despite living in a town where African-Americans form a small minority.<sup>224</sup> By providing the ability for both urban and suburban African-American children to attend a high-quality school with other African-American children, the magnet schools can help foster bonding social capital within the black community, while not forcing middle class blacks to choose between having the benefits associated with suburban living and having ties to the black community.

Yet cross-boundary school choice programs might also harm the potential for bridging social capital. Society has a positive interest in the bridging social capital that comes with having heterogeneous and integrated suburban school environments.<sup>225</sup> The chance to form bonds across heterogeneous lines, which Putnam identifies as key to American social progress,<sup>226</sup> may be undermined by the self-segregation that the magnet schools permit and perhaps even foster among suburban students of different races. Nevertheless, the interdistrict magnet schools themselves show evidence of fostering bridging social capital in several ways. First, as suggested in the previous Section, the

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<sup>224</sup> CASHIN, *supra* note 9, at 25.

<sup>225</sup> See Liu & Taylor, *supra* note 4, at 791-92 (discussing civic, economic, and social benefits of desegregated schools).

<sup>226</sup> See PUTNAM, *supra* note 220, at 23, 28.

existence of the interdistrict magnet schools may help incentivize some African-American families to move to the suburbs. Even if these families send all their children to an interdistrict magnet school, they nevertheless will interact with their neighbors and may otherwise participate in the civic affairs of their new town—itsself a form of bridging social capital that the magnet schools indirectly help to foster. Second, the interdistrict magnet schools foster bridging social capital between the relatively well-off suburban attendees of various races, on the one hand, and the relatively poor, mostly minority urban attendees on the other.<sup>227</sup> By far the most integrated of the New Haven schools—along race, socioeconomic, and geographic lines—the interdistrict magnet schools have particular potential for fostering bridging social capital among individuals from across the region.

The *Open Choice* program may bridge social capital across race and class lines to an even greater extent than the magnet schools do. In the short term, it does so by creating more integration across race, class, and geographic lines in suburban schools. In the long term, by facilitating the achievement of a critical mass of black students in suburban districts, it has the potential to foster an even greater degree of bridging social capital along similar lines. Finally, by smoothing the road for black students to attend the school in the future, the *Open Choice* pioneers may help create bonding social capital within the black community.

It is difficult to weigh the positive and negative contributions of school choice on bridging and bonding social capital. The actual extent to which the magnet schools foster

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<sup>227</sup> Putnam points out the extent to which many groups bridge and bond across different social dimensions at the same time. He specifically identifies the example of the black church, which “brings together people of the same race and religion across class lines.” *Id.* at 23. The interdistrict magnet schools take this example one step further, creating bonding social capital between African-Americans across class lines as well as whites and African-Americans across race and class lines.

community among blacks cannot easily be assessed, and the extent to which the magnet schools facilitate an increased African-American presence in suburban towns and schools cannot be determined, if at all, until the program has existed for a longer period of time. Furthermore, even if the extent of these effects could be determined, it would be difficult to quantify the relative values of facilitating black-white integration, maintaining bonds in the black community, and educational achievement. While Putnam's framework offers a means to understand the competing social values at stake in the development of school choice programs, competing effects on the program of different types of bridging and bonding social capital make an overall evaluation difficult.

### C. Tools from Political Economy

Thus far, this paper has examined cross-boundary programs primarily from the perspective of the opportunities they provide for urban and suburban students and how they have affected the racial makeup of urban and suburban schools. Yet policy is never a zero sum game, and in many areas cross-boundary programs have met political opposition.<sup>228</sup>

Literature from political science and economics can help illuminate both the descriptive conditions under which attempts to implement cross-boundary programs will likely be met with support or opposition, and the normative considerations that should shape an evaluation of such programs from a political economy perspective. Supporters of such programs, including the plaintiffs in *Sheff*, articulate a powerful argument for why those concerned with the problems of urban education and the harmful effects of segregation should support cross-boundary programs. This paper suggests additional

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<sup>228</sup> See *infra* Subsection III.C.1.

reasons why these programs might be in the general interest of suburban African-Americans. Critics of these programs, on the other hand, might reasonably fear that by opening up well-regarded suburban school districts to outsiders, these programs will undermine the quality of those districts without producing any measurable benefit for the programs' participants. Critics focusing on interests of urban students in particular might also question whether the massive resources spent on cross-boundary programs, including transportation costs, might be better spent on reducing class sizes or creating charter-type schools in the urban district itself, which have less integrative potential but might be able to benefit a greater share of the urban student body.<sup>229</sup> This Section will explore these various perspectives, the normative premises they embody, and the conclusions they support. While the arguments for each perspective have compelling elements and are worthy of discussion and understanding, none of them completely address the objections the others' raise or provide a fully persuasive account of how we should view cross-boundary school choice programs.

*(i) The Tiebout Critique and the Sheff Rejoinder*

Writing in local government economics offers a coherent platform from which to mount a critique of cross-boundary remedies that open up suburban schools to urban students; as a descriptive matter, it also explains why proposals for such remedies may meet opposition. To understand this literature and possible solutions to the problems it

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<sup>229</sup> See EDUCATIONAL POLICY INSTITUTE, FOCUS ON RESULTS: AN ACADEMIC IMPACT ANALYSIS OF THE KNOWLEDGE IS POWER PROGRAM (2005), available at <http://www.educationalpolicy.org/pdf/KIPP.pdf> (discussing benefits of highly acclaimed charter schools run by the "Knowledge is Power Program"); GILL ET AL., *supra* note 60, at 164 (discussing benefits of charter schools, despite their segregation); Kevin Brown, *The Supreme Court's Role in the Growing School Choice Movement*, 67 OHIO ST. L.J. 37, 59 (2006) (explaining that charter schools tend to be more segregated than normal public schools, but at least provide choice); Liu & Taylor, *supra* note 4, at 800-01 (noting that creating charter schools does not facilitate desegregation).

poses, it is useful to divide the perceived threats posed by the entrance into suburban schools of low-income and minority children from the city into two separated but interrelated types. One type is *physical*—the perception by suburban residents that the presence of outsiders in the suburban school will itself be a threat to the school’s quality. The other is *financial*—the notion that in a regime where schools are primarily funded through local property taxes, access to those schools by outsiders can cause a free-riding problem.

Expanding upon the theoretical model of local expenditures first proposed by Charles Tiebout,<sup>230</sup> economist Bruce Hamilton argued controversially in 1975 that maintaining the quality of suburban services depended on individual communities being able to maintain an economically homogenous population, which required excluding poor entrants through exclusionary zoning.<sup>231</sup> Hamilton’s focus was on the *financial* threat—that low-income “free-riders,” if able to inexpensively enter a community, would take community benefits without adequately contributing funds of their own.<sup>232</sup> In the cross-boundary context, Hamilton’s analysis may not be directly applicable to outsiders entering the schools of a suburban community but living elsewhere,<sup>233</sup> particularly if, as with *Open Choice*, the state or their home district provides funds to the receiving district to mitigate any resulting financial loss. However, William Fischel’s work, *The Homevoter Hypothesis*, suggests that outsider access may pose a financial threat by reducing property values in the receiving community.<sup>234</sup> Giving life to the dynamic

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<sup>230</sup> Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1954).

<sup>231</sup> Bruce Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205 (1975).

<sup>232</sup> *Id.* at 205.

<sup>233</sup> See Berry, *supra* note 39, at 257.

<sup>234</sup> WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001)

identified by Tiebout and Hamilton, Fischel hypothesizes that “homevoters” act on the civic and political stage against perceived threats to their home values.<sup>235</sup> As long as the value of unique local-based goods—like a high-quality school district—remains available only to residents of a particular locality, it will get capitalized into the values of homes in that locality.<sup>236</sup> As a result, even those middle class homeowners who do not have children in the schools will act to preserve the quality and exclusivity of their schools, because the value of their largest, most undiversified asset—their home—depends on maintaining a high quality school to which those outside the locality cannot gain access.<sup>237</sup> If access becomes universal, then others will not need to pay the premium home price in a given district in order to gain access to that district’s schools. Property values may therefore decline, even if quality stays high.

From a normative perspective, the Tiebout/Fischel model fails to acknowledge the significant externalities that self-segregation and sorting by whites imposes on those low-income and minority individuals on the other side of that sorting. The *Sheff* court spoke about the harms sorting itself had caused, holding that the state had a constitutional obligation to remedy “the devastating effects that racial and ethnic isolation, as well as poverty” have had on public schoolchildren in Hartford.<sup>238</sup> The court contended that these harms, though unintentional, resulted directly from a 1909 statute that made school district boundaries coterminous with town boundaries, facilitating a system under which

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<sup>235</sup> *Id.* at 72-80.

<sup>236</sup> *Id.* at 39-46, 149. Econometric work has confirmed that home values reflect the quality of a district’s schools. *See id.* at 154-155 (discussing differing home values and school district quality in Hempstead & Garden City, neighboring municipalities in Long Island, New York); William T. Bogart & Brian A. Cromwell, *How Much Is a Neighborhood School Worth?*, 47 J. URB. ECON. 280 (2000) (discussing the significant extent to which neighborhood school quality is capitalized into home values in Shaker Heights, Ohio).

<sup>237</sup> FISCHEL, *supra* note 234, at 1, 4, 39-46, 149, 154-55.

<sup>238</sup> *See Sheff v. O’Neill*, 678 A.2d 1267, 1270-72 (Conn. 1996).



town governments had significant political and fiscal autonomy as well as responsibility for schooling.<sup>239</sup> By granting localities significant independence within their own boundaries, suburban residents had had little need to contribute financially to address social problems in other localities.<sup>240</sup> In identifying the school districting statute as the source of the isolation, the *Sheff* court gave voice to the dark side of Tiebout sorting dynamics. Namely, within the context of a political structure that values local autonomy, families acting in a rationally self-maximizing way move to more expensive localities and maintain the financial exclusivity of those localities, generating negative externalities that harm those left behind.<sup>241</sup> Furthermore, the *Sheff* court insisted that the negative effects of racial and ethnic isolation affected everyone, not just minority children in the cities. The *Sheff* court thus concluded that a cross-boundary remedy would be in the broad public interest because “a more integrated public school system would likely be beneficial to all schoolchildren.”<sup>242</sup>

In identifying the districting statute and the resulting racial and economic isolation as the main source of harm, and directing the legislature to calibrate its remedy to address that harm, the *Sheff* court spoke directly to the normative incompleteness of

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<sup>239</sup> *Id.* at 1274, 1289.

<sup>240</sup> This independence may be a virtue or a vice, depending on one’s perspective. Compare FISCHEL, *supra* note 234, at 39-40 (“[I]f one wants to maintain what I see as the virtues of local government, reforms should not attempt to divorce the collection of taxes from the decisions to spend and regulate.”), with Alan Wolfe, *The Irony of School Choice: Liberals, Conservatives, and the New Politics of Race*, in SCHOOL CHOICE: THE MORAL DEBATE, *supra* note 186, at 31, 47 (advocating the delinking of school finance from property taxes in order to enhance equity across school districts), and Stephen D. Sugarman, *School Choice and Public Funding*, in SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW, *supra* note 55, at 111 (contending that expanding public school choice for low-income families will undermine the link between the local tax base and local public school, and in turn may help pave way for broader equality-based school funding reforms that Sugarman considers desirable).

<sup>241</sup> Cf. CASHIN, *supra* note 9, at 104-124 (describing the broad and enduring harms to African-Americans caused by economically rational separatist behavior on the part of whites).

<sup>242</sup> *Sheff*, 678 A.2d at 1273. But see Barnes, *supra* note 17, at 2385 (contending that the *Sheff* court wrongfully viewed racial isolation as harmful to minorities in the city but not to all of Connecticut’s schoolchildren).

the Tiebout model. However, the *Sheff* court failed to address the potential detrimental effects of cross-boundary remedies that Hamilton and Fischel articulate: cutting the link between local control and suburban schools reduces the incentives of local residents to monitor and care about the quality of their schools, causing those schools to decrease in quality. In passing, the *Sheff* court did note that rationales in support of the districting scheme held unconstitutional included that it “further[ed] the legitimate nonracial interests permitting considerable local control and accountability in educational matters,” but the court did not explore the rationales behind local control, nor did it consider the ways in which cross-boundary remedies might harm the “legitimate nonracial interests” behind it.<sup>243</sup> Like Fischel, therefore, the *Sheff* court offers an incomplete framework for thinking about the benefits and harms of local autonomy alongside strict school district boundary lines.

Realizing the goal of high quality public education for both city and suburban dwellers requires adequately addressing the roles that both local control and cross-boundary remedies need to play. The Connecticut legislature recognized this fact in addressing the question of remedies to the *Sheff* lawsuit. It neither dis-established local school districts nor required suburban districts to accept an unlimited number of students through *Open Choice*, but instead proceeded incrementally to create cross-boundary remedies that preserved an extensive amount of local control.

(ii) *Lessons from the Tiebout/Fischel Model on Political Viability*

Its normative flaws aside, the Tiebout/Fischel model provides a useful framework for exploring the sources of actual or potential opposition to the expansion of cross-

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<sup>243</sup> *Sheff*, 678 A.2d at 1288.

boundary school choice programs, and for predicting whether or not they will garner sufficient political support. For the reasons explained in the previous Subsection, the literature suggests that these programs will meet opposition. Applying a Fischel-like model to the question of open enrollment programs like *Open Choice*, James Ryan and Michael Heise contend that suburban residents are largely satisfied with their local public schools and do not favor a vast expansion of school choice options at taxpayer expense.<sup>244</sup> Suburban residents will resist the implementation of cross-boundary programs, they argue—particularly those that enable low-income, urban students to attend suburban schools—on the grounds that such programs threaten “the physical and the financial sanctity” of those schools.<sup>245</sup>

However, an examination Connecticut’s experience suggests that additional attempts to implement cross-boundary programs will not meet the same level of political resistance that had met past attempts at large-scale residential integration.<sup>246</sup> New Haven’s *Open Choice* plan has expanded steadily since its inception in 1998-99, from 160 participants in its first year to 480 participants in 2006-07;<sup>247</sup> Hartford’s plan has surpassed 1000 students, expanding by 178 seats from 2004-05 to 2005-06;<sup>248</sup> and Bridgeport’s currently has 207.<sup>249</sup> As discussed earlier, the number of open enrollment plans nationwide has continued to expand, and to expand services for low-income students, in spite of the structural and political limitations to such programs’

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<sup>244</sup> Ryan & Heise, *supra* note 34, at 2045.

<sup>245</sup> *Id.*

<sup>246</sup> See *supra* notes 36-41 and accompanying text.

<sup>247</sup> *Open Choice* Data, *supra* note 86.

<sup>248</sup> Letter from Betty J. Sternberg, Commissioner of Education, to Chairpersons of Local and Regional School Boards in the *Sheff v. O’Neill* Region et al., July 19, 2006, available at <http://www.sde.ct.gov/sde/lib/sde/pdf/circ/circ06-07/c-1.pdf> (noting expansion in Hartford for 2005-06 and 2006-07) (last visited May 5, 2007).

<sup>249</sup> Cooperative Educational Services: Open Choice, *supra* note 100.

expansion.<sup>250</sup> Implementing cross-boundary school choice options may in fact be more politically acceptable than attempts to implement residential integration through the elimination of exclusionary zoning, because the latter combines sentiments of financial self-preservation with a particularly potent racialized view of neighborhood quality, specifically the white anxiety about living with African-Americans as neighbors.<sup>251</sup> If suburban residents do not perceive *Open Choice* programs as offering the same level of threat to neighborhood quality, but only a marginal, diffuse, and uncertain threat to their home values, they may be less inclined to mobilize politically to stop such programs from being created.

*Open Choice* may also pave its own way. It has the potential to continue to expand slowly as it closes the gap between suburbanities' perception of the program as threatening a feared minority "influx" and the realities of bringing urban students into their schools.<sup>252</sup> Indeed, as discussed above, even at small numbers *Open Choice* helps expose suburban students to a range of diverse classmates, accustoming parents and students to having larger numbers of black attendees in their school and paving the way for its own future expansion. By facilitating the advent of a critical mass of black students in a suburban community, *Open Choice* may even facilitate an increased

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<sup>250</sup> See *supra* notes 55, 92-93 and accompanying text.

<sup>251</sup> See Berry, *supra* note 39, at 258 n.5 (quoting NANCY BURNS, THE FORMATION OF AMERICAN LOCAL GOVERNMENTS 167 (1994)) ("Citizens are also interested in zoning for its power to exclude African Americans, not because African-Americans are poor, but simply because they are African-Americans."); *id.* (noting Tiebout's acknowledgement that residents' preferences "will include noneconomic variables" including the desire "to associate with nice people"); see also ELLEN, *supra* note 42, at 2-8 (arguing that whites prefer to move into neighborhoods with few blacks because they view a significant black presence as a proxy for a declining neighborhood).

<sup>252</sup> See Liu & Taylor, *supra* note 4, at 804, 810-11 (explaining that suburban districts are frequently initially reluctant to participate in an open enrollment plan but once they participate, the example of St. Louis suggests that they will find participation valuable and generally continue to participate).

openness among African-Americans to consider the community a desirable place to locate, and among the community to have African-Americans locate there.

Even if opposition arises to programs like *Open Choice*, however, programs that allow suburban students to attend magnet schools in the city should not engender the same sorts of opposition, because these programs do not threaten the physical sanctity of suburban schools. Ryan and Heise argue that suburban residents will oppose even this form of school choice, as it directs revenue away from suburban schools towards city schools, threatening the financial security of suburban schools and the link between local taxes and spending.<sup>253</sup> But Ryan and Heise do not take into account that suburban residents who want to participate in choice plans will likely support making such plans available. As discussed in Part II, African-American suburban residents in the New Haven region, compared with other New Haven-area suburban residents, are particularly likely to participate in interdistrict magnet schools. In a given region, therefore, African-Americans may provide a suburban contingent of support for such schools. Furthermore, interdistrict magnet schools may find an unnatural political ally in those who wish to maintain a significant white population in the inner suburban public schools, since the departure of suburban African Americans from the public school system in favor of city-based magnet schools may help to stabilize or decrease the rate of racial population change in the suburban public schools.<sup>254</sup>

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<sup>253</sup> Ryan & Heise, *supra* note 34, at 2045.

<sup>254</sup> As discussed in text accompanying notes 196-197, following a period of steady increase, the percentage of minority students in the New Haven and Hamden high schools stayed roughly constant for several years after the interdistrict magnet schools opened their doors to suburban students. Though the rate has started to rise again in recent years, it is clear that were it not for the magnet schools absorbing a slightly greater number of minority students from Hamden and West Haven each year, that the rate of increase in the minority student population in those towns would be higher. Furthermore, closing the magnet schools entirely would almost certainly result in a spike in the minority population of the West Haven and Hamden schools as magnet school attendees returned to their home districts' public schools, so even those who may

Ryan and Heise may misperceive support for cross-boundary remedies in part because they treat the suburbs monolithically. Though they acknowledge that there may be meaningful differences between inner and outer-ring suburbs, they nevertheless contend that variations among individual suburbs are not meaningful as compared with variations between the city and suburbs.<sup>255</sup> Crucially, they claim that “many suburbanites select the suburbs precisely because they wish to separate themselves from urban residents and urban problems, which presumably predisposes them to oppose efforts to link urban and suburban schools.”<sup>256</sup> In lumping suburbs and suburban residents together, Ryan and Heise do not acknowledge the fact that suburban African-Americans, who today constitute a significant percentage of the residents of the inner suburbs in many metropolitan areas, may have different political interests than their white counterparts. As the number of African-Americans continues to rise in certain suburbs, residents of those suburbs will likely continue to increase their participation in and support for cross-boundary programs.

Additionally, though white students participate at disproportionately low rates in the interdistrict magnet schools, the fact that some participate at all reflects an increasing willingness on the part of some whites to send their children to predominantly minority city schools. Though both *Open Choice* and the interdistrict magnet schools could pose fiscal challenges by a) diverting suburban resources from suburban schools to the city magnet schools; b) diverting suburban resources from suburban residents by spending suburban money on city students attending suburban schools; or c) diverting city

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have supported the programs originally on the assumption that they would stabilize the rate of minority population indefinitely would be unlikely to withdraw their support now.

<sup>255</sup> Ryan & Heise, *supra* note 34, at 2048-49.

<sup>256</sup> Ryan & Heise, *supra* note 34, at 2049.

resources for suburban residents (in the case of suburban students enrolled in the magnet schools), these challenges can be met through strategic deployment of state funding to mitigate these financial harms.<sup>257</sup> Finally, though open enrollment programs do threaten exclusivity of access, the structural limitations of such programs and fact that there remains a practical ceiling on slots ensures that access to suburban schools should remain sufficiently exclusive as to preserve the premium that good schools provide for the home values in a given area.<sup>258</sup>

### *(iii) Financial and Political Expense*

Cross-boundary programs are quite expensive to fund,<sup>259</sup> and thus may crowd out the political palatability or funding for other types of potentially successful alternatives.

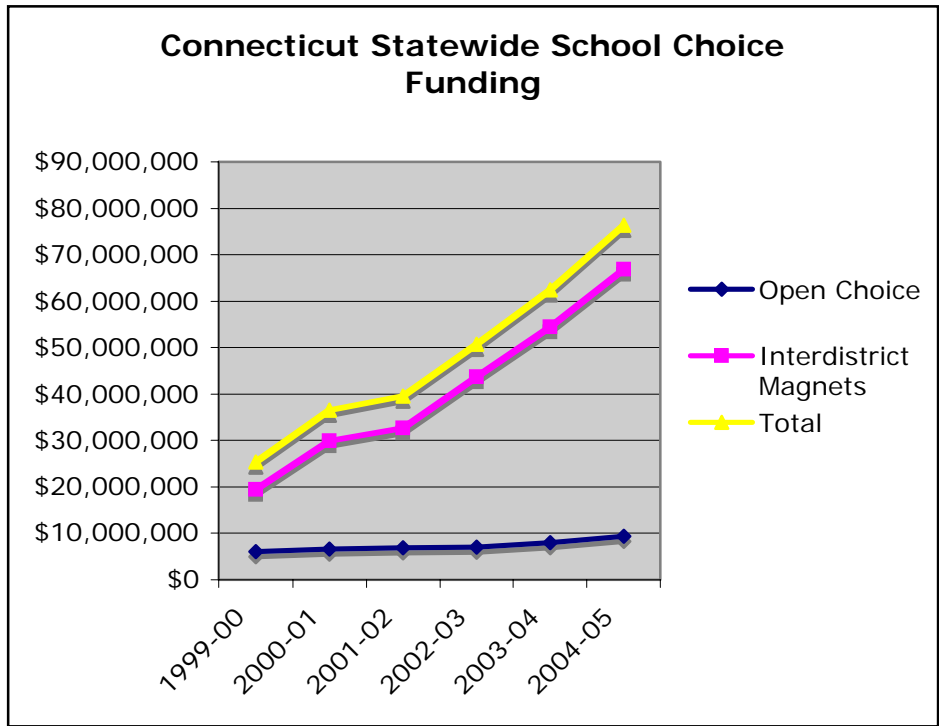
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<sup>257</sup> See *supra* notes 79-91 and accompanying text (discussing the complex funding formulas for the interdistrict magnet schools and *Open Choice*). Fischel himself acknowledges that targeting extra public school funds to low-income families with children, which they could take with them to the districts in which they attended school (a sort of “Tiebout voucher”), would give communities a greater incentive to accept low-income residents. FISCHEL, *supra* note 234, at 279. Fischel would not, however, apply his voucher to permit interdistrict choice, because he argues that for the voucher system to work, it could only be accepted by public schools that those with the voucher would otherwise be able to attend (i.e., based on their location of residence). To do otherwise would sever the link between homeownership and education that keeps even childless voters interested in school quality. FISCHEL, *supra* note 234, at 279-80. Perhaps Fischel is right, but given that *Open Choice* attendees only make up a small percentage of those attending a suburban public school, it seems that general Tieboutian dynamics would not be much upset by the program. See *infra* note 258 and accompanying text.

<sup>258</sup> The *Open Choice* program in New Haven remains oversubscribed, and though the number of slots has increased over time and pressure remains on suburban districts to participate in greater numbers, in practice suburban districts retain the discretion to decide how many slots are available in the program. For the 2006-07 school year, fewer than 2% of New Haven school-aged residents participated in *Open Choice*; *Open Choice* participants did not represent more than 2.4% of the total students in any of the thirteen receiving districts, and constituted fewer than 1% of the total in eight out of the thirteen. Data calculated from Connecticut 2005-06 District SSP, *supra* note 45; *Open Choice* Data, *supra* note 86. These small numbers may reflect funding limitations and a desire to not expand too fast, but they may also provide support for Fischel-esque reasoning that suburban districts will calibrate their “natural limit” of the number of slots they offer urban students below the point at which they believe making slots available will overly threaten exclusivity of access.

<sup>259</sup> A particularly significant cost is the long and costly hours of busing that the programs entail for those crossing district lines. A few participants in *Open Choice* spend up to four hours per day on a school bus. Interview with Carolyn McNally, Program Development Director, *Open Choice*, and Lynn Bailey, *Open Choice* Coordinator, in North Haven, Conn. (Nov. 15, 2006). As discussed above, state law provides for a transportation grant of up to \$2,100 per student per year for *Open Choice* participants and also makes

In Connecticut alone, these continually expanding programs have incurred significant costs at the state level:



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The magnet school figures include direct state funding to magnet schools, including operating grants and transportation grants, but they do not include construction grants or costs directly paid by the sending or receiving districts out of locally raised revenues.<sup>261</sup>

In the 2005-06 school year, statewide approximately 14,790 students participated in the

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supplemental funds available to cover transportation costs above this amount. *See supra* note 88 and accompanying text. For the interdistrict magnet schools, transportation grants have accounted for about 12-13% of the annual state funding these schools receive. CONNECTICUT STATE DEPARTMENT OF EDUCATION, *supra* note 97. This sizable portion of the total funding includes only the transportation costs of out-of-district attendees, since host districts must provide transportation for their own students. *See* CONN. GEN. STAT. § 10-264i(a) (requiring state to give town of student residence actual costs, up to \$1,300 per student, for transporting or providing for transportation of students to interdistrict magnet schools in another town); CONN. GEN. STAT. § 10-261l(f) (requiring districts housing interdistrict magnet schools to provide transportation to students resident in that district on same terms in which it provides transportation to other public school students).

<sup>260</sup> Connecticut State Department of Education, State Funding for Open Choice and Interdistrict Magnet Schools, *supra* note 98.

<sup>261</sup> For a detailed discussion of how interdistrict magnet and *Open Choice* funding operates, see *supra* notes 79-91 and accompanying text.



interdistrict magnet schools and 1,710 participated in *Open Choice*.<sup>262</sup> Assuming that funding grew at similar levels as in previous years, the per-student costs to the state are approximately \$6000 per *Open Choice* participant and \$5200 per interdistrict magnet school student.<sup>263</sup> This funding is likely to rise; Governor M. Jodi Rell recently proposed significant increases in funding for interdistrict magnet schools and *Open Choice*.<sup>264</sup>

Cross-boundary programs compete for funding with charter schools. In many other states, urban public school innovation has focused on charter schools, which seek to replicate private school successes of small class size and individual attention, but generally do not emphasize integration.<sup>265</sup> Though results have been mixed, in the past decade, a few networks of charter schools particularly well-endowed with human and economic capital, like the networks of school run by the Knowledge is Power Program (KIPP) and Achievement First, have achieved a feat previously thought impossible—dramatically improving the environment and academic achievement of inner-city black school children without desegregating their environment by either race or social class.<sup>266</sup> These results have helped undermine the long-standing gospel among many liberal school reformers—including the plaintiffs in the *Sheff* lawsuit—that urban educational reform was not possible without integration.<sup>267</sup>

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<sup>262</sup> See sources cited *supra* note 100.

<sup>263</sup> I could not obtain the 2005-06 state funding levels.

<sup>264</sup> See GOVERNOR M. JODI RELLE'S COMMISSION ON EDUCATION FINANCE, *supra* note 90, at 2-4.

<sup>265</sup> See *supra* note 229.

<sup>266</sup> For example, of students at the much acclaimed Amistad Academy in New Haven, part of the Achievement First network of charter schools, 83.7% received free or reduced lunch in 2005-06, and the school has a combined black and Hispanic enrollment of 97.4%. Yet on the 2006 Connecticut Mastery Test (CMT), Amistad Academy's black students outperformed the statewide average for black students by 162% in math, 54% in reading, and 81% in writing, while Amistad's students receiving free/reduced lunch outperformed the statewide free/reduced lunch average by 133%, 74%, and 71% in the same categories. Connecticut 2005-06 School SSP, *supra* note 100. For more on the impressive achievements of KIPP schools, see EDUCATIONAL POLICY INSTITUTE, *supra* note 229.

<sup>267</sup> Emphasizing the precariousness and questioning the sustainability of high-achieving poor, segregated schools, however, many prominent civil rights activists—including Dennis Parker, one of the plaintiffs'

Connecticut has also experimented with charter schools, beginning in 1996—the same year the interdistrict magnet schools began—and now has fourteen charter schools that collectively enrolled 2,693 students in 2005-06.<sup>268</sup> Critics, however, have called its charter school law “weak”<sup>269</sup> because of the stringent cap on the total number of schools and students and the meager funding the schools receive.<sup>270</sup> Given the legislature’s emphasis on implementing the *Sheff* remedies over the past decade, a political focus on interdistrict magnet schools and *Open Choice* appears to have crowded out political will and resources to implement charter schools on a broad scale, at least until the most recent couple of years.<sup>271</sup> Though it is beyond the scope of this paper to evaluate charter schools or to directly compare them to other forms of school choice, it is important to note the political reality that the massive financial and political resources required to

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attorneys in *Sheff*—continue to believe that only with integration can progress for minority students be achieved. *See, e.g.*, Speech by Dennis Parker, Director, American Civil Liberties Union’s Racial Justice Program, at Rebellious Lawyering Conference, New Haven, Conn., Feb. 24, 2007 (explaining that so-called “miracle” schools often falter the moment a gifted principal or staff members depart, and are thus not sustainable as a long-term solution to the problems of urban education); *see also* Levin, *supra* note 156, at 270-71 (noting that in part because of its segregationist history, national civil rights leaders have tended to fear school choice).

<sup>268</sup> *See* The Connecticut Alliance for Great Schools: How Connecticut’s Public Charter Schools Succeed, <http://www.ctags.org/succeed.php> (last visited May 8, 2007).

<sup>269</sup> The Heritage Foundation, Connecticut School Choice, <http://www.heritage.org/research/education/schoolchoice/Connecticut.cfm> (last visited May 6, 2007).

<sup>270</sup> Funding has been expanding in recent years. The state funded charter schools at a per-pupil rate of \$7,250 in 2004-05, \$7,625 for 2005-06, and \$8,000 for 2006-07. *Id.* The state board of education has also proposed doubling the number of charter schools and lifting the enrollment cap. *Id.* Though the state did not fund charter school facilities or construction costs in the first decade of the program, a 2005 law, S.B. 2002, provides \$10 million for charter school facilities over a two-year period. *See id.* Though charters receive more per-pupil *state* funding than interdistrict magnet schools, the overall per-pupil funding levels for charter schools is much less because unlike magnet and suburban public schools, state-funded charter schools do not receive support from local tax revenue. Prior to 2005, Connecticut Charter schools received no additional assistance for construction and facilities costs, though student transportation was provided by the local school district. *See* CONNCAN, ISSUE BRIEF: PUBLIC CHARTER SCHOOLS 3 & n.18 (2006), *available at*

[http://www.conncan.org/matriarch/documents/IB\\_Connecticut\\_Charter\\_Schools%282%29.pdf](http://www.conncan.org/matriarch/documents/IB_Connecticut_Charter_Schools%282%29.pdf). One study calculated that on average, taking all funding sources into account, charter schools received about \$2,300 less public funding per student than standard public schools. *Id.*

<sup>271</sup> *See supra* note 270 (detailing enacted and proposed expansion plans for Connecticut’s charter school program during the past couple of years).

implement a successful cross-boundary choice program will likely detract from the ability of a state to robustly implement charter schools or other forms of school choice.

#### **IV. Conclusion**

Questions of school policy are some of the most difficult that state and local lawmakers face. Competing empirical studies, profound conflicts of values, paternalistic beliefs on education reform, and grassroots movements for education rights all meet in the high-stakes battle over how to ensure a successful future for the next generation of American schoolchildren. Urban education has been a particular hotbed of conflict over the past several decades, as white and minority city residents alike have spoken out against public schools that they perceive as stagnant and unable to fulfill their children's needs. Since the late 1980s, a series of experimenters have sought to discover the panacea to urban education's problems, or more modestly, at least solutions that work for some students.

Within this complex mess of policies, interdistrict magnet schools and open enrollment programs have tremendous experimental value, especially when deployed as part of a broader menu of choice options. For all their difficulties—the expense of transportation, the difficulty of coordination, political resistance, the potential undermining of Tiebout dynamics, and their failure to achieve the integration their supporters expected—they offer distinct advantages to members of various races and income groups, particularly those who have been the subject of present and past disadvantage in our society, as well as for society more broadly. Though these programs fail to achieve school integration in the way envisioned by their original proponents, they

do create positive momentum around a new type of school located in the city, with benefits for city and suburban residents alike. They enable low-income and minority city residents to attend high-quality schools in a socioeconomically diverse environment. They provide African-Americans—including those who choose to move to the suburbs—the opportunity to send their children to a well-funded, socioeconomically diverse, predominantly black school. And they allow all participants to attend schools with greater levels of socioeconomic and racial diversity, providing benefits to students across class and race lines.

This paper has demonstrated the unique benefits cross-boundary school choice options provide to African-American families in suburbia. By giving suburban black families the opportunity to maintain their connection to the city's black community through sending their children to city schools, cross-boundary programs help those families gain the benefits of suburban living like safe neighborhoods and nicer housing stock while retaining connections to the urban black community. Urban blacks benefit too, by being able to attend school with their suburban counterparts. By facilitating black migration to the suburbs, these programs have the potential to help middle-class black families avoid having to make the potentially undesirable choice between remaining in an environment that lacks opportunity and sending their children to a school where they will be a token minority. The programs also allow for intra-family diversity, in that they permit suburban families—white and black alike—to choose different publicly-funded educational environments for each child. This is particularly important, because as *Moving to Opportunity* reveals, moving low-income teenagers to the suburbs doesn't reap benefits for every child. The interdistrict magnet schools provide an experimental field

from which to disentangle and better understand the role of neighborhoods and schools in fostering the well-being of minority teenagers.

Civil rights activists who oppose voluntary choice schools on the ground that they do not offer truly integrated environments must contend with the significant numbers of black suburban families who have voted with their feet in choosing to send their children to the interdistrict magnet schools. While suburban blacks attending school in the city may face similar long bus rides to city residents attending suburban schools through *Open Choice*, if those rides prove excessively burdensome they can choose to send their child to the local suburban public school. Research on intradistrict magnet schools and *Open Choice* can thus help discover the conditions under which families are willing to tolerate longer bus rides in order for their children to attend a school they perceive as superior. In the meantime, city residents benefit from having an easily accessible high-quality school—a particular advantage given that low-income city residents are least likely to have access to independent means of transportation.

Finally, even as they work to bring about educational equity for minority students, these programs provide an opportunity to test the policy waters and points of support that likely lie somewhere between the politically unacceptable (and highly disruptive) disestablishing of urban and suburban school districts on the one hand and the morally unjust notion of failing to address the inequities of city schools on the other. Suburban homeowners who would not consent to the total undermining of the physical or financial integrity of suburban public schools may nevertheless, for reasons of moral justice or perceived self-benefit, be willing to commit financial and physical resources to cross-boundary experiments. The programs therefore provide the opportunity to assess where

exactly the Tiebout pressure points lie and to educate future policymakers about designing cross-boundary or other school choice programs in a politically palatable fashion.

The danger remains that these programs will crowd out funding for charter schools or other innovative forms of urban education that can educate a greater number of students at a lower cost. But charter schools also have weaknesses, and the fact that charter schools may ultimately be more economical than cross-boundary programs does not, in my view, justify smothering the rich field of study that the diversity of school choice programs operating across different states can provide.

From a stew of different policy innovations, society cannot help but learn more about the ways that families of various races and socioeconomic backgrounds will exercise school and housing choice given increased options, and about the way that the exercise of choice may benefit every child's education. Furthermore, by providing good educational opportunities to African-Americans and a viable schooling option for those selected city and suburban whites who are comfortable attending a good school in a predominantly minority environment, the magnet schools provide a potential integrative opportunity that single-district forms of school choice do not. Ultimately, having cross-boundary programs can only move us closer to discovering the most worthwhile ways to ensure that every child has the opportunity to attend a high-quality school with a safe, productive, and beneficial learning environment.



## Appendix A

### New Haven's Interdistrict Magnet Schools and Non-Magnet High Schools

<b>All NH Non-Magnet Schools</b>	###	1496	###	7978	217	14	9.7%	####	51.5%	
<b>All NH Public and Magnet Scho</b>	###	2229	###	###	277	23	11.0%	####	53.7%	61.7%

*all figures are for the 2005-06 year and include both New Haven and suburban residents in NH Schools*

Source: Connecticut State Department of Education, Connecticut Strategic School Profiles