Overview: Issues and Initiatives in Public Education

School Choice and the Lessons of Choctaw County

Helen Hershkoff† and Adam S. Cohen‡

In the past year, school choice has emerged as a leading proposal for addressing the current crisis in American education. President Bush has made choice a cornerstone of his educational reform plans, and a growing number of educational theorists are promoting choice as a remedy for the problems of the nation’s schools. As one education law scholar recently observed, “choice is hot.”

In current policy discourse, the term “choice” refers to education systems in which parents are allowed maximum decisionmaking authority over their children’s schooling. Advocates of choice believe that the poor quality of today’s public schools results from the state’s virtual monopoly over education.

† Associate Legal Director, American Civil Liberties Union. A.B. Radcliffe College 1973; B.A. Oxford Univ. 1975; J.D. Harvard Univ. 1978.
‡ Staff Attorney, American Civil Liberties Union. A.B. Harvard College 1984; J.D. Harvard Univ. 1987.

The authors are counsel to the plaintiffs in Harper v. Hunt, No. 91-0117-R, (Montgomery County (Ala.) Cir. Ct. 1991), which challenges the Alabama school finance system on behalf of school children in four school districts in Alabama’s Black Belt, including Choctaw County. The authors wish to thank Martha Morgan and Olivia Turner, and the other members of the Harper litigation team. The opinions expressed in this Article are the authors’ own, and do not necessarily represent the position of the American Civil Liberties Union or their co-counsel in the Harper case.

1. There can be little question that the educational problems at which choice is directed are real. The evidence is often cited: declining S.A.T. scores, see THE COLLEGE EDUCATIONAL TESTING BOARD, 1991 PROFILE OF SAT AND ACHIEVEMENT TEST TAKERS iii-vi (1991); high drop-out rates, see CHILDREN’S DEFENSE FUND, MAKING THE MIDDLE GRADES WORK 4 (1988); an increasingly unskilled labor force, see generally U.S. DEPT. OF LABOR, WHAT WORK REQUIRES OF SCHOOLS (1991); and widespread national dissatisfaction, see JOHN CHUBB & TERRY MOE, POLITICS, MARKETS, AND AMERICA’S SCHOOLS 6-11 (1990) (hereinafter CHUBB & MOE). This failure was summed up in a landmark 1983 report of the National Commission on Excellence in Education. See NATIONAL COMM’N ON EXCELLENCE IN EDUCATION, A NATION AT RISK 5 (1983) (“The educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people.”). But see Robert Rothman, Revisionists Take Aim at Gloomy View of Schools, EDUCATION WEEK, Nov. 13, 1991, at 1 (discussing data on test scores and graduation rates that indicate improvement in student achievement).

and the absence of any mechanism for parents to express preferences among schools for their children. Although choice proposals differ in their details, they proceed from a common premise: the quality of schools will improve if parents are permitted to act as consumers in an educational marketplace. Choice proponents maintain that competition of this kind would give rise to new and diverse schools that better meet students' educational needs.¹

Advocates of choice offer a variety of rationales in support of this kind of market approach to education. One of their appeals is to the long intellectual history of the idea of parental choice. Choice proponents contend that the idea of giving parents greater control over the schooling of their children traces back to the writings of such diverse thinkers as Tom Paine, Thomas Jefferson, and John Stuart Mill.⁴ The historical record of how choice has worked in practice is considerably more limited. The major piece of empirical evidence on which proponents rely is the small-scale experiment in choice that occurred in Alum Rock, California in the early 1970s.⁵

Accounts of how parental choice has operated throughout history almost invariably omit the largest single experiment in school choice in this nation's past: the "segregation academy" movement that swept the South in the late 1960s and early 1970s.⁶ The segregation academy movement was the culmination of the South's "massive resistance" to racially integrated education. Initially, Southern states attempted to deny the power of federal courts to order desegregation. When that failed, they attempted to keep the public schools racially segregated by use of pupil-assignment laws and other legal subterfuges. Finally, when the battle to keep the public schools segregated was lost, they began a concerted effort to assist parents who wanted to send their children to private schools as an alternative to integrated public education. As a result of these efforts, a network of all-white private schools was established in the large cities and small towns of the South that continues to this day.

The segregation academy movement was a school choice plan in that the government made its resources available to help parents to choose schools other than their child's assigned school. This governmental assistance took many forms. During this era, seven states enacted tuition-grant laws that made government money available to pay tuition at the academies.⁷ In addition,

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¹ See generally CHUBB & MOE, supra note 1; PUBLIC SCHOOLS BY CHOICE (Joe Nathan ed., 1989); MYRON LIEBERMAN, PRIVATIZATION AND EDUCATIONAL CHOICE (1989).


³ See, e.g., KIRKPATRICK, supra note 1, at 91-102.

⁴ But see Deborah Meier, Choice Can Save Public Education, NATION, March 4, 1991, at 266 (discussing southern "freedom of choice" plans).

many governmental entities throughout the South provided buildings, donated educational supplies, and gave other such support. The movement's rhetorical commitment was to "individual freedom in choosing public or private schooling."

It is understandable that choice proponents would be reluctant to invoke the emergence of segregation academies throughout the South when they discuss the historical antecedents of parental choice. This era of Southern "massive resistance" to school desegregation was an ugly period in American history, and clearly no model for reform. Moreover, it is easy to dismiss the segregation academy movement as a mere historical anomaly because of the extreme racial animus that motivated it, and to conclude that it has no relevance to today's choice debate.

This Article, however, will take a different view. It will suggest that parental choice—even if not racially motivated—is likely to have many of the same structural consequences for public education today as it did in the South during the rise of the private academies. It will do this by examining the rise of private academies in a single school district: Choctaw County, Alabama. There, parental choice has led to the creation of a dual school system that has had a devastating impact on the public schools and the children left behind in them. This Article will look at these effects of parental choice, and it will suggest that Choctaw County's experience poses difficult questions for policymakers who would ignore the racial and economic consequences of a market approach to education. It will contend that school choice raises a set of concerns that any plan must address if it is to avoid the educational problems experienced in Choctaw County.

The Article will proceed in three parts. Part I will discuss how parental choice produced private academies in Choctaw County in the late 1960s and early 1970s. It will examine how the market for educational services worked and look closely at its adverse consequences for the county's poor and minority children who remained trapped in the public school system. Part II will suggest that the harm that parental choice did to education for poor and minority children in Choctaw County is not an isolated phenomenon, but rather a predictable outcome of a market-based approach to schooling. Part III will attempt to derive general lessons from this school district's experience with school choice. It will conclude that Choctaw County provides a cautionary tale about school choice and its likely impact on poor and minority children.

8. 12 RACE REL. L. REP. 2211 (Alabama tuition grant law of 1967).
9. There are certainly some school initiatives that have incorporated degrees of parental choice that have been generally recognized as successes. See, e.g., SY FLIEGEL, Parental Choice in East Harlem Schools, in PUBLIC SCHOOLS BY CHOICE, supra note 3, at 95-112 (describing the success of school choice program in East Harlem District No. 4). But even where alternative schools have been able to provide better educational opportunities for their own students, we have little research on the unintended consequences that these schools have had on education for students left in mainstream schools.
I. FREEDOM OF CHOICE IN CHOCTAW COUNTY

Until they were ordered to desegregate, public schools in the South had a virtual monopoly on education. The few non-sectarian schools that existed in the region in this period were the preserve of an affluent few. And because the region had comparatively few Catholics, the Catholic parochial schools that offered an alternative to public education in many parts of the country had less of a presence in the South. In short, the educational regime that prevailed prior to desegregation was one marked by little parental choice in the current use of that term.

With the threat of desegregated education posed by the Supreme Court’s ruling in Brown v. Board of Education, however, parents in the South demanded greater control over their children’s education. Acting under the banner of “freedom of choice,” these parents sought an alternative to the public schools. At the time, proponents of parental choice maintained that they were seeking higher quality education, not segregated schools. “We really didn’t do it on account of segregation,” one private-academy advocate said at the time, “we done it for a better education.”

State governments throughout the South accommodated these educational preferences by enacting a series of laws designed to build parental choice into the educational system, ranging from tuition grant laws, to pupil-placement laws, to repeal of compulsory attendance laws. The result of these changes was a radical restructuring of education in the South. With the assistance of tuition grants, and often other forms of government support, a large network of private academies emerged throughout the South during the post-Brown period.

The story of the rise of “segregation academies” and the students who enrolled in them has been the focus of historical accounts from this period. This Part will explore a less visible phenomenon of the choice movement: the effect of the academies on the public schools and the children who were left behind in them. It will do this by examining the rise of parental choice in one Alabama county and the consequences that the private school system had for students who remained in the County’s public schools.

10. See Hafter & Hoffman, supra note 7, at 1441 & n.43 (estimated total private school enrollment in the South in 1966 was 25,000); id. at 1444 (attributing low enrollment rates to “generally prohibitive” tuition charges).
11. See id. at 1443 n.50.
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A. The Emergence of Private Schools in Choctaw County

Choctaw County is a rural Alabama county, bordering on Mississippi, in the western part of the Alabama Black Belt region. Like the rest of the American South, Choctaw County operated a “dual school system based upon race and color” for most of this century. The attributes of such school systems are well known, including separate public schools for white and black students, separate school buses for the two races, and assignment of teachers to schools on the basis of race.

The first substantial challenge to segregated schooling in the South came on May 17, 1954, when the United States Supreme Court held in Brown v. Board of Education that schools segregated by law violated the Fourteenth Amendment to the United States Constitution. The Brown Court’s mandate of desegregation “with all deliberate speed” was met with a campaign of “massive resistance” throughout the South. Many Southern states enacted legislation withdrawing support from public schools and promoting private schools as a way of continuing segregated education.

In Alabama, legislation designed to block desegregation of the public schools took many forms. The state adopted a statute of interposition and nullification that challenged the authority of the federal courts to order desegregation. It changed teacher tenure laws to permit the firing of teachers who advocated desegregation. And, it enacted pupil assignment laws that put almost insurmountable obstacles in the way of black children who wanted to be assigned to white schools.

Initially, the South’s resistance to school desegregation was largely successful. By 1967, thirteen years after the Brown decision, 95.7% of black children in the South were still attending schools in segregated school districts. It became clear by the late 1960s, however, that despite the best efforts of the

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14. The Black Belt is a region of rich cotton-growing soil that cuts a swath across the Deep South, stretching from eastern Alabama through northeast Mississippi and Tennessee. Dominated by cotton plantations before the Civil War, and sharecropping afterward, the Black Belt has an appreciably higher percentage of blacks in its population than the rest of the South. See ENCYCLOPEDIA OF SOUTHERN CULTURE 567 (Charles Reagan Wilson & William Ferris eds., 1989).
20. See Hafter & Hoffman, supra note 7, at 1436.
Southern states, desegregation of the public schools could not be delayed indefinitely. The watershed event was the Supreme Court's ruling in Green v. County School Board in 1968, in which the Court replaced the "all deliberate speed" standard of Brown with a requirement that segregated schools devise a desegregation plan that "promises realistically to work now." In the next several years, Southern schools underwent considerable change as pupil assignment was altered to achieve racial integration. Choctaw County was among the many Southern school districts forced to desegregate its public schools in these years.

After the Supreme Court's decision in Green, it became clear that pupil assignment laws and other such subterfuges would not succeed in keeping the public schools racially segregated. At this point, parents increasingly turned to private segregation academies to prevent their children from being educated in a racially integrated setting. The speed with which the academies were established—and the number of students they enrolled—is remarkable. Between the years 1966 and 1972, southern private school enrollment rose from an estimated 25,000 to 535,000. In Alabama, private school enrollment more than doubled between the 1968 and 1971 school years. According to one account from this time, "[i]t seem[ed] that every little town had its private school.

State governments across the South directly assisted in the establishment of the segregation academies. During this period, seven southern states—Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia—enacted statutes authorizing tuition payments to students opting out of the public school system. Alabama had enacted a tuition-grant statute in 1955 that made money available for private school education. In 1966, as desegregation appeared more imminent, the law was revised, authorizing the State Board of Education to offer "tuition grant[s] to attend any private non-sectarian school in or outside the school attendance district in which the child resides."

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24. Id. at 438.
25. See Hafer & Hoffman, supra note 7, at 1439.
26. Segregation academies have been defined as "a system of private schools operated on a racially segregated basis as an alternative available to white students seeking to avoid desegregated public schools." Coffey v. State Educ. Fin. Comm'n, 296 F. Supp. 1389, 1392 (S.D. Miss. 1969); see Hafer & Hoffman, supra note 7, at 1441.
27. See Hafer & Hoffman, supra note 7, at 1441 n.44 (citing Katherine Griffith Terjen, Close-up on Segregation Academies, NEW SOUTH, Fall 1972, at 50.).
29. SOUTH TODAY, supra note 12, at 6.
30. See Hafer & Hoffman, supra note 7, at 1440 n.32.
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This statute was in essence a "school choice" regime. By making money available for private tuition, it helped parents to choose schools other than the public schools to which their children were ordinarily assigned. The deciding factor was to be the parents' assessment that the child's attendance in the public school to which he or she was assigned would be "detrimental to the physical or emotional health of such child or subject the child to hazards to emotional safety." The statute authorized the State Board of Education to make private school tuition payments on behalf of individual students ranging up to the per-pupil cost of public school tuition in the student's own district.

Although all of the state tuition grant statutes—including Alabama's—were eventually struck down as unconstitutional attempts to avoid racial desegregation, in several states a substantial amount of money was nonetheless transferred to the emerging private schools. Even in states where less money was transferred, private academies in many cases had the benefit of the government's promise to pay tuition during the crucial early days in which the schools were organized. And in most states, the government was able to provide considerable support to the private schools in the form of contributions of school buildings, school supplies, or direct financial payments.

Choctaw County's history of resisting school desegregation was similar to that of many Southern communities. Initially, the county relied on facially race-neutral pupil-assignment laws that nevertheless were designed to circumvent court-ordered desegregation. These pupil-assignment laws worked for some time—in Choctaw County as throughout the state—to permit white students to be reassigned to schools from which blacks would be excluded. But the era of reliance on pupil-assignment laws to forestall desegregation did not last long. When such laws were struck down by the federal courts, the county once again faced imminent desegregation of its public schools.

32. Id.
33. See id.
35. See Hafter & Hoffman, supra note 7, at 1445 n.58.
36. See id. at 1440 & n.30.
38. See, e.g., TINSLEY E. YARBROUGH, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA 95 (1981) (discussing use of state money to create Macon Academy in Macon County, Alabama).
39. See, e.g., RACE REL. L. REP. 235 (1956) (mandating pupil assignment on the basis of factors such as "the possibility or threat of friction or disorder among pupils or others" as a pretext for maintaining racially segregated schools).
40. See Affidavit of Toreatha M. Johnson, at ¶ 6, Harper v. Hunt. No. 91-0117-R (Montgomery County (Ala.) Cir. Ct. 1991) (stating that under Choctaw County's use of pupil-assignment laws "only a handful of black students have attended previously all-white public schools").
41. See generally Hafter & Hoffman, supra note 7, at 1439 & n.26.
After the pupil-assignment laws had failed to preserve segregation in the public school system, the elites of Choctaw County—like those in many other school districts throughout the South—turned to the private market. Invoking the right of parents to choose their children's education, the white citizens of the county established the two private schools—Patrician Academy and South Choctaw Academy—that survive today.  

The effort to encourage parental choice through the establishment of a dual school system in Choctaw County received substantial government assistance. In some parts of Alabama, private academies had been established in time to take advantage of tuition grant laws. Although the Choctaw County private schools were founded too late to benefit from these state tuition subsidies, they still received several types of governmental support. The Choctaw County Board of Education, for instance, provided a public school building for the establishment of South Choctaw Academy at a nominal fee. In addition, the academies reportedly received a substantial amount of educational materials—including books, maps, globes, football uniforms, and band instruments—that had been purchased for and belonged to the county's public schools. The private schools also received an important government subsidy by being treated as tax-exempt institutions despite their racially discriminatory policies.  

Choctaw County's new private schools caught on quickly. From the time they were established, almost all of the white parents in the county who could afford the tuition sent their children to the academies. In the six-year period from 1966 to 1972, white enrollment in the public schools of Choctaw County dropped by one-half.

The students who switched to the private schools were far from a cross-section of Choctaw County's children. Aside from their racial exclusion, the academies drew their students disproportionately from the county's economic and social elite. As one county educator recalls, "almost all of the influential white citizens with school-age children, including elected public officials, doctors, lawyers, and businesspersons, sent their children to one of these all-
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white private schools." And throughout their entire history, neither Patrician Academy nor South Choctaw County ever has admitted a black student.

B. The Continuing Effect of the Private Academies on Education in Choctaw County

From their inception, the new private academies had a substantial negative impact on Choctaw County’s public schools and the children who attended them. The dual school system divided the county’s citizens between supporters of public schools and supporters of private schools. This division worked to the detriment of the public school system: it diminished financial support for the public schools; it promoted racial and economic segregation; and it stigmatized the public school system and its students.

The legal apparatus that once supported the segregation academies was quickly dismantled after a series of constitutional challenges. Direct tuition payments for private school education are no longer available, in-kind contributions from government entities to private schools have been held to be illegal, and tax exemptions for schools that practice racial discrimination have been struck down. Nevertheless, the dual school system that emerged continues to be a major component of education in the county with dramatic negative effects for public schools and the children who attend them.

1. The diminution of fiscal support for public schools. From their inception, the private schools of Choctaw County have contributed to a dramatic reduction in funding for the public school system. The Choctaw County public schools’ loss of financial support has occurred on three levels: reduction of state aid, loss of local tax support, and a decline in private contributions and community support. These effects continue today.

On the most basic level, the presence of the private academies has reduced state funding for the public schools by lowering student enrollment in the public school system. Like most states, Alabama distributes a substantial portion of its education resources to localities using formulas based on average

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51. See id., at ¶ 11.
daily attendance. In Choctaw County, where white enrollment fell by one-half at the time the private schools were created, state funding for the public schools fell substantially. The public schools have never recovered from the loss of white children and the state aid they represent.

The dual school system has also decreased fiscal support for the public school system by undermining popular support for school taxes. Public schools in Alabama, as in much of the nation, are funded according to a formula that, as a practical matter, requires significant local taxation to finance their operations. Because these taxes must be enacted by a vote of the Choctaw County electorate, they are particularly vulnerable to vicissitudes in popular support. Experience has shown that school districts that are divided by a dual school system are substantially less willing to tax themselves to support the public schools.

Since the establishment of the private academies, the Choctaw County electorate has been so deeply divided between supporters and opponents of the private schools that it has been impossible to pass a school tax referendum. In the twenty years since desegregation, not a single school tax has passed in the County, despite repeated efforts by supporters of the public schools. In 1987 and 1988 alone, eight separate school taxes were voted down. In each referendum campaign, a significant portion of the opposition came from the same source: the affluent supporters of the private academies.

Finally, the dual school system continues to cause a diversion of private resources away from the public schools and toward the segregation academies. The Choctaw County schools, like many public schools across the country, have long benefitted from financial and in-kind contributions from corporations


57. Although state funding was reduced in proportion to declining enrollment, educational offerings nevertheless suffered because overhead and capital costs established on the basis of higher attendance could not be instantly lowered. See Note, supra note 7, at 1452 n.86. This outflux of students also deprived schools of economies of scale, which were particularly important to many small, rural schools.

58. The establishment of the academies affects the public schools’ state aid in a second way. Alabama, like many states, allocates some of its educational funding on a discretionary basis to schools with politically influential supporters in the state legislature and the executive branch. One effect of removing elite students from the student body is decreasing such discretionary support for the public schools. See Note, supra note 7, at 1452-53 & n.87.


60. See Affidavit of Jerome C. Hafter, supra note 21, at ¶ 30; Hafter & Hoffman, supra note 7, at 1453 & n.88.

61. Indeed, in addition to opposing any new local taxation for the public schools, a few years ago, some of the supporters of the private academies in Choctaw County successfully challenged the validity of a local tax collected for public schools under a local taxation authority that had expired. The court ordered the county to refund taxes that had been collected. See Affidavit of Alphonso Marsh, supra note 37, at ¶¶ 16, 17, 19.

62. See Affidavit of Toreatha M. Johnson, supra note 40, at ¶ 12; Affidavit of Alphonso Howard Marsh, supra note 37, at ¶ 16.
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and private citizens. Traditionally, many of the county's wealthy citizens and local businesses donated large sums of money and equipment to the public schools. Toreatha M. Johnson, the current Choctaw County Superintendent, reports that this money is no longer available:

[M]any of the same people who made these large donations were instrumental in setting up the private schools, and the public schools no longer get their support, financial or otherwise. For example, we have struggled for two years to buy band uniforms for public school students. Before the establishment of the private schools, large private donations were obtained for this type of public project.63

One former Choctaw County school principal states that "[s]ince the creation of the academies . . . influential whites have withdrawn their support from the public schools and shifted it to the private schools."64 He notes that today, "influential white citizens hold fund-raisers for the private schools and they have even sold tickets within the offices of the Choctaw County Board of Education."65

The loss of community support for the public schools also has hurt the public schools and their students in less direct ways. Public schools rely on community support for many kinds of assistance beyond financial support. The public schools' vocational education and placement programs have suffered, for example, because many of the people who run the county's banks and businesses and who have discretion over hiring decisions and apprenticeship opportunities feel a greater loyalty to private academy students than to public school students.66

2. Increased racial and economic isolation. Not surprisingly, another continuing effect of the rise of the segregation academies in Choctaw County is the high degree of racial and economic isolation among the schoolchildren. From the outset, the private education market has served as a "sorting mechanism" that separates children in the county along racial and class lines.67 This segregation has continued despite the application of civil rights laws to private school admissions policies and decisions about the granting of tax-exempt status.68

The emergence of all-white private schools in Choctaw County has substantially reduced the impact of school desegregation by removing many white students from the public school system. When the private schools were established, more than half of the white students in the county abandoned the public school system. Thus, instead of being evenly balanced between the races, as

63. Affidavit of Toreatha M. Johnson, supra note 40, at ¶ 13.
64. Affidavit of Alphonso Howard Marsh, supra note 37, at ¶ 15.
65. Id.
66. See id.
67. See e.g., Hafter & Hoffman, supra note 7, at 1451-52.
they would have been if there were no private schools, Choctaw County’s public schools are now almost two-thirds minority.69

In addition to dividing the County’s children on the basis of race, the dual school system that resulted from “freedom of choice” separates students on the basis of economic and social class. The students who exited from the public schools were disproportionately drawn from the most affluent sections of the white community. As Superintendent Johnson notes:

[T]he private academies that were established in Choctaw County to avoid integrated schools were set up by, and continue to be supported by, the leading white professionals in the county, including bankers, lawyers, doctors, and elected officials. . . . Most of the white elected officials of Choctaw County have their children in private academies, or did when their children were of school age. For example, the probate judge sent his daughter to one of the private academies, and the District Attorney and members of the county commission have also sent children to these schools.70

The result of this departure of elites is a public school system made up of students from low income families—as shown by the fact that fully seventy percent of the students receive free or reduced-price school lunch.71

C. The Private Education Market and the Restructuring of Education in Choctaw County

The results of the diminution of support, and racial and economic separation, can readily be seen in the public schools of Choctaw County today. Lacking sufficient money and resources to do an adequate job, the public schools are struggling to provide educational opportunity. Beyond the material deprivations, the public schools labor under the burden of the stigma of inferiority—that they are the exclusive preserve of those who are unable to opt out of the system. These material and spiritual burdens make it difficult, if not impossible, for the public schools to provide a minimally adequate education.

1. The burden of inadequate resources. As a result of the lack of electoral and community support for the Choctaw County public school system, public schools in the county are underfunded and inadequate. The county’s revenues per pupil place it near the bottom of a state that itself falls close to last in the

69. See ALABAMA DEPT’ OF EDUC., ANNUAL REPORT 30 (1988) (Choctaw County public schools 63.5% non-white). Private academies throughout the South had similar segregative effects. See, e.g., Jack White, Segregated Academies, TIME, Dec. 15, 1974, at 54 (stating that in Memphis, Tennessee, 25,000 white students left the public schools between 1972 and 1975, tipping the racial balance in the schools from 50-50 to 70% black).

70. See Affidavit of Toreatha M. Johnson, supra note 40, at ¶ 7.

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national rankings. The local revenues available to the public schools—the portion allocated on the basis of countywide referenda—were only $254 in 1985-1986, less than one-half of Alabama’s statewide average.

As a result of this lack of support, the Choctaw County public schools are lacking in many of the most basic components of an adequate education. The shortage of money is apparent in the schools’ physical plants. The buildings are run-down and overcrowded, with leaky roofs and portable classroom buildings the norm. One school in the County burned down several years ago, and since then most of its classes have been held in portable buildings. Because of the shortage of money, the School Board has not only been unable to replace the lost building, but it also has been unable to purchase the simple metal breezeways that would protect the children from rain as they walk between the school’s portable units.

The County schools cannot afford adequate supplies of basic educational resources. Schools regularly lack sufficient up-to-date textbooks. The high schools lack basic science laboratory equipment and supplies. There is not enough money to provide adequate janitorial services. And none of the schools has a nurse; sick students typically wait at their desks or in the principal’s office until a parent can come to the school to pick them up. Because of these inadequacies, several of the Choctaw County public schools are not accredited by the state.

Lack of adequate resources is more than just an inconvenience to students—achievement levels themselves are affected. Superintendent Johnson firmly believes that if there were more money available to provide basic educational resources, it “would have an impact on our students and their achievement levels.” The current achievement levels of the County’s public school students as measured by standardized examinations suggest that—notwithstanding the considerable problem with standardized tests as a measure of performance—there are serious deficiencies in the education provided.

These deficiencies can be seen, for example, in the Stanford Achievement Test (SAT) that is administered to all Alabama schoolchildren in the fourth and eighth grades. The SAT tests achievement in several skill areas. Test results are measured in comparison to a norm set by a nationwide group of students taking the examination in 1988. In the April 1990 administration of the test, the reading scores showed that students in Choctaw County fell considerably

72. Alabama ranks 49th in the nation in per capita spending on public school education. See IRA HARVEY, A HISTORY OF EDUCATIONAL FINANCE IN ALABAMA 541 (1989). Alabama’s expenditures by average daily attendance in 1986-87 were only 65% of the national average. See id. at App. 8-2.
73. See id. at App. 8-6.
74. Interview with Toreatha M. Johnson, Superintendent of Education for Choctaw County (Dec. 12, 1991).
75. Id.
76. Id.
below the national norm, and dramatically below the scores in one of the State's wealthiest and most homogeneously white districts:

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<td>CHOCTAW COUNTY</td>
<td>34</td>
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Stanford Achievement Test—Reading Scores, 4/90

(Average Percentile Rank)

The performance of Choctaw County students on the American College Testing (ACT) test raises similar concerns. The most widely used college-entrance examination in Alabama, that test is graded on a scale from one to thirty-six. In 1990, the national average score was 20.6 and the minimum ACT score for automatic admission to the University of Alabama was 22.0. In the 1988-1989 school year, students in Choctaw County had an average ACT score of 14.5.

2. The burden of demoralization and stigma. In addition to depriving the public schools of needed resources, the dual school system that has arisen in Choctaw County stigmatizes the public schools by branding them as inferior. This is similar to the stigma and demoralization that the Supreme Court in Brown observed in the racially segregated schools of the South. The dual school system in Choctaw County creates a widely held impression that the public schools are used primarily by students who are unable to avail themselves of a private school education.

The Supreme Court in Brown held that the dual school systems of the South, by segregating black schoolchildren on the basis of race, branded black children as different and "less" than white children. A dual school system that separates out black children "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."78 In Choctaw County, the dual school system has a similar

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78. 347 U.S. at 494. But see Denise C. Morgan, What is Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education, 8 HARV. BLACKLETTER J. 99 (1991) (arguing that major issue in educational equality is assuring black children adequate, rather than integrated, education); Derrick A. Bell, Jr., The Legacy of W.E.B. Du Bois: A Rational Model for Achieving Public School Equity for America's Black Children, 11 CREIGHTON L. REV. 409 (1977) (same); W.E.B. Du Bois, Does the Negro Need Separate Schools?, 4 J. OF NEGRO EDUC. 328 (1935) (same). In recent years, special schools, segregated by race and sex, have been promoted by some members of the African-American community as a way of better addressing the needs of black males. A discussion of the merits of these schools is outside the scope of this Article.
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stigmatizing effect on black children because it consigns them to an inferior educational system that lacks the support of the larger community.\(^7\)

The stigmatizing message of Choctaw County's dual school system is clearly communicated to public school students and, as the Brown Court warned, has a profound effect on their "hearts and minds."\(^8\) Frizzette Lyles, a fourteen-year-old black girl who attends public school in Choctaw County, explains:

"Most people in this community believe that the private academy is better than the public schools. I think they believe this because parents pay to have their children go there. I believe that because of the private school, people look on the public school system as inferior and look down on its students.\(^9\)"

Her ten-year-old sister, who attends public elementary school in the county, agrees. She says that she believes that parents who send their children to Patrician Academy "want them to go to this school because they think they are better than other people.\(^9\)"

This stigmatizing effect is compounded by the fact that the most prominent members of the white community are particularly likely to abandon the public schools.\(^8\) As Superintendent Johnson states:

"When a community's professionals—lawyers, doctors, bankers, judges—send their children to the public schools, it says to the general population that the public schools provide a good education. When none of them have their children in the public schools it says to the general population that the public schools are inadequate. These perceptions need not be true for such an image to take hold.\(^4\)"

In Choctaw County, the stigmatizing impact of the all-white private schools is made worse by the fact that a significant number of the County's public school teachers send their own children to the academies. As a result, children in the public schools are at times confronted by the fact that their own teachers consider them and their schools somehow less than adequate.

Kenneth Clark, the social psychologist whose research on the psychological effects of segregated education was relied upon by the Brown Court, has explained the corrosive effect of stigmatizing racial classifications on schoolchildren:

"As minority group children learn the inferior status to which they are assigned—as they observe the fact that they are almost always segregated and kept apart from others who are treated with more respect by the society as a whole—they often react with feelings of inferiority and a sense of personal humiliation. Many

\(^7\) See ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 5 (1963) (discussing stigma as "undesired differness").
\(^8\) 347 U.S. at 494.
\(^8\) Affidavit of Besstina Ethelene Lyles, at ¶¶ 4-5, Harper v. Hunt, No. 91-0117-R (Montgomery County (Ala.) Cir. Ct. 1991).
\(^8\) See Affidavit of Toreatha M. Johnson, supra note 40, at ¶ 7; Affidavit of Alphonso Howard Marsh, supra note 37, at ¶ 9.
\(^8\) Affidavit of Toreatha M. Johnson, supra note 40, at ¶ 15.
of them become confused about their own personal worth. On the one hand, like all other human beings they require a sense of personal dignity; on the other hand, almost nowhere in the larger society do they find their own dignity as human beings respected by others.\textsuperscript{85}

The stigmatizing effect of segregated education has an effect on the larger society, as well, because it "make[s] it practically impossible to educate children in the ideals of democracy" and "impair[s] the ability of children to profit from democratic education."\textsuperscript{86}

II. IS CHOCTAW COUNTY UNIQUE?

Choctaw County's experiment with school choice clearly occurred during a unique period in American history.\textsuperscript{87} Perhaps never before in American history was racism so overtly made a part of discussions about educational policy.\textsuperscript{88} To opponents of school desegregation, the prescription for quality education was simple: continue to educate the races in separate schools. During this time, there was little confusion about the fact that "choice" was a code word for the freedom of white parents to choose segregated education for their children.

Nevertheless, it would be wrong to dismiss Choctaw County's experience with choice as mere historical anomaly. To be sure, race is not the driving force behind school choice programs today as it was in the post-\textit{Brown} period in the South. But it is important to ask whether the effects that choice produced for public education in Choctaw County have a structural significance quite apart from their racial motivation. The little empirical evidence that exists about how choice actually works\textsuperscript{89} suggests that the kinds of problems that choice created in Choctaw County have arisen elsewhere even where the programs were not motivated by race.

This Part will examine several more recent experiments with school choice. Although the data on these uses of choice is quite limited, they at least suggest that the harm that choice did to the public schools of Choctaw County was not an isolated phenomenon. It will then draw on organizational and sociological theory to put forth a more general explanation for why a market-based approach to education may systematically disadvantage public schools and their students.

\textsuperscript{85} KENNETH CLARK, PREJUDICE AND YOUR CHILD 168 (1963).
\textsuperscript{86} Id. at 87.
\textsuperscript{87} See ENCYCLOPEDIA OF SOUTHERN CULTURE, supra note 14, at 1176-77.
\textsuperscript{88} See, e.g., Jay Murphy, Can Public Schools Be "Private"?, 7 ALA. L. REV. 48 (1954) (discussing Alabama Legislature's initiatives to block school desegregation).
\textsuperscript{89} See Liebman, supra note 2, at 278.
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A. The Limited Record of School Choice

Discussions of school choice today must inevitably begin with a recognition that the empirical record of school choice is quite limited. There have been few experiments with school choice in modern American history. A number of educational programs—such as the G.I. bill—have introduced market elements to government provision of education. But the number of programs in which parental choice has actually been enlisted in the provision of primary and secondary education is quite small.

To the extent that parental choice has been tried, it has taken a variety of forms. A very small number of states have introduced limited experiments with vouchers at various times. Several school districts employ parental choice to some extent in making pupil assignments among public schools. In addition, several jurisdictions have established magnet school programs that incorporate a significant degree of parental choice into their educational systems.

There is, however, a critical shortage of analysis of these limited experiments in parental choice. As one scholar has noted, "the first thing to acknowledge is how little we know about how educational markets could and should work." Indeed, the leading discussions of school choice today often fail to present any analysis of how previous choice experiments have worked and whether their results suggest that choice is a useful educational tool.

Nevertheless, the limited literature that does exist analyzing school choice demands attention. This section will consider some of the themes that emerge

90. See KIRKPATRICK, supra note 4, at 145-46.
91. Vermont introduced a choice system in 1782, which continues to operate in the state's rural districts. See PRESIDENT'S COMM'N ON PRIVATIZATION, PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT 92 (1988). New Hampshire and Maine have also operated voucher systems to a limited extent. See KIRKPATRICK, supra note 4, at 146. Other states have used vouchers for specific educational purposes. See PRESIDENT'S COMM'N, supra at 92 (discussing Minnesota's use of vouchers for advanced high school students to attend college classes and other states' use of vouchers to address educational needs of drop-outs).
92. See, e.g., Tom Chenoweth, Unanticipated Consequences of Schools of Choice: Some Thoughts on the Case of San Francisco, 7 EQUITY & CHOICE 35 (discussing school choice in San Francisco Unified School District).
93. By one estimate, about one-third of big-city school districts offer a choice of magnet or specialty schools at the high school level. See AUSTIN D. SWANSON & RICHARD A. KING, SCHOOL FINANCE: ITS ECONOMICS AND POLITICS 337 (1991); see also Anne Turnbaugh Lockwood, Boston's Last Hope: The Exam Schools, 5 EQUITY & CHOICE 7 (1989) (discussing Boston's city-wide high schools that require taking of an examination for admission); Donald R. Moore & Suzanne Davenport, High School Choice and Students at Risk, 5 EQUITY & CHOICE 5, 7 (1989) (discussing specialized high school choice available in New York City).
94. Liebman, supra note 2, at 278.
95. For example, a leading study promoting increased use of school choice nowhere mentions the federally financed school choice program at Alum Rock Unified School District, California, one of the most ambitious experiments in school choice in the nation's history. See Nicholas Lemann, A False Panacea, HARPER'S, Jan. 1991, at 101, 105 (book review of JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS (1991)).
in discussions of choice programs and their effects on the educational systems in which they are introduced. It will consider analyses of several school choice regimes—ranging in scope from city-wide magnet schools to Britain's nationwide school choice program—and will suggest that these analyses point to many of the same concerns as those raised by Choctaw County's school choice experience.

1. Unequal access to preferred schools. One of the harmful effects of the dual school system in Choctaw County is that it has divided children in the county along class lines by drawing a disproportionate number of children from the economic and social elites of the county into the private school system. This theme of social division is a common one in analyses of other school choice programs. Even when school choice programs involve only public schools, they are often criticized for exacerbating social divisions by allowing the children of economic and social elites disproportionate access to preferred schools.96

A number of jurisdictions that have introduced school choice into their school systems have found that segregation along class lines ensued. One study of a magnet school program in San Francisco, for example, found that the 15 alternative schools established there consistently draw students from higher socioeconomic levels than the regular public schools.97 The result, according to the study, was that the city's magnet school program "unintentionally created a two-tiered school system."98 In Britain, critics of the school choice regime similarly charge that it has enabled preferred schools in the system to become a preserve of the more affluent.99 In the words of one British educator, "The evidence of all other markets is where there is limited supply, those who have the economic and cultural resources to get the most desirable products will get them."100

Even assuming that outright discrimination is not a factor in this exclusion—perhaps an unduly optimistic assumption101—there are a number of reasons that school choice regimes are likely to segregate students along economic lines. First, choice programs are unlikely to give all students—rich and poor—enough money to attend the schools of their choice. Choice regimes that include private schools, for example, generally do not contemplate paying full cost, but instead would offer vouchers that pay only a small percentage

96. A few theorists have proposed choice models that would address some of these problems. See SWANSON & KING, supra note 93, at 340-41.
97. See Chenoweth, supra note 92, at 35-36.
98. Id. at 36.
100. Id. at A12 (quoting Professor Geoff J. Whitley, University of London).
of tuition. Such vouchers would be of little use to parents unable from their own resources to make up the difference between the value of the voucher and the cost of private school tuition.

Indeed, some choice proposals even more explicitly separate children on the basis of wealth. One proposal now pending in Congress, the Low-Income School Choice Demonstration amendment proposed by Senator Orrin Hatch, would actually give larger tuition grants to more affluent parents. Under the Hatch proposal, parents would receive certificates that would cover the cost of tuition, fees, and transportation at the receiving school. The value of the certificate, however, could not exceed the average per-pupil expenditure at the school that the child would otherwise attend. Because school districts vary considerably in their average per-pupil expenditure—and poor people tend to live in districts that cannot afford to spend as much on their schools as more affluent districts—the Hatch plan would inevitably give more money to rich students than to poor. As a result, it would segregate children by class because children from poor districts will not be able to afford to choose schools that are available to students from more affluent districts.

Second, even if money were not an obstacle, the differential access to information and ability to maneuver through bureaucratic obstacles also make it likely that choice plans will separate students along class lines. Experience shows that parents generally do not approach school choice programs with equal access to the information necessary to make informed choices. For example, one study of Massachusetts's selective schools that require entrance examinations observed that admissions announcements were exclusively in English, never in Spanish, creating a situation of unequal access to necessary information.

In addition to problems of information access, in many cases school choice models present bureaucratic barriers that make it more difficult for poor or minority students to gain access to favored schools. For example, one discussion of the admissions procedures for New York's specialized high schools.
found that many applicants are disadvantaged by the "complex formal and informal intricacies of the high school admissions process." This study found that many parents and students knew little about the kinds of programs offered in the different high schools and the preparatory coursework necessary or strategic factors, like the importance of listing the school as the applicant's top choice or the role of political influence in securing admission to desirable schools. As a result, the study concluded, poor families and those in which English is not the first language "are unlikely to negotiate the admissions process successfully."

Finally, a number of existing school choice plans have been criticized as elitist for not providing transportation as part of their programs. In some cases, this means that poor students will not be able to attend some of the participating schools. For example, plaintiffs in a pending lawsuit challenging the Massachusetts school finance system have stipulated that the state's choice plan disadvantages poor children because students who wish to attend school in another city or town must provide their own transportation. The Massachusetts plaintiffs contend that "[b]ecause transportation is not funded, only students in families with means to provide transportation will be able to attend" schools for which they would otherwise be eligible.

2. Impoverishment of less-favored schools. A second problem with the school-choice regime in Choctaw County is that the dual school system that it established has impoverished the county's public school system. Studies of other school choice programs suggest that this is not an isolated phenomenon. To the contrary, analysis of such programs shows that choice regimes are likely to direct money away from poorer and less-favored schools in a variety of ways, ranging from reducing education aid to siphoning off material goods. Because these less-favored schools generally do not close, but continue to operate with even fewer resources, the result is that struggling schools are forced to get by with even less than what a basic education requires.

The tendency of choice regimes to siphon resources from poorer schools can be seen in the Massachusetts statewide experiment in school choice. The Massachusetts choice program has systematically shifted state aid from poorer school districts to more affluent ones. The shifting of resources is amplified by the fact that under the Massachusetts plan, when a student leaves a school system, the system loses not only the aid that that student would have brought, but an amount equal to the cost of educating that student in his new school

107. Moore & Davenport, supra note 93, at 8.
108. Id.
109. Id.
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district. As a result of this policy, the shifting of even a small number of students out of a system can lead to a considerable loss in aid.

The town of Maynard, for example, receives $753 in Chapter 70 state aid for each student enrolled in its schools. Under the choice program, however, Maynard loses the full average cost of educating each student—up to $5,800—in aid for each student who transfers to a public school outside of the district. In the 1991-92 school year, 58 of Maynard’s 1,268 students elected to leave the system, taking with them $321,400 of the $954,884 in state aid that the Maynard schools received. The departure of only 4% of Maynard’s students took away fully 33% of the town’s Chapter 70 aid. Brockton, another poor school system, has lost a significant number of students to the more affluent Avon system since the introduction of school choice. For each student who leaves the Brockton system, its schools have lost up to $9,671.

Massachusetts’s school choice program has worked, in the words of one state legislator, as “a ‘reverse Robin Hood’, taking from the poorer school districts to give to the richer” ones. The result of the plan has been to “punish[] communities which lose students” by further impeding their ability to provide a quality education. The deprivation of state aid to poorer school districts that has come about as a result of choice translates directly into a loss of educational opportunity for students in those districts. Brockton schools, for example, will have to increase their average class size to 35, with individual class sizes ranging up to 40. Avon, by contrast, has advertised that its class sizes will not exceed 20 students.

The deprivations that less-favored schools experience as a result of choice are not only due to formal reductions in education aid. A study of magnet high schools in four cities—New York, Chicago, Philadelphia, and Boston—found that the magnet schools in those cities systematically siphoned off the best teachers and received a greater allocation of resources than the neighborhood schools. The magnet schools ended up with the best teachers either because of teacher preferences or because these schools were given special prerogatives in choosing staff. Overall, the study found that neighborhood schools “frequently come off second-best in the allocation of school system resources” despite the fact that these schools face a variety of problems that require more resources to address. Moreover, the study suggested that a

112. See Stipulation of Agreed Facts, supra note 110, at ¶ 75.
114. Id. at 2.
115. See id.
116. See id.
117. See Moore & Davenport, supra note 93, at 9.
118. See id.
119. See id.
magnet school may "receive small amounts of discretionary money not available to the [less favored] school, first priority in getting its boiler repaired, first priority in receiving its allotment of supplies and in ordering new books." 120

3. Stigmatization and demoralization. A third negative effect that the dual school system in Choctaw County had on education in the county was its stigmatization of the public schools and public school students. Studies of other choice programs suggest that this phenomenon is one that frequently accompanies the use of school choice.

The study of magnet schools in New York, Chicago, Philadelphia, and Boston found that the presence of magnet schools produced a "prevalent feeling of demoralization" among students, educators, and parents in the non-magnet schools. 121 Even though the great majority of students in these systems continue to be educated in non-magnet schools, a widespread sense has nevertheless emerged that "the students who don't make it into a selective school or program are by-and-large 'losers,' from whom little can be expected." 122

In England, the nation's experiment with school choice has also been found to produce demoralization among the students and staff of disfavored schools. The British parental choice regime has begun to divide the nation's schools into good schools, which fill up quickly, and bad schools, which fill up more slowly but are nevertheless generally able to attract sufficient students to remain in operation. 123 Although some of these bad schools may eventually fail, one British educator has stated that "the signs are of a slow, lingering death, damaging to children in that school and to teachers, whose morale and skill deteriorates [sic]." 124

B. Choice and the Exit of Societal Elites

Despite its limited scope, the literature on parental choice points to a consistent theme: competition does not always improve the quality of education. To the contrary, the evidence suggests that parental choice has the capacity to cause systematic harm to certain schools and students by facilitating the departure of their more elite members. This result is not surprising. Indeed, it is consistent with social science theory about how elites operate in complex organizations, and with social commentary about the general direction of American society today.

120. Id.
121. Id.
122. Id. at 9-10.
123. See Chira, supra note 99, at A12.
124. Id.
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Parental choice is a textbook example of Albert O. Hirschman's theory of consumer behavior. Hirschman explains that consumers respond in one of two ways to declines in product quality: they "exit" for an alternative product, or they remain to "voice" their concerns. Both responses have an effect on the product involved.

Consumers differ, however, in the degree to which they value quality in a particular product, and hence in their likelihood to abandon one supplier for another or to complain about product decline. Hirschman maintains that some consumers, whom he labels "connoisseurs," are particularly sensitive to changes in product quality. When they also have "capital surplus," or the financial resources to act upon their preferences, they will exit from one firm to another product more to their liking. In doing so, they leave behind a firm whose consumers are now made up to a larger extent of individuals who lack either the attachment to quality or ability to exit in favor of the superior product.

Exit of elites is an increasingly widespread phenomenon in American society. Robert Reich contends that the departure of elites—which he calls "the new secession"—is occurring throughout the country in almost every sphere in which the government supplies goods and services:

In many cities and towns, the wealthy have in effect withdrawn their dollars from the support of public spaces and institutions shared by all and dedicated the savings to their own private services. As public parks and playgrounds deteriorate, there is a proliferation of private health clubs, golf clubs, tennis clubs, skating clubs and every other type of recreational association in which costs are shared among members. Condominiums and the omnipresent residential communities dun their members to undertake work that financially strapped local governments can no longer afford to do well—maintaining roads, mending sidewalks, pruning trees, repairing street lights...

Although this proliferation of private alternatives has technically increased "competition" in each of these areas, this competition has not improved the quality of the public goods and services involved. Modern society is full of examples—many of which Reich alludes to—of instances in which the creation of private alternatives has not improved the corresponding public good. The proliferation of expensive private health clubs that cater to economic elites has not forced urban parks or public swimming pools to rise to the competition. The growth of premium private mail services like Federal Express has likewise not improved the U.S. mail service with which it competes. To the contrary,

126. Id. at 4.
127. See id. at 45-50.
128. See id.
130. Id.
experience shows that the introduction of increased market choice often does little more than exacerbate “a growing inequality in basic social community services.”

In the education context, the departure of elites that is facilitated through parental choice deprives the public schools of their most influential constituents. In Reich’s terms, choice permits the most affluent students and parents in the community to “disengage[] themselves from their less favored fellows,” and withdraw their financial and political support from the public sphere. Hirschman writes of a similar process in which connoisseurs exit from a supplier and leave behind consumers who are least able to demand high-quality goods and services. When public schools lose their “educational connoisseurs” to a competing private school system, they lose precisely those consumers who “might otherwise have fought deterioration.”

### III. THE LESSONS OF CHOCTAW COUNTY

Choctaw County’s experience with school choice is a cautionary tale about the power of the market to deprive disadvantaged students of necessary educational opportunities. It would, of course, be wrong to conclude on the basis of any one example that a choice regime cannot work to improve the quality of schooling for all. Nevertheless, the problems that have emerged in Choctaw County appear to exist in at least some other choice regimes throughout the country and are consistent with organizational theory about how consumers behave when public goods are available through private sources.

The dual school system that choice produced in Choctaw County provides important lessons about the harm that may be done by an unregulated market in education. The problems that arose in Choctaw County will not necessarily arise in every choice regime. However, any jurisdiction considering implementing a parental choice plan should be mindful of these potential consequences and should ensure that its choice plan builds in protections against them.

#### A. Lesson #1: The Elitism of the Market

Proponents of choice contend that it is an educational reform that will improve schools for children at all economic levels. They assume that choice will increase the educational options available to all children regardless of their

131. Id.
132. Id.
133. HIRSCHMAN, supra note 125, at 54.
134. See Liebman, supra note 2, at 261.
135. HIRSCHMAN, supra note 125, at 51.
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parent’s income. They ignore, however, the fact that ability to pay is a powerful component of all market systems. Unless an education market is regulated with the needs of the poorest consumers in mind, choice programs will offer little real choice to those who enter the market with little money to pay.

Choctaw County provides an illustration of how the introduction of an education market is likely to divide a community along class lines. Putting aside for a moment the private academies’ racially discriminatory admissions practices, the mere fact that they charge tuition means that the academies can provide “freedom of choice” only to the most affluent members of the community. It is appropriate that one of Choctaw County’s two private schools is named “Patrician Academy,” since its tuition charges puts it out of reach of a sizable portion of the community.

In many choice proposals, students would similarly be divided by class—either because they would have to pay part of the tuition to attend some schools or because the regime would actually allocate larger tuition credits to students from more affluent school districts. Either way, such choice plans would undermine the democratic principles that are central to American education. Instead of preserving an American educational system that “know[s] no distinction of rich and poor, of bond and free,”136 choice plans threaten to exacerbate economic divisions and promote “the further ghettoization of American society that is already too ghettoized.”137

B. Lesson #2: Creation of an Educational Underclass

Choice proponents contend that such regimes will promote educational excellence through competition. In their view, the power of parental preference will cause good schools to prosper and bad schools to improve or close. Choctaw County’s experience with choice demonstrates, however, that any educational improvement that a market approach might bring comes at a price: the creation of an underclass of disfavored and underfunded schools.

In Choctaw County, parental choice has established a dual school system in which poor children are relegated to public schools that lack community support and do not receive adequate educational resources. Any choice plan that facilitates the departure of social and economic elites has the danger of creating an educational underclass of this kind. Although choice advocates assume that inadequate schools “will either go out of business . . . or change their ways,”138 the fact is that “bad schools wither slowly.”139 So long as

some parents and children in a choice regime have only limited choice—whether due to inadequate financial resources, information, or transportation—the market will generate sufficient numbers of students to keep bad schools in operation.

If a school choice plan is to avoid institutionalizing a lower tier of schooling for the poor and disadvantaged, it must include an express commitment to a level of adequacy consistent with the democratic purposes of education. Without such a commitment, choice plans threaten to saddle one segment of society with a system of education that is unequal and separate. Offering an education of this kind to children who are least able to strike a good bargain for themselves in the educational market is “an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”

C. Lesson #3: Competition Over Non-Academic Factors

Choice proponents contend that parental choice will produce academic excellence because the market will work to satisfy consumer demand for quality schooling. This formulation fails to consider the fact that education consumers are motivated by a variety of factors, some of which are unrelated to academic excellence. Some parents may base their choice of schools on curriculum offerings, mastery test results, or the quality of computer facilities. But other parents may be most interested in factors that fall outside of the

140. Public education plays a special role in advancing the democratic purpose of American society. See, e.g., AMY GUTMANN, DEMOCRATIC EDUCATION (1987). The Supreme Court has recognized that the public schools fulfill this democratic mission in several ways. First, they teach basic educational skills and “some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.” Wisconsin v. Yoder, 406 U.S. 205, 221 (1972). See also MANN, supra note 136, at 63 (“Under a republican government, it seems clear that the minimum . . . education can never be less than such as is sufficient to qualify each citizen for the civil and social duties he will be called upon to discharge.”). Second, public schools are critical to the preservation of democratic values because they are “the primary vehicle for transmitting ‘the values on which our society rests.’” Plyler v. Doe, 457 U.S. 202, 221 (quoting Ambach v. Norwick, 441 U.S. 68, 76 (1979)). Taken together, these two educational functions—imparting skills and imparting values—are crucial to “maintaining the fabric of our society.” Plyler, 457 U.S. at 221.

The Supreme Court has also recognized that education serves yet another democratic purpose: providing young people with equal opportunity. The classic formulation of this equality principle is that articulated by the Brown Court:

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.


141. Plyler, 457 U.S. at 221-22.
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academic realm—such as a school’s athletic program, or its social standing, or the racial composition of its student body.¹⁴²

For example, in Choctaw County, as throughout the South, white parents whose children attended schools facing integration made educational decisions more on the basis of race than any other factor. When educational markets opened, the consumer demand was for segregated education, regardless of quality. Many of the schools to which white students fled were hastily built with little regard for curriculum, physical plant, and other basic educational features. It was not necessary for these schools to have in place superior educational programs because that was not the basis on which educational decisions were being made. As an editorial in one pro-segregation academy journal explained, “private schools will flourish because parents want their children educated, not integrated.”¹⁴³

Parental choice plans need not be proposed in as racially charged an atmosphere as the South of the late 1960s and early 1970s for non-academic factors to play an inordinate role in parental preference. Because choice plans introduce the ways of the market into the educational arena, they allow—and indeed encourage—schools to sell themselves on any basis that appeals to parents. In Britain, this competition has at times been taken to its logical extreme: the hawking of education as though it were no different from any other consumer good. One school in central England, for example, offered a discount on shower units as an inducement to parents to enroll their children.¹⁴⁴

D. Lesson #4: The Potential for Segregation

Some choice proponents seem to accept on faith the proposition that a market approach will not exacerbate existing segregation.¹⁴⁵ In particular, they contend that civil rights laws will guarantee equal access to schools in a

¹⁴². See PRESIDENT'S COMM'N ON PRIVATIZATION, supra note 91, at 94.
¹⁴⁴. See Chira, supra note 99, at A1. Indeed, Madison Avenue thinking has begun to inject itself into choice theorists' accounts of how to promote schools in an educational market. One educator gives the following advice for how to choose a name for an alternative school:

School names should describe schools, not students, and let those themes and purposes attract natural constituencies. There is a strong pull to label students when describing alternative schools. “Oh that’s the school for Special Ed kids,” or “That’s the school for drop-outs.” Educators should not make that mistake. Imagine if the beverage industry advertised diet cola as the cola for fat people. Sales would plummet!

Rosanne Wood, SAIL: A Pioneer for Schools of Choice in Florida, in PUBLIC SCHOOLS BY CHOICE, supra note 3, at 190; see also Mark Walsh, Demographic Trends, Economy Spur Private Schools to Expand Marketing, EDUCATION WEEK, Dec. 4, 1991, at 8 (describing increased use of print and broadcast advertising to promote private schools).
¹⁴⁵. See, e.g., KIRKPATRICK, supra note 4, at 89; CHUBB & MOE, supra note 1, at 221.
choice regime. This reasoning is flawed in two respects. First, civil rights laws do not reach all of the kinds of segregation with which a democratic society must be concerned. Second, the Choctaw County experience shows that even when practices are prohibited by law, current civil rights enforcement will not necessarily prevent discrimination from occurring.

Although the Supreme Court has expressly held that private schools are covered by civil rights laws, there are many kinds of discrimination that such laws do not reach. These schools are still free to select students on the basis of social class, parental contacts, ability to pay, and other such non-covered factors. Choice models thus threaten to divide students in many ways that are not legally prohibited, but that are nevertheless troubling in a democratic society.

Moreover, although racial discrimination by private schools is expressly prohibited by law, current conditions in Choctaw County reveal the gap between anti-discrimination principles and practice. Choctaw County's two private schools—like many throughout the South—have never accepted a black student despite the large number of blacks who live in the county. As one commentator explains:

It was evident in 1973 . . . and . . . [i]t remains true today that the segregation academies are a key element in a new dual system of schools—one, white and private; the other, disproportionately black and public. The academies clearly threaten to frustrate the national goal of banishing racial segregation from the classroom.

Despite this pattern of exclusion, no civil rights action has been filed against the schools. The ability of the private schools to maintain an all-white student body should give pause to those who assert that existing civil rights laws will ensure that choice does not operate in a racially discriminatory manner.

**CONCLUSION**

Throughout American history, education has played an almost mythic role in the life of the nation. Basic to the American ethos is the belief that education has a unique capacity to transform individuals and allow them to improve themselves and society generally. For any system of education to live up to this democratic ideal, it must offer quality education on an equal basis to all. As Horace Mann cautioned almost a century and a half ago, “[i]f one class possesses all the wealth and the education, while the residue of society is ignorant and poor, it matters not by what name the relation between them may

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147. In many counties in the South, a significant portion of the population was unable to pay the tuition charged by the private academies. See BOB SMITH, THEY CLOSED THEIR SCHOOLS: PRINCE EDWARD COUNTY, VIRGINIA, 1951-1964, at 250-51 (1965) (describing limited access of poor whites to private schooling in Prince Edward County, Va.).
148. Affidavit of Jerome C. Hafter, supra note 21, at ¶ 34.
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be called; the latter, in fact and in truth, will be the servile dependents and subjects of the former."149

Whatever their promise, parental choice plans have the capacity to do harm to the American educational ideal by producing a kind of dual school system that Horace Mann warned about and that now exists in Choctaw County. The burden on educational reformers is to ensure that parental choice does not increase the educational options of some by diminishing the opportunities available to the system’s most disadvantaged students.

149. MANN, supra note 136, at 86.