

# **“Schoolhouse Block”: Why the Arkansas Public School Choice Act Should Be Improved but Not Eliminated\***

## I. INTRODUCTION

Imagine that you are a high school student living with your parents in Arkansas. You currently attend school in the district in which you reside, but you would like to transfer to another district because it offers the Advanced Placement courses that appeal to college admissions officers. However, you are told you cannot transfer because granting your transfer request would result in a net decrease in enrollment at your resident district that is greater than the 3% cap on such changes in enrollment.<sup>1</sup> Sounds arbitrary, right? Because it is.

School choice has an interesting history in the State of Arkansas. A new chapter of this history developed when the Public School Choice Act of 2013 (the “2013 Act”) was passed.<sup>2</sup> This Act was passed after a federal court invalidated the Arkansas Public School Choice Act of 1989 (the “1989 Act”)<sup>3</sup> because it limited the ability of a student to “transfer to a nonresident district where the percentage of enrollment for the student’s race exceed[ed] that percentage in his resident district.”<sup>4</sup> This racial restriction violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and the 1989 Act was ruled unconstitutional.<sup>5</sup>

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\* The author thanks Mark. R. Killenbeck, Wylie H. Davis Distinguished Professor of Law, University of Arkansas School of Law, for his guidance and learned insight during the drafting of this comment. The author also expresses his deep gratitude to Mark Daven, John Damron, Micah Goodwin, and Christoph Keller for the long nights they spent editing this comment.

1. ARK. CODE ANN. § 6-18-1906(c)(1)(A) (Repl. 2013).

2. See Act 1227, 2013 Ark. Acts 5019 (codified at ARK. CODE ANN. §§ 6-18-1901 to -1908 (Repl. 2013)).

3. See Act 609, 1989 vol. II Ark. Acts 1346 (codified at ARK. CODE ANN. § 6-18-206 (Repl. 1993)), *invalidated by* Teague *ex rel.* T.T. v. Ark. Bd. of Educ., 873 F. Supp. 2d 1055, 1069 (W.D. Ark. 2012).

4. See ARK. CODE ANN. § 6-18-206(g)(1) (Repl. 1993) (repealed 2013).

5. Teague *ex rel.* T.T., 873 F. Supp. 2d at 1069.

In 2013, the Arkansas General Assembly sought to replace the 1989 Act with a measure that was both constitutional and provided students with the right to choose the best school for their needs. To accomplish this, the 2013 Act did not contain the racial “quotas” that were included in its 1989 predecessor; instead, it “established a numerical net maximum limit on school choice transfers” from the district “of not more than three percent (3%) of the school district’s three-quarter average daily membership.”<sup>6</sup>

The Arkansas General Assembly will soon be forced to deal with this topic again when the 2013 Act expires on July 1, 2015.<sup>7</sup> According to the bill’s sponsor, State Senator Johnny Key, the measure was only authorized for two years so lawmakers can amend the Act as necessary following a ruling by the Eighth Circuit Court of Appeals.<sup>8</sup> The built-in expiration date ensures the school choice debate will arise again, regardless of the law’s effectiveness.

Part II of this comment reviews the case law with which school choice laws must comply and explains why events in Arkansas’s history have made this issue such a difficult one to address. Part III reviews the development of the 2013 Act in order to give the reader a sense of the most practical approach for Arkansas. Part IV reviews the other options that are available to Arkansas students seeking to transfer out of their resident district. Part V considers the merits of competing theories regarding the implementation of school choice laws. Part VI argues that the best approach to school choice is one that requires a student to articulate a legitimate academic reason for leaving his or her resident district. Lastly, Part VII reiterates the best approach and calls the Arkansas General Assembly to action.

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6. ARK. CODE ANN. § 6-18-1906(c)(1)(A) (Repl. 2013).

7. See ARK. CODE ANN. § 6-18-1908 (Repl. 2013) (“The provisions of this subchapter shall remain in effect until July 1, 2015.”).

8. Rob Moritz, *Senate Panel Endorses School Choice Bill*, ARK. NEWS (Mar. 27, 2013, 12:42 PM), <http://arkansasnews.com/sections/news/senate-panel-endorses-school-choice-bill.html>.

## II. THE HISTORY OF SCHOOL CHOICE AND THE GOVERNMENT'S USE OF RACE

In order to understand why the 1989 Act was ruled unconstitutional, one must first review the case law that laid the framework for the government's use of race to further its interests. Such an analysis is made even more difficult by the fact that school choice laws are a divisive issue in Arkansas due to the "tumultuous history" of racial segregation.<sup>9</sup> As such, any suggested improvements in the law must follow a discussion of relevant case law and history.

### A. The Impact of the Court's Decision in *Brown*

Arkansas had a long-standing history of segregation in education that continued until 1954.<sup>10</sup> In *Brown v. Board of Education of Topeka*,<sup>11</sup> the United States Supreme Court overturned the "separate but equal" doctrine from *Plessy v. Ferguson*<sup>12</sup> and determined that segregation "ha[d] no place" in public education.<sup>13</sup> In 1955, the Court revisited the decision in *Brown* because school districts in a number of states were reluctant to participate in desegregation efforts.<sup>14</sup> This second decision, *Brown II*, underscored the importance of the issue by demanding desegregation "with all deliberate speed."<sup>15</sup> The Court decided *Brown* and *Brown II* in accordance with its 1944 ruling in *Korematsu v. United States*.<sup>16</sup> *Korematsu* is a seminal case with respect to the government's use of racial restrictions because the Court took the stance "that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and should be subjected "to the most rigid

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9. See Haley Heath, Comment, *Maintaining Diversity After Parents Involved: Supreme Court Precedent Renders Arkansas's School Choice Statute Unconstitutional, and the State Should Respond by Abolishing School Choice*, 63 ARK. L. REV. 321, 348-49 (2010).

10. See *id.* at 348.

11. 347 U.S. 483 (1954).

12. 163 U.S. 537 (1896).

13. *Brown*, 347 U.S. at 494-95.

14. See *Brown v. Bd. of Educ. of Topeka (Brown II)*, 349 U.S. 294 (1955). This case was issued one year after *Brown* because a number of states had not taken an active role in carrying out desegregation efforts. As the Court stated, "it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Id.* at 300.

15. *Id.* at 301.

16. 323 U.S. 214 (1944).

scrutiny.”<sup>17</sup> These cases demonstrated the Court’s shift towards more active participation in America’s troubled history of race relations.

After the United States Supreme Court’s decision in *Brown*, the push for integration of Arkansas’s public schools encountered significant resistance. During the state’s 1956 general election, the proposal that ultimately became amendment 44 to the state constitution was passed by a vote of 56% in favor to 44% opposed.<sup>18</sup> This amendment demanded that the Arkansas General Assembly “take appropriate action and pass laws opposing . . . the Un-Constitutional desegregation decisions of May 17, 1954 and May 31, 1955 of the United States Supreme Court.”<sup>19</sup> The amendment demonstrated the goal of many lawmakers and Arkansas citizens to blatantly disregard the Court’s decisions in *Brown* and *Brown II*.

Arkansas attempted to further this interposition of the law in 1957, when “then-Governor Orval Faubus order[ed] the Arkansas National Guard to prevent the nine African-American children who desired to attend [Little Rock] Central High from doing so.”<sup>20</sup> In response, President Eisenhower sent federal troops and national guardsmen to protect the students for the remainder of the school year.<sup>21</sup> In the litigious aftermath that followed, the United States Supreme Court ruled that racial segregation could not coexist with “the concept of due process of law.”<sup>22</sup> Old notions of “separate but equal” bore no weight with the Court, which held in *Cooper v. Aaron* that “[s]tate support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment’s command that no State shall deny to any person within its jurisdiction the equal protection of the laws.”<sup>23</sup>

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17. *Id.* at 216.

18. See ARK. SEC’Y OF STATE, HISTORICAL INITIATIVE AND REFERENDA ELECTION RESULTS 5 (n.d.), available at <http://www.sos.ar.gov/elections/Documents/Initiatives%20and%20Amendments%201938-2012.pdf>.

19. ARK. CONST. amend. 44 (repealed 1990).

20. Heath, *supra* note 9, at 348.

21. See 358 U.S. 1, 12 (1958) (recounting many of the facts of the crisis at Little Rock Central High School).

22. *Id.* at 19.

23. *Id.*

Governor Faubus's action was not the only example of resistance to the integration demanded by the Court in *Brown*. In 1959, the Arkansas General Assembly passed two measures that demonstrated further resistance to integration. The first piece of legislation passed was a pupil assignment law.<sup>24</sup> This law stated, in part, "no child shall be compelled to attend any school in which the races are commingled when a written objection of the parent or guardian has been filed with the Board of Education."<sup>25</sup> The same year, the legislature also passed Act 275, a measure that allowed school districts to contract with other districts to transfer not only students from district to district but also the pro rata share of state funds allocable to each student as well.<sup>26</sup> Enactment of these laws unequivocally demonstrated the lengths that some political leaders in Arkansas were willing to go in order to resist desegregation.

The nation experienced a delay in the desegregation of its schools when other state governments employed tactics similar to those used by Governor Faubus.<sup>27</sup> It became clear that the United States Supreme Court's vision of the desegregation process was not coming to fruition. Ten years after *Brown*, less than 3% of African-American children in the South attended desegregated schools.<sup>28</sup> The Civil Rights Act of 1964 contained certain provisions that attempted to rectify this issue. For example, Title VI of the Act provides, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."<sup>29</sup> Title VI effectively required the Department of Health, Education, and

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24. See Act 461, 1959 Ark. Acts 1827.

25. See Act 461, § 8, 1959 Ark. Acts 1827, 1831.

26. Act 275, 1959 Ark. Acts 1337, 1337-38.

27. See *Civil Rights 101: School Desegregation and Equal Educational Opportunity*, LEADERSHIP CONF., <http://www.civilrights.org/resources/civilrights101/desegregation.html> (last visited Nov. 20, 2014) ("In one prominent example, Prince Edward County, Virginia, abandoned its entire public school system, leaving education to private interests that excluded African American children from their schools. Many African American children were essentially locked out of school for several years until the Supreme Court ruled Virginia's action unconstitutional.")

28. Comment, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321, 321-22 (1967).

29. 42 U.S.C. § 2000d (2012).

Welfare to monitor schools in the United States.<sup>30</sup> If schools failed to comply, they would lose federal funding.<sup>31</sup>

As Congress took steps to encourage desegregation, judicial decisions moved in the same direction. In *United States v. Jefferson County Board of Education*,<sup>32</sup> the Fifth Circuit Court of Appeals stated that schools should take steps “to undo the harm . . . created and fostered” by segregation.<sup>33</sup> The court ordered the schools “to devote every effort towards initiating desegregation and bringing about the elimination of racial discrimination in the public school system.”<sup>34</sup> Following that decision, the United States Supreme Court struck down an open school choice plan in *Green v. County School Board of New Kent County*,<sup>35</sup> holding that in the interest of desegregation, school boards have to develop desegregation “plan[s] that promise[] realistically to work, and promise[] realistically to work now.”<sup>36</sup> In *Raney v. Board of Education of Gould School District*,<sup>37</sup> an Arkansas case before the nation’s highest court, another freedom of choice desegregation plan was deemed unconstitutional when the Court ruled against the Gould School District for maintaining a system of “totally segregated” schools located blocks apart.<sup>38</sup> After three years of operating these purportedly desegregated schools with no geographic attendance policy, the schools remained segregated, with some schools remaining entirely African American and the others “almost all white.”<sup>39</sup> Despite the open school choice plan allowing residents to take their children to whichever school they wanted, the Court condemned the school district for “remain[ing] a dual system” because “the plan ha[d] operated simply to burden

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30. *The Courts, HEW, and Southern School Desegregation*, *supra* note 28, at 322.

31. *Id.*

32. 372 F.2d 836 (5th Cir. 1966).

33. *Id.* at 868.

34. *Id.* (quoting *Cooper v. Aaron*, 358 U.S. 1, 7 (1958)) (internal quotation mark omitted).

35. 391 U.S. 430 (1968).

36. *Id.* at 439.

37. 391 U.S. 443 (1968).

38. *Id.* at 445.

39. *Id.* at 445-46.

children and their parents with a responsibility which *Brown II* placed squarely on the School Board."<sup>40</sup>

The Court's decision in *Raney* demonstrated an unwillingness to allow states to establish effectively segregated school systems merely because the states were not actively encouraging segregation. This mindset was bolstered by the Court's decision in *Norwood v. Harrison*,<sup>41</sup> a case involving a Mississippi statutory scheme in which the state purchased textbooks and loaned them to both public and private schools.<sup>42</sup> The program did not discern whether the participating private schools had policies that discriminated on the basis of race.<sup>43</sup> The Court stated, "[w]hen, as here, that necessary expense is borne by the State, the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination."<sup>44</sup> Further, "[r]acial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'"<sup>45</sup> *Norwood* further clarified the principle that not only should government refrain from facilitating racial discrimination, it should also be prohibited from allocating resources in a way that encourages private citizens to do so through their choices.<sup>46</sup>

### B. The Government's Use of Race and the Standard of Review

In the years following *Brown*, desegregation efforts pushed forward while the use of race by the government continued to be a difficult issue to address. Following the Court's decision in *Korematsu*, there was no definite answer to the question of whether strict scrutiny should be applied when the government's

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40. *Id.* at 447-48. The Court was referencing its mandate in *Brown II* for school districts to desegregate "with all deliberate speed." See *Brown II*, 349 U.S. 294, 301 (1955).

41. 413 U.S. 455 (1973).

42. *Id.* at 456.

43. *Id.*

44. *Id.* at 464-65.

45. *Id.* at 465 (second alteration in original) (quoting *Lee v. Macon Cnty. Bd. of Educ.*, 267 F. Supp. 458, 475-76 (M.D. Ala. 1967)).

46. See *Norwood*, 413 U.S. at 464-65.

use of race did not harm minority groups.<sup>47</sup> *Regents of the University of California v. Bakke*<sup>48</sup> was a split decision involving a policy at a California medical school that imposed a minimum grade point average on applicants, but the policy did not always apply the requirement when evaluating applications from “disadvantaged” minority groups.<sup>49</sup> Despite the fact that the motive behind this policy was to help, not harm, minority students within the student body, the Court ruled the admissions program unconstitutional.<sup>50</sup> Commentators have noted that while “‘the attainment of a diverse student body’ [is] a compelling state interest,” the particular admission program used by the university “was not narrowly tailored to this compelling state interest.”<sup>51</sup>

Ultimately, the Court did not agree that strict scrutiny should apply to *all* governmental uses of race. While Justice Powell’s plurality opinion in *Bakke* supported the use of strict scrutiny, four Justices argued that this standard should not apply to the government’s use of race when such use is “designed to further remedial purposes.”<sup>52</sup> Even though this particular use of race by a governmental entity was found to be unconstitutional, the language in *Bakke* indicates that there are instances in which race-based classifications would be constitutionally permissible.<sup>53</sup>

The issue of whether strict scrutiny should be applied to the government’s use of race for remedial purposes became even more muddled when the Court handed down its decision in *Fullilove v. Klutznick*.<sup>54</sup> The case involved the “minority business enterprise” provision of the Public Works Employment Act of 1977.<sup>55</sup> The provision required at least 10% of the

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47. Heath, *supra* note 9, at 327.

48. 438 U.S. 265 (1978).

49. *Id.* at 274-75.

50. *See id.* at 319.

51. William Q. Lowe, Comment, *Understanding Race: The Evolution of the Meaning of Race in American Law and the Impact of DNA Technology on its Meaning in the Future*, 72 ALB. L. REV. 1113, 1131 (2009) (footnotes omitted) (quoting *Bakke*, 438 U.S. at 311).

52. *Bakke*, 438 U.S. at 358-59 (Brennan, White, Marshall, Blackmun, JJ., concurring in part and dissenting in part).

53. *See* Lowe, *supra* note 51, at 1131 (noting “two current permissible uses of race-based classifications”).

54. 448 U.S. 448 (1980) (plurality opinion).

55. *Id.* at 453-54.

federal funds granted for local public works projects to be used "to procure services or supplies from businesses owned and controlled by members of statutorily identified minority groups."<sup>56</sup> The Court upheld this provision but refused to articulate the proper standard of review that should be applied to the government's use of race for remedial purposes.<sup>57</sup>

The Court avoided deciding this issue yet again in *Wygant v. Jackson Board of Education*,<sup>58</sup> despite holding that a school board's procedure "of laying off nonminority teachers with greater seniority in order to retain minority teachers with less seniority" violated the Fourteenth Amendment.<sup>59</sup> *Bakke*, *Fullilove*, and *Wygant* created great confusion—*Bakke* and *Wygant* condemned the government's use of race in a benign manner with respect to minorities, while *Fullilove* upheld it. None of these cases, however, made a definite declaration as to the standard of review that should be applied to such uses of race.

This issue became much clearer in 1989, when the Court agreed with the plurality in *Wygant* "that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."<sup>60</sup> The Court erased all doubt as to the proper standard when it ruled in *Adarand Constructors, Inc. v. Peña*<sup>61</sup> "that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."<sup>62</sup> Justice O'Connor, writing for the Court, stated, "such classifications are constitutional only if they are narrowly tailored measures that further compelling

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56. *Id.* at 453.

57. *See id.* at 491-92 ("[O]ur analysis demonstrates that the MBE provision would survive judicial review under either 'test' articulated in the several *Bakke* opinions.")

58. 476 U.S. 267 (1986) (plurality opinion).

59. *Id.* at 282-84. The Court avoided articulating the standard of review to be applied to the government's use of race. The majority reprimanded the application of a "reasonableness" standard by the Sixth Circuit Court of Appeals, iterating that the "standard has no support in the decisions of this Court." *Id.* at 279. The Court continued, "our decisions always have employed a more stringent standard—however articulated—to test the validity of the means chosen by a State to accomplish its race-conscious purposes." *Id.*

60. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989).

61. 515 U.S. 200 (1995) (plurality opinion).

62. *Id.* at 227.

governmental interests.”<sup>63</sup> This holding did not settle the issue, but it did set the framework for the standard that must be applied to the government’s use of race in the context of school choice.

### C. The Effect of *Parents Involved*

The Court’s 2007 decision in *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>64</sup> spelled doom for Arkansas’s 1989 Act. The case evaluated the validity of the school choice policies of school districts in Seattle, Washington and Jefferson County, Kentucky.<sup>65</sup> The Seattle schools used racial classifications as a “tiebreaker” in order to decide which students could attend certain nonresident districts.<sup>66</sup> The school district in Kentucky set minimum and maximum minority percentages for assignment to its elementary schools and limited transfers in the same manner.<sup>67</sup> After applying strict scrutiny to these racial allocations, the Court ruled that both systems were unconstitutional.<sup>68</sup> The Court ignored the districts’ arguments regarding the beneficial nature of these systems, holding that the policies were “not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity.”<sup>69</sup> In his concurring opinion, Justice Kennedy advised school administrators of their options:

If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion *solely on the basis of a systematic, individual typing by race*.<sup>70</sup>

The ruling, and Justice Kennedy’s concurrence, had lasting implications for the State of Arkansas. Because the 1989 Act forced districts to treat a nonresident transfer differently based

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63. *Id.*

64. 551 U.S. 701 (2007).

65. *Id.* at 709-10.

66. *Id.* at 711-12.

67. *Id.* at 716-17.

68. *See id.* at 732-35.

69. *Parents Involved*, 551 U.S. at 726.

70. *Id.* at 788-89 (Kennedy, J., concurring) (emphasis added).

solely on his or her race and the racial composition of the nonresident district, the Act was directly at odds with the Court’s holding.

#### D. The 1989 Act Tested in Court

In the 2008 Arkansas case *Hardy v. Malvern School District*,<sup>71</sup> the 1989 Act was finally challenged in court. During the 2007–2008 school year, at least 300 students living in the Malvern School District were “illegally” attending neighboring districts.<sup>72</sup> After the school district unsuccessfully threatened a number of these students with fines, their parents, who were unable to legally transfer them because of the school choice statute, sued the district.<sup>73</sup> The parents argued that the 1989 Act was a racial classification subject to strict scrutiny and did not further a compelling government interest.<sup>74</sup> The district disputed these claims, arguing that the statute should not be subjected to strict scrutiny because it was race neutral and, even if strict scrutiny did apply, the Act survived that test because it sought to remedy the effects of past segregation.<sup>75</sup>

In light of *Parents Involved* and the ongoing litigation in *Hardy*, the Arkansas General Assembly indicated that it would address the issue during the 2009 legislative session.<sup>76</sup> However, no action was taken because legislators decided to wait until after *Hardy* was decided in order to use the ruling to develop new legislation.<sup>77</sup> The legislative fix was delayed further when *Hardy* was dismissed before the court could reach the merits of the case.<sup>78</sup>

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71. Civ. No. 08-6094, 2010 WL 956696 (W.D. Ark. Mar. 16, 2010).

72. *Id.* at \*2.

73. *Id.*

74. Response to Brief in Support of Motion for Summary Judgment and Judgment on the Pleadings Filed by Independent Defendant Malvern School District at 6-7, *Hardy*, 2010 WL 956696 (W.D. Ark. Mar. 16, 2010) (Civ. No. 08-6094).

75. Malvern School District’s Memorandum Reply to Plaintiffs’ Response to Malvern School District’s Motion for Summary Judgment and Judgment on the Pleadings at 7-8, *Hardy*, 2010 WL 956696 (W.D. Ark., Mar. 16, 2010) (Civ. No. 08-6094).

76. Heath, *supra* note 9, at 326.

77. *Id.*

78. *See Hardy*, 2010 WL 956696, at \*9 n.12 (dismissing case because of improper defendants).

In 2012, this issue was finally visited in full in *Teague ex rel. T.T. v. Arkansas Board of Education*,<sup>79</sup> when several families applied to transfer their white children from the racially diverse Malvern School District to a predominantly white school district in nearby Magnet Cove.<sup>80</sup> They tried to accomplish this nonresident transfer in accordance with the 1989 Act, but their request was denied because the Act stated, in part, “[n]o student may transfer to a non-resident district where the percentage of enrollment for the student’s race exceeds that percentage in the student’s resident district.”<sup>81</sup>

After the transfer requests were rejected, the parents filed suit against the Arkansas Board of Education and the Arkansas Department of Education, seeking, *inter alia*, a declaratory judgment that portions of the 1989 Act violated the Equal Protection Clause of the Fourteenth Amendment.<sup>82</sup> The Magnet Cove School District argued that the Act had been passed by legislators that recognized the need to repeal and replace laws that “ha[d] their roots in the segregative practices of the 1950s.”<sup>83</sup> Therefore, the defendants reasoned that the racial restrictions of the 1989 Act were a vital part of that plan that could not be separated.<sup>84</sup> Using *Parents Involved* as precedent, a federal district court reasoned the Act did not survive the required strict scrutiny because its “blanket rule on inter-district transfers based solely on percentages of minority students in a school district directly contradict[ed] the Legislature’s stated goal of permitting students to choose from among different schools with differing assets that meet their individual needs.”<sup>85</sup> The court went on to declare that subsection (f)(1) was not severable from the rest of the 1989 Act, and therefore, the 1989

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79. 873 F. Supp. 2d 1055 (W.D. Ark. 2012), *vacated by* *Teague v. Cooper*, 720 F.3d 973 (8th Cir. 2013). It is worth noting that the named plaintiffs in *Teague* included Ron and Kathy Teague and Rhonda Richardson, three of the same parents involved in the litigation in *Hardy*.

80. *Id.* at 1061.

81. *Id.* at 1059, 1061 (quoting ARK. CODE ANN. § 6-18-206(f)(1) (Repl. 2009) (repealed 2013)).

82. *Id.* at 1057.

83. Brief of the Magnet Cove Defendants–Appellees and the Intervenor–Appellees at 40 n.9, *Teague*, 720 F.3d 973 (8th Cir. 2013) (Nos. 12-2413, 12-2418) (quoting Act 950, § 5, 1989 vol. II Ark. Acts 2425, 2525)) (internal quotation mark omitted).

84. *Id.* at 48.

85. *Teague ex rel. T.T.*, 873 F. Supp. 2d at 1066.

Act was unconstitutional in its entirety.<sup>86</sup> In addition, the court denied the parents' petition for injunctive relief to transfer their children.<sup>87</sup> Both sides appealed.

### III. LEGISLATIVE RESPONSE

The district court's decision in *Teague* threw school choice in Arkansas into a state of limbo.<sup>88</sup> Despite the fact that United States District Judge Robert Dawson stayed his ruling pending both parties' appeals to the Eighth Circuit,<sup>89</sup> it was clear that school choice in Arkansas would have to change. As the battle in *Teague* raged on, the Arkansas General Assembly decided the time had come to rewrite the state's school choice statute. To give the legislature some instruction, Judge Dawson posited, "[t]he State must employ a more nuanced, individualized evaluation of school and student needs, which, while they may include race as one component, may not base enrollment or transfer options solely on race."<sup>90</sup>

#### A. The 2013 Act

In an attempt to rectify the problem, three school choice bills developed in the legislature. The first bill, Senate Bill 65, was introduced by State Senator Johnny Key, the chair of the Senate Education Committee.<sup>91</sup> State Senator Key's earliest bill would have allowed a student one unrestricted school transfer per school year, while removing all of the racial restrictions on nonresident transfers contained in the 1989 Act.<sup>92</sup>

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86. *Id.* at 1069.

87. *Id.*

88. See *Teague v. Cooper*, 720 F.3d 973, 978 (8th Cir. 2013) (appellate decision) ("Without question, the General Assembly will need to address these difficult issues again in 2015 . . . ."); *School Choice Puts Parents, Students in Limbo*, KATV.COM (last updated June 15, 2012, 5:03 PM), <http://www.katv.com/story/18794267/school-choice-puts-parents-students-in-limbo> ("Since a federal judge's ruling put a freeze on any school choice application's [sic] [an Arkansas mother's] filing will have to wait.").

89. Max Brantley, *Judge Stays School Choice Ruling*, ARK. BLOG (June 22, 2012, 5:00 PM), <http://www.arktimes.com/ArkansasBlog/>.

90. *Teague* ex rel. *T.T.*, 873 F. Supp. 2d at 1068.

91. See S.B. 65, 89th Gen. Assemb., Reg. Sess. (Ark. 2013); see also *Senator Johnny Key*, ARK. STATE LEGISLATURE, <http://www.arkleg.state.ar.us/assembly/2013/2013R/Pages/MemberProfile.aspx?member=J.%20Key> (last visited Nov. 20, 2014) (noting State Senator Key's membership on the House Education committee).

92. S.B. 65, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

Ultimately, State Senator Key's bill was passed and signed into law as Act 1227 on April 16, 2013.<sup>93</sup> However, the law only passed after significant qualifications had been added.<sup>94</sup> As originally introduced, Senate Bill 65 removed the racial restrictions that rendered the 1989 Act unconstitutional, but it did nothing to limit students' ability to transfer out of a district, which prompted "fear it would lead to rapid resegregation."<sup>95</sup> In response, State Senator Key and State Representative Les Carnine amended the bill, inserting statutory language that capped nonresident transfers at "three percent (3%) of the school district's three-quarter average daily membership for the immediately preceding school year."<sup>96</sup> Moreover, the bill was amended to contain a provision requiring the Arkansas Department of Education to collect data to determine the effects of the law on school transfers.<sup>97</sup>

### B. Competing Bills

Before State Senator Key's bill was altered and passed, State Senator Joyce Elliott introduced her own school choice bill. Essentially, Senate Bill 114 would have allowed students to transfer to nonresident districts and permitted schools to opt out of the choice program in the interest of avoiding racial resegregation.<sup>98</sup> More precisely, the legislation stated that the benefits of school choice justified allowing a student to transfer to a nonresident district except in circumstances which:

- (i) Conflict with a federal remedial desegregation order or plan;
- (ii) Adversely affect the desegregation of either public school district;
- (iii) Promote the *resegregation* or desegregation of either public school district; or
- (iv)

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93. Act 1227, 2013 Ark. Acts 5019 (codified at ARK. CODE ANN. § 6-18-1901 to -1908 (Repl. 2013)); *see also* Rob Moritz, *Beebe Signs School Choice Bill into Law*, ARK. NEWS (Apr. 16, 2013, 6:57 PM), <http://arkansasnews.com/sections/news/beebe-signs-school-choice-bill-law.html> (noting the legislation's enactment).

94. Steve Brawner, *School Choice Bill Passes Senate Education Committee*, TALK BUS. & POL., (Mar. 27, 2013), <http://talkbusiness.net/2013/03/school-choice-bill-passes-senate-education-committee/>.

95. *Id.*

96. S.B. 65 amend. 1, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

97. S.B. 65 amend. 1, 89th Gen. Assemb., Reg. Sess.

98. S.B. 114, 89th Gen. Assemb., Reg. Sess. (Ark. 2013); *see also* Steve Brawner, *Parental Rights, Race in School Choice Debate*, ARK. NEWS, (Feb. 17, 2013, 1:00 AM), <http://arkansasnews.com/sections/columns/news/steve-brawner-parental-rights-race-school-choice-debate.html> (discussing the legislation).

Interfere with measures designed to eliminate the vestiges of the state's prior dual system of education.<sup>99</sup>

Citing *Green v. County School Board of New Kent County*,<sup>100</sup> the legislative findings section of the bill noted "the state's obligation to create and maintain a unitary, nonracial system of public education."<sup>101</sup>

Of further interest in State Senator Elliott's bill was the recurring theme that school choice is proper when it satisfies a student's "demonstrated, individual educational needs."<sup>102</sup> This language is important because, when read in conjunction with the responsibility of individual school boards to "adopt specific standards for accepting or denying a public school choice application,"<sup>103</sup> it indicates that State Senator Elliott was trying to substitute an education-based consideration for the unconstitutional racial restrictions included in the 1989 Act. Under State Senator Elliott's bill, the nonresident district would have "ma[de] the decision about whether there [was] an educational need that justify[ed] a child choosing the receiving school district."<sup>104</sup> This focus on educational considerations represents a factor that can be used in lieu of race during transfers under the proposed law.

The third school choice bill was introduced by State Representative Kim Hammer. House Bill 1181 would have implemented school choice, subject to restrictions on a student's ability to transfer to a nonresident district, based on factors such as academic distress of the resident district, fiscal distress of the resident district, and the percentage of students at the nonresident district that received national school lunch funds.<sup>105</sup> House Bill 1181 never became law. State Representative Hammer, however, was instrumental in the passage of Act 1334, which allows students and their siblings who had transferred under the now-unconstitutional 1989 Act to remain in the

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99. S.B. 114, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

100. 391 U.S. 430 (1968).

101. S.B. 114, 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (quoting *Green*, 391 U.S. at 436) (internal quotation marks omitted).

102. S.B. 114, 89th Gen. Assemb., Reg. Sess.

103. S.B. 114, 89th Gen. Assemb., Reg. Sess.

104. *The Ballad of the Two Competing Public School Choice Bills*, U. ARK. OFF. FOR EDUC. POL'Y (Feb. 28, 2013, 2:40 PM), <http://officeforeducationpolicy.com/2013/02/28/the-ballad-of-the-two-competing-public-school-choice-bills/>.

105. H.B. 1181, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

district to which they transferred in order to complete their education.<sup>106</sup> Further, the siblings of these students now may transfer to the nonresident district as long as the students that transferred under the 1989 Act still attend the nonresident district.<sup>107</sup>

### C. Expiration of the 2013 Act

The passage of the 2013 Act not only revived public school choice as a statutory option in Arkansas, but it also put ongoing litigation to rest.<sup>108</sup> Once the Act was passed, the Eighth Circuit Court of Appeals ruled the *Teague* lawsuit moot.<sup>109</sup> However, the issue of how school choice should be implemented is far from settled because of the Act's built-in expiration date of July 1, 2015.<sup>110</sup> According to State Senator Key, the expiration date will allow the Arkansas General Assembly to review the Act's

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106. Act 1334, § 1, 2013 Ark. Acts 5591, 5592 (codified at ARK. CODE ANN. § 6-18-108 (Repl. 2013)).

107. See ARK. CODE ANN. § 6-18-108(c) (Repl. 2013).

108. However, great controversy quickly arose due to an internal conflict in the Public School Choice Act. See Lynda Altman, *Arkansas Senate Endorses School Choice Bill*, EXAMINER (Mar. 28, 2013, 1:02 PM), <http://www.examiner.com/article/arkansas-senate-endorses-school-choice-bill>. Ostensibly, the Arkansas General Assembly intended to pass legislation that would allow school transfers in time for the 2013–2014 school year. Under the current law, a school district subject to a desegregation order must notify the Arkansas Department of Education by April 1 that it intends to opt-out for the following year. See ARK. CODE ANN. § 6-18-1906(b)(3) (Repl. 2013). However, the new law did not go into effect until April 16, 2013, fifteen days after the required date for schools to request an exemption for the 2013–2014 academic year. See Act 1227, § 6, 2013 Ark. Acts 5019, 5035-36 (“Emergency Clause”). Fortunately, the statute provides that “[t]he State Board of Education may promulgate rules to implement” the new law. ARK. CODE ANN. § 6-18-1907(a) (Repl. 2013). To that end, the Arkansas Department of Education sent out an informational memorandum addressing the issue, which appeared to extend the deadline to May 17, 2013. See *Stevenson v. Blytheville Sch. Dist.* No. 5, 955 F. Supp. 2d 971, 977 (E.D. Ark. 2013) (describing the memorandum). A number of schools notified the Arkansas Department of Education that they planned to opt-out under the provisions of the new law. *Id.* At the center of the controversy was the Blytheville School District, where a number of parents and grandparents with children and grandchildren wishing to transfer sued the district, alleging that it had missed the April 1 deadline for exemption. See *id.* at 974-75. They argued that the district could not “use its past racial segregation as a reason to deny plaintiffs and their children the benefits of the education-reform measures established by this 2013 Act.” *Id.* at 976 (internal quotation marks omitted). A federal judge denied the plaintiffs’ motion for an injunction that would have allowed their children to transfer, and plaintiffs appealed. *Id.* at 987. This appeal was later dismissed as moot because the school year in question had passed. See *Stevenson v. Blytheville Sch. Dist.* No. 5, 762 F.3d 765, 769-70 (8th Cir. 2014).

109. *Teague v. Cooper*, 720 F.3d 973, 978 (8th Cir. 2013).

110. See ARK. CODE ANN. § 6-18-1908 (Repl. 2013).

effectiveness and make the proper changes.<sup>111</sup> The fact that the Arkansas General Assembly must address this issue provides the perfect opportunity to improve upon existing school choice laws.

#### IV. ALTERNATIVE FORMS OF SCHOOL CHOICE IN ARKANSAS

It is worth noting that the 2013 Act is not the only mechanism by which a student in Arkansas may attend a nonresident school. Students who have transferred to a nonresident district under the provisions of the 1989 Act may continue their education at the same school.<sup>112</sup> Siblings of students that transferred under the 1989 Act also may transfer to the district in which their sibling attends school as long as the sibling is still attending school in the nonresident district at that time.<sup>113</sup> Further, if a student's parent lived on an undivided tract of land located partially in one district and partially in another for ten years or more prior to August 13, 2001, then that student can attend school in either district "regardless of the location of the home on the property."<sup>114</sup> A student can also attend a nonresident district if one of his or her parents has worked at a school, or in the office of an education service cooperative located in that district, before April 1, 2009.<sup>115</sup> The child of a parent who works for the Department of Correction and lives, or will live, on department property, may complete his or her education in the school district in which they are enrolled at the time the parent or guardian is transferred.<sup>116</sup> A student may also transfer to a nonresident district if the school the student currently attends has been classified as being in "academic distress," as long as notice is given to the Arkansas Department of Education and both districts on or before July 30 of the year during which the student wishes to transfer.<sup>117</sup> Perhaps most relevant to the topic of school choice, a student may transfer to a

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111. Moritz, *supra* note 8.

112. See ARK. CODE ANN. § 6-18-108(b) (Repl. 2013).

113. See ARK. CODE ANN. § 6-18-108(c).

114. ARK. CODE ANN. § 6-18-203(a)(2) (Repl. 2013).

115. See ARK. CODE ANN. § 6-18-203(b)(1).

116. See ARK. CODE ANN. § 6-18-203(c).

117. See ARK. CODE ANN. § 6-18-227(b)(1) (Repl. 2013).

nonresident district if he or she petitions and receives permission from both school districts.<sup>118</sup>

Further, voucher programs and charter schools also merit mention. While voucher programs are a hot topic, proposed House Bill 1897, which would have allowed 92% of state K–12 per-pupil funding to travel with a student to the receiving school district, did not pass in 2013.<sup>119</sup> Instead, the Arkansas House Education Committee decided to employ an interim committee to conduct a further review of the voucher bill.<sup>120</sup>

With respect to charter schools, Arkansas has two basic types—the conversion school and the open-enrollment school.<sup>121</sup> A conversion school is a public school that has been “converted to a public charter school” and may only attract students from within the district’s boundaries.<sup>122</sup> Alternatively, an open-enrollment school is one “run by a governmental entity, an institution of higher learning or a tax-exempt non-sectarian organization” and may attract “students from across district boundaries.”<sup>123</sup> While voucher programs and charter schools are developing options for Arkansas students, they do not replace the need for comprehensive school choice reform.

## V. SCHOOL CHOICE IN THEORY

Like most legislative fixes to social problems, school choice is much simpler to implement in theory than in reality. There is no general consensus on how to implement school choice. Every current approach will generally fall into one of three categories: (1) abolishing school choice;<sup>124</sup> (2) establishing

118. See ARK. CODE ANN. § 6-18-316 (Repl. 2013). This transfer option is most relevant to the discussion of school choice because while it can potentially be used by a student to transfer to a school that is right for him or her, such a transfer is contingent upon the permission of both the sending and the receiving school district. As the sending and receiving school districts do not have the same incentive to allow the transfer, it would likely hinder a student’s ability to attend the right school if no other option existed.

119. Isabel Lyman, *Arkansas Decides to Study, Not Pass, School Vouchers*, HEARTLAND INST. (Apr. 11, 2013), <http://news.heartland.org/newspaper-article/2013/04/11/arkansas-decides-study-not-pass-school-vouchers>.

120. *Id.*

121. *Charter Schools*, ARK. DEPARTMENT EDUC., <http://www.arkansased.org/contact-us/charter-schools> (last visited Nov. 20, 2014).

122. *Id.*

123. *Id.*

124. See Heath, *supra* note 9, at 365-66.

school choice with few or zero limitations,<sup>125</sup> or (3) allowing school choice in a manner that falls somewhere in between.<sup>126</sup> While the rhetoric coming from opposite sides of the spectrum may be different, their goals are not mutually exclusive, and some sort of middle ground can be reached.

Opponents of school choice believe school choice increases segregation, decreases community involvement, and results in less exposure for students to the environment in which they live.<sup>127</sup> Supporters of school choice contend that it results in better academic performance by students, a more diversified education, racial balance, and equality of opportunity.<sup>128</sup> This Part first addresses the argument for the abolition of school choice. The Part then provides an overview of the strengths and weaknesses of the argument for universal school choice. A review of school enrollment statistics based on racial characteristics since the passage of the 2013 Act follows.

#### A. Abolishing School Choice

School choice has seemingly been under attack since it came into the spotlight in the aftermath of *Brown*. Critics contend that public school choice runs contrary to the goal of racial desegregation.<sup>129</sup> In the 1990s, opponents argued "that public school choice [was] . . . reversing massive national efforts to increase integration of America's schools" because the students that took advantage of school choice options were predominately white.<sup>130</sup> For example, when Nebraska implemented school choice, nearly 94% of the students that applied to transfer out of the Omaha Public School district were white.<sup>131</sup>

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125. See Sara Cohen, *Public School Choice: A Viable Option For Maryland's Schools?*, 144 EDUC. L. REP. 787, 791 (2000).

126. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2051 (2002).

127. Heath, *supra* note 9, at 359-60.

128. Cohen, *supra* note 125, at 790-91.

129. 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, 96 (2005) ("Choice unhitched from integration is likely to further segregate our public schools.").

130. Joseph R. McKinney, *Public School Choice and Desegregation: A Reality Check*, 25 J.L. & EDUC. 649, 649-50 (1996).

131. *Id.* at 652.

This criticism of school choice has not dissipated with the passage of time. In 2011, opponents argued that while the courts attempted to facilitate desegregation, “white parents made choices that undermined these mandates.”<sup>132</sup> In support of this argument, opponents noted that “at the peak of court-ordered desegregation, in the 1980s, 57 percent of black southerners attended schools that were majority black and—re-segregation developed quickly and forcefully, so that by 2005, that figure had risen to 72 percent.”<sup>133</sup> Opponents further pointed out that this pattern occurred not only in the South, but in the North as well.<sup>134</sup>

Critics also contend that school choice increases segregation of whites from minorities and detracts from the social integration of society.<sup>135</sup> This is a strong point, as segregation would “make[] it impossible to teach interracial cooperation and tolerance, indispensable skills for whites as well as racial minorities in a society that is increasingly heterogeneous and multi-racial.”<sup>136</sup> On this basis, some argue that in the interest of desegregating its schools, Arkansas should eliminate school choice entirely.<sup>137</sup> However, if the legislature were to do so, it would likely worsen the state’s segregation problem due to the phenomenon of “white flight.”

White flight occurs when whites “object to integration in a city’s public schools and . . . ‘flee’ by sending their children to private schools or by choosing to live in another community.”<sup>138</sup> In his analysis of white flight, Professor Joseph McKinney reviewed case law that “explored the relationship between residential housing patterns and segregation in schools.”<sup>139</sup> McKinney believed the problem of white flight was akin to the chicken and egg dilemma—“[t]he question often becomes whether white flight results from desegregation efforts or from

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132. Ansley T. Erickson, *The Rhetoric of Choice: Segregation, Desegregation, and Charter Schools*, DISSENT, Fall 2011, at 41, 41.

133. *Id.*

134. *Id.*

135. See Stephen Eisdorfer, *Public School Choice and Racial Integration*, 24 SETON HALL L. REV. 937, 943-44 (1993).

136. *Id.* at 948.

137. Heath, *supra* note 9, at 365-66.

138. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 629 (1983).

139. Joseph R. McKinney, *The Courts and White Flight: Is Segregation or Desegregation the Culprit?*, 110 EDUC. L. REP. 915, 916 (1996).

official de jure segregation."<sup>140</sup> His logic was that "[h]ousing pattern segregation, which necessarily leads to segregated schools, can also be the result of free choice."<sup>141</sup> Thus, "segregated schools, in turn, may cause white flight from the minority areas."<sup>142</sup> McKinney's analysis of how the "vicious cycle"<sup>143</sup> begins illustrates the complex problem that must be accounted for when implementing school choice in Arkansas.

Eliminating school choice would likely exacerbate the problem of white flight in Arkansas. White flight originated, in part, as a protest to federal desegregation orders handed down by the courts in compliance with *Brown*.<sup>144</sup> Federal desegregation orders require school districts to implement plans that will remedy the effects of the "separate but equal" doctrine followed under *Plessy v. Ferguson*.<sup>145</sup> Unfortunately, desegregation orders have led to resegregation, not only of school districts, but of entire communities.<sup>146</sup> For example, consider how one commentator described resegregation in Little Rock in 1970: "Whites have fled to the suburbs by the thousands to escape desegregation and the city is building itself racial islands, black ones in the central city and white ones farther out."<sup>147</sup> This description is not an exaggeration. In 1970, almost 75% of Little Rock's population was white while only 25% was black.<sup>148</sup> In 2010, of Little Rock's 193,524 residents, 48.9% were white compared to the 42.3% who were black.<sup>149</sup>

Desegregation orders are court-ordered plans dictating how public schools should reverse former discriminatory practices.<sup>150</sup>

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140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. See U.S. COMM'N ON CIVIL RIGHTS, SCHOOL DESEGREGATION IN LITTLE ROCK, ARKANSAS 4 (1977), available at <https://www.law.umaryland.edu/marshall/usccr/documents/cr12d4514.pdf>.

145. See *id.*

146. Roy Reed, *Resegregation: A Problem in Urban South*, N.Y. TIMES, Sept. 28, 1970, at A1.

147. *Id.*

148. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1980, at 25 (1980).

149. *State & County QuickFacts: Little Rock (City), Arkansas*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/05/0541000.html> (last updated Dec. 4, 2014).

150. This was one of the aims of the Court's decision in *Brown II*. See *Brown II*, 349 U.S. 294, 301 (1955).

The Supremacy Clause of the United States Constitution mandates that federal law “trumps” state law when the two directly conflict.<sup>151</sup> In *Brown*, the Court declared that segregated school districts deprived students of the equal protection of the laws guaranteed by the Fourteenth Amendment.<sup>152</sup> Because desegregation orders have their legal basis in federal law, they take priority over state school choice laws. This means that absent a statutory alternative, Arkansas families living in a district under a desegregation order must move in order to choose their children’s schools.<sup>153</sup> The elimination of school choice statewide would have a similar impact to that of imposing desegregation orders on all of the state’s school districts. If the Arkansas General Assembly were to eliminate school choice, the same phenomenon that began in Little Rock in the early 1970s would likely occur statewide.<sup>154</sup> The imposition of desegregation orders on the Little Rock School District led to white flight as families moved to the suburbs in order to send their children to school somewhere else.<sup>155</sup>

White flight perpetuates the very segregation that desegregation orders were meant to prevent, as white students flee to school districts with student bodies that are predominantly white. To accomplish this transfer, families must move to another area, creating segregation on an even more damaging scale, as not only do the school districts become segregated, but entire geographic areas do as well. This is important because, as Justice Breyer has stated, “there is a democratic element: an interest in producing an educational environment that reflects the ‘pluralistic society’ in which our children will live.”<sup>156</sup> If it is so important for the government to create an educational environment that mirrors the

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151. See U.S. CONST. art. VI, cl. 2; see also Dustin M. Dow, Note, *The Unambiguous Supremacy Clause*, 53 B.C. L. REV. 1009, 1009 (2012) (“When a state law conflicts with a federal law, the Supremacy Clause provides a resolution: federal law trumps state law.”).

152. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954).

153. ARK. CODE ANN. § 6-18-1906(a) (Repl. 2013).

154. See U.S. COMM’N ON CIVIL RIGHTS, *supra* note 144, at 2 (describing the desegregation struggle in Little Rock); Reed, *supra* note 146 (same).

155. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 144, at 9.

156. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 840 (2007) (Breyer, J., dissenting) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)).

demographics of modern America, then the government should not apply a method that will lead to the segregation of entire communities.

School choice has the potential to at least alleviate the segregation of geographic areas. For example, a student can attend school in a district in which he or she does not live, removing the incentive or necessity to move in order to achieve the same end. At the very least, school choice can prevent the geographic segregation caused by white flight. However, the underlying purpose of desegregation will not be served when such limits are placed on school choice to the extent that the only way a student can transfer to another school is to move.

Further, white families are statistically the most affluent demographic in the United States and are most likely to possess the resources necessary to relocate in order to self-select into a certain school district.<sup>157</sup> As school choice cannot limit the rights of a family to move, it should also not be used in an attempt to prevent district segregation when it will likely create segregation in both a community and its public schools.<sup>158</sup>

If school choice were to be eliminated, then only the students from wealthy families would be able to transfer to other schools. If nonresident school choice were to be eliminated completely, then not only would this decision fail to remedy desegregation in schools, but it would cause segregation in entire geographic regions, while creating the additional problem of wealthy students and their families leaving resident school districts. This would result in a wealth drain that would further harm these school districts. Legislators must keep this in mind because the elimination of school choice might cause the very problem the legislature seeks to fix. School choice in Arkansas cannot be eliminated entirely—to do so would further exacerbate white flight and result in a correlated socioeconomic disparity. However, school choice should be limited in order to further the state's underlying interest of diversity.

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157. THOMAS SHAPIRO ET AL., *THE ROOTS OF THE WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE 1* (2013), available at <http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf>.

158. This is not to suggest that the legislature should enact some sort of measure to limit a family's right to move. This paradox merely highlights that a student want to move in order to attend a new school, the only thing stopping him or her is the willingness and resources of his or her family.

## B. Open School Choice

Unrestrained school choice is a popular ideology because it resonates with Americans' love of freedom from government interference.<sup>159</sup> Commentators note, "[t]he rhetoric of choice has appealed to religious free exercise, individual autonomy, free market values, American multiculturalism, and ideological neutrality."<sup>160</sup> Supporters of school choice also base their argument on psychological motivations. They argue that school choice improves a student's access to a quality education in the following ways: (1) by increasing student and parent commitment;<sup>161</sup> (2) by encouraging schools to improve their academics through a market theory competition approach to education;<sup>162</sup> and (3) by advancing the public interest in social equality.<sup>163</sup>

Supporters also contend that, if implemented, school choice would foster higher levels of parent and student involvement.<sup>164</sup> The logic behind this is that parents and students are likely to be more committed and motivated in schools that they choose rather than being assigned to a school based on residence.<sup>165</sup>

The argument that open school choice fosters involvement goes hand-in-hand with the market theory approach. This approach contends that an open market with no restrictions on school choice forces schools to compete for their students and offer the best possible education.<sup>166</sup> Supporters also view public education as a "monopoly."<sup>167</sup> They contend that "[b]reaking the monopoly and forcing schools to compete in the marketplace will not only better match student needs and parental desires with educational resources, but will produce better education for all at lower cost."<sup>168</sup> Supporters of the market theory approach contend that under open school choice, school administrators have a greater incentive to offer diverse courses and to push

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159. See Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 819-21 (2011).

160. *Id.* at 818.

161. Cohen, *supra* note 125, at 791.

162. *See id.*

163. *See* Eisdorfer, *supra* note 135, at 940; Ryan & Heise, *supra* note 126, at 2051.

164. Cohen, *supra* note 125, at 791.

165. *Id.*

166. *Id.*

167. Eisdorfer, *supra* note 135, at 940.

168. *See id.* (footnote omitted).

teachers to work harder to help students.<sup>169</sup> Further, this incentivizes parents to collaborate with teachers and to take an active role in monitoring the quality of their child's school.<sup>170</sup> Similarly, the market theory approach is compatible with the argument that choice allows parents and students to select the school that best fits an individual's educational needs.<sup>171</sup>

Some argue that school choice is essential in the push for equality.<sup>172</sup> This argument is based on the idea that wealthy students have their own form of school choice through private schools or a greater ability to move and attend a school in another district.<sup>173</sup> Public school choice grants poorer students "the functional equivalent of this same opportunity."<sup>174</sup>

As the government has a compelling interest in desegregating its school system, to implement laws that would strongly conflict with this interest would be a mistake. When the Court handed down its decision in *Brown*, it was sending a message that the segregation once condoned by the government under *Plessy* was now condemned as "depriv[ing] the children of the minority group of equal educational opportunities."<sup>175</sup> Despite its redeeming characteristics, unrestricted school choice is not the approach that should be implemented in Arkansas because it would interfere too greatly with desegregation efforts.

Supporters argue that any segregation of school districts caused by the transfer of students under such a policy would simply represent an imbalance created by demographic factors, or de facto segregation.<sup>176</sup> As such, there would be no problem with such resegregation because in situations where "resegregation is a product not of state action but of private choices, it does not have constitutional implications."<sup>177</sup> As Justice Thomas stated in his concurrence in *Missouri v. Jenkins*,<sup>178</sup> "[r]acial isolation' itself is not a harm; only state-

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169. Cohen, *supra* note 125, at 791.

170. *See id.*

171. *Id.*

172. *See* Ryan & Heise, *supra* note 126, at 2051.

173. *See id.*

174. Eisdorfer, *supra* note 135, at 940.

175. *See* *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954).

176. Heath, *supra* note 9, at 330.

177. *Freeman v. Pitts*, 503 U.S. 467, 495 (1992).

178. 515 U.S. 70 (1995).

enforced segregation is.”<sup>179</sup> To try and completely eliminate such behavior would be an exercise in futility because it “would require ongoing and never-ending supervision by the courts of school districts simply because they were once de jure segregated.”<sup>180</sup> Similarly, it is not the legislature’s responsibility to try to eliminate certain demographic shifts, and any proposed legislation would only represent an attempt to influence behavior. However, when white flight is the response to conditions that the government’s original segregation helped to create, it is still an effect of the original segregation.<sup>181</sup>

Initial results gathered following the passage of the 2013 Act indicate that school choice is disproportionately taken advantage of by white students.<sup>182</sup> Therefore, the government should refrain from enacting open school choice because, much like the abolition of school choice, it would facilitate white flight and recreate the same scenario that was fostered by the government’s unconstitutional de jure segregation. It is true that white flight results “not of state action but of private choices”<sup>183</sup>; however, to the extent possible, the government should avoid enacting policies that would increase the frequency and severity of white flight. There exists a fundamental difference between trying to control citizens’ choices and trying to influence their behavior. Accordingly, the Arkansas General Assembly should not enact unrestrained, open school choice because to do so would likely increase white flight.

In addition to white flight, there are other reasons that compel the legislature to hold off on implementing an unrestricted school choice policy. One such argument against school choice that has little to do with race involves situations in which students are required to remain in their resident district; such requirements “incentiviz[e] the push to improve those schools.”<sup>184</sup> When parents cannot send their children somewhere else, they have a much greater incentive to work to improve their resident school district.

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179. *Id.* at 122 (Thomas, J., concurring).

180. *Freeman*, 503 U.S. at 495.

181. *See* Gewirtz, *supra* note 138, at 629.

182. *See infra* notes 203-04 and accompanying charts.

183. *Freeman*, 503 U.S. at 495.

184. Heath, *supra* note 9, at 357.

Further, when a student leaves a district, the district loses the funds allocated by the state for the education of that student.<sup>185</sup> As a result, "lesser-desired schools" no longer receive those funds, and it becomes more difficult for them to improve.<sup>186</sup> Opponents of school choice contend that students are allowed to freely leave a school district whenever they choose, but their departure creates a trap that makes it more difficult for the school to retain other students.<sup>187</sup>

Based on these considerations, neither the elimination of school choice nor an unrestricted school choice policy should be considered by the Arkansas General Assembly in its attempts to further the goals of racial integration and access to a quality education. To reach these goals, the legislature should consider a hybrid theory. However, in order to properly implement such a theory in light of the current realities, it is necessary to examine the impact of the 2013 Act.

### C. The Effects of the 2013 Act

The critical inquiry now becomes whether or not the recently implemented school choice law is having its desired effect. As critics of open school choice argue that unrestricted school choice will result in white flight, one may expect that the 2013 Act is being used predominately by whites. When analyzing data from the Arkansas Department of Education (ADE), however, an interesting trend emerges.

According to preliminary data from the ADE, of the 12,674 transfers made under the 1989 Act, approximately 72% of school choice transfers during the 2012–2013 school year were made by white students.<sup>188</sup> Black students made the second-most transfers, comprising about 20% under the 1989 Act.<sup>189</sup> Hispanics were third with 4.79% of the transfers, followed by students of two or more races (1.55%), Asians (0.81%), Native

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185. See ARK. CODE ANN. § 6-20-216 (Repl. 2013) ("The county treasurer shall apportion the general school fund of the county based upon the average daily membership of the school districts within the county. Each school district within the county shall receive its pro rata share of the general school fund of the county.").

186. Heath, *supra* note 9, at 361.

187. See *id.*

188. ARK. DEP'T OF EDUC., STUDENT CHOICE (GENERAL) BY RACE BY DISTRICT (2012–2013), at 1 (2012). The author independently calculated these figures using the data provided by the ADE. This data is currently on file with the author.

189. *Id.*

Americans/Native Alaskans (0.64%), and Native Hawaiians/Pacific Islanders (0.09%).<sup>190</sup> Since these numbers reflect transfers made while the 1989 Act was in effect, they must now be compared to the data generated under the 2013 Act.

The 1989 Act included provisions to prevent segregation of the school systems, but the 2013 Act removed the racial restrictions and substituted a 3% net cap on enrollment changes. Ostensibly, opponents of the 2013 Act argue that this should have opened the floodgates for transfers by white students. However, the numbers surprisingly mirror the trends from preceding years. In 2013–2014, 13,340 students used the 2013 Act in order to change school districts.<sup>191</sup> Of that number, 72.25% were transfers made by white students.<sup>192</sup> Black students again came in second, making up 19.87% of the transfers, and Hispanics followed with 4.57%.<sup>193</sup> The rest of the transfers were made by students of two or more races (1.61%), Asians (0.88%), Native Americans/Native Alaskans (0.71%), and Native Hawaiians/Pacific Islanders (0.11%).<sup>194</sup>

The numbers from the 2014–2015 school year admittedly show a slight deviation from the trend of previous years. During this year, there were 12,262 school choice transfers, the lowest amount in the previous five years.<sup>195</sup> Of those transfers, 81.18% were made by white students.<sup>196</sup> Black students made 10.61% of the transfers for the 2014–2015 school year.<sup>197</sup> Hispanics made 4.55% of the transfers, followed by students of two or more races (1.84%), Asians (0.96%), Native Americans/Native Alaskans (0.71%), and Native Hawaiians/Pacific Islanders (0.14%).<sup>198</sup>

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190. *Id.*

191. ARK. DEP'T OF EDUC., STUDENT CHOICE (GENERAL) BY RACE BY DISTRICT (2013–2014), at 1 (2014). The author independently calculated these figures using the data provided by the ADE. This data is currently on file with the author.

192. *Id.*

193. *Id.*

194. *Id.*

195. ARK. DEP'T OF EDUC., STUDENT CHOICE (GENERAL) BY RACE BY DISTRICT (2014–2015), at 1 (2015). The author independently calculated these figures using the data provided by the ADE. This data is currently on file with the author.

196. *Id.*

197. *Id.*

198. *Id.*

According to the ADE, this data is the first of its kind collected in compliance with the new school choice law.<sup>199</sup> The 2013–2014 data closely mirrors that of the years preceding the passage of the 2013 Act.<sup>200</sup> The 2014–2015 data shows that it is difficult to tell whether this year was an aberration or the new normal. In any event, the school choice picture has become a bit clearer. The new school choice law does not appear to have resulted in an increase in total student transfers.<sup>201</sup> Further, while these numbers do not support the argument that the new law would lead to increased white flight (the lack thereof may be attributable to the 3% cap), the numbers do support the conclusion that a majority of students utilizing school choice are white.<sup>202</sup>

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199. Telephone Interview with Keyth Howard, Pub. Sch. Program Advisor, Ark. Dep't of Educ. (Nov. 15, 2013) (on file with author); *see also* ARK. CODE ANN. § 6-18-1907(c) (Repl. 2013) (provision governing data reporting).

200. *See infra* Charts 1-2.

201. *See infra* Chart 2.

202. *See infra* Charts 1-2.

Chart 1: Percentage of School Choice Transfers by Race<sup>203</sup>

<b>School Choice Allocated by Race</b>	<b>2010-2011</b>	<b>2011-2012</b>	<b>2012-2013</b>	<b>2013-2014</b>	<b>2014-2015</b>
2 or More Races	1.07%	1.34%	1.55%	1.61%	1.84%
Asian	0.82%	0.85%	0.81%	0.88%	0.96%
Black	17.18%	17.90%	19.98%	19.87%	10.61%
Hispanic	4.08%	3.95%	4.79%	4.57%	4.55%
Native American/ Alaskan	0.77%	0.75%	0.64%	0.71%	0.71%
White	75.97%	75.11%	72.14%	72.25%	81.18%
Native Hawaiian/Pacific Islander	0.11%	0.10%	0.09%	0.11%	0.14%

Chart 2: School Choice Transfers by Race<sup>204</sup>

<b>School Choice Allocated by Race</b>	<b>2010-2011</b>	<b>2011-2012</b>	<b>2012-2013</b>	<b>2013-2014</b>	<b>2014-2015</b>
2 or More Races	168	183	197	215	226
Asian	129	116	103	117	118
Black	2694	2440	2532	2651	1302
Hispanic	640	538	607	609	558
Native American/Alaskan	120	102	81	95	87
White	11,913	10,239	9143	9638	9954
Native Hawaiian/Pacific Islander	18	14	11	15	17
Total	15,682	13,632	12,674	13,340	12,262

203. The author created this chart using publicly available information from the ADE's website. See ARK. DEPARTMENT EDUC., <http://www.arkansased.org> (last visited Nov. 20, 2014).

204. The author created this chart using publicly available information from the ADE's website. See *id.*

## VI. ARKANSAS'S OPTIMAL STRATEGY

Arkansas should adopt a hybrid system that gives students the right to transfer for a legitimate academic reason, while limiting the negative effects fostered by school choice policies at opposite ends of the spectrum. As demonstrated by United States Supreme Court jurisprudence, when the government uses race as a factor, such policies must be narrowly tailored to achieve a compelling government interest.<sup>205</sup> By design, race need not enter the equation. With respect to school choice, the underlying government interest should be in providing Arkansas children with the best education possible without undermining desegregation efforts. Both open and closed school choice would likely undermine desegregation efforts. Further, either of the two extremes could have a negative effect on education quality, with closed school choice harming the students that remain at the school district from which other students move, and open school choice harming the students that are not wealthy enough to travel to attend school outside their district.

Further, to abolish school choice in its entirety would represent a declaration that Arkansas's alternative options are sufficient. Arguably the best option that a student may have to transfer under the current law is the student petition.<sup>206</sup> However, this option is undesirable because the success of such a petition is contingent upon the approval of both school districts.<sup>207</sup> Parents and students do not want the district from which the student seeks to transfer to have this kind of power because the student has an incentive to attend the school that meets his or her individual needs, but the district has an incentive to retain students at all costs in order to receive funds based on student enrollment.<sup>208</sup> This disconnect inevitably causes harm to the student if the student petition is the only school choice option in Arkansas. To subject a student's educational future to the approval of both the sending and the receiving school district is certainly an inadequate solution. A more appropriate school choice plan would focus on the

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205. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

206. *See* ARK. CODE ANN. § 6-18-316 (Repl. 2013) (relevant statute).

207. *See* ARK. CODE ANN. § 6-18-316(a) (relevant statutory provision).

208. *See* Heath, *supra* note 9, at 361.

student's educational needs, with no consideration for the whims of the local school board.

The optimal plan is one in which nonresident transfers are allowed, but only when the student can point to a specific educational goal that would be furthered by transferring to a nonresident district. This should be coupled with monitoring procedures that ensure the student is actually progressing in accordance with this educational goal after the transfer has been made.

Under the optimal approach, a school district could simply retain its students by offering them the courses that would otherwise provide the basis for their transfer request. This satisfies supporters of the market theory model because schools are now competing for students based on the merits, and not the racial composition, of school districts.<sup>209</sup> This approach should also alleviate the concerns of those who want school choice abolished because it addresses "the larger problem of how to correct the failing schools."<sup>210</sup> Additionally, incentivizing schools to offer a wider range of courses can only further this underlying interest because parents and students are more likely to buy into schools that they choose rather than schools to which they are assigned based on residency.<sup>211</sup>

Further, this approach recognizes the obvious limitations of school choice to prevent white flight. Under this plan, if a student's parents move to a new residence in order to keep their child separated from children of a different race, they will not be able to do so under the guise of searching for a better education. They will be moving simply because they do not like integrated schools, which is beyond the government's control.

## VII. CONCLUSION

The Arkansas General Assembly should amend the state's school choice law because Arkansas needs a program that complies with federal desegregation orders while still meeting the educational needs of students. The 3% net cap on nonresident transfers permitted by current law will not affect schools that opt out of school choice because of a standing

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209. Cohen, *supra* note 125, at 791.

210. Heath, *supra* note 9, at 366.

211. Cohen, *supra* note 125, at 791.

federal desegregation order.<sup>212</sup> This means that the cap will only apply to schools that are not otherwise subject to a desegregation order, and therefore this restriction is not fulfilling its true purpose. Opponents to this proposal contend that to remove all caps on nonresident transfers would cause schools that are currently integrated to quickly realize substantial white flight that will ultimately result in resegregation.

In order to prevent school choice from facilitating white flight, the Arkansas General Assembly should amend the Public School Choice Act. The 3% net cap on nonresident transfers should be removed and replaced with an application process that includes a form that requires a student to state a legitimate academic reason for the transfer. For example, a student wishing to transfer could point to his or her desire to take Advanced Placement courses in biology to prepare for college. The student's application should then be subjected to review by the Arkansas State Board of Education. In order to prevent abuse of this system, the Arkansas General Assembly must create some type of monitoring system to ensure that the students who transfer under the amended provision are actually enrolled in, or actively participating in, the classes and/or academic pursuit used to justify the transfer. A revised scheme for school choice in Arkansas should positively affect the outcomes for the state's schoolchildren and continue to distance the state from its tumultuous history of segregated education.

BRINKLEY BEECHER COOK-CAMPBELL

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212. See ARK. CODE ANN. § 6-18-1906 (Repl. 2013).