AN EMPIRICAL AND CONSTITUTIONAL ANALYSIS OF RACIAL CEILINGS AND PUBLIC SCHOOLS

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I. INTRODUCTION

This Article focuses on an Equal Protection Clause issue raised by a conflict between an existing policy goal—school desegregation—and an emerging policy goal—school choice. This conflict is a result of school districts' use of racial ceilings in school choice programs, which operates to the detriment of a large number of black students. These students are denied access to schools of their choosing solely on the basis of their race, while a much smaller number are able to attend school in an integrated setting.

This conflict originates from two sources. The first source is the nation's effort to desegregate its public schools. The second source is the more recent and growing demand by parents to have more control over the schools their children attend. As more public school districts that operate school desegregation plans and use racial ceilings also implement school choice policies, it is becoming increasingly clear that the wishes of many parents—particularly the parents of minority students—are colliding with school desegregation requirements.

Although almost 40 years have passed since the Supreme Court's *Brown v. Board of Education*[1] decision, the federal government's involvement with school desegregation remains substantial. National statistics on the number of school districts operating under desegregation plans are difficult to obtain. One survey reports that 960 school districts attempted to desegregate between 1968 and 1986.[2] In 1990, the Department of Education's Office for Civil Rights reported that 256 school districts, with a combined student enrollment exceeding two million, operated under court supervision in desegregation cases brought by the Justice

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1 347 U.S. 483 (1954).

2 KARL TAEUBER, RESEGREGATION OF PUBLIC SCHOOL DISTRICTS, 1968-86 (June 1990) (Working Paper #90-16, on file at the Center for Demography and Ecology, University of Wisconsin-Madison).

Department.[3] Also, of the 44 members of the Council of the Great City Schools, an organization of the nation's largest urban public school districts, only four had not implemented a school desegregation plan by the 1990-91 school year.[4] Many urban school desegregation plans include voluntary transfer programs, one of the many forms of school choice. These transfer programs, along with other public school choice programs, often utilize racial ceilings.[5]

Proponents of racial ceiling policies typically argue that such policies are needed to avoid or stem white flight from public schools. Although racial ceilings vary in form, they are generally used to regulate the demographic composition of schools. Public school districts often use the severest form: majority-to-minority racial ceilings. As the name implies, majority-to-minority racial ceilings permit a student to transfer only from a school where the student is in the racial majority into a school where the student is in the racial minority.[6]

With a much briefer history than school desegregation, school choice has emerged, according to many, as the most prevalent education reform policy of the 1990s.[7] In response to the growing perception that public schools are overly encumbered by complex bureaucratic structures that impede organizational responsiveness, an increasing number of policymakers are turning their attention to school choice as one approach to improve American education. Many existing school choice programs, particularly those that limit choices to schools within a public school district, use racial ceilings to regulate student assignment and help maintain school integration levels.

Proponents of school choice—even choice that is restricted to public schools—suggest that such policies might give more parents greater control over their children's education and thereby force

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[3] OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., 1990 ELEMENTARY AND SECONDARY SCHOOL CIVIL RIGHTS SURVEY: COURT-ORDERED SCHOOL DISTRICTS, *cited in* David S. Tatel, *Desegregation Versus School Reform: Resolving the Conflict*, 4 STAN. L. & POL'Y REV. 61, 63, 70 n.20 (Winter 1992-93).

[4] THE COUNCIL OF THE GREAT CITY SCHOOLS, NATIONAL URBAN EDUCATION GOALS: BASELINE INDICATORS, 1990-91 81 (1992).

[5] *See generally* David J. Armor, *After Busing: Education and Choice*, 95 PUB. INT. 24 (1989).

[6] *Id.* Typical majority-to-minority racial ceilings provide that minority students may transfer from schools more than 50% minority to schools more than 50% white, and white students may transfer from schools more than 50% white to schools more than 50% minority.

[7] John F. Witte, *Public Subsidies for Private Schools: What We Know and How to Proceed*, EDUC. POLICY, June 1992, at 206.

schools to become more responsive to students' needs.[8] Many school choice proponents argue that school choice policies should encompass both public and private schools. For example, there are those who argue that private schools, because they are controlled more by market forces than bureaucratic institutions, place a premium on responding to family needs and produce superior education results.[9] Others suggest that school choice policies might help form non-geographic communities that would establish and enforce desired norms of behavior.[10] Still others suggest that traditional economic cost-benefit analysis supports school choice. For example, one scholar notes that private schools' ability to provide the same or better education for less cost would be important evidence supporting school choice policies.[11] Finally, in response to many school choice critics, some argue that private schools promote educational equality better than public schools.[12]

Critics of school choice fear that school choice policies will increase education inequality. Jonathan Kozol, for example, questions whether all people will receive adequate information regarding their education choices. In addition, he asserts that school choice will also increase school segregation by class and race.[13] Other critics of school choice argue that public schools would be placed at a competitive disadvantage if forced to compete with private schools for scarce education funds, partly because private schools have wider flexibility in selecting students and a greater ability to expel problem students.[14] Finally, others suggest that the administrative burdens and associated costs incidental to the establishment and maintenance of school choice programs[15] and the

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8 *See, e.g.*, Chester E. Finn, Jr., *Why We Need Choice, in* CHOICE IN EDUCATION: POTENTIAL AND PROBLEMS 3, 7-12 (William L. Boyd & Herbert J. Walberg eds., 1990).

9 *See, e.g.*, JOHN E. CHUBB AND TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS (1990).

10 *See, e.g.*, James S. Coleman, *Changes in the Family and Implications for the Common School*, 1991 U. CHI. LEGAL F. 153.

11 *See, e.g.*, Paul E. Peterson, *Are Big City Schools Holding Their Own?, in* THE SEEDS OF CRISIS (John Rury ed.) (forthcoming).

12 John E. Chubb and Terry M. Moe, Politics, Markets, and Equality in Schools, Paper presented at the Annual Meeting of the American Political Science Association (Sept. 3, 1992).

13 JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991); Larry Hayes, *A Simple Matter of Humanity*, PHI DELTA KAPPAN, Dec. 1992, at 334.

14 *See generally*, Michelle Fine, *Democratizing Choice: Reinventing, Not Retreating From, Public Education, in* SCHOOL CHOICE: EXAMINING THE EVIDENCE 269, 299 (Edith Rasell & Richard Rothstein eds., 1993).

15 Henry M. Levin, *Education as a Public and Private Good*, 6 J. POL'Y ANALYSIS & MGMT. 628 (1988).

oversight needed to protect against waste and fraud[16] are considerable and might overcome any benefits attributable to school choice.

While the academic and public debate surrounding school choice increases in tone and tenor, state legislatures and school boards—the governmental units primarily charged with the legal duty to educate students—continue to explore and implement various school choice policies. Already, twenty states have implemented programs described as school choice. Thirteen of those states have done so in the past five years, and two states (Michigan and Ohio) are scheduled to implement school choice programs in 1993.[17] In addition to these state-level efforts, scores of individual school districts have introduced choice plans.[18]

A school district's use of racial ceilings is at the intersection of school desegregation and school choice policies. Although numerous legal scholars have written about the legal issues surrounding racial ceilings, few scholars have examined how racial ceilings operate with any empirical rigor. This Article attempts to do just that by analyzing, from two perspectives, school districts' use of racial ceilings. First, the Article reviews data from one of the nation's largest public school systems for the purpose of better understanding how racial ceilings work. Specifically, the analyses will test the hypothesis that racial ceilings disproportionately harm black students. Second, the Article will review the judicial history of school districts' efforts to use racial ceilings as a mechanism to regulate student assignment in a school choice program. Together, these two perspectives allow for cautious predictions about the constitutionality of a public school district's use of racial ceilings.

II. DATA AND RESULTS

The Chicago public school system (CPS), the nation's third largest, operates a voluntary transfer program designed to increase a student's choice of schools while maintaining a school system as integrated as possible. Chicago's program, implemented in 1980 pursuant to a consent decree, includes a majority-to-minority racial ceiling.[19]

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16 Stephen D. Sugarman, *Using Private School to Promote Public Values*, 1991 U. CHI. LEGAL F. 171.

17 CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, SCHOOL CHOICE (1992).

18 *Id.*

19 Through the 1988-89 school year and the course of this study, the Board operated a minority-to-majority (or "50/50") racial ceiling. Since then, the Chicago Board

Voluntary transfer program data are gathered by the Chicago Board of Education (Board). Data for the 1988-89 academic year include individual-level variables for all transfer applications received and processed by the Board.[20] Data on rejected applicants[21] include information on their race, desired school, and reason for rejection. In addition to racial ceiling limitations, student transfer applications can be rejected for one of five other reasons, including lack of space and excessive distance between a student and the desired school.

Data were analyzed with the Chi-square test statistic and statistical significance was set at .05. Because the Chi-square test statistic is sensitive to sample size,[22] two rounds of analyses were performed. The first used the entire pool of rejected applicants, and the second used a random selection of fifty percent of those rejected.

The Board's voluntary transfer program is open to all students, and, therefore, the racial composition of the transfer program's applicant pool should generally reflect the school system's demographic profile. In 1988, approximately sixty percent of the students attending public elementary and secondary schools in Chicago were black, approximately twelve percent were white, and approximately twenty-five percent were Hispanic.[23] Table I illustrates that, as expected, voluntary transfer applicants in 1988 largely reflected the CPS's overall racial composition.

Whereas the applicant pool was roughly representative of the CPS's demographic profile, voluntary transfer acceptances and rejections were not. The direction of the differences between the observed and expected distributions among racial groups is informative. For example, black students were rejected more than expected by random distribution. The opposite was true for all other students. As Table II illustrates, these differences were statistically significant.[24]

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of Education amended its policy slightly, making transfers available to minority students until a school enrollment reaches 60% minority (thereby creating a "60/40" racial ceiling). Chicago Board of Education Resolution 88-1026-RS1, Resolution Approving Report on the Assessment of Availability of Transfer Opportunities (Oct. 26, 1988); Chicago Public Schools Annual Desegregation Review, 1987-88, Part 1: Student Assignment Component, 33-34 (1988).

[20] N = 4818.

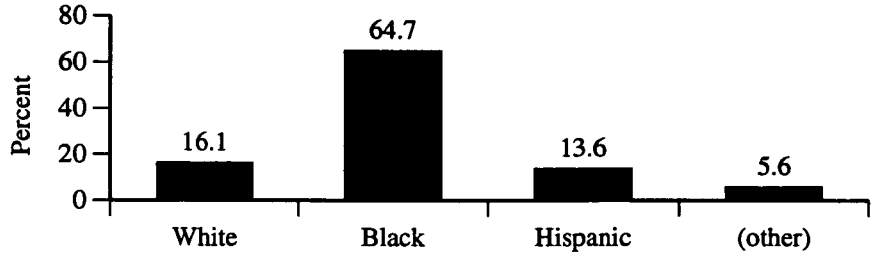
[21] N = 2730.

[22] G. BOHRNSTEDT & D. KNOKE, STATISTICS FOR SOCIAL SCIENCE DATA ANALYSIS (1988).

[23] Three percent were classified as "other." *Chicago Public Schools, Racial/Ethnic Survey — Students* (1988).

[24] For a fuller set of analyses, see Michael Heise, A Quantitative and Legal Analysis

TABLE I
VOLUNTARY TRANSFER PARTICIPATION RATES



Although it is important to note that black students' transfer applications were rejected more than expected, even more crucial are the reasons why the applications were rejected. Due to the CPS's demographic profile, it is not surprising to find that the school district's racial ceilings were a major reason why black student transfer applications were rejected. The school district's racial ceiling was used to reject 819 applications, or approximately thirty percent. Table III also illustrates that among the six possible reasons for rejection, lack of space and racial ceiling limitations were the two most important reasons and together accounted for approximately sixty-five percent of all rejections.

TABLE II

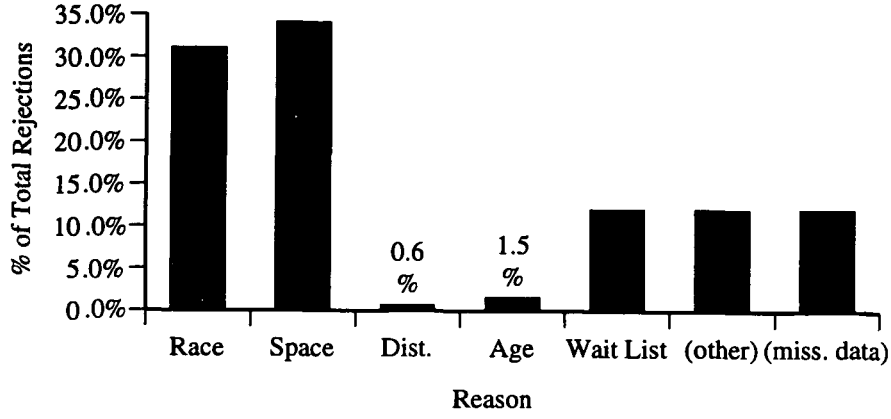
	Accept	Reject
White	439	338
Black	1080	2035
Hispanic	401	255
(other)	168	102

Chi-square = 273.86
$p < .01$
N = 4,818
Missing Observations = 0

A critical issue, however, is whether more black applications than expected were rejected due to racial ceiling concerns. Table IV suggests that they were. Not only were more black transfer applicants rejected due to the school district's racial ceiling than random distribution would suggest, and all other racial groups were

of Racial Ceilings and Equal Educational Opportunity (1990) (unpublished Ph.D. dissertation, Northwestern University).

TABLE III
REASONS FOR REJECTION



rejected less than expected, but a statistically significant relationship remains even after collapsing all non-black racial groups and all non-racial ceiling reasons for rejection.

That a statistically significant relationship remains, after collapsing both racial group and reason-for-rejection categories, strengthens the test statistic. The likelihood of a statistically significant result decreases as the number of degrees of freedom decreases. Therefore, by collapsing the number of racial groups and reasons for rejection and reducing the number of degrees of freedom, the likelihood that the test statistic will be statistically significant decreases. That the results remain significant after such changes underscores the relationship between student race and the reason for voluntary transfer rejection.

TABLE IV
REASON FOR REJECTION (COLLAPSED)
BY RACE (COLLAPSED)

	Racial Ceiling	All Other Reasons
Black	720	1315
Non-Black	115	580

Chi-Square = 85.67
$p < .01$
N = 2,730
Missing Observations = 0

To test whether this finding was solely a function of the sample size, the previous analysis was replicated on a randomly selected

pool of fifty percent of the cases.[25] As Table V illustrates, a smaller sample size reduces but does not eliminate the statistically significant relationship.

TABLE V
REASON FOR REJECTION (COLLAPSED)
BY RACE (COLLAPSED)
(SAMPLE * .50)

	Racial Ceiling	All Other Reasons
Black	356	609
Non-Black	55	289

Chi-Square = 50.48
$p < .01$
N = 1,309
Missing Observations = 0

A review of data from one of America's largest public school systems reveals that the school's use of racial ceilings particularly burdens black transfer applicants. Specifically, a statistically significant relationship exists between rejections due to racial ceiling limits and rejections of black transfer applicants. As this Article discusses below, these data raise important constitutional issues.

III. CONSTITUTIONAL ANALYSIS

Statistical analysis can help identify policies and practices that adversely affect some groups more strongly than others. Governmental uses of race, particularly uses that adversely affect minorities, raise complex constitutional issues. The Supreme Court has noted that "[i]n the history of this . . . country, few questions have been more divisive than those arising from governmental action taken on the basis of race."[26] Rather than focus on the Court's long involvement with such questions, this Article examines whether a public school district's use of racial ceilings, such as those used in Chicago, is permissible under the Fourteenth Amendment.

Although the Supreme Court has not directly addressed the constitutionality of racial ceilings,[27] lower federal courts have, par-

25 A random sample of cases was drawn by using the SPSS(x) SAMPLE command.

26 Fullilove v. Klutznick, 448 U.S. 448, 516 (1980).

27 The Court has, in dictum, noted that "[a]n optional majority-to-minority transfer provision has long been recognized as a useful part of every desegregation plan." The Court went on to note, however, that free student transportation and making space

ticularly in the public housing context. Three cases shape the legal contours of racial ceilings and public housing.

In *Burney v. Housing Authority*,[28] racial ceilings were used to regulate tenant selection and assignment pursuant to a 1975 consent decree. The target racial goals were established to reflect the racial composition of all public housing units located in Beaver County, Pennsylvania. The district court declined to decide whether the housing authority's desire to stem white flight constituted a compelling governmental interest and instead focused on whether the racial ceilings were a "*necessary* and a *precisely tailored* means of achieving" that goal.[29] Housing authority officials argued that the ceilings were necessary, and presented statistical evidence to validate their concern.

Despite such evidence, the court concluded that the racial ceilings violated the Equal Protection Clause and the Fair Housing Act. The court expressed its belief that the housing authority's evidence supporting use of racial ceilings for all the housing units was scant and that the racial ceilings were not narrowly tailored. The court noted the housing authority's failure to present evidence demonstrating the accuracy of the fit between the housing units' actual tipping points and the tipping points presumed by the racial ceilings. "Tipping" occurs when the percentage of minority group members reaches a point at which whites will leave or avoid moving in, resulting in segregation or resegregation.[30]

Similar racial ceilings were used by the New York Housing Authority in *Otero v. New York City Housing Authority*.[31] To make room for a new public housing development, the state housing authority relocated more than 1,800 families from Manhattan's Lower East Side. As compensation to the displaced families, most of whom were minorities, the housing authority promised those families priority status for the new housing units. The demand for new housing units from those promised priority greatly exceeded expectations, however, and ran afoul of the racial ceilings implemented to regulate the racial composition of the new units' initial lease-up. As a result, the housing authority reneged on its commitment to those displaced families promised priority and, instead,

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available in desired schools were requirements for an effective transfer plan. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26-27 (1971).

28 551 F. Supp. 746 (W.D. Pa. 1982).

29 *Id.* at 764.

30 For a more complete definition, see Victor S. Navasky, *The Benevolent Housing Quota*, 6 How. L.J. 30 (1960).

31 484 F.2d 1122 (2d Cir. 1973).

rented roughly one-half of the new units to others, eighty-eight percent of whom were white.

A class of displaced residents who were denied their promised priority for new housing units due to the development's racial ceilings filed suit in federal court. The district court granted their motion for summary judgment.[32] The court concluded that the housing authority's obligation to foster and maintain desegregated housing units was subordinate to its duty not to deprive access to public housing on the basis of race. Nonetheless, the Second Circuit reversed the lower court ruling and held that the housing authority was permitted to promote a desegregated housing environment even if the program harmed minority individuals. Specifically, the Second Circuit concluded that, as a matter of law, it was not impermissible to use racial ceilings even though the ceilings adversely affected racial minorities.[33]

Although the Second Circuit concluded that the racial ceilings in *Otero* were constitutional, the opinion's influence was mitigated by three factors. First, the racial ceilings in *Otero*, in contrast to most others, were temporary and used only to regulate the initial lease-up of the housing units. Second, the opinion involved a motion for summary judgment. As a result, the court considered only whether the use of racial ceilings was impermissible as a matter of law. Third, a similar and more recent case also decided by the Second Circuit invalidated a similar use of racial ceilings.

In the more recent case, *United States v. Starrett City Associates*,[34] developers of the nation's largest housing complex were required to assure New York City officials that racial ceilings would be used to help create and maintain a desegregated housing complex and prevent white flight. The racial ceilings adversely affected minorities, who waited up to ten times longer for an apartment than white applicants. As part of a settlement, Starrett City developers were required to make available an additional thirty-five units each year for five years to black and other minority applicants.

Despite the settlement, the Justice Department brought suit against Starrett City developers for the purpose of placing before the court the "legality of defendant's policy and practice of limiting the number of apartments available to minorities in order to main-

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[32] *Id.* at 1125.

[33] *Id.* at 1134.

[34] 840 F.2d 1096 (2d Cir.), *cert. denied*, 488 U.S. 946 (1988).

tain a proscribed degree of racial balance."[35] The government's complaint charged that the developer's use of racial ceilings violated the Fair Housing Act's anti-discrimination clause. The district court agreed with the government, granted its motion for summary judgment, and enjoined the developers from using racial ceilings.[36]

On appeal, the Second Circuit ignored the Fair Housing Act's legislative history, concluding that the legislation contained language supporting both integration and anti-discrimination policies. The court instead looked to equal protection case law for direction and upheld the lower court's decision disallowing the housing developer's use of racial ceilings.

The court articulated three reasons for its ruling. First, the court explained, the racial ceilings lacked a defined goal and termination date. Second, the plaintiffs presented insufficient evidence suggesting that the developers or the housing authority were guilty of past discrimination. According to the court, general societal discrimination alone was "'insufficient and overly expansive' as the basis for adopting so-called 'benign' practices with discriminatory effects . . . ."[37] Finally, the court pointed out that racial ceilings adversely affected minorities.

Cases involving racial ceilings in public housing provide one important insight into the judicial landscape surrounding racial ceilings and offer some insight into how courts will treat a public school district's use of racial ceilings. Some scholars and courts disagree, however, and attempt to distinguish between the public housing and schooling contexts.

For example, one scholar argues that although in theory minorities denied public housing due to racial ceilings could become homeless, the adverse impact of racial ceilings in the public school setting is mitigated because minorities are not denied access to public schooling, but only to their choice of a particular school.[38] Also, the *Burney* court noted that, unlike in the housing context, racial ceilings in public schools do not deny students a governmental benefit.

Such a distinction might be valid, but, if so, only to a point. It

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[35] *Id.* at 1099 (quoting United States v. Starrett City Assocs., 605 F. Supp. 262, 263 (E.D.N.Y. 1985)).

[36] United States v. Starrett City Assocs., 660 F. Supp. 668, 678-79 (E.D.N.Y. 1987), *aff'd*, 840 F.2d 1096 (2d Cir.), *cert. denied*, 488 U.S. 946 (1988).

[37] *Starrett City*, 840 F.2d at 1102 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986)).

[38] Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983).

is certainly possible that minorities denied access to public housing units due to racial ceilings might not have other housing alternatives. It is also true that students denied their school of choice will be offered a seat in some public school. Nevertheless, two reasons suggest that these differences do not warrant different outcomes with regard to the constitutionality of racial ceilings.

First, the distinction is not necessarily valid. The judicial records of the housing cases discussed above are silent as to whether those people denied units were able to find alternative public housing units. To the extent that they were, their situation becomes more analogous to students denied their choice of school, but not access to public education.

Second, the availability of alternative housing units or schools may not adequately compensate an individual for the government's denial of choice based solely on an individual's race. The alternative schools or housing units might be inferior, less convenient, or less desirable. If such a denial is unconstitutional in the public housing context, it also logically follows that a similar denial would be unconstitutional in the public school context.

Even if public housing decisions do not make clear how courts might rule when confronted with a school district's use of racial ceilings, two appellate court decisions, *Johnson v. Board of Education*[39] and *Parent Association of Andrew Jackson High School v. Ambach*,[40] involve school districts and are instructive.

Johnson involved an earlier attempt by the Chicago Board of Education to regulate the racial composition of its schools and discourage white flight. Because of accelerated changes in the size and racial composition of student enrollment at two Chicago public high schools, in 1975 the Board developed and implemented a Student Racial Stabilization Quota Plan (Quota Plan) for both schools. The Board regarded the Quota Plan as necessary to prevent further white flight. The Quota Plan established racial ceilings that, in conjunction with a lottery, regulated access to both high schools. Students denied access to either school were given enrollment priority at other desegregated high schools.

The racial ceilings at both schools harmed black students. Because the number of seats reserved for white students exceeded the number of white applicants, no white students were denied access because of the racial ceilings. The opposite was true for black and Hispanic students. As a result, whereas no white students were af-

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[39] 604 F.2d 504 (7th Cir. 1979), *vacated*, 449 U.S. 915 (1980).
[40] 738 F.2d 574 (2d Cir. 1984).

fected, "hundreds of black and Hispanic students were denied admission to these schools . . . ."[41]

Despite this harm, the district court ruled in favor of the Board's Quota Plan and noted that the plan permitted all students a meaningful opportunity to attend school in a desegregated setting. The Seventh Circuit affirmed the lower court ruling, concluding that the Quota Plan advanced a compelling governmental interest and was narrowly tailored. Accordingly, the court ruled that the plan did not violate the Equal Protection Clause of the Fourteenth Amendment.

Although the *Johnson* opinion certainly offers support for proponents of racial ceilings, two factors diminish its influence. First, the Supreme Court vacated the *Johnson* decision.[42] As a result, one scholar reviewed *Johnson*'s tortured and protracted history and concluded that the case may lack precedential value.[43] Also, at least one court, the district court in *Burney v. Housing Authority*, declined to view *Johnson* as controlling.[44]

Moreover, *Johnson*'s peculiar facts limit the opinion's general applicability. The court relied heavily on the Quota Plan's guarantee that rejected applicants would receive admission to another desegregated school. This promise was possible because the Board's racial ceilings were limited to only two schools and other desegregated schools were able to enroll interested students. Because this condition no longer exists in Chicago, however, the Board no longer offers such a guarantee to rejected voluntary transfer applicants.

The New York City Board of Education also attempted to increase school choice and school desegregation by using racial ceilings. Not surprisingly, similar results ensued, and the racial ceilings harmed a disproportionate number of black students. In *Ambach*, parents of black students who were denied their choice of school on the basis of race challenged the constitutionality of the Board's use of racial ceilings.

The district court agreed with the parents.[45] Although the court acknowledged that the school district's use of racial ceilings

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41 *Johnson*, 604 F.2d at 512.

42 Johnson v. Board of Educ., 449 U.S. 915 (1980).

43 Rodney A. Smolla, *Integration Maintenance: The Unconstitutionality of Benign Programs that Discourage Black Entry to Prevent White Flight*, 1981 DUKE L.J. 891.

44 551 F. Supp. 746, 759 (W.D. Pa. 1982).

45 Parent Ass'n of Andrew Jackson High Sch. v. Ambach, 451 F. Supp. 1056, 1082 (E.D.N.Y.), *aff'd in part and rev'd in part*, 598 F.2d 705 (2d Cir. 1979).

was benign, the court concluded that its progressively adverse impact on minorities failed to withstand strict judicial scrutiny.

On appeal, the Second Circuit reversed in part and remanded the case to the district court for further factual findings.[46] The Second Circuit found that although the use of racial ceilings to stem white flight fulfills a compelling governmental interest, the use of racial ceilings tends to "preserve predominately white schools from an influx of non-white students and, therefore, discriminates against the non-white community."[47] Nonetheless, the court stated in dicta that the racial ceilings would be permissible if carefully crafted. The Second Circuit thereafter remanded the case to the district court for the purpose of determining whether the school district's evidence supported the fifty percent racial ceiling.

On remand, the district court ruled that the board's evidence was inadequate,[48] but on appeal the Second Circuit did not completely agree with the district court's ruling.[49] In an odd ruling, the Second Circuit decided that the lower court had erred in determining that the school district's evidence did not support the racial ceiling. The court also indicated, however, that the opposite conclusion—that the board's evidence supported its use of the fifty percent racial ceiling—was likewise unwarranted. As a result, the Second Circuit once again remanded this factual issue to the lower court for further deliberation.

Although the Second Circuit assiduously avoided ruling on the racial ceiling's constitutionality, the court's opinion addressed three important issues. First, the most exacting form of judicial review is warranted when a government policy arguably stigmatizes minorities, even if the policy also benefits other minorities. Second, a school district's concern over white flight constitutes a compelling governmental interest, thereby focusing the legal debate on strict scrutiny's second prong. Third, the appellate court outlined the extraordinary circumstances and conditions that would enable it to conclude that a school district's use of racial ceilings was sufficiently narrowly tailored.

Although it is clear that a school district must tightly tailor its use of racial ceilings, the degree of statistical evidence necessary to justify the formulation of a school district's racial ceilings remains

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46 Parent Ass'n of Andrew Jackson High Sch. v. Ambach, 598 F.2d 705, 721-22 (2d Cir. 1979).

47 *Id.* at 717.

48 Parent Ass'n of Andrew Jackson High Sch. v. Ambach, 738 F.2d 574, 579 (2d Cir. 1984).

49 *Id.* at 579-83.

unclear. In *Ambach*, the Second Circuit asked the lower court for school-level data on the acceleration of white students from schools where white enrollment dropped below the fifty percent level. In a footnote, the court noted that it did not want to impose an impossible evidentiary burden on the New York Board of Education. The court also considered such information necessary, however, "[g]iven the equal protection issues raised by a plan designed to counteract the perceived problem of a tipping point . . . ."[50]

Despite the court's suggestion to the contrary, the evidentiary burden it imposed on the New York City school district was steep. The Second Circuit has already rejected the adequacy of the school district's earlier data. Although the Second Circuit theoretically approved the use of racial ceilings in principle, the circumstances warranting the use of such ceilings, along with the necessary empirical support for the ceilings, combine to place court approval of such programs nearly beyond reach.

As the *Johnson* and *Ambach* cases make clear, a public school district's use of racial ceilings, such as those now used in Chicago and elsewhere, is problematic and will need to survive strict judicial scrutiny. A school board's legitimate concerns over white flight appear sufficient to constitute a compelling governmental interest, but it is not clear how any school board can sufficiently narrow and tailor its racial ceilings.

Four factors are helpful in determining whether a school district's racial ceilings are adequately tailored. None of the four are dispositive and different courts might focus on different aspects. The first is whether racial ceilings harm innocent third parties. Data from Chicago show that the racial ceilings harm black students, the intended beneficiaries of school desegregation plans.

A second factor concerns the threat that racial ceilings will stigmatize students. The goal of racial ceilings—reduction or avoidance of white flight—carries with it the suggestion that whites will tolerate public schools only so long as black student enrollment does not exceed a set amount, typically fifty percent. Even if this suggestion has empirical support, the suggestion encourages students to view each other as possessors of racial characteristics and not as individuals. Such encouragement risks stigmatizing.

A third factor is the scope and duration of the racial ceilings. Even if courts are willing to subordinate the interests of individuals

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[50] *Id.* at 582 n.14.

to broader social or group interests, racial ceilings that are flexible and temporary will more likely survive judicial review.

The fourth factor courts will consider is whether a school district's use of racial ceilings is necessary and reasonable. Paul Gewirtz, a proponent of racial ceilings, notes that "on balance, in most situations, racial ceilings are not appropriate—more effective interdistrict remedies . . . should be preferred."[51] Even if preferable, most social scientists argue that it is difficult, if not impossible, to measure tipping points accurately. Therefore, school boards that formulate racial ceilings without any research transform a difficult calculation into mere guesswork.

IV. CONCLUSION

Despite the best of intentions, the use of racial ceilings by public school districts for school desegregation purposes raises significant constitutional issues because the racial ceilings harm a disproportionate number of black students, the intended beneficiaries of school desegregation measures. Public school districts that are serious about implementing school choice policies face a difficult dilemma to the extent that such policies produce results that conflict with school desegregation plans. Data from the nation's third largest public school system illustrate this conflict.

Although it may be arguable on policy grounds that racial ceilings constitute a net social gain because of the benefits enjoyed by some black students,[52] these benefits accrue at the expense of many other black students. Despite possible policy merits, the constitutionality of racial ceilings in the public school context is, at best, dubious. In an attempt to ameliorate the past effects of school desegregation, a school district's use of racial ceilings that harm black students paradoxically further burdens many of the intended beneficiaries of school desegregation policies. Regardless of which of the four factors a court may focus upon, it is unlikely that a public school district's use of racial ceilings that work against minority students would survive strict judicial scrutiny.

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51 Gewirtz, *supra* note 38.

52 *See, e.g.*, Stephen Eisdorfer, *Public School Choice and Racial Integration*, 24 SETON HALL L. REV. 937 (1993).