

Brown in Jerusalem: A Comparative Look on Race and Ethnicity in Public Schools

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I. Introduction

CONSIDER THE FOLLOWING THREE LEGAL STORIES from Israel: first, there is the *Hassnian* case. On July 2005, the Board of Education of Lod ("Board"), a mixed Jewish-Arab town near Tel Aviv, denied the request of Tamir Hassnian, an eight-year-old Israeli-Arab boy, to enroll in a Jewish public school. The official reason given by the Board of Education was that the school Tamir wished to attend is all-Jewish, and it is "in his best interest," as an Arab child, to go to either an all-Arab or a mixed Arab-Jewish school.¹ A Jewish school's curriculum, the Board reasoned, would be unfit for the child's "needs as an Arab," and going to school only with Jews would be detrimental to his interest in obtaining an education that "fits his identity."² Tamir and his parents filed a petition with the Israeli Supreme Court. They argued that their right to equality had been infringed, citing *Brown v. Board of Education*,³ and further claimed that, under the Israeli Public Education Act, Tamir has the right to attend the school closest to his home, regardless of its national character.⁴ But before the Court had the opportunity to rule on the matter, the Lod Municipality agreed to register Tamir in the all-Jewish school and the petition was withdrawn.

The second story is as follows: in 1996, Adam Abu-Shamis, a four-year-old Arab boy from Jaffa (the Arab section within the greater Tel-Aviv municipality), filed a petition with the Israeli Supreme Court arguing that the Tel-Aviv-Jaffa Board of Education had denied him his right to attend a Jewish preschool because he is Arab. In the process of the deliberations in the Court it was revealed that the Board of Edu-

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1. A.P. 2293/05, *Hassnian v. Lod* (petition filed Aug. 23, 2005).

2. *Id.*

3. 347 U.S. 483 (1954)

cation refused to enroll Arab children in Jewish preschools in order to prevent them from acquiring a sufficient command of Hebrew. Since fluent Hebrew is a precondition for enrollment in most Jewish schools, this policy effectively undermined the chances of admission to Jewish schools for many Arab children—precisely as the Board of Education intended.⁵ After the petition had been deliberated by the Court, but before it ruled on the matter, a compromise was reached between Adam and the Municipality, according to which Tel Aviv would refrain from using any means—direct or oblique—to prevent or discourage Arab pupils from enrolling in Jewish preschools or schools.

Third, consider the *Kedma* case. In 1995, the Director-General of the Ministry of Education ordered the closure of the Kedma school in Qiryat Malachi, a development town in the south of Israel, populated mostly by Jews who had immigrated from Arab countries (*Mizrahi* Jews).⁶ The Director-General based his decision on the grounds that there is no need or justification for a school that promotes a Mizrahi-separatist ideology and that there are enough schools in Qiryat Malachi where students from all ethnic origins can learn together. The Director-General's decision came in the wake of public debate over the legitimacy of the radical Kedma Mizrahi ideology, according to which students of Mizrahi origin have been discriminated against over the past decades in public schools. The proof, argued Mizrahi activists, was in the pudding: 42 percent of Mizrahi students drop out of school before completing twelve years of study, as compared to only 22 percent of Ashkenazi students;⁷ of the graduating students, only 62 percent of Mizrahi students successfully pass the matriculation exams, as compared to 75 percent of the Ashkenazi students⁸; and as a result, only 16.7 percent of the Mizrahi population pursue post-secondary education, as compared to 51 percent of the Ashkenazi population.⁹ The Director-General's decision was challenged both before the Be'er-Sheba District Court and the Israeli Supreme Court, and both affirmed the decision, leading to the permanent closure of the school.¹⁰

5. Abu-Shamis v. Tel Aviv-Jaffa Municipality (1996). For a detailed description and analysis of the case, see Ruth Gavison, *Does Equality Require Integration? A Case Study*, 3 DEMOCRATIC CULTURE 37 (2000).

6. *Mizrahi*, literally meaning "oriental," refers to those Jewish communities originating in Asian and North African countries; *Ashkenazi* refers to European (Western, Central, and Eastern) Jewry.

7. ISSACHAR ROSEN-ZVI, *TAKING SPACE SERIOUSLY: LAW, SPACE AND SOCIETY IN CONTEMPORARY ISRAEL* (Ashgate 2004).

8. MAJID AL-HAJ, *EDUCATION, EMPOWERMENT AND CONTROL: THE CASE OF THE ARABS IN ISRAEL* (1995).

Much of the academic work published in the wake of the fiftieth anniversary of *Brown v. Board of Education*¹¹ in the United States has revolved around the following theme: racial segregation in the educational system has proven highly resilient and extremely hard to combat, and in many ways it still characterizes American schools.¹² Not only have the courts been incapable of delivering American schools from racial segregation by explicitly prohibiting it, well-intentioned legislatures and administrative agencies also have failed to produce the utopia of racial integration in the schooling system. Indeed, racial segregation in schools, once thought to be the result of an insidious but simple set of legal rules that prohibited black and white children from attending the same schools, is now understood to be the result of a multitude of factors, a complicated amalgamation of legal rules, historical conditions, social facts, individual choices, and cognitive dispositions, much harder to decipher and fight. Residential segregation, white flight, economic disparities, market forces, multicultural ideology, public choice dynamics, and other social and cultural factors overwhelm the efforts of courts, legislatures, and governments (local and national) to abolish educational segregation. Moreover, even when state-sanctioned segregation is thoroughly abolished, these social forces prevent racial integration from taking place.

Educational segregation is not unique to the United States; it is often the norm rather than the exception.¹³ In Israel, deep educational segregation exists—not only between Jews and Arabs, as the *Hassnian* and *Abu-Shamis* cases exemplify—but also within the Jewish community, between Mizrahi Jews and Ashkenazi Jews. The problem exists, even

General of the Ministry of Educ.; C.A. 6575/95, Kedma—An Ass'n for Egalitarian Educ. in Israel v. Director-General of the Ministry of Educ. (*aff'd*).

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

12. See, e.g., DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004); SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* (2004); CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* (2004); WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID (Jack M. Balkin ed., 2001); *Brown v. Board of Education at 50*, 6(4) MULTICULTURAL PERSPS. (special topics issue, 2004); *The 50th Anniversary of Brown v. Board of Education: Interethnic Contact and Change in Education in the 21st Century*, 60(1) J. SOC. ISSUES (special topics issue 2004); Symposium, *Brown at Fifty*, 117 HARV. L. REV. 1302 (2004); Brandon M. Lofton, *Fifty Years After Brown, the Civil Rights Ideology, and Today's Movement*, 29 N.Y.U. REV. L. & SOC. CHANGE 19 (2005).

13. See, e.g., Tanya Katerí Hernández, *To Be Brown in Brazil: Education and Segregation Latin American Style*, 29 N.Y.U. REV. L. & SOC. CHANGE 683 (2005) (seg-

though there has never been a formally legislated Jim Crow regime mandating this and despite various measures taken by the state to combat the phenomenon (at least within the Jewish sector). This is perhaps the reason that various scholars have argued that Israel is still waiting for its own *Brown v. Board of Education*.¹⁴ However, as the American case demonstrates, *Brown* did not solve the de-facto segregation between children of different races and ethnicities in the United States, and it is doubtful that it would solve Israel's deep segregation. The Israeli case is a particularly interesting one, because the legal system is heavily influenced by the American system and its courts have explicitly adopted *Brown* and its anti-segregationist jurisprudence, ironically except for segregation in education.¹⁵

But why are Israeli public schools plagued with segregation, and is a locally grown *Brown*-like decision necessary? This article is an attempt to answer these two questions. Whereas the educational segregation between Jews and Arabs has often been understood by Israelis to stem from free choices made by the members of the two national communities living in Israel, the segregation within the Jewish community is thought to be a regrettable outcome of the maltreatment of Mizrahi Oriental Jews by the Ashkenazi European-Jewish elites. In other words, both types of segregation are analyzed not as systemic results of a given and even neutral legal structure, but, rather, of intent and free will. Moreover, they are thought to be theoretically unrelated to each other since the former is conceived as a manifestation of the national conflict and cultural differences between Arabs and Jews, and the latter is seen as a result of either benign neglect on the part of education policymakers or intentional Ashkenazi racism towards Mizrahi Jews. And while internal-Jewish segregation has been fought against over the past thirty-seven years, Arab-Jewish segregation is still

14. One of Israel's leading experts on educational law and policy, Professor Dan Gibton has recently published the article *Awaiting Mizrahi v. Board of Education of Topi-Gan*, which playfully hints to what would be the Israeli version of *Brown*. Gibton discusses *Mizrahi-Ashkenazi* segregation. See Dan Gibton, *A Critical and Comparative Analysis of Israel's Supreme Court's Position on Integration in the School System*, 28 TEL AVIV U. L. REV. 473, 499-504 (2004) (Hebrew). A recent article in the *Ha'aretz* newspaper referred to the case of *Hassnian* as another opportunity for an Israeli *Brown*. See Khromchenko, *supra* note 4.

15. *Brown* has been explicitly endorsed by the Israeli Supreme Court in its famous *Ka'adan* decision in which state agencies were prohibited from allocating lands to Jewish-only communities that explicitly excluded Arabs. See *Ka'adan v. Israeli Land Auth.*, 54(1) PD 258. *Brown* is also mentioned in various decisions regarding educa-

seen by many as necessary or justified. Hence, many argue that there is no real need for an Israeli version of *Brown*.

Challenging this common belief, this article argues that both types of segregation must be understood in the framework of a careful analysis of the structure of Israeli local government law and the way it has impacted residential segregation, suburbanization, and other public choice dynamics. Although the literature has stressed residential segregation between Jews and Arabs and between Mizrahi Jews and Ashkenazi Jews as a central source of the inequality and segregation in education in Israel,¹⁶ the part of local government law and the role of local governments in producing and reproducing the segregation have been largely overlooked. As a result, conventional wisdom has held that segregation could be eliminated if only the courts were to better enforce the various integration schemes that have been initiated over the past thirty-five years. I argue that fifty years after *Brown*, it is established that racial and ethnic segregation is far more complicated to understand and combat, even when direct state-sanctioned segregation is abolished. To change the dire situation of Israel's education system it is, therefore, necessary to change local government law, and to find effective antidotes to white flight, market dynamics, and unequal social and economic baseline conditions. Put differently, a *Brown*-like decision by itself will not suffice; it will need to be augmented by central supervision and financial support, local participation, and construction of affordable housing that will counter residential segregation.

This article seeks, first and foremost to provide a rich factual and legal description of some of the aspects to the role local governments have played in shaping public education in Israel and the changes that this form of government has undergone over the last decades. My claim is that the involvement of local governments in education (which, for lack of a better term, will be called "decentralization," even though this term is oftentimes a misnomer when local involvement is shaped primarily by central policy¹⁷) has been made possible by the basic legal

16. SHLOMO SWIRSKI, *POLITICS AND EDUCATION IN ISRAEL* (1999).

17. As I will clarify further on, the conception of the term "decentralization" in the context of the state education system (as in many other contexts) can set apart different, and at times even opposing, policy recommendations from one another. For some authors, the decentralization of the education system means transferring powers to the local governments; for others, it means transferring powers to the schools themselves. Yet other authors regard the transfer of powers to parents and their increased involvement in the education system as a specific feature of decentralization, while there are those who maintain that the community is the primary entity to which the various education authorities should be transferred. In addition, decentralization schemes differ in terms of which powers (or duties) should be decentralized: some focus on decen-

infrastructure, which gives local governments seemingly “technical” powers in education matters: placement of students in schools; establishment of special and selective schools; control over the pace and depth of the implementation of an integration plan that was launched in the late 1960s;¹⁸ and participation in funding schools within their jurisdictions.

However, due to creeping statutory, economic, and social changes since the early 1970s, only in the last two decades have local governments begun to make use of their legal authority (which they have held since the 1950s) to attract strong populations and compete with other local governments. These changes include: accelerated suburbanization;¹⁹ the shift of many local governments to self-generated funding (rather than state funding);²⁰ the growth of economic disparity in Israeli society;²¹ statutory reforms that have given local governments broader planning and building powers;²² and an ideological shift towards the conception of education as a commodity. These changes led to widespread acceptance of the notion that local government is, in effect, a “package of commodities (or goods)” (including education) that are consumed by people who move between localities.²³ This notion draws its theoretical strength and normative legitimacy from “jurisdictional competition” theories that have gained widespread support over the past few decades.²⁴ According to these theories, competition among local governments over the provision of services and goods is a solution to

18. In 1968, a special plan to integrate children from different neighborhoods in the same locality was adopted by the Israeli parliament. I analyze the plan in detail below. See *infra* notes 102-27 and accompanying text.

19. AMIRAM GONEN, *BETWEEN CITY AND SUBURB: URBAN RESIDENTIAL PATTERNS AND PROCESSES IN ISRAEL* (1995); Eran Razin, *Policies to Control Urban Sprawl: Planning Regulations or Changes in the “Rules of the Game”?*, 35 *URB. STUD.* 321 (1998); Rachele Alterman, *The Challenges of Farmland Preservation: Lessons from a Six-Nation Comparison*, 63 *J. AM. PLANNING ASS’N* 220 (1997); Leviah Applebaum & David Newman, *Rural Trends in Israel and Their Implications on Local Government* (Policy Paper 1/15) (1997).

20. Yishai Blank, *Local Frontiers: Local Government Law and Its Impact on Space and Society in Israel* (2002) (unpublished S.J.D. dissertation, Harvard Law School).

21. See SHLOMO SWIRSKI & ETTI CONOR-ATIAS, *A SOCIAL SITUATION REPORT 2003* (2003) (Hebrew) [hereinafter Report]. The Report points to a significant increase in the size of the piece of the general income pie enjoyed by the top decile relative to the nine remaining deciles. In addition, the Report indicates significant disparities between Jews and Arabs and between Mizrahis and Ashkenazis. *Id.* at 8.

22. Planning and Building Law (Amendment No. 43), 5755-1995.

23. This model was first introduced and developed by Charles Tiebout. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. ECON.* 416 (1956).

24. See William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*. 86 *GEO.*

various social problems, including deterioration of public services, central corruption, and capture by strong elites groups.²⁵ A careful look at the way jurisdictional competition worked in public education in Israel, however, exemplifies also some of the problems caused by jurisdictional competition: problems of cooperation (even where such cooperation is necessary), inefficiencies, and distributive injustices. For example, some of the parents to children in the public system tried to influence their local governments to provide quality education in exchange for the local taxes they pay, either by using their political voice or by exiting the locality or threatening to do so.²⁶ Accordingly, local government law began to function in a way that gave wealthy parents a more effective political voice than poor parents, and allowed the former easier exit from and greater mobility between different localities. This disparity led to an outcome that is concurrently ineffective and socially deplorable.

In this article, I make a number of fundamental claims. First, I assert that the division of the Israeli territory into local governments wielding broad legal powers and authority (in education and any number of other areas) has played a crucial role, alongside the central government's policy, in creating the unequal baseline and segregation plaguing the education system. The lack of central supervision to compensate for problems created by a decentralized structure is a central component of the problem. Second, I assert that as a result of the legal background rules, the patterns of residential segregation between Jews and Arabs, Mizrahi Jews and Ashkenazi Jews, and the rich and the poor have been translated into structural segregation in the education system. Accordingly, although the theoretical desirability of different integration schemes can be questioned, the existing segregation in Israeli basic education cannot be explained as resulting only from the preferences and free choices of individuals or groups. Rather, these preferences and choices (whose existence I do not dispute even though their constancy and weight often seem exaggerated) are distorted and channeled by a system of legal rules that support and foster segregation. This segregation has drastically restricted the spatial mobility of different social groups, which, in turn, has not only impaired the efficiency of the local

25. *See id.*

26. For a classical analysis of "exit" mechanisms and their logic, see ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES* (1970). Fennell provides a fascinating overview of the "exit and voice" model as applied to public good provision. *See* Lee Anne Fennell. *Beyond*

services provision but also hindered the accessibility of important and quality public resources for those social groups. Such limitations on free movement of residents damage the legitimacy of jurisdictional competition.

Third, I show that the shift from state funding to self-generated funding and the emergence of competition between localities in Israel over economically strong populations, with the aim of driving away economically weak populations, have accelerated and exacerbated the disintegration of the public education system and have contributed to the widening of the gaps within the system. In addition, for strong populations, they have encouraged the development of escape and exit mechanisms from the regular public education system. Due to the growing participation of local governments in funding schools within their jurisdictions and the vast divergence in economic strength amongst localities, wide accompanying variances have emerged in the amounts of funds invested in education amongst the different localities, as well as amongst schools within the same locality. The principal victims of this phenomenon are pupils in peripheral towns, in poor neighborhoods, and in Arab towns and villages. However, the general population has also suffered in that this structure has promoted decentralized, ineffective, and expensive suburbanization.

This article's descriptive aspect enables me to scrutinize critically the justification mechanisms that support additional decentralization of the public education system in Israel, since it exposes the different flaws in the jurisdictional competition theory and in the multicultural discourse,²⁷ both of which seek a general antidote (termed "decentralization" at times) for the severe problems of the public school system. Many of these policy recommendations in fact forget the objectives that make decentralizing certain aspects of the education system desirable from the outset. Further, they fail to take into consideration many of the problems that decentralization is likely to produce and with which different decentralization schemes are, therefore, supposed to contend, such as negative externalities, creating inequality, and coordination problems. Lastly, I submit that from an ethical perspective, public education is not a regular product that should be chosen by

27. The article focuses on the economic justifications for decentralization of the education system and on the different criticisms, theoretical as well as practical, of these justifications. Alongside these justifications, another explanation given for decentralizing the education system is the need to promote pluralism and community autonomy in a multicultural state. Due to the complexity of the discussions and limited

people according to their consumer preferences alone. Rather, public education has unique goals (such as training a civic body in possession of certain fundamental attributes), which are likely to be thwarted by the decentralization of education to local governments, given the high degree of segregation and inequality that currently characterizes them.

This article does not support recentralization of the public educational system; instead, it proposes a more cautious and precise consideration of decentralization notions that fail to give proper weight to the need for close central involvement to accompany decentralization and to limit decentralization to those places where it is beneficial. Especially when the American and the Israeli systems are compared to one another, the calamities associated with decentralization, mainly racial and ethnic segregation and inequality become apparent. Decentralization, like centralization, of the state education system must address the spatial conditions, social relations, and legal background rules in order to attain the social objectives lying at the foundation of state education—whether the formation of a civic body possessing basic liberal values, improvement of educational output, greater administrative efficiency, or allowing different communities a voice in their children's education.

II. The Legal Powers of Local Governments in Education

From a positivist-legal perspective, the involvement of local governments in public education in Israel is manifested primarily in two areas. First, local governments provide education to their residents and are responsible for the administrative aspects of pupil enrollment. In other words, the scope of the local government's general jurisdiction was extended by the Israeli legislature to include education matters,²⁸ and those residents of a locality who wish to send their children to a public school must do so within the boundaries of the locality in which they reside (the "localism principle"). Second, local governments participate in the funding of the schools lying within their jurisdiction. Since this jurisdiction supposedly is not pedagogic—local governments have little influence on the curriculum and on teachers' salaries—the prevailing

28. As I have explained elsewhere, municipal jurisdiction entails rather broad powers and duties on the part of the local government vis-à-vis the residents of the locality: local taxation powers, provision of various services (such as social aid and welfare, education, culture, public parks and gardens, sanitation, water, and sewage), and control of many matters that influence the public space within the locality (such as business

belief is that local governments have no substantive influence on education within their jurisdiction (and could not even if they wished to). Technical rules, which grant the local governments enrollment, zoning, and funding authorities, have unparalleled importance for understanding many of the problems facing the Israeli public education system and for contending with modern urban dynamics such as suburbanization and urban decay.

Indeed, my analysis shows that there are striking similarities between Israeli and American local government law. Both legal systems create linkage between place of residence and place of study, and both grant localities with significant taxing and zoning powers that exacerbate dynamics that have been associated with attempts to desegregate the educational system: white flight, suburbanization, and a re-segregation of the system.

A. *The Localism Principle*

The set of rules that regulates the localism principle in education includes statutory clauses, regulations, and judicial rules, the essence of which is that the map of local authorities in Israel delineates the map of education authorities as well. That is to say, every local authority automatically constitutes the "local education authority" within its boundaries and, as such, is responsible for providing the education services in its jurisdiction.²⁹ Every child, upon reaching the age of compulsory education (age 3), is "locked" into the locality in which he or she resides, unless the local government consents to his or her attending a school in the jurisdiction of another locality (as well as to making a payment to the latter for the transfer).³⁰ The schools within the boundaries of a locality are supposed to serve the residents of that locality exclusively; hence the consent of the local government is required for a child resident of another locality to attend school within its jurisdiction. The rules create an even more precise overlap between a child's place of residence and his or her place of schooling through the internal division of every locality into "enrollment zones;" every child has to go to a school that is not only in the locality in which he or she resides, but also within the enrollment zone in which he or she lives.³¹ A central

29. NAHUM BEN-ELIA, *RESTRUCTURING EDUCATION SERVICES IN ISRAEL: DEREGULATION, DEMOCRATIZATION AND ACCOUNTABILITY* (Policy Paper 1/41) (2000); NAHUM BEN-ELIA & SHAI CNAANI, "COSTLESS" LOCAL AUTONOMY: THE ISSUE OF EDUCATIONAL FACILITIES FUNDING (1996).

30. See Regulation 12B of the State Education (Transfer) Regulations, 5719-1959 [hereinafter *Transfer Regulations*].

feature of these rules is that the local governments enjoy broad discretion on a range of matters. For example, local governments delineation of enrollment zones (thus, the shape of an enrollment zone, much like with the practice of gerrymandering in the United States in the voting rights context, can be irregular and winding, reflecting a decision to integrate children from different neighborhoods, even if they are geographically far apart, or, alternatively, to separate children from neighboring areas),³² and whether to allow a pupil to transfer from one school to another or from one enrollment zone to another within the same locality or from one locality to another.³³ This discretion supposedly relates to technical matters only, but in practice, it gave local governments considerable power to influence the student-body makeup in schools in terms of economic class, ethnic origin, and nationality (in other words, the extent of segregation in the education system). And indeed, in a survey conducted among the heads of the local education

that "chains" students to their place of residence is set forth in Regulation 7(b)(1) of the Enrollment Regulations. The central consideration in delineating enrollment zones is, ostensibly, the proximity of the school to students' place of residence, as manifested in the "two kilometers rule," according to which, until Grade 5, the distance between students' place of residence and the school must not exceed two kilometers and, after Grade 5, three kilometers. Nonetheless, a local education authority can deviate from this rule if it cannot meet the requirements (due to locality size and geographic dispersion, for example), so long as public transportation or busing is available that will compensate for the deviation from the maximum distances (Regulations 7(b)(3)-(4) of the Enrollment Regulations). The arrangement for setting enrollment zones exemplifies the extent to which this "technical" power gives the local government the ability to control the degree of segregation in schools within its jurisdiction. The Enrollment Regulations enable the localities to set enrollment zones in a way that allows for a zone to include nonneighboring areas. It is quite possible for one part of an enrollment zone to be in North Tel Aviv, for example, and the second part to be in a certain neighborhood in Jaffa. It is also possible for an enrollment zone to encompass more than one school, and enrollment zones can vary in size. *See* Regulations 7(b)(5), 7(b)(7), 7(b)(8) of the Enrollment Regulations.

32. *See* Regulation 7 of the Enrollment Regulations.

33. The consent of the local education authority is required for a student enrolled in a school in the enrollment zone of her place of residence who wishes to transfer to a different school within the same enrollment zone or in another zone. *See* Regulations 2-3 of the Transfer Regulations. A request to transfer from one enrollment zone to another sets off a bureaucratic process that is subject to the discretion of the local government, and the request is not granted automatically even if the student changes her place of residence. *See* Regulation 2(1)(d) of the Transfer Regulations. The local government has complete discretion to grant or reject a request to transfer from one school to another Regulation 7 of the Transfer Regulations; it has the authority to transfer a student from one school to another for reasons relating to education or for budgetary reasons or due to special education needs. Regulation 6 of the Transfer Regulations. Moreover, transferring from one locality to another requires the consent

authorities, more than 90 percent attested to having a “high to very high” influence on the setting of enrollment zones in their locality.³⁴

These rules have given enormous importance to the unseen boundaries that demarcate the localities in which Israelis live. School pupils are bound to the locality in which they live and, within that locality, to their residential neighborhoods. Despite the fact that the exceptionally broad discretion allowed local governments in setting enrollment zones could enable the integration of students from different neighborhoods, the a priori tendency of the localities has been to follow the boundaries of the residential neighborhoods as the basis for the enrollment zones (at least for elementary schools).³⁵ The localism principle, therefore, erected walls not only between different localities but also between different areas and neighborhoods within the same locality. In other words, the “technical” enrollment zones have far more profound implications than initially apparent. Any residential segregation between national, ethnic, or class groups within the same locality is likely to be easily translated into educational segregation by means of the enrollment zoning mechanism.

B. *Funding of Education*

Local government also participates, partially, in the funding of public schools. As with other areas in which the state funds services provided to its citizens, the formal legal basis for the funding of the education system is formulated vaguely. Thus, in practice, school funding is arranged in annual budget laws, individual agreements between different administrative authorities, and internal instructions of the executive branch. That is to say, school budgets are controlled, in practice, by the central government, local governments, and various administrative bodies. This situation has led to substantial differences in the ways in which schools are funded in different localities and in the amounts of funds available to their school systems, with the funds available to public schools in wealthy localities far exceeding those available to schools in poor localities. Despite the fact that, by law, the state bears the fun-

34. DAN INBAR & MAYA CHOSHEN, *DECENTRALIZATION OF EDUCATION AUTHORITY IN LOCAL GOVERNMENT* (1997) (Hebrew).

35. Researchers see this link to be the result of the educational and ideological conception that places value on a physical-geographical connection between the school and its students' place of residence, because of the resulting potential for parental involvement in the learning (and education) process, for student commitment to the community and environment (students learn in their “natural” environment), and for

damental responsibility for compulsory education (ages three to fifteen), the duty to “sustain” educational institutions is, as noted, imposed jointly on the state and local governments.³⁶ In other words, wherever a local government exists—namely, in the overwhelming majority of the country’s territory—the actual expenses of providing education services are borne jointly by the state and the local government, and not by the state alone.³⁷ Over the years, additional norms have evolved, informal but consistent in nature, which have created a reality of four sources of school funding: the Ministry of Education’s budget, the local government’s budget, the parents,³⁸ and self-generated funds raised by the school.³⁹

Under different agreements and arrangements reached over the years between the central government and local governments, the Ministry of Education is supposed to fund 75 percent of the local governments’ expenditures on education, with the locality responsible for the remaining 25 percent.⁴⁰ This funding structure was allegedly intended to ensure equality in education, since every pupil, regardless of place of residence, was supposed to receive an identical “education parcel.” In practice, however, the Ministry of Education has failed to meet its obligation and, in many localities, compensates the local governments for only 50 to 60 percent of their schools’ education expenses. This has had catastrophic distributive ramifications. First, enormous disparities

36. Section 7(a) of the Compulsory Education Law, 1959, establishes the responsibility of the state for providing free compulsory education. However, the Law goes on to provide that “sustaining” official education institutions for the purpose of providing free compulsory education to students residing within the jurisdiction of a given education authority is to be borne jointly by the state and that education authority. Compulsory Education Law, 5719–1959 __ LSI __ (1959)(Isr.).

37. The local education authority (that is, the local government in its capacity as responsible for education in its jurisdiction) has the power to levy “education taxes” (subject to the consent of the district commissioner) for the purpose of funding the education system in the locality. Compulsory Education Law § 8 (authorizing the Minister of Education, in consultation with the Interior Minister, to permit local education authorities to levy such taxes); *see also* Regulation 60 of the Education Regulations, 3(70) H.E.I. 1713 (general power of local education authorities to levy education taxes); Section 14 of the Local Councils Ordinance (New Version), 1965, N.H. 256 (authority of local councils to levy education taxes).

38. Section 6(4) of the Compulsory Education Law permits the local education authority to collect payments for services and goods it provides to students. In the 1980s, many local governments began to charge parents for various “services” that previously had been provided for free. Compulsory Education Law, 5719–1959 __ LSI __ (1959)(Isr.).

39. These self-generated funds came primarily from renting school classrooms and halls during afternoon hours and from collaboration with commercial entities (for example, through sponsorship by advertisers). For a detailed discussion of this issue, *see infra* Part C.3.b.

arose amongst different localities in the amounts of funds expended on pupils due to divergences in the budgetary resources of the different local government, which depend, of course, on the economic state of the given locality (and, possibly, also on the preferences of local decision makers, who are not only motivated by the preferences of their local constituents, but also by narrow political and personal considerations). Second, great pressure was brought to bear on local governments to decrease their education expenditures by driving away weak, expensive pupils (or by making use of their planning and zoning authorities to completely exclude such pupils from residing in the locality). Third, this has been a further impetus to the suburbanization process, since it allows wealthy parents to leave large cities populated by poor people (often Mizrahi or Arab) for suburbs with wealthier populations and, therefore, improved quality of schooling with only a minor increase in the local taxes they have to pay. Moreover, the Ministry of Education—and not the local governments—finance the construction, development, and physical upkeep of the schools. It is not uncommon for one locality to have schools with empty classrooms or structures, while the neighboring locality is in dire need of additional structures. The Ministry of Education, however, due to the municipal division and the principles of localism, cannot divert students from one locality to the other; as a result, the public has had to fund the construction and upkeep of additional schools.⁴¹ That is to say, increased education costs, stemming from accelerated suburbanization, have been externalized to the public at large.⁴²

III. The Jurisdictional Competition Justification for Decentralizing Public Education

In his groundbreaking article from 1956, Charles Tiebout⁴³ asserted that local governments—instead of the central government—should be allowed to provide public services in their jurisdictions. In a sophisticated market, many local governments will emerge. They will distinguish themselves from one another by offering different packages of services/goods composed of services (such as education, public parks, well-tended streets, public welfare and aid, and a type of lifestyle), and other

41. BEN-ELIA & CNAANI, *supra* note 29.

42. In this article, the term “suburb” is used to refer to a separate locality that is adjacent to a city and not to a neighborhood that is an inseparable part of the greater municipal unit. As such, the suburb enjoys all the legal powers held by a city, since it

goods, and people will choose between localities according to their preferences. People, now called consumer-voters, will “vote with their feet” and consume local services/goods by moving from locality to locality according to their needs and preferences.⁴⁴ Under the (critical) assumption that individuals can move freely between localities, the true preferences of the consumers will be revealed, pressure will be placed on the service providers (the local governments) to become efficient, and optimal prices for the services will be set. In other words, the mobility of consumers-voters will give local governments incentive to optimally match the level of taxation to the type and quality of the public goods they provide, in light of the competition, to attract consumers-voters.⁴⁵

Tiebout’s model not only provided a justification for the prevailing regime in the United States at the time, under which local governments were responsible for providing many services to their residents, it also gave an, albeit partial, response to the theoretical and practical obstacles pointed to by such theoreticians as Samuelson and Hardin, who claimed that public goods are doomed to a process of deterioration and diminished quality.⁴⁶ Tiebout’s model clarified that in a world of voluntary and diversified local governments, it is possible to provide, for example, education services in a public fashion and still avoid such phenomena as grabbing and shirking.

Moreover, the Tiebout model seems particularly attractive as a normative basis since it describes a world in which people are organized not around the amount of money in their pockets but, rather, according

44. *Id.* at 418.

45. The central reason for this competition is the desire of local governments to enjoy the existing advantage size accords them in supplying services. There are additional reasons, such as the desire of some residents to live in a heterogeneous locality or the desire of elected officials to increase the size of the locality for the accompanying increase in their prestige and salaries, which are often affected by the size of a locality. In contrast, there are those residents who prefer to live in a small and intimate locality, and there are politicians who will respond to this demand and will favor it over the financial benefits that accompany size. In other words, there is a distinction between the demand side and the supply side for local services in this context.

46. Under Samuelson’s model, which significantly influenced Tiebout’s model, public goods are allocated efficiently when the marginal rate of exchange of income for goods (for the citizen) equals the marginal cost of producing an additional unit of the good (for the producer). See Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 388 (1954). With private goods, the preferences of individuals are revealed by the demand on the free market and the rate of exchange of income for goods revealed by the producer’s adjustment of prices, which enables the producer to adjust the quality (and marginal cost of production) to correspond with the price he can charge consumers. With public goods, however, there is no way to

to their preferences: people who like public parks as opposed to those who prefer cultural institutions, people who prefer quality schools as opposed to those who have no want for schools (the elderly or childless, for example). These preferences are in no way supposed to be related to the amount of money an individual has. On the contrary, Tiebout's model assumes that all individuals (regardless of the depth of their pockets) enjoy full freedom of movement and, therefore, move without restraint between different localities, thereby exposing their true preferences and influencing the prices and quality of the consumed services.⁴⁷ Hypothetically, this assumption is no more imperative with regard to education than to any other part of the market: people have disparate payment abilities with regard to the entire market of privately consumed goods, and this does not hinder market efficiency. It is sufficient that producers in the market compete over providing services to people with inferior payment ability and that the market is sufficiently "thick" for the preferences of those individuals to be exposed in order for the prices that are set to reflect a correspondence between supply and demand. Analogously with regard to local governments and education, it is sufficient that enough residents have enough mobility—not total freedom of movement—for competition between local governments to arise over the quality of the schools they operate.

The normative appeal of Tiebout's model also springs from what Bratton and McCahery identified as the growing general suspicion of strong central governments, and from the justification it provided for empowering local communities.⁴⁸ Public choice theories and public goods theories have consistently exposed various failures of central governments such as capture by strong central elites, rent seeking legislatures, and circularity in decision-making processes, all hampering the ability of central governments to divine the elusive public good.⁴⁹ Jurisdictional competition provided a way out of the glum picture these theories drew, by offering to inject public good provision with market-associated advantages: only free markets can ensure that the distribution of goods is efficient and that the goods are indeed desired by the

47. For a concise summation of the various critiques that were launched against Tiebout's assumptions, see GERALD E. FRUG, *CITY MAKING* 168–73 (1999).

48. Bratton & McCahery, *supra* note 24.

49. KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 46–60 (1951) (circularity as a problem characterizing large governments); James M. Buchanan, *Rent Seeking Under External Diseconomies*, in *TOWARD A THEORY OF A RENT-SEEKING SOCIETY* 183 (James M. Buchanan et al. eds., 1980) (rent seeking legislatures): MAN-

people and not by self-interested minorities. Granting smaller units (such as localities) the authority over the provision of public services and goods would correct the flaws in over-centralized regimes, without giving up on the ability to cooperate and enjoy the benefits of economics of scale.

Why, then, must we assume full mobility specifically in relation to education or be troubled by limitations on mobility between different localities? There are a number of responses that relate to the uniqueness of education and the structure of local government law in Israel (and also in the United States). First, with regard to the weak segments of society (primarily Arabs and public housing residents), it is not certain that they enjoy even a minimal amount of mobility between poor or weak (sub-market) localities. Accordingly, it is not certain that there is sufficient competition for these groups to expose their preferences, and it is therefore possible that efficiency is not attained in the education market. Put differently, even from a pure economic perspective, it is doubtful that such limited mobility is sufficient incentive for local governments to compete for weak populations. There is concern that those people whose mobility is most limited will in effect be a captive audience in the hands of the local government in whose jurisdiction they reside and they will, therefore, receive meager and inadequate education.

Second, in light of the fact that local governments bundle powers in a wide variety of matters, the choice amongst localities is not focused specifically on education, but, rather, entails any number of factors, such as geographic location, job and occupation opportunities, cultural character, selection and quality of additional local services (such as health and welfare), and the ethnic makeup of the population.⁵⁰ Accordingly, if certain people have strong preferences vis-à-vis a specific part of the package, they will be compelled to compromise on education, which leads to a distortion of the education market. If these preferences are consistent amongst certain sectors of the population—such as ultra-orthodox religious Jews, Arabs, or welfare recipients—and they create a tendency amongst members of these groups to choose from only amongst a very limited number of localities, the mobility of these groups could be limited in terms of their choice amongst localities according to quality of education. Local governments that serve this public will not compete with one another with regard to the quality of the schools they offer.

50. Richard Ford labeled this legal technique bundling of powers. See Richard T.

Third, even if the restricted mobility does not impair the efficiency of the decentralized model, it nonetheless decreases the normative attractiveness of the Tieboutian justification for it. If, with regard to regular goods, it is possible to accept the fact that people with high payment ability enjoy superior products to those consumed by the poor, this does not seem acceptable in the context of goods like education. Deep disparities in the quality of education consumed by children from different sectors of society that derive not from preferences but from diverging payment abilities are less desirable from a normative perspective than in the context of cars or televisions, particularly with respect to state-provided education, as opposed to privately provided education. Public schools are supposed to prepare and train citizens to function as citizens in a democratic state: curious, critical, and tolerant, with awareness and understanding that will assist them in making decisions regarding the fate of the political community. And even if there is no consensus with regard to the specific values schools are supposed to teach, the basic function of the education system is indubitable. It is possible that particularly poor schools will not instill these values and will even fail at their duty to train citizens to fit into the advanced job market.⁵¹ Due to their far-reaching and extreme consequences for the future of the child, discrepancies in the quality of education that stem from limitations on mobility are particularly outrageous and contemptible. Indeed, when the consequences of this model become even more apparent in racial and ethnic terms as in the case of Israel—where Arabs and Mizrahi Jews consistently receive poorer education—it is harder still to support the Tieboutian model as normatively desirable in reality.

Below, I detail the causes of the limited mobility of residents amongst localities in Israel and the ramifications of this phenomenon specifically for the public education system. These causes also reveal some of the deficiencies in the jurisdictional competition's support for decentralization of public education.

A. *An Imperfect World: Deep Residential Segregation as a Starting Point*

One of the most prominent aspects of limited mobility amongst localities in Israel is the link between economic class and ethnic, religious, and national affiliation, as is the case in many countries across the world. One of the chief obstacles in attempting to attribute to consumers-voters

a genuine freedom of movement amongst localities is the basic state (or starting point): the world arranged by the law is not a tabula rasa, but, rather, a reality in which people are spatially organized according to "identity," which is understood as ethnic, religious, or national affiliation, and in which they continue to be treated (also legally) as belonging to a certain community and identity. The fact that the basic condition in Israel is one of deep segregation along the lines of these characteristics is crucial for understanding the difficulties of mobility between different localities.

Approximately 90 percent of Arabs in Israel⁵² live in Arab localities (that is, in localities in which the overwhelming majority of residents are Arab).⁵³ The remaining 10 percent live in neighborhoods in five cities with mixed populations,⁵⁴ with the Arab neighborhoods almost completely detached from the Jewish ones.⁵⁵ Indeed, as Falah observed, it appears that the term "hyper segregation," coined by Massey and Denton to describe the situation of African-Americans in the United States,⁵⁶ is valid and accurate also with regard to the situation of Arabs in Israel.⁵⁷

For many Mizrahi Jews as well, deep residential segregation is not part of the distant past, but rather a tangible reality. In the 1980s, the majority of the development towns in Israel were still disproportionately populated by residents of Asian or North-African origin (i.e., Mizrahi). In sixteen of these towns, the proportion of households of Asian or North-African origin was no less than 80 percent, and in some, it reached 90 percent. In the remaining ten development towns (except for three) the proportion did not drop lower than 65 percent.⁵⁸ Today

52. My discussion will relate only to Arabs who are citizens of the State of Israel, who live inside the Green Line boundary, and not to residents of East Jerusalem, who are, by and large, not citizens of the state (but rather permanent residents).

53. GONEN, *supra* note 19, at 192.

54. Arabs comprise 4.5 percent of the population in Tel Aviv-Jaffa; 9 percent in Ramla; 20 percent in Lod; 10 percent in Haifa; and 26 percent in Acre; see YOSEF JABAREEN & HANA HAMDAN, *THE ARAB CITIZENS IN MIXED CITIES: JAFFA, LOD, AND RAMLE—A FIELD SURVEY 6* (2001) (Hebrew); Majid Al-Haj, *Higher Education Among the Arabs in Israel: Formal Policy Between Empowerment and Control*, 16 HIGHER EDUC. POL. 351 (2003); AL-HAJ, *supra* note 8; see also Ghazi Falah, *Living Together Apart: Residential Segregation in Mixed Arab-Jewish Cities in Israel*, 33 URBAN STUD. 823, 829 (1996)

55. See GONEN, *supra* note 19, at 194.

56. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 10, 74–78 (1993).

57. The segregation is not only residential, but also in regard to employment, leisure activities, general economic activity, and social activity. See Falah, *supra* note 54, at

as well, the average proportion of Ashkenazi Jews still stands at only approximately 20 percent in development towns.⁵⁹ The hundreds of Mizrahi immigrant *moshavs* (semi-collective agricultural settlements) in the country are populated with disproportionate amounts of Mizrahi Jews, and the poverty-stricken neighborhoods in many cities are overwhelming populated by Mizrahis.

It is perhaps becoming clearer now why schools in Israel were so deeply segregated along lines of race and ethnicity. In most instances, local-jurisdictional lines simply produced separate educational districts, segregating Arabs from Jews and Mizrahis from Ashkenazis. The *Hassnian* and *Abu-Shamis* cases⁶⁰ are such rare examples precisely because mixed Arab-Jewish towns are so few. Neighborhoods where Jewish and Arab children live together and therefore, are at risk of going to school together, are fewer still. I will return to this point later on.

This baseline of deep spatial segregation between different communities was, to a significant extent, created by the central government, and it continues to perpetuate this segregation by means of its land policy.⁶¹ The "population dispersion plan" adopted by the state in the 1950s⁶² isolated Arabs mainly in their villages, Mizrahi Jews in development towns, and immigrant Moshavs in semi-collective agricultural settlements and outskirt neighborhoods in metropolitan areas.⁶³ The segregation of Jews from Arabs is maintained by the central government through the most brutal and coercive means, such as allotting lands exclusively to Jews and selling land to Jews at tremendous discounts.⁶⁴ In addition, the mobility of public housing residents, who are

in Homeownership and the Value of Housing: The Case of Immigrants in Israel, 75 SOC. FORCES 1439 (1997); Noah Lewin-Epstein & Moshe Semyonov, *Migration, Ethnicity and Inequality: Homeownership in Israel*, 47 SOC. PROBLEMS 425 (2000).

59. Oren Yiftachel, *Nation Building and the Division of Space: Ashkenazi Domination in the Israeli "Ethnocracy"*, 4 NATIONALISM AND ETHNIC POLITICS 33 (1998).

60. See *supra* Part I.

61. Eyal Benvenisti has noted in this context that the separate residential pattern is no longer the result of an almost self-generated natural historical development or the product of a casting of lots by a leader following God's command. Rather, today, this is an allocation that is the product of state planning. See Eyal Benvenisti, "Separate But Un-Equal" in the Allocation of Lands in Israel for Residential Purposes, 21 TEL AVIV U. L. REV. 769, 770-71 (1998) (Hebrew); see generally Yiftachel, *supra* note 59.

62. The "population dispersion plan" was the name by which architect and urban planner Arye Sharon's 1951 *Physical Planning in Israel* was popularly known.

63. SHLOMO SWIRSKI, *THE DEVELOPMENT TOWNS OF ISRAEL: TOWARDS A BRIGHTER TOMORROW* (B. Swirski trans., 1986).

64. A basic condition that enabled the country to realize its policy of territorial segregation amongst communities is the fact that the overwhelming majority of the land in Israel (over 90 percent) is owned by the state. For many years, the state pursued

mainly Arabs and Mizrahi Jews, is severely limited by the geographically concentrated pattern in which the housing projects were built by the central government, in accordance with the population dispersion policy and not homogeneously across the country. Settling Jewish immigrants from Arab countries in public housing could have enabled high mobility, if not for the limited number of public housing units built and the fact that they are situated in the peripheral areas of the country (mostly in development towns) and disadvantaged neighborhoods.⁶⁵ In addition, from the 1970s, a sharp decline in the construction of public housing began further limiting the mobility of populations who are dependent on public housing.⁶⁶

The result of this centralist policy was the spatialization⁶⁷ of economic discrepancies and community affiliation in Israel.⁶⁸ A more current example of the asymmetrical restriction of the mobility of different groups can be found in the suburbanization trend in Israel in the last two decades. Until the 1970s, the upper-middle class could be found

was the allocation of state lands, through the Jewish Agency, to entities that leased the land (in long-term tenancy) only to Jews who had served in the army. *See* Benvenisti, *supra* note 61; *id.* This policy, as I mentioned above, was declared illegal by the Israeli Supreme Court in its landmark *Ka'adan* decision.

65. *See* GILAT BEN-SHIRIT, HOUSING POLICY IN ISRAEL 16 (2003) (Hebrew). In this way, Mizrahi Jews (and urban Arabs)—who were the main consumers of public housing—were concentrated in isolated enclaves and their mobility restricted. Despite the fact that the housing was leased for extremely long periods (sometimes for literally the entirety of the leaser's lifetime), purchasing the apartments was most difficult, and thus many leasers found themselves trapped in the places in which the state had settled them if they did not want to lose their places of residence.

66. This is with the exception of a short period of time during the 1990s, when many housing units were built by the state in response to the massive wave of immigration from the former Soviet Union. *See id.* at 7.

67. A body of research has recently developed dealing with the importance of spatial analysis—which relates to the spatial reality and not only the abstract social basis or the social and political situation—for a realistic and deep understanding of the law and its relationship with society. For a general discussion, see Alexandre (Sandy) Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948–1967*, 33 N.Y.U. J. INT'L L. & POL. 923 (2001); ROSEN-ZVI, *supra* note 7.

68. Of the ten towns comprising the lowest socio-economic cluster of towns, seven are Bedouin, one is Arab, and two are ultra-orthodox Jewish (*haredi*). Of the thirty-one towns that are in the second-to-last cluster, six are Bedouin, ten are Arab, and four are *haredi*. Twenty-one of the thirty-three towns making up the third-lowest cluster are Arab. In contrast, neither of the two towns in the top cluster are Arab, *haredi*, or a development town; the same is true with regard to the eleven towns in the second-from-the-top cluster and the twenty-five towns in the third cluster from the top. *See* CENTRAL BUREAU OF STATISTICS. CHARACTERIZATION AND CLASSIFICATION OF LO-

almost only in city centers, while the more distant neighborhoods were populated mainly by the lower socio-economic classes. Towards the end of the decade, this pattern began to change.⁶⁹ Studies show that the economically and politically strong populations had a greater chance of being granted permits by the Israel Land Administration and the Jewish Agency to build new suburbs. Arabs, the poor, and those without political clout or power were unlikely to be leased land from the state to set up new towns.⁷⁰ In addition, as part of the distorted baseline, the value of houses in the development towns and Arab villages was significantly lower than that of houses in central Jewish communities.⁷¹ There were also vast discrepancies amongst the different social groups in funds available for purchasing an apartment; the income levels of Arabs, ultra-orthodox Jews, and Mizrahis were significantly lower than those of secular Ashkenazis.⁷² The social capital of the former groups was similarly low.⁷³ Accordingly, an Arab or Mizrahi homeowner who

69. According to a survey conducted in 1972, upper-middle class households were disproportionately represented in the urban centers of all the localities comprising metropolitan Tel Aviv. The same was true of Jerusalem and Haifa. See GONEN, *supra* note 19, at 88.

70. The majority of the populations of most of the new suburban towns are Ashkenazi and economically well-off. Approximately 84 percent of the residents in the new community settlements are Ashkenazi, with only 16 percent Mizrahi. No Arabs or ultra-orthodox Jews live in these new settlements, the majority of whom would be automatically disqualified since they have not done compulsory military service, a precondition for acceptance. See Yiftachel, *supra* note 59. The exclusion of Mizrahis, Arabs, ultra-orthodox Jews, and the poor from these settlements has been achieved not only through the market mechanism of (high) real estate prices, but also in a more active fashion, through acceptance committees that are responsible for accepting new members to the settlement and whose activities are enabled by a unique legal structure. Many applicants seeking to purchase a plot in the settlements were routinely rejected for "social incompatibility" with the cooperative association and settlement. A petition currently before the Supreme Court was brought against the acceptance committees in community settlements due to the discriminative effects of their actions on accessibility to state lands.

71. Research that was conducted in the mid-1990s revealed that the average value of homes owned by Jews is almost twice as high as that of homes owned by Arabs. In 1992, the value of homes owned by Ashkenazis was approximately 65 percent higher than the value of homes owned by native-born Mizrahis. See Rachel Kallus & Hubert Law Yone, *National Home/Personal Home: Public Housing and the Shaping of National Space in Israel*, 10 EUROPEAN PLAN. STUD. 765 (2002).

72. See generally Yinon Cohen & Yitzhak Haberfeld, *Second-Generation Jewish Immigrants in Israel: Have the Ethnic Gaps in Schooling and Earnings Declined?*, 21 ETHNIC AND RACIAL STUD. 507 (1998). Since the 1980s, the gap in education has not widened between second-generation (i.e., Israeli-born) Mizrahis and Ashkenazis, but rather it appears to be narrowing. However, the wage gap was not reduced and perhaps even increased. In the period between 1975 and 1982, the average income of Mizrahis, as a percentage of the average income of Ashkenazis, dropped from 79 percent to only 70 percent. From that time until 1995, the income gap did not narrow.

sought to sell his or her house and purchase one in a Jewish town would be forced either to compromise on the size of the new house (if he or she succeeded in finding a smaller one, and live in crowded quarters), or else live in a poor neighborhood in which the schools are inferior.

B. Restrictions on Mobility Created by Local Government Law

The Tiebout conception of local government as just one more product on the market, which can be bought and sold relatively easily by changing place of residence, entails an important fact: local governments will have to maintain a high correlation between the level of payment and quality of service. In order to do so, they must have control of both the income (taxes) and expenditure (services and goods) elements. If a consumer-voter moves to a certain locality to enjoy its excellent education services in exchange for high local taxes, but the education services turn out to be unsatisfactory, she will either quickly move to another locality or else use her political voice to try to cause the local government to levy fewer taxes. In the latter event, the locality will cease to provide education services (or will provide a particularly minimal and low-quality education), and at the same time, a private education market will evolve in which the consumer-voter will receive proper value for her money.⁷⁴

mountable obstacle to improving economic class. In a social and spatial configuration in which the residential environments of communities are so isolated and the contact between groups so minimal, the chances of members of the weak groups securing either material capital or social capital (contacts, acquaintanceships, information on business options, diverse networks) drop drastically and any potential for significant social mobility for them is hindered. See NAN LIN, *SOCIAL CAPITAL: A THEORY OF SOCIAL STRUCTURE AND ACTION* (Cambridge 2001); Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY (1995) 65; Robert D. Putnam, *The Prosperous Community: Social Capital and Public Life*, AM. PROSPECT 35 (1993).

74. Fischel points to the education system in California as an example of this phenomenon. He claims that following two decisions handed down in the 1970s, *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976), and *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), in which the California Supreme Court ordered equalization of the level of funding for all California public schools, a law, known as Proposition 13 was adopted, drastically reducing land taxes in the state. This legislation dealt a terrible blow to the public school system in California, since it had relied predominantly on this type of tax income. See WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE AND LAND-USE POLICIES* 98-128 (2001). In his book, Fischel relies on previous studies he published on the matter: William A. Fischel, *Did Serrano Cause Proposition 13?*, 42 NAT'L TAX J. 465 (1989), and William A. Fischel, *How Serrano Caused Proposition 13*, 12 J. L. & POL. 607 (1996). The debate surrounding the *Serrano* decisions and Proposition 13 and the question as to whether a causal link exists between them continued for more than twenty years. For a comprehensive and critical review of the literature that deals with Fischel's research on the link between *Serrano* and Proposition 13. see Kirk Stark &

Even if a sophisticated local government market does exist and there is high mobility between localities, there is a danger that people with poor taste, or, as Lee Fennell justifiably notes, "poor pocket,"⁷⁵ will ceaselessly follow the wealthy and attempt to consume the expensive services for a low payment. Assuming that local governments tax their residents according to the criterion of property and not income, the lesser-off will attempt to purchase small residential units and live in crowded conditions and thereby be able to consume quality services for a minimal tax payment.⁷⁶ This will in effect lead to the absence of an effective exit mechanism, so that in the end, everyone will receive poor services for little money. Hamilton concluded that in order to prevent such negative outcomes, the local governments must be given a certain power to exclude from their localities those who are unable to contribute sufficiently to the general pool.⁷⁷ Exclusionary planning and zoning tactics can include setting a minimum plot size for houses, thereby effectively ensuring a minimum amount contributed by every resident to funding local services.⁷⁸ Another such tactic is to disallow the erection of apartment buildings, as opposed to houses, or to severely restrict the number of apartment buildings that can be built. Indeed, in the United States, the use of local planning and zoning powers is an organizing principle of local government.⁷⁹ While local control over

75. See Lee Anne Fennell, Book Review: *Homes Rule: The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies*, 112 YALE L.J. 617, 623 (2002). Following Gerald Frug, Fennell asserts that the notion that people "choose" to live in localities in which there are poor schools, violence, crime, and air pollution is extremely dubious. It is more likely that they do not have enough money to move to a better residential area, not that such a "preference" exists. See Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 31 (1998).

76. In Israel, the population density of the top decile is 0.6 people per square meter, whereas the population density for the bottom decile is 1.6 people per square meter. The average size of homes for the bottom decile is 3.6 rooms, whereas for the top decile it is 4.5 rooms, with the average number of people per household 5.7 and 2.6, respectively. See CENTRAL BUREAU OF STATISTICS, STATISTICAL ABSTRACT OF ISRAEL 2003—No. 54 (2003), Table 5.35.

77. See Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205 (1975).

78. See *id.* at 206.

79. The examples are numerous. See, e.g., *Gardner v. Baltimore*, 969 F.2d 63 (4th Cir. 1992) (holding that city officials did not "improperly prevent[] landowners from securing necessary approvals for residential development of their property." Using "the 'claim of entitlement' approach," the court held that "any significant discretion conferred upon city officials defeated the claim of a property interest"); *Federation of Advert. Indus. v. City of Chicago*, 189 F.3d 633 (7th Cir. 1999) ("accordingly, the traditional local police powers held by states enabling them to enact zoning restrictions on the sizes and placement of outdoor advertisements were found not to be preempted by the [Federal Cigarette Labeling and Advertising Act]"); *Vill. of Belle Terre v.*

taxation and local expenditures ensures that money will not trickle out to neighboring local governments, exclusionary planning ensures that the necessary link between payment and service is not eroded as a result of the infiltration of parasites into the locality.⁸⁰

Exclusionary planning obviously leads to restrictions on the free movement of certain groups of people between localities, first and foremost, those populations lacking means. It appears that over the last two decades in Israel, people have increasingly sought to exclude weak populations from their localities, in the wake of the move by many local governments to self-generated funding for the services they provide.⁸¹ This was most acute particularly with regard to education services: over the course of the 1980s, there was a sharp cut (of about 28 percent) in the number of classroom hours allocated by the central government to state schools.⁸² In conjunction with this curtailment of state support, parents and local governments began to fund more and more education services.⁸³ Between the years 1984 and 1995, families' contribution to the funding of their children's education rose from a mere 5 percent to approximately 24 percent, an increase of about 600 percent within only a decade.⁸⁴ In the last fifteen years, the average family expenditure on education services has grown from 3.8 percent of total family expenses to approximately 6.1 percent.⁸⁵

80. Fennell, *supra* note 75, at 624.

81. In a previous article, I showed that, due to various processes that began in the 1980s, there was an ongoing decline in government funding for public services that under law the local governments are required to provide, with the local governments forced to bear a steadily increasing share of the costs of these services. See Blank, *supra* note 20, at 220. It appears that the rise in homeownership was also one of the growing incentives for people to seek to exclude "weak" populations from the localities in which they live.

82. See STATE COMPTROLLER, ANNUAL REPORT NO. 40 330-31 (1990). Excluding the period in which there was a Labor Government (from 1993 to 1996), the government's national investment in state education has steadily declined since the 1980s. See PARLIAMENTARY INQUIRY COMMITTEE ON SOCIAL GAPS IN ISRAEL, REPORT AND SURVEY OF THE DEVELOPMENT OF SOCIAL GAPS IN ISRAEL IN THE LAST TWENTY YEARS § 5.2 (July 2001) (Hebrew) [hereinafter PARLIAMENTARY INQUIRY COMMITTEE ON SOCIAL GAPS IN ISRAEL], available at <http://www.knesset.gov.il> (last visited June 19, 2006). Ami Volansky notes that between the years 1979 and 1985 alone, the heavy budget cuts led to a decrease of 9.2 percent in the number of classroom instruction hours in elementary education and 20 percent in junior high schools. AMI VOLANSKY, FROM EXPERIMENT TO EDUCATIONAL POLICY: THE TRANSITION TO SCHOOL-BASED MANAGEMENT IN ISRAELI SCHOOLS, IN SCHOOL-BASED MANAGEMENT: AN INTERNATIONAL PERSPECTIVE 207, 209 (Ami Volansky & Isaac A. Friedman eds., 2003).

83. This phenomenon is often called "grey education." Yossi Yonah, *Parental Choice in Israel's Education System: Theory vs. Praxis*, 19 STUD. IN PHIL. & EDU. 445, 454 (2000).

84. See Yonah, *supra* note 83.

85. See SHLOMO SWIRSKI. THE INCREASE IN HOUSEHOLD EXPENSES ON EDUCATION

The desire of the average resident (the resident who consumes exactly what he or she pays for) to exclude members of poor groups was, therefore, economic logic rather than racially motivated, even though these groups are often Arab, Mizrahi, or ultra-orthodox Jews. Similarly, the logical assumption is that the average resident pressured her local government to exclude these groups from the locality. But it can also be reasonably assumed that a pure economic self-interest drove local governments to zone out populations that cannot meet the level of local taxation and, therefore, could be expected to raise the tax level or, alternatively, cause a deterioration in the quality of local services.

These processes caused local governments to come closer and closer, supposedly, to the ideal described by Tiebout and Hamilton, for, indeed, the "packages" they offered became more and more varied and each locality began to take autonomous action to compete with its neighbors for people who could pay the local taxes, while seeking to match the level of taxation to the type and quality of the local services. Moreover, under Fischel's model, the high level of ownership of residential apartments in Israel should have raised residents' awareness of the quality of education (and other local services), in light of its influence on the value of their properties.⁸⁶ Due to the need for signals to enable easy assessment of the value of residential environments and real estate, quality education has become a desired product, not only because people have a preference for it, but also because it serves as a signal of a good residential environment. Thus, the fact that the level of home ownership has risen over the last few decades (consequent to deliberate government policy)⁸⁷ elucidates the assumption that people used their

the wealthy social sectors and necessarily discriminates against students from the weak sectors. See PARLIAMENTARY INQUIRY COMMITTEE ON SOCIAL GAPS IN ISRAEL, *supra* note 82, § 5.2.3.

86. Seventy-one percent of the Israeli population are homeowners, ranking Israel high in the Western world in this respect. In the United States, the level of homeownership stands at approximately 68 percent. See BEN-SHRIT, *supra* note 65, at 8-12; see also CENTRAL BUREAU OF STATISTICS, *supra* note 74, *ibid.* In his ambitious book *The Homevoter Hypothesis*, Fischel claims that the local government regime in the United States not only ensures the ability of residents to choose bundles of services that match their preferences, but also the efficient management of public and private resources and efficient political decision making, since it, in effect, enables the capitalization of preferences, services, and goods by translating them into the value of houses. See FISCHEL, *THE HOMEVOTER HYPOTHESIS*, *supra* note 74, at 6-7, 12, 45-51. Under Fischel's hypothesis, homeowners make the best evaluation of the array of services provided to them; they capitalize this array into the value of their homes; they are motivated by the desire to preserve the value of their homes (or increase that value); and, therefore, it can be reasonably assumed that they will make wise political decisions. *Id.*

87. In 1957, it was found that "only" 54 percent of homes in Israel were owned by their residents. and the high rate of homeownership currently prevailing in Israel (71

political power (“voice”)—by influencing local government mechanisms—to improve the local education system not only with augmented education budgets, but also by restricting the mobility of weak populations.⁸⁸

Fennell maintains that these processes make the Tiebout choice between localities turn on the depth-of-pocket and income level of neighbors, not on preferences with regard to the taxation/services package. These processes thereby inhibit the efficient provision of services supposedly secured by the Tiebout model.⁸⁹ If people in Israel choose a locality according to the residents’ income levels and not according to the (marginal) payment they were willing to make for a (marginal) improvement in the service they wish to consume, then their true preferences are not revealed to the local governments and the latter have no way of knowing how to assemble efficient taxation/services parcels. With regard to weaker sectors of the population, whose mobility is more severely restricted, there is a genuine concern that the competition for them has been severely impeded, and as a result, their children have received particularly poor educations. It also explains the high levels of segregation of subordinated groups such as Arabs and Mizrahi Jews.

In sum, over the last few decades, a legal and economic mechanism has evolved in Israel that has given rise to a clear interest for many to take action in the political framework of their locality to exclude Arabs, Mizrahis, ultra-orthodox Jews, and the poor, not due to nationality, ethnicity, or religiosity, but, due to their economic class, which points to them as potentially “parasitic.” For these same reasons, an incentive has emerged for Jews to leave mixed Arab and Jewish cities and move to entirely Jewish localities, and for Ashkenazis to leave big cities with

of a residential home is not considered theoretical income and, therefore, it is not taxed (in the past, ownership of a residential home constituted “theoretical income” under § 3(2) of the British Mandatory Income Tax Ordinance). In addition, mortgages are subsidized by the government for young couples and new immigrants, and additional mechanisms for making purchasing a home easier encourage people to buy homes rather than rent. See BEN-SHIRIT, *supra* note 65, at 8–13.

88. This is principally due to risk-aversion, high transaction costs, and the concern for lost value upon selling, traits that characterize homeowners. See FISCHER, THE HOMEVOTER HYPOTHESIS, *supra* note 74, at 9–11, 230, 262. Fischer clarifies that homeownership—a phenomenon that typifies the house markets in the United States and Israel—produces some of the less desirable behaviors from economic and social standpoints: NIMBYism (Not in My Backyard); extreme risk aversion and excessive hesitancy, which lead to irrational decisions; local egoism accompanied by negative externalities; and so on. NIMBYism refers to the phenomenon where the owner of an asset (an individual, company, or locality) objects to a certain land use on an individual basis and not in principle—that is, does not wish for that type of use to occur specifically in

significant Mizrahi populations, or else to threaten local government representatives with this prospect if they do not receive better education services than residents of the weak neighborhoods. Thus, central government policy alone is not responsible for inter-community segregation; local government law has also fostered these dynamics.

Over the last fifty years, a broad body of research has evolved that explains different spatial dynamics in urban regions by means of jurisdictional competition and public choice theory, in particular, suburbanization processes, urban decay, sprawl, segregation on the basis of race and class, and the emergence of closed neighborhoods. Public choice theory seeks to clarify the complex reciprocal relations amongst legal rules, economic incentives, and social reality, and to provide solutions to problems created by these processes. Despite the fact that the focal point of the majority of these analyses is a one-dimensional normative conception that sanctifies maximization of personal welfare (or preferences) that can be translated into money—a conception that, for a variety of reasons, can be disputed and is erroneous specifically vis-à-vis education, as I will explain—these models bear important analytical potential: they attempt to explain the particular way in which Israeli positive law evolved and was interpreted, and they particularly assist in understanding the Israeli spatial reality (suburbanization, the reproduction of segregation, the splintering of the education system, etc.). These models are, therefore, important for a realistic analysis of the law, one that seeks to explain the discrepancy between the positive rules, and their desired outcomes and their outcomes in reality. Such an analysis facilitates an understanding of the processes that enable neutral rules to have discriminatory effects and the (legal, social, and economic) background rules that enable these outcomes.⁹⁰

In this part, I described the limitations placed in practice on the mobility of consumer-voters between different localities. These limitations are the *unnecessary yet actual* outcome of background legal rules (that establish the link between local governments and public

90. It is in fact *imperative* to consider the law both through and in opposition to economic analysis, rather than rejecting this analysis out of hand. This theoretical tool facilitates the understanding of the Israeli reality and law not as a set of unfortunate accidents or evil decisions that have resulted in the perpetuation of educational segregation and inequality, but, rather, as the outcome of interwoven choices and constraints—social, legal, economic. Economic analysis also reveals education as only one, albeit important, component in an entire complex of social, economic, and legal phenomena, at the hub of which lie local governments. Finally, assuming that a richer normative conception is available, these theoretical tools can assist in crystallizing legal

education), social-economic baseline conditions, and spatial processes (suburbanization and urban decay) that have unfolded in Israel over the last few decades. Part IV demonstrates the problems that the theoretical analyses point to, and which have been observed by scholars in the United States, by means of a meticulous analysis of the legal structure of the Israeli education system and how the system has developed over the last two decades.

IV. The Trouble with the Jurisdictional Competition Justification for Decentralized Public Education

The discussion in this part will focus on clarifying the profound link between local governments and the education systems in their jurisdictions and the necessary conclusion that obtains: we cannot consider significant reforms of the public education system in isolation from the current structural problems and circumstances of the local governments, such as, suburbanization, economic crisis, competition for wealthy populations, ethnic tensions, and power struggles with the central authorities. First, I will explain the uniqueness of education from an economic perspective, as a product in whose production the consumers participate and whose quality is therefore crucially influenced by their attributes and composition. Second, I will describe the distributive problems that derive from the way in which public education is funded in Israel, a system that enables schools that are in essence private and selective to be called public and, thus, receive state funding.

A. Problems of Cooperation

Thus far, we have accepted the assumption that the school is no different from any other commodity and, therefore, its provision can be analyzed as though it were, for example, sanitation services. In this section, I challenge this premise from three different angles. First, following Fennell, I claim that education is distinct from other commodities in that those who consume it participate in its production. Accordingly, the makeup of its consumers, that is, school pupils, must be taken into account in planning optimal production. Furthermore, consumer makeup has an impact on the collective way in which people choose their children's school and their locality. Thus, transferring decision making on matters of education to local government is likely to exacerbate the trend of escape to the suburbs or to private education institutions in the city (prisoner's dilemma). Due to the noted unique

as amongst its different suppliers (local governments). Accordingly, considerable importance has been attributed to the extent to which the education system contends with the many difficulties entailed in achieving cooperation between these entities and its ability to minimize the likely problems of cooperation. Second, I claim that conceiving education as a product has contributed to the weakening of social norms that encourage people to remain in the state education system and has therefore also exacerbated cooperation problems amongst locality residents.

I present these fundamental criticisms of the economic analysis by way of two concrete examples: the relative failure of the integration plan implemented in Israel from the late 1960s, and the appearance of special schools and supra-regional educational frameworks across the country in the last decade.⁹¹ In brief, I assert that the processes that occurred over the last two decades in education and local government in Israel led to the disappearance (or elimination) of legal and social mechanisms that had fostered cooperation—and, in effect, had assisted in surmounting the problem of cooperation—with no notice given to the likely emergence of an acute prisoner's dilemma that will lead to the deterioration of the entire education system and to a generally undesirable situation. Therefore, sufficient steps were not taken to develop mechanisms that foster (or compel) cooperation. The fact that the state allowed the development of a great number of suburbs and permitted them to operate state education systems independent of the systems operating in the neighboring cities (or to set-up special schools within the existing cities) in effect removed the strong coercion that had existed: the strict limitation of the practical ability to escape the locality in which one lives and the schools in that locality (a typical "lock" mechanism, by which residents are locked into a certain service).⁹² I

91. Despite the fact that it is well-known that supra-regional frameworks have been set-up in elementary and secondary schools since the 1980s and with greater fervor in the 1990s, it is particularly difficult to find data with regard to the exact scope of the phenomenon. See STATE OF ISRAEL—MINISTRY OF EDUCATION, TASK FORCE FOR THE EXAMINATION OF UNIQUE SCHOOLS 28 (2002) [hereinafter THE WEINSTEIN REPORT]. From the available partial data, it can be determined with high certainty that there are currently tens of supra-regional state schools across the country (at least thirty-five) and additional tens of schools with supra-regional classes (in regional schools). It can also be assumed with high certainty that these numbers are in fact larger. Moreover, there are many supra-regional institutions in the religious stream of state education and in Arab education.

92. For a description of "lock" mechanisms, see Fennell, *supra* note 26, at 46–48. Of course, the wealthiest will always be able to exit the public system for completely private education—so long as it is permitted under law—and thereby escape lock mechanisms. However, it should be assumed that their numbers will be quite minimal in

argue that the establishment of scores of supra-regional special schools across the country and initiation of a great number of learning “experiments” (which allowed parents and schools to add instruction hours and to set parts of the school curriculum) also served to eliminate cooperation-compelling mechanisms, since they allowed easy flight from the general system (without having to move to the suburbs) and placed many parents in a dilemma: to leave or stay? The fact that the special schools were public schools in terms of their formal definition made it even easier for parents to send their children to these schools, since they were not forced to pay the full price of this exit, which would have been cutting off from the state. This dynamic was further enhanced by the courts’ position on the matter, which I detail below.

1. EDUCATION AS A COMMODITY IN WHOSE
PRODUCTION THE CONSUMERS PARTICIPATE

The question that now arises is why, from an economic perspective, should the state and local governments in general, provide education to children? Is education not in every respect a private commodity that can be provided by free market entities in a better and more efficient way? Put differently, why does the need to provide public services arise, whether by the central government or by the local government? On its face, education is not a public good in two respects: students can be excluded from schools, and the more students in a given school, the greater the danger of a decline in its quality.⁹³ Nonetheless, there is a very important aspect to education that is fundamentally public, namely, the community in its entirety benefits from educated children and this benefit cannot be withheld from someone who does not pay the school, and is harmed by citizens who did not receive a proper education.⁹⁴ For

93. In other words, two central, necessary qualities of public goods are missing in education. They are not nonexcludable (someone who cannot pay for the good cannot be excluded from enjoying it) or nonrivalrous (the good’s quality does not diminish even when many use it). Because of these two characteristics, no private entity will ever agree to produce public goods, at least not in the socially optimal amount, since no one will pay for them. Accordingly, a central authority is required to compel everyone to pay for these services, which are efficient to produce. A state’s central government generally constitutes this authority, and it does, indeed, force individuals in society to pay taxes, in exchange for which the state supplies these services. *See, e.g.,* ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 105 (2000).

94. It is, of course, possible to say that this “public” aspect is negligible, on the one hand, and shared by every market, on the other hand. That is, not only do all citizens benefit from good education, they also benefit from all markets—even the most private market. And indeed, the importance of a competitive market for all residents is clear. Hence, we find strict monitoring of private markets as well in most countries. In anv

this reason, even free-marketeers like Milton Friedman concede that basic education is a service that the state should provide to all its residents.⁹⁵ This aspect of education meets precisely the requirements of a public good: everyone benefits from educated citizens and there is no way to exclude someone who is unwilling to pay for this good from reaping its benefits; and the increased consumption of a properly educated population does not impair its quality.⁹⁶ The majority of scholars regard education to be a mixed, or “merit,” good: a good that bears elements of both a public good (as stated above) and a private commodity. Thus, despite the fact that private bodies can provide education (as they do in practice), the state nonetheless has good reason to ensure that its children receive free education and to provide that education itself.

However, education is a unique type of mixed good. Unlike most commodities, whose production and consumption are sharply delineated (when the production is carried out by the producer alone), education’s consumers (the students and parents) participate in its production.⁹⁷ In other words, the quality of the education is determined not only by the infrastructure, number of instruction hours, and quality of teachers. Rather, studying is a collective and interactive process, and a key element of this process is peer pressure and the mutual influence of schoolmates on one another.⁹⁸ That is to say, students do not merely consume “good” or “bad” education; they, amongst others, also make it better or worse by way of their participation. This fact explains why the presence of children from weaker social groups in schools homogeneously populated with high socio-economic students constitutes a source of political and social debate. In Israel, not only are Arab and

industrialized society—would be enormous and, hence, the involvement of the state in the education market not only in the form of a “monitor” but also as one of its central suppliers.

95. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 86 (1968).

96. See Fennell, *supra* note 26, at 8.

97. Fennell’s in-depth analysis points to the vacuum in most of the legal literature dealing with the supply of public services such as education and policing, with regard to the impact of consumer behavior on the quality of the services. Fennell focuses on the behavior of consumers, whom she classifies into two general groups: quality-enhancing users and quality-detracting users. In order to produce quality local services, Fennell explains, a balance between the two types of users must be found, the problem being ensuring the appropriate balance. See *id.* at 16–23.

98. JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA’S SCHOOLS 101, 119 (1990); Vernon Henderson et al., *Peer Group Effects and Educational Production Functions*, 10 J. PUB. ECON. 97 (1978); Charles F. Manski, *Educational Choice (Vouchers) and Social Mobility*, 11 ECON. EDUC. REV. 351, 356 (1992):

Mizrahi parents “suspected” of not contributing sufficiently to the funding of schools (that is, of free-riding on the high-quality good without paying for it since they live in small apartments and pay low local taxes), but their children are suspected of diminishing the school’s quality by their very presence and thereby harming both the product and the value of the real estate in a given neighborhood or locality, whose value is dependent on the quality of the education system. Hence the dynamics of panic and middle-class mass exit from the locality when a given school begins to deteriorate or when members of a weaker social class “flood” the school. Moreover, this also explains why parents are concerned over “weak” students transferring to the schools that their children attend and why they seek to move to the suburbs or wealthy neighborhoods, which exclude weak students by means of local government powers: the localism principle in education and zoning powers.

Nonetheless, presumably, if people were concerned only with their own benefit and the direct benefit of consuming excellent education, anyone with enough money to pay for a house in the suburbs (or a good neighborhood) or for entirely private schooling would do so and exit the public pool. In many instances, this is, indeed, likely the case. However, it seems that along with the benefit that people derive personally from consuming quality education, many consider also the benefit they derive from an educated population, that is, from education’s pure public good aspect. Therefore, when considering whether to move to the suburbs or transfer their children to a special school, many parents find themselves trapped in a typical prisoner’s dilemma. They know that it is worthwhile for them to cooperate (that is, to remain in the city) and thereby ensure both a good education for their children and a more educated general population, since their children will assist in the education of others. However, they also fear that other people will not cooperate (that is, others will move to the suburbs or better neighborhoods). As a result, their own children will be “stuck” with a public school in which the number of good students lies below the “critical mass” level and, therefore, the deterioration in the quality of the education will be rapid. For many, this is too great a sacrifice of their children’s education. Therefore, there is concern that without mechanisms that coerce cooperation, anyone who can will leave the public school system in the city for the suburban system.⁹⁹

99. Of course, it is quite possible that there are people with more “altruistic” ten-

2. SEGREGATION, INTEGRATION, AND PROBLEMS OF COOPERATION

The legal structure of the localism principle translated—technically and automatically—residential segregation (where it exists) into segregation in the education system. Since Jews and Arabs live separately, and Ashkenazis and Mizrahis often live in separate localities and neighborhoods, an acute and ongoing problem of educational segregation developed among these groups. The localities came to resemble detached islands, making student transfers between localities virtually impossible. In addition, residential neighborhoods, whose boundaries the local government can set “creatively” and autonomously, within the same locality were also detached in terms of schooling due to the legal structure of the enrollment zones—children were limited to attending schools in their home neighborhoods. Thus, the local boundaries became fortified walls in everything relating to elementary education. This problem was exacerbated by the regional councils, since the local committees (Kibbutzes, Moshavs, and other community-based settlements) are recognized as the education authorities in their jurisdictions.¹⁰⁰ Thus, the legal barriers that locked students into the localities in which they live were also raised between the different local committees comprising the same regional council.

Jurisdictional competition theories explain why it was worthwhile for local governments to preserve the educational segregation between children from wealthy neighborhoods and those from underprivileged neighborhoods. Indeed, attaching schools to the residential environment did not necessarily entail that children from adjacent neighborhoods could not go to school with one another. Although local governments could have set the enrollment zones in a way that integrated children from poor neighborhoods and children from wealthy neighborhoods, they refrained from doing so and, thereby, created a clear distinction between schools based on residential neighborhoods. Under jurisdictional competition theory, providing differential services (that is, providing good services to the rich and inferior ones to the poor) within a locality is a different (at times opposite, at times supplementary) tactic from the exclusionary zoning justified by Hamilton, but

direct good. However, this phenomenon apparently does not reach proportions that would prevent the mass flight I describe.

100. See § 1 of the Compulsory Education Law (providing that a local education authority refers, “with regard to a moshav [Israeli cooperative settlement], group, or kibbutz [Israeli collective settlement]—[to] the moshav committee, or the group or

contends with the same problem. Instead of completely excluding the poor from the locality, local governments allow them to pay fewer taxes, at times driving them from certain areas within the locality, in return for poorer services. Cities “bribe” the rich, that is, provide them with improved education (or policing) services so that they will not leave for the suburbs, and give the poor inferior and cheap services.¹⁰¹ In this context, as well, of course, the planning and zoning powers come to the aid of the local government, enabling it to concentrate the poor in one area and exclude them from prestigious neighborhoods. This overtly discriminatory tactic, it should be noted, when openly and overtly used, is illegal in the United States,¹⁰² as is apparently the case in Israel. It is possible, however, to attain similar results in substance through unofficial, hidden segregation. In Israel, such de facto segregation has been achieved in a number of ways: by setting enrollment zones within localities that reflect the social class (and, often, ethnic origin) of the residents; by creating funding plans that, despite their superficially neutral appearance, in practice favor the strong classes and the residents of urban localities in the center of the country; by classifying various education services as optional and which must be paid for by the parents; and by creating selective, merit-based education frameworks that exclude children from the weaker classes.

Harsh educational segregation in Israel has, therefore, been the product of a combination of local government law and the economic dy-

101. In other words, as opposed to Tiebout’s original model, according to which the local government is supposed to offer one taxes-services parcel, apparently it is often worthwhile for the local government in fact to offer a number of such packages. The packages are supposed to reflect the differences in tastes amongst residents of the same locality and, even more so, the divergences in their payment abilities. James Buchanan pointed to the fact that the mobility of the rich bears a cost, such as the formation of pockets of poverty that cause overall social damage and loss of positive externalities. Accordingly, he maintained, despite the fact that supplying such unequal services is likely to violate our “traditional” sense of equality, it is a worthwhile funding strategy in urban areas. See James M. Buchanan, *Principles of Urban Fiscal Strategy*, 11 PUB. CHOICE 1, 13–16 (1971); see also Clayton P. Gillette, *Public Service: Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185, 1204 (1996). Nonetheless, in order for the size advantage to be attained, it must be assumed that despite the interurban splintering, there are services that everyone consumes and for which everyone pays, such as water, sewage, public parks, and so on. This will be the “basic package” for which a certain minimum will be paid by the poor, whereas the more expensive services, such as education, culture, and security, will be provided differentially to the different sectors in the locality.

102. In the United States, the relevant doctrine is the “equal service provision” doctrine that prohibits the state from offering unequal services to different citizens-consumers. See Gillette, *supra* note 101, at 1197–98; Clayton Gillette, *Equality and Variety in the Delivery of Municipal Services*. 100 HARV. L. REV. 946 (1987) (reviewing CHARLES M. HAAR & DANIEL W. FESSLER, *THE WRONG SIDE OF THE TRACKS: A*

namics described above. A study conducted in 1972 revealed that 40 percent of Mizrahi children were in classes comprised of 95 percent or more Mizrahis and only 8 percent of Mizrahi students were in classes in which the proportion of Mizrahis was lower than 35 percent.¹⁰³ As noted, from the outset, the educational segregation of Mizrahis has been an almost necessary outcome of the social-spatial reality of residential segregation combined with legal mechanisms fostering segregation—the localism principle in education and the school funding system. The same legal structure that led to the creation of the Arab school system (a system that was the result of a segregative reality and not a legal definition)¹⁰⁴ created “Mizrahi” schools that were almost completely detached from “Ashkenazi” schools.¹⁰⁵ Indeed, contrary to common wisdom, since the establishment of Israel in 1948, there was never a legally defined “Arab” public educational system that was distinct and separate from the “Jewish” one. The fact that for decades Arab kids went to segregated schools was a result of the profound residential segregation and dynamics described above, and in this respect, it was identical to the way the segregation of Mizrahi children took place. This fact has eluded even acute critics of education policy, such as Swirski and Rosen-Zvi, who treat the Arab-Jewish segregation as qualitatively distinct from the Mizrahi-Ashkenazi one, mistakenly arguing that not only was the former a result of preferences of Jews and Arabs,

103. Chaim Adler, *School Integration in the Context of the Development of Israel's Education System*, in *SCHOOL DESEGREGATION: CROSS-CULTURAL PERSPECTIVE* 21 (Y. Amir, S. Sharan & R. Ben-Ari eds., 1984).

104. Until the 1990s, the public-Arab education “stream” was only alluded to in education legislation. See § 4 State Education Law, 1953, S.H. 137. In 1996, special regulations were enacted establishing an advisory council on the matter of Arab education. However, from a formal legislative perspective, there was—and still is—no reference to the Arab education stream as a separate education stream that parents can choose (or not choose) to send their children to or to which a local government can channel students. See State Education Regulations (Advisory Council for Arab Education), 1996, K.T. 1407. The Arab education system became separate both in practice and administratively as a result of decisions and administrative policymaking, with none of these bearing the stamp of primary legislation. See *AL-HAJ*, *supra* note 8.

105. Despite the fact that the majority of the development towns and labor moshavs (where many Mizrahis lived) are situated in the heart of the territory in the jurisdiction of the regional councils, the children from the development towns and moshavs did not go to school with children who belonged to other local councils in the same regional councils, namely, children from the neighboring kibbutzes and moshavs affiliated with the Labor Movement. In general, the voluntary cooperation that existed amongst the kibbutzes and amongst the moshavs did not include the immigrant moshavs or development towns. The issue of the status of the local council as a local education authority, as opposed to the status of the regional council in this type of instance, is discussed in detail in the *Ramat Raziel Committee* case (parallel to the local councils, the regional

but also of a legal rule that recognized Arab schools as belonging to a separate "stream" that the general Jewish one.¹⁰⁶

Hence, whereas the Jewish-Arab segregation was not regarded by most policymakers and researchers as problematic but, rather, as manifesting national conflict, cultural differences and group preferences, the Ashkenazi-Mizrahi segregation was seen as an acute problem from the day it emerged, and which called for an immediate intervention on the part of the state. The way in which the problem of segregation was contended with, the integration plan I discuss below, illustrates the inherent hindrances of a decentralization model in education and the perpetual need to supplement it with central supervision.

a. The Local and Decentralized Nature of the Integration Plan

Integration is a consummate example of an action whose enforcement and funding must be performed by central entities, since problems of cooperation and severe externalities almost necessarily arise with its implementation. The limited effectiveness of the integration plan being implemented in Israel since 1968 has derived, first and foremost, from its decentralized character. A crucial role was given to the local governments in implementing the plan, without the Ministry of Education or any other central body making sufficient use of its supervisory powers or significantly contending with the problems of cooperation that arise in the framework of this type of reform. The integration plan thus exemplifies the dangers inherent to unsupervised decentralization that fails to take into account the specific nature of the action being decentralized.

There are three prominent features to the integration plan adopted by the Israeli Parliament (*Knesset*) at the end of 1968.¹⁰⁷ First, in place of the existing two-staged system (eight years of elementary school and four years of high-school), a three-staged system was proposed: six years of elementary school, three years of junior high-school, and three more years in high-school.¹⁰⁸ Second, under the plan, the tight link

106. Rosen-Zvi analyzes in great detail the segregation of Mizrahi children and the structural reasons for its creation but does not see it as related to the segregation between Arab and Jewish pupils. See ROSEN-ZVI, *supra* note 7.

107. In so doing, Parliament adopted the recommendations of the Rimalt Committee, appointed in June 1966, to examine segregation and disparities in the Israeli education system and submitted its report to Parliament two years later, in July 1968. See REPORT OF THE PARLIAMENTARY INQUIRY COMMITTEE ON THE STRUCTURE OF ELEMENTARY AND SECONDARY EDUCATION IN ISRAEL (submitted by Elimelech S. Rimalt, 1968).

between place of residence and place of schooling was loosened at the junior high-school stage, as this was (justifiably) seen as a source of educational segregation between Ashkenazis and Mizrahis, and pupils were brought together from different parts of the city. Local governments were required to set special precincts for the junior high-schools that would ensure suitable integration.¹⁰⁹ Third, despite the fact that the localism principle was maintained with regard to elementary schools, various local governments applied the junior high school integration principles to this stage as well. Here and there, new enrollment zones were set in a way that advanced inter-neighborhood integration, and a stricter policy regarding transfer from one enrollment zone to another was applied.¹¹⁰

The decentralizing nature of the integration plan is clear from these features of the plan. First, as noted, integration was applied only internally, within the localities, despite the fact that a significant amount of the ethnic segregation problems stemmed from the ethnic homogeneity of the localities. This, of course, caused the integration plan to fail in integrating Arabs and Jews who mostly lived in separate localities and Mizrahis and Ashkenazis who also lived in distinct local governments. Second, the plan did not mandate cooperation or coordination between neighboring or nearby localities. The reform related to the local government as the entity capable of solving the problem of segregation within its jurisdiction and ignored the foreseeable processes that would result from the integration: the fleeing of the middle classes ("white flight") in mixed localities from the "terror" of integration to localities that have a homogeneous ethnic and class makeup, and the development of various mechanisms to exclude poor Mizrahis from localities

Ashkenazi strong students. Their local victory was turned into a flag for bureaucrats in the Ministry of Education to wave in the face of opponents of the reform, who claimed that integration at age twelve is too little, too late. *See Swirski, supra* note 16, at 193.

109. *See* Regulation 1, Enrollment Regulations (definition of the term "precinct"); Regulation 7A, Enrollment Regulations (the local education authority must set "precincts" to which students from a given number of elementary schools will be channeled). The Ministry of Education set guidelines and principles for the implementation of the reform, which went beyond the simple gathering of students from different neighborhoods under one roof, the junior high-school. The main points of the guidelines were: organizing heterogenic homerooms, maintaining a gradated set of proficiency-based groupings in certain subjects, introducing changes and innovations in the curriculum and pedagogy, expanding teachers' training to enable them to better handle heterogeneous classes, and organizing social education activities for the purpose of achieving integration. *See* STATE COMPTROLLER, ANNUAL REPORT 43 277 (1993).

110. *See* Regulations 7(b)(7), 7(b)(8), and 7(b)(9) of the Enrollment Regulations (authorizing the local government to delineate enrollment zones for elementary schools

and, thereby, dilute the impact of integration on the school system. Third, the local governments were given the authority to remove certain schools within their jurisdictions from the scope of the integration plan, subject to the consent of the district commissioner.¹¹¹ This power was, of course, particularly problematic, as it enabled local governments to frustrate the integration plan's objective by creating shelters from the plan's application. Fourth, certain localities were completely exempted from applying the reform, due to a wide discretion given to the Ministry of Education.¹¹² Fifth, local governments were given full discretion regarding the boundaries of the integration districts and broad freedom of action regarding how the setting of school precincts was implemented.¹¹³ Sixth, local governments were left with a variety of tools that enabled them to create different and unusual curricula and schools, whereby those learning these curricula were, in practice, removed from the integrative system. Local governments initiated a broad variety of experimental, supplementary, and additional curricula and schools,¹¹⁴ which became more and more exclusive and unequal with time.¹¹⁵

As noted, the strong social sectors in the big cities had a clear interest in fighting the integration plan. According to Fischel, an integration plan under which pupils from affluent families that pay high local taxes are supposed to get "less" for their investment than students from a more difficult background can be expected to cause the wealthy residents of a locality to flee to a neighboring locality, and if there is no possibility for flight, they will initiate a "tax revolt" to secure a reduction in local taxes and use the money they save to fund private schooling for their children.¹¹⁶ As studies in the United States demonstrate, *Brown*

111. See Regulation 7B of the Enrollment Regulations (providing that the local government has the authority to declare a given school excluded from the scope of the reform and as ranging from Grade 1 to Grade 9). In addition, see the special regulations directed primarily at students who learn in elementary schools with eight grades, that is, with regard to whom the integration plan does not apply. Compulsory Education and State Education Regulations (Additional Enrollment), 1978, K.T. 740.

112. This is despite the decree-like language of Regulations 7A and 7B of the Enrollment Regulations. In practice, many local governments adopted the integration plan only several years after it was set as official policy of the education system. Many other local governments never adopted it. *See infra* ?

113. See Regulation 7A, Enrollment Regulations. Even though broad discretion is given to the local governments under the Regulations, the Ministry of Education and Culture guidelines provide that the local government must strive to ensure that there are heterogeneous populations in the junior high schools and that the various precincts are balanced in terms of ethnic and social makeup. *See* STATE COMPTROLLER, *supra* note 109, at 291.

114. See Articles 5-9, State Education Law, 5713-1953; State Education (Complementary Program and Additional Program) Regulations. 5717-1956.

and other desegregation schemes induced such escape mechanisms, and without the appropriate antidote, integration was likely to be hampered.¹¹⁷ And indeed, at the outset of the implementation of the Israeli integration plan, there were explicit attempts by parents to combat it through petitions to the High Court, but the Court blocked these attempts.

Thus initially, the Israeli Supreme Court dealt with the integration reform rather successfully, though it never took the avant-garde role that the U.S. Supreme Court assumed in *Brown*. Unlike the Warren Court, the Israeli High Court did not initiate the integration plan, but rather, simply affirmed a plan that was devised and executed by the Parliament (Knesset) and the Ministry of Education. Nor did the Court act in a hostile public environment. On the contrary, the first case in which the Court favored school integration was in 1971, after the Knesset had already adopted the integration reform in an overwhelming consensus.¹¹⁸ Until then, the Supreme Court had consistently supported Ashkenazi parents who sought to escape registration districts that were less prestigious (i.e., populated with Mizrahis).¹¹⁹ Therefore, scholars who hail the *Kramer* case as the Israeli *Brown* are, to my mind, wholly mistaken.¹²⁰ In *Kramer*, the Court rejected the claim of a group of parents from an affluent neighborhood in Jerusalem that the integration policy was invalid since it infringed the parents' right to choose the best education for their children, while emphasizing the importance of integration in education.¹²¹ Like in almost all the petitions that challenged the reform after its adoption, the Court was asked to intervene in the discretion that the locality exercised when it decided on an application to transfer a student from one school to the other. The Court ruled that the reform was aimed at achieving "social integration be-

117. See, e.g., Richard Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365 (1997); Jack M. Balkin, *Introduction*, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID 3 (Jack M. Balkin ed., 2001).

118. H CJ 152/71 *Kramer v. Jerusalem*, [1971] IsrSC 25(1) 767.

119. See, e.g., H CJ 284/61 *Morgenshtern v. Mayor*, [need date] IsrSC 15 2297; H CJ 342/61 *Ashkenazi v. Gan Yavne Local Council*, [date] IsrSC 16(2) 1306; H CJ 273/63 *Peres v. Mayor of Kfar Saba*, [date] IsrSC 17(4) 2994; see also Stephen Goldstein, *Liberty v. Equality: Concerning Student Placement in State Schools in Israel: The Changing View of the Supreme Court*, in EDUCATIONAL ADVANCEMENT AND DISTRIBUTIVE JUSTICE: BETWEEN EQUALITY AND EQUITY 311, 315-19 (Reuven Kahane ed., 1995). According to Goldstein, the wholehearted support of the Supreme Court of the integration reform is especially remarkable considering that prior to 1968 it protected the right of parents to choose and pursue the best education for their children. *Id.*

120. See, e.g. Goldstein. *supra* note 119. For another critique of the importance of

tween members of different ethnicities and classes,” and that this required overcoming the structure of neighborhood schools by mixing students in supra-zonal junior high schools.¹²² Therefore, the Court rejected the parents’ argument that the discretion given to the locality to decide on transfer requests—a discretion given to localities more than ten years prior to the reform (in 1959)—was not meant to be used to promote integration. The important social value of the reform, ruled the Court, justified such a use of the discretionary powers of the locality, and merited its application in a way that promoted the integration reform.¹²³ In a succession of cases throughout the 1970s and 1980s, the Supreme Court stood firm by the Ministry of Education, blocking attempts of middle class parents to escape integrated schools.¹²⁴

Hence, despite the Court’s lack of a *Brown*-like activist attitude, the integration reform was slowly affecting the schooling system. As a result, less explicit mechanisms for countering the plan developed: suburbanization, the formation of special schools, and the shift to self-managed schools. Regarding these more subtle mechanisms, Israeli courts have by and large failed to promote integration by curtailing them and by offering corrections to the flaws in the original plan.

b. Negative Externalities Resulting from the Decentralized Nature of the Integration Plan

The way in which the integration plan is implemented in one locality produces significant externalities for other localities in the same metropolitan vicinity. For example, if a locality in an urban region that is split into many localities decides not to implement integration in its jurisdiction, it encourages the strong social sectors to abandon their

122. *Id.* at 770–71 (Berinson, J.).

123. *Id.*

124. A prevalent view in the literature is that the Court clearly supported the reform from the day of its adoption, until the 1990s. *See* Goldstein, *supra* note 119; NIVI GAL, *THE INDIVIDUAL, THE AUTHORITY, AND STRICT JUSTICE—THE ISRAELI SUPREME COURT’S STANCE ON THE QUESTION OF PARENTAL CHOICE OF SCHOOL* 55 (1996); *see, e.g.*, H.C.J. 608/75 Kozlovski v. Eshkol Regional Council, 30(2) P.D. 449; H.C.J. 421/77 Nir v. Beer Yaakov Local Council, [year] IsrSC 32(2) 253 (upholding the refusal of the local council to allow a group of children from a wealthy neighborhood in Beer Yaakov to transfer to the schools in the adjacent *kibbutzes*); *Ramat Raziel Committee Case* (affirming the elementary school’s integration scheme for students from different local councils); H.C.J. 434/80 Hayun v. Mayor of Herzliya, 34(4) P.D. 780 (affirming the integration scheme in an elementary school in Herzliya); H.C.J. 518/80 Dickman v. Ashdod Municipality, 35(2) P.D. 203 (upholding the decision of the local education authority to adjust the junior high-school precincts to the requirements of the integration plan); H.C.J. 595/88 Shulman v. Director of the Tel Aviv Municipality Education

localities for the non-implementing locality and, without incurring any heavy costs, thereby ensure that their children will not go to school with socially economic weak children. Beyond thwarting integration in the non-implementing locality, this move is likely to impact those local governments that do adopt the reform: they will face growing pressure to act to keep affluent parents in their localities, that is, to soften the force of the implementation of the integration plan in their jurisdiction or to allow the strongest residents different escape mechanisms from the plan, such as establishing special schools in which integration is de facto not applied.

Over the last twenty-five years, more and more suburban towns were established with the goal of attracting upper-middle class Ashkenazis, offering completely autonomous education systems. Of the 125 settlements founded between the end of the 1970s and 1995, not one was brought into the jurisdiction of development town (predominately Mizrahi). All of these settlements have been granted municipal autonomy—if not as a local council then as a local committee—in the area of education and in other important matters.¹²⁵ This “white flight” poses a threat to big cities such as Tel Aviv, which fear that the affluent will abandon them and that they will be forced, as anticipated by Buchanan, to bribe them not to escape to nearby suburbs or community settlements.¹²⁶ This could take the form of, among other things, only partial implementation of the integration plan¹²⁷ or the provision of improved education services to children from the city’s stronger sectors.

Thus, the decentralized nature of the integration plan in Israel has had many negative outcomes. Not only has the plan accomplished less than expected, but there is reason to fear that its decentralized aspect fosters white flight and suburbanization and has even contributed to the emergence of special schools, discussed below. In fact, I argue that the Israeli High Court of Justice—in choosing to restrict the integration to

125. Yiftachel, *supra* note 59, at 44–51.

126. *See supra* sources cited in note 111.

127. The 1993 State Comptroller Report criticized the way in which local governments had thwarted the integration plan. First, it was found that many large- and medium-sized localities had not set up supra-regional junior high-schools. In other words, integration had never been performed in their jurisdictions. These included Tiberias, Netanya, Lod, Bnei Brak, Bat Yam, Givatayim, Holon, Ramat Gan, and Beer-sheba. *See STATE COMPTROLLER, supra* note 109, at 289–90. Second, the fact that, in metropolitan areas, some of the localities had set up junior high schools and others had refrained from doing so had a negative impact on the success of the integration in the entire metropolitan area due to the ramifications for the supra-regional high-schools. Third, four large- and medium-sized localities (Tel Aviv-Jaffa, Haifa, Ashdod, and

within the boundaries of the localities rather than taking a different interpretative route and applying it across localities—perhaps even contributed to the exacerbation of these spatial dynamics.

Indeed, the Court has persistently refrained from forcing local governments to impose integration in their schools, integrate their schools with schools from other localities (even where entailed by the goal of ethnic integration), or set enrollment zones and supra-zones in a way that fosters integration. Even when the Court had an opening to so order, it preferred to lead the sides to compromise and not make a precedential ruling that would compel local governments to act against their will.¹²⁸ The Court's refusal to interpret the integration plan as applying across local boundaries—that is, to instruct neighboring localities to integrate their students if there is a need to do so stemming from the basic state of residential segregation¹²⁹—along with the central government's failure to so apply integration¹³⁰ have meant that the reform affirms and even bolsters, rather than breaking, the problematic structural link between place of residence and place of schooling. What is more, it is possible that the reform thereby also has encouraged sub-

128. H CJ 4383/91 Shpeckman v. Municipality of Herzliya [1992] IsrSC 46(1) 447. In 1992, there were only five junior high schools in Herzliya that integrated students from the poor, most eastern part of the city. Students from the western side of the city ("Herzliya Pituah") went to elementary schools with eight grades, in which the reform was never applied. A special committee appointed by the district commissioner recommended changing this situation so that students from the eastern and western parts of the city would be integrated, but the municipality refused to so act. Eighteen parents petitioned the Supreme Court, requesting that it instruct the mayor to conform to the district commissioner's instruction. The Court issued a rule absolute as requested, after pressuring the two sides to reach an agreement. No grounds are given for the judgment, nor does it set any binding precedent, since it is based on an agreement between the parties. STATE COMPTROLLER, *supra* note 109, at 291–92. It should be noted that even after this decision, the Municipality continued to drag its feet. See H CJ 3723/90 Merom v. Levi, [2003] IsrSC 16 44.

129. The fate of the plan was not necessarily doomed from the outset; the courts could have interpreted the reform otherwise. Rather, they refrained from applying the reform in way that would have been sensitive to its goal—integration of Mizrahi and Ashkenazi students in a joint learning framework—and held fast to the formalism of the local boundaries. In at least one instance, the Supreme Court supported a local government's prohibition on the transfer of students from one locality to another, even when the transfer was intended to "rescue" Mizrahi students from a homogeneous Mizrahi locality and to, in effect, achieve integration. See H CJ 567/77 Ifgin v. Mayor of Netanya [year] IsrSC 32(1) 109. It is possible that the Supreme Court refused to intervene in this matter because the students did not request to transfer to an integrative school, but, rather, to a school in a poor neighborhood in the eastern part of Netanya—a "mixed" middle-class city. As noted, a similar rule was set also in the *Nir* case. IsrSC 32(2) 253.

130. In fact, following the *Ifgin* case, IsrSC 32(1) 109, the regulations were amended to reflect the Supreme Court's jurisprudence. establishing a strict rule under which a

urbanization, similar to what occurred in the United States in the wake of *Brown* and the disastrous *Milliken v. Bradley*,¹³¹ in which the U.S. Supreme Court refused to order integration across local jurisdictional lines.¹³² Maintaining this link has had catastrophic effects for the practical success of the reform in Israel, for it prevented remedying educational segregation between Mizrahis and Ashkenazis, between rich and poor, and between Arabs and Jews in settlements that were considerably homogenous and where the problem was manifested in the high correlation between the boundaries of the settlement and the ethnic makeup of the residents.

Many researchers have pointed to the high social costs of unplanned and accelerated suburbanization processes: inefficient exploitation of land resources, environmental harm, and externalization of costs (road construction funded by public monies, increased pollution, and road accidents). In education, as well, wealthy suburban authorities have externalized the cost of establishing new schools to all of the state's citizens, since the cost of building and maintaining these schools is borne solely by the Ministry of Education. Indeed, the reform's efficiency has been impaired, not only due to the plan's decentralized quality, but also (perhaps even more) by its narrow scope and provisory nature, the poor quality and training of teachers, and many other contributing factors.¹³³ In this article, I have chosen to focus less on the reasons for the failure (or partial success) of the integration plan and more on the problems that arose due to its decentralized structure, which did not take into account local government's spatial and legal background conditions—suburbanization, negative externalizations, and the fostering of the breakdown of the public education system. This reveals the destructiveness of decentralization, just like centralization,

131. 418 U.S. 717 (1974).

132. In *Milliken*, the U.S. Supreme Court ruled that integration cannot be imposed on schools belonging to different education districts, that is, localities, and that *Brown* mandated integration only between schools from the same locality. *Id.* There are those who claim that *Milliken* led to accelerated suburbanization since this process enabled the preservation of segregation in education between whites and blacks. *See supra* note 54, at 916–21; *see also* Rosen-Zvi's discussion of the similarity between the Israeli Supreme Court's stance in *Ifgin* and the U.S. Supreme Court's stance in *Milliken*. ROSEN-ZVI, *supra* note 7.

133. Yehuda Amir, et al., Shlomo Sharan & Rachel Ben-Ari, *Why Integration?*, in SCHOOL DESEGREGATION: CROSS-CULTURAL PERSPECTIVE 1 (Yehuda Amir et al. eds., 1984); Yechezkel Dar & Nura Resh, *Socioeconomic and Ethnic Gaps in Academic Achievement in Israeli Junior High Schools*, in CONTEMPORARY ISSUES IN CROSS-CULTURAL PSYCHOLOGY 327 (N. Bleichrodt & P. Drenth eds., 1991); Dan Inbar et al.,

when undertaken incautiously and where it is not suitable, in substance, as a solution to the specific problem.

For the last decade, the integration plan has been described by many as a failed project that must be abandoned,¹³⁴ for completely different reasons that I analyzed: because it has tried to defy the necessary dynamics of the market and public choice and to impose equal services on those who can afford better. Jurisdictional competition theory supposedly “foresaw” this failure due to the inevitability and determinism that integration will lead to the collapse of public education or to the development of privatization-like mechanisms in the form of the growing establishment of special schools. Unfortunately, a significant proportion of these theories, as well as some of the stances supporting integration, has created an artificial dichotomy between integration, centralization, and poor quality, on the one hand, and choice, decentralization, and excellence, on the other. These theories, some of them simplistic, stress only the importance of consumer choice, competition, and community and present the integration reform as a doomed failure that should be discarded if we seek a free and quality education system.

The determinism referred to rests on the premise that people’s preferences with regard to their children’s education are exogenous and autonomous of the spatial and legal structure and other economic incentives. However, it is possible that these preferences, for, say, quality or separate education, are in fact endogenous and that people would prefer to receive also solidarity, mutual assistance, and more state regulation if this were not accompanied by heavy economic sanctions and the fear of the dynamics of white flight and the race to the bottom. The premises of some of the jurisdictional competition theories with regard to the preferences of individuals—quality and maximization of profits at any cost—rest on particularistic moral conceptions of narrow (and often unrealistic) rationalism or on the refusal to recognize the force and impact of elites on their constituents, and therefore, their normative neutrality should be called into question.

Indeed, there is no reason to reject the opposite premise, that preferences change over time and space and, among other things, in ac-

134. See Yitzhak Kashti, *Nationhood, Modernity and Social Class in Israeli Education*, 19(3) BRITISH J. SOCIO. EDU. 355 (1998). In 1991, the Kashti Committee determined that a clear trend towards abandonment of the idea of integration and return to the idea of segregation could be distinguished. See THE STATE OF ISRAEL, REPORT OF THE EXAMINING COMMITTEE ON THE STATUS OF SUPRA-REGIONAL EDUCATIONAL FRAMEWORKS 14 [hereinafter THE KASHTI REPORT]. In 1992, then-Director General of the Ministry of Education, Shimshon Shushani, declared that the integration plan

cordance with ideological trends dictated to the people by different elites. It is possible that a divided and segregated education system shapes citizens who prefer segregation at a given moment, but it would actually be better for all were we to "inject" the education policy with additional values that would, among other things, change some of the current preferences. A multidimensional normative conception is therefore necessary, one that will relate to the different aspects of education and to the different and varied values that people can and need to assign to the education their children receive. The conception of education as a product through which children acquire knowledge that will assist them in attaining good jobs in the future is extremely narrow; even if many thus regard their children's education, it is highly doubtful that these people represent the majority, and even more doubtful that this is a sufficient reason to take only this viewpoint into consideration.

Hence, it is important not to reject outright notions that stress the importance of efficient provision of public services, the need to establish a link between the quality of the services and the level of taxation (or payment), and the concern that people will seek to maximize profits at the expense of other values, such as social solidarity. However, these notions must be understood as constituting only one part of an entire complex of values and considerations that must be weighed when discussing a matter as crucial to our public lives as elementary and secondary education.

3. SPECIAL SCHOOLS AS EXACERBATING PROBLEMS OF COOPERATION

A current development in Israel that highlights the unique problems of education and the difficulties of cooperation (amongst consumers, in this case) is the supra-regional special schools. The chief legal-educational justification for the exclusion of many supra-regional schools and supra-regional classes from the scope of the integration plan and the localism principle is the fact that they are categorized by the Ministry of Education as "special" or "experimental."¹³⁵ These schools' uniqueness allows them to screen their students, through special exams and personal interviews, and escape integration. The special schools do not differ in substance from state schools in the suburbs or in regional councils, nor

135. This uniqueness can be ideological, pedagogical, or deriving from the subject-matter. That is to say, some of the supra-regional schools belong to an ideological stream that is not the mainstream of the education system (such as anthroposophist, scientologist): some of them apply unique and experimental teaching approaches (open

from other separate autonomous schools that owe their existence to the spatial segregation in Israel and the annexing of educational jurisdiction to general municipal jurisdiction. As described, the education system has for many years been split by class, ethnicity, religion and religiosity, and nationality. The appearance of supra-regional schools in the large cities since the 1980s is only one more instance of this reality.¹³⁶ Even if localities did foster this trend, it in no way differs in essence from the other splits in the education system, which were the result of central government policy. On the contrary, in the reality of the last few decades, with the middle classes fleeing the cities for the suburbs and establishing separate school systems, the supra-regional schools have offered an alternative to suburban schools, a sort of enticement to the rich not to leave the city. Thus, the special schools are an additional phenomenon deriving from the structure of education law and local government law in Israel.

The establishment of these schools, however, has meant the elimination of the mechanism forcing cooperation on education consumers in the cities, as well, and the exacerbation of the prisoner's dilemma there. The result of this has been that many of those who can remove their children from the neighborhood schools and send them to special schools do so. Studies have shown that the supra-regional nature of the new special schools has produced ethnic and class segregation: by means of entrance exams, suitability interviews, and high participation fees, these schools have managed to gather strong pupils from affluent families and exclude pupils from the weak and poor sectors.¹³⁷ These

136. Israeli supra-regional special education frameworks first appeared in the 1950s. In the religious education system there were supra-regional *yeshivas*; in the general education system there were individual special frameworks; and supra-regional frameworks were very common in the private Arab education system. Nonetheless, the emergence of scores of supra-regional special frameworks in the state education system has, without a doubt, been a development of the last two decades.

137. See Rona Shavit & Rina Shapira, *Principles and Returns of Integration in Education in Israel—Towards a Systemic Approach*, 48 SOCIAL SECURITY 66 (1997). It is no small irony that supra-regional education frameworks in Israel have become an "antidote" to integration rather than constituting a central avenue for its advancement. In the United States, the magnet schools (which are quality supra-regional schools) were intended primarily to draw children from geographically distant populations and to overcome residential segregation between different classes, ethnic groups, and races, which, in Israel, was translated into educational segregation. Nonetheless, many critics of the magnet schools, as well, have surfaced with time, and claim that what began as an integrative tool developed into an education system enjoyed primarily by children from relatively more educated and wealthy families. See, e.g., Janet R. Price & Jane R. Stern, *Magnet Schools as a Strategy for Integration and School Reform*, 5 YALE L. & POL'Y REV. 291 (1987); CHRISTINE H. ROSSELL, THE CARROT OR THE STICK FOR SCHOOL DESEGREGATION POLICY: MAGNET SCHOOLS OR FORCED BUSING (1990):

selection mechanisms have enabled the development of the supra-regional schools and their elitism. Alongside these semi-formal barriers, researchers point to additional causes of the relative inaccessibility of these schools to the weaker sectors, namely, their lack of information, absence of personal connections, physical inaccessibility, and low self-perception (self-selection).¹³⁸ Local governments have had a central role in the process of the establishment of supra-regional schools, as well as financially supporting them.¹³⁹

The legality of the different selection mechanisms used by the special schools (public schools in every respect, which are supposed to be equally open to all students) has yet to be put to the test in the courts. This is so, despite the fact that the selection process stands in direct contradiction to the explicit policy of the Knesset, the government, and the Ministry of Education.¹⁴⁰ Two parliamentary committees took a clear stance against these selection methods,¹⁴¹ yet their recommendations were not officially adopted by the Ministry of Education, and the special schools did not cease from the practice of filtering students. Over the years, the Ministry of Education formulated a set of quasi regulations prohibiting entry tests for supra-regional special schools,¹⁴² but apparently the special schools continued to administer admission tests.¹⁴³ Recently, the governmental committee for examining fundamental principles in the area of the child and law and the implementation of these principles in legislation also recommended legislating an explicit prohibition on selection practices for education institutions and programs within education institutions. These recommendations have yet to be adopted or implemented,¹⁴⁴ and the Dovrat Committee

ING, SCHOOL CHOICE IN URBAN AMERICA: MAGNET SCHOOLS AND THE PURSUIT OF EQUITY (1999).

138. Ellen B. Goldring & Rina Shapira, *Empowerment, Choice and Involvement: What Satisfies Parents?*, 15 *EDU. EVALUATION & POL'Y ANALYSIS* 396 (1993); Miriam Schmida & Yaakov J. Katz, *Parental Considerations When Choosing High School for Their Children*, 22 *SOC. BEHAV. & PERSONALITY* 337 (1994).

139. *Id.*

140. *See* THE KASHTI REPORT, *supra* note 134, at 1.

141. *Id.* at 20–21. In the Nature, Environment, and Society School in Tel Aviv, for example, “candidates” for Grade 1 have to undergo interviews, observation, and IQ tests. In Grade 6, students who are “incompatible” with the school’s character are filtered out. *Id.* at 20.

142. *See* THE WEINSTEIN REPORT, *supra* note 91, at 33.

143. *Id.* at 25.

144. Thus, § 11 of the Equal Education Draft Bill, formulated by the Education Subcommittee of the Committee on the Status of Children, provides for an exception to this principle and allows selectivity on the basis of academic achievements in “special

seems to have slightly retreated from its predecessors' notion of an absolute prohibition of selection methods and entry tests for acceptance to (supra-regional) special schools.¹⁴⁵ According to the Committee's Principal Recommendations, in special instances and contingent on the consent of the Ministry of Education, the establishment of a special school will be allowed, and it will be permitted to operate selection mechanisms based on qualifications.¹⁴⁶

The Israeli Pupils Rights Law ("Law")¹⁴⁷ includes various provisions prohibiting discrimination on the basis of ethnicity, socio-economic class, or political outlook of a pupil or her parents. However, the Law is silent on the matter of discrimination based on national background, as well as on the basis of education or academic achievements, giving rise to the concern that they are in fact permissible.¹⁴⁸ Indeed, this new legislation represents a missed opportunity to explicitly and unequivocally prohibit entry tests and all other methods of selection to all schools. The issue of entry exams has never been deliberated in court. However, in the early 1980s, the segregative ramifications of the Ministry of Education's ambivalent policy vis-à-vis supra-regional education frameworks (granting permits for their establishment, caving-in to different pressure groups, withdrawing permits, etc.) were first brought under judicial scrutiny. In its various decisions since the 1990s, the Israeli High Court of Justice ignored the fact that local governments had a patent interest in mitigating the integration policy by creating escape mechanisms from the plan for parents with political influence, by, amongst other things, setting up supra-regional special frameworks and manipulative setting of enrollment zones and precincts.¹⁴⁹

recommendations as operative draft legislation. *See* STATE OF ISRAEL, MINISTRY OF JUSTICE, THE COMMITTEE ON THE STATUS OF CHILDREN, REPORT OF THE EDUCATION SUB-COMMITTEE 215 (2003) (hereinafter ROTLEVI REPORT).

145. The Dovrat Committee is the unofficial name of the National Taskforce for the Promotion of Education in Israel. The committee was appointed by Prime Minister Sharon in September 2003 for the purpose of formulating recommendations for an overall reform of the Israeli education system. *See* NATIONAL TASKFORCE FOR THE PROMOTION OF EDUCATION IN ISRAEL—THE NATIONAL PLAN FOR EDUCATION, *Part A—Principal Recommendations* (2004) [hereinafter DOVRAT REPORT].

146. The Dovrat Committee was aware of the segregative and elitist potential of special schools and, therefore, stressed that these schools should be permitted only in exceptional cases and that preference be given to students from a weak socio-economic background. *See id.* at 73 (Recommendation 5.9) (Hebrew).

147. Pupils Rights Law, 5761–2000 Vol # 1st page of statute (date of volume) (Isr.).

148. Article 5, Pupils Rights Law Vol # 1st page of statute (date of volume) (Isr.).

149. *See also* Gavison, *supra* note 5 (referring to the decision as an exemplary instance of the courts' part in inhibiting changes in the sculpting and regional diverting

Many scholars see these decisions, in which the Court has sided with parents who sought to send their children to schools with exceptional and unique educational frameworks,¹⁵⁰ as a creeping withdrawal from its previously unequivocal support of the integration plan.¹⁵¹ It is my claim, however, that the Court's stance should be interpreted less as a shift in stance on integration as an educational-social ideal and more as a failure to internalize, or a total lack of awareness of, the changing social reality and the importance of this reality for the way in which the legal rules operate in practice. The Supreme Court views itself as supporting the national policy of integration, on the assumption that all the branches of the state do. The Court ignores the fact that in the last few decades many local governments have found themselves facing tremendous pressure and threats of abandonment from parents to make the implementation of integration more lenient. The changes in the Israeli spatial configuration brought about by suburbanization have made the threats of these groups credible, a palpable reality. The establishment of supra-regional educational frameworks is still not perceived by the Court as a structural problem that must be contended with systematically, including by "breaching" administrative promises and "at the expense of" pupils who relied on these promises.¹⁵²

The Court's ruling in these cases inadvertently induces parents to put pressure on local education boards, or on the Ministry of Education, to create special education frameworks for their children. Though parents who seek personal excuse for their children out of the integration plan are not deserving of relief, the Court ruled, if the educational authorities *themselves* had deviated from the integration plan, the Court would defend the right of the parents to execution of the administrative promise.¹⁵³ In other words, parents who caused the education authorities (local or central) to create a special education framework for their children would be granted relief even if it were to emerge that the framework counteracted the integration plan and even if later on the authorities reneged from their promise. This new line of cases, in effect, rewards strong parents who apply pressure on the authorities to set up supra-regional special frameworks and give other parents the incentive to do so in the future.

150. H.C.J. 715/89 Sarig v. Minister of Education and Culture; H.C.J. 4383/91 Shepckman v. Municipality of Herzliya, 46(1) P.D. 447 (1992).

151. Gibton, *supra* note 14, at 499-504; NIVI GAL, *supra* note 124, at 55; Goldstein, *supra* note 119, at 315-19.

4. THE CONCEPTUALIZATION OF EDUCATION AS A COMMODITY

Along with the establishment of special schools and emergence of the suburbs as a refuge from integration, an important coercive mechanism was eliminated, namely, the social norms that encouraged remaining in the general public education system.¹⁵⁴ This development also contributed to the crumbling of the public schools system. The fact that education began to be conceived as a product that is consumed at full price and the wise consumer of that product should do everything to ensure that she or he receives best value (presumably) for his or her money played a significant role in the weakening of the social norm of allegiance to the regular state system.¹⁵⁵ The awkwardness and shame that accompany the breach of social norms encourage people to cooperate, and the elimination or undermining of social norms and their coercive effects leads to escape from the system. However, in addition to the notion of education as a product, other factors have led to the current weakening of social norms: the opening of the independent Mizrahi-religious educational system (called *El Ha-Ma'ayan*) that was fully funded by the state despite its refusal to abide by any liberal or national curriculum due to the political power of the political party that supported it, which eroded the sense of solidarity in the state system;¹⁵⁶ the increase in the number of children learning in independent ultra-orthodox schools;¹⁵⁷ and the collapse of statist ideology and melting-

154. There is extensive writing on social norms as a decisive factor in cooperation and in resolving prisoner's dilemmas (and other problems of cooperation). See, e.g., HIRSCHMAN, *supra* note 26, at 100; Fennell, *supra* note 26, at 51-52, and accompanying references.

155. The commodification of education had both material and ideological manifestations. As noted, people began to pay more and more for education and were prepared to invest considerable funds to obtain a better education for their children. At the same time, educators, economists, and policymakers began to conceptualize education as a commodity in the sense that the public aspect of education (constituting a central site for the creation of citizens with the capability to participate in the political process) waned. Thus, education became a commodity whose quality and price were both subjectively and objectively set according to the measures of grades, improved chances of succeeding in the workforce, and on the pay scale, consumer demand, and suitability to consumers' specific tastes.

156. Since the 1980s, the Sephardic *haredi* (ultra-orthodox Jewish) education stream has grown dramatically, today constituting one of the largest streams in Israeli education. Even though it is not a state education stream, it receives full government funding. See Dan Gibton, *Autonomy, Anomie, Integration, and Anarchy: Legislation and Case-Law as Tools for Operating Education Reforms and for Implementing the Education Policy in Israel*, in RETURNS IN EDUCATION: AN OUTLINE FOR THE EDUCATION POLICY IN ISRAEL FOR THE TWENTY-FIRST CENTURY 431, 433 (Yuval Dror, David Nevo, Rina Shapira eds., 2003).

157. The number of students learning in these schools has consistently grown. cur-

pot approach. These factors, I assert, combined to weaken the social norms that ensured cooperation and prevented people from exiting the state system.

Thus, both conceptually and in practice, schools became consumer products, with the element of choice central to their existence.¹⁵⁸ Accordingly, the rise of "parental choice" is understood as a value that must be given central consideration in the education system's policy-making;¹⁵⁹ in the framework of this approach, different legal mechanisms evolved by which parents could increasingly influence the curriculum and student-body makeup of the schools in which their children learn.¹⁶⁰ The approach achieved consensus amongst educators during the last decade, whether they overwhelmingly accepted the assurance that the creation of a sophisticated market of "education products" (schools) and the increased choice available to consumers would improve education "outputs" and improve the services education consumers receive¹⁶¹ or whether they were wary of a sweeping adoption of market and competition models in light of the inherent dangers to equality, integration, and the duty of education to unify and train citizens.¹⁶²

As noted, the price of this consumerist conception of education was the erosion of the social norms and ideological mechanisms that, in the past, had caused individuals to prefer cooperation, rely on other, and be ashamed of leaving the public systems. This weakening was perceived as the outcome of the augmented parental freedom of choice, although, in practice, it also led to the emergence of an almost foreseeable dynamic of massive exit from the public system by anyone with the means to do so. The race to the bottom is a phenomenon that should be celebrated by none, for it means a less educated population, which is detrimental to everyone in the long-run. Moreover, it bears harsh social ramifications, as weak groups are unable to exit and move to suburban schools or special schools and are left behind in a deteri-

158. The seminal work on this subject is Chubb & Moe's research analyzing the "failure" of the public school system in the United States from an economic perspective, at the heart of which lies the conceptualization of the school as a market commodity. See CHUBB & MOE, *supra* note 98. This research has had a major impact in Israel as well, and many authors have adopted Chubb & Moe's fundamental approach, even if they do not share their absolute belief in the market and the good it generates. *Id.*

159. See, e.g., Goldring & Shapira, *supra* note 138; Schmida & Katz, *supra* note 138.

160. See Articles 1, 5-8, State Education Law; Regulations 2, 6-8, State Education (Complementary Program and Additional Program) Regulations; THE WEINSTEIN REPORT, *supra* note 91, at 21-22.

161. BEN-ELIA. *supra* note 29.

orated public system. The plummeting outputs of the Israeli education system over the last decade, accompanied by an increased discrepancy between strong and weak students, are clear evidence of this described dynamic.

One of the most severe problems of special schools and the emergence of parental choice as a central ideology in education derives from the fact that competition between families or individuals necessarily entails a structural advantage for those with connections, information, and access. A special effort is, therefore, essential to ensure that people without connections and information can consume the products with the same degree of reason and discretion. Studies in the United States and Israel have pointed to the fact that the structural advantage translates, in practice, to strong groups making use of and rationally applying their ability to choose.¹⁶³ The competition among individuals and families over securing the best education for their children leads to education's changing from a public forum, in which the state's citizens are shaped, to a "neutral" means for personal advancement, with emphasis placed on scientific and technical subjects and subjects whose contribution to this utilitarian advancement is less direct and immediate.¹⁶⁴

B. Problems of Distributive Justice

A central problem of the jurisdictional competition justifications noted by many critics is the deficiency of distributive justice it is prone to produce or at least reproduce. That is to say, the disparities that exist amongst communities and the rich and the poor can be expected to be maintained, created, or exacerbated by the brute and insensitive application of these models. As noted, these disparities tend to stem from socio-economic divergences and public choice dynamics. Decentralization of education powers, including school funding, that does not take into consideration the social and economic baseline is likely not to improve, and perhaps even to worsen, the state of peripheral and disadvantaged localities, for two principal reasons. First, localities diverge in economic ability, with the wealthy localities being able to

163. See Hanna Shachar, *Social and Educational Aspects to Parental Choice of School in Light of the "Market Economy" Concept in Education: A Review of the Research and Conclusions*, 36 MEGAMOT 173, 175-79 (1995). The Kashti Committee found that, although impressive integration had been achieved in five supra-regional schools, "unfortunately" these schools were the exception and not the rule with regard to special schools. The Committee also denounced the misleading criteria that had been set by the local governments aimed at achieving the appearance of integration and not genuine integration. See KASHTI REPORT. *supra* note 134. at 19-21.

invest more resources in the schools in their jurisdictions. Second, the new funding system, called “school-based management,”¹⁶⁵ places at an advantage not only schools in strong localities relative to schools in poor localities, but also schools in prestigious neighborhoods, relative to underprivileged neighborhoods in the same locality.

This criticism is best understood as calling for the monitored and supervised decentralization of education and *not* recentralization, in light of the dismal history of the central allocations in education. The Israeli State Comptroller has noted that the funding structure for schools—an odd assortment of various agreements and arrangements (amongst the government, the Union of Local Authorities, and local governments) and the outrageous splintering of the government education budget into 142 different clauses—is overwhelmingly to the benefit of those who are resourceful in finding budgetary sources or those who are close to sources of information.¹⁶⁶ Due to the nationality-biased character of the political and administrative system in Israel, certain localities (primarily the Arab ones and Mizrahi development towns) have fewer connections and less information and proximity to centers of power and decision makers. In addition, not every locality can afford to devote resources and time to unraveling the complex funding structure and insisting on their rights.¹⁶⁷ This is manifested both in the disparities in basic allocations of standard hours of study, to the benefit of Jewish schools,¹⁶⁸ as well as in the supplementary benefits that certain Jewish schools enjoy, but Arab schools and other Jewish schools do not.¹⁶⁹

1. THE UNEQUAL OUTCOMES OF LOCAL FUNDING

It was not only the discriminatory government budgeting system that led to disparities in funding among schools. The increased divergences between “strong” schools and “weak” schools also stemmed from the

165. This system of management became the official policy of the Ministry of Education. See *Ministry's Planning Division*, <http://cms.education.gov.il/EducationCMS/Units/Planning/English> (last visited June 20, 2006); see also *SCHOOL-BASED MANAGEMENT—AN INTERNATIONAL PERSPECTIVE* (Ami Volansky & Yitzhak Friedman eds., 2003); YITZHAK FRIEDMAN, RA'AYA BRAMA & SARAH TOREN, *SELF-BASED MANAGEMENT: THE CHANGE OF SCHOOL MANAGEMENT CULTURE* (1998).

166. See *STATE COMPTROLLER, ANNUAL REPORT NO. 48, 315* (1998) (Hebrew). The Ministry of Education budgetary transfers are supposed to be executed annually in the framework of an order (§ 7(b) of the Compulsory Education Law). However, no such order has ever been issued with regard to Jewish schools or with regard to schools in the Arab sector for about forty years.

167. *Id.* at 328.

168. AYALET BARAK-MEDINA, *ALLOCATION OF FUNDING IN THE EDUCATION SYS-*

fact that the four sources that feed state schools' budgets (the state budget, local government budget, parent fees, and schools' self-generated funds) were significantly minimized for schools in Arab towns,¹⁷⁰ in poor peripheral, predominantly Mizrahi towns, and in disadvantaged neighborhoods.¹⁷¹ Localities with an abundance of resources channel them to improving their education system, whereas poor localities remain reliant on the Ministry of Education and have to make do with the shrinking state budgets. Thus, in rich cities like Tel Aviv, Jaffa, the municipality currently accounts for 50 percent of the budget in public schools, as well as funding enrichment hours, support for weak students, and the like, activities that poor local governments cannot afford to fund.¹⁷² This has been manifested not only in the varying quality of life and infrastructures at the different schools, but also in the significant divergences in academic achievement. Indeed, in 2002, a study found that while eligibility for matriculation from high-school stood at 63 percent in affluent towns, in the development towns only 48 percent of students were eligible.¹⁷³ In Arab towns eligibility stood at 34 percent while the Bedouin in the Negev had the lowest rate of eligibility at only 26 percent.¹⁷⁴

As opposed to jurisdictional competition theory's ideal conception, these discrepancies in the funding abilities of schools cannot be explained as the result of differences in the taxes paid by the residents of the different localities. Far more important has been the income potential of the localities, which is far from being equal or dependent on property tax income, but rather is a function of a locality's assets and geographical location. Some localities stretched out over expansive lands, which they could exploit for construction, commerce, and industry enterprises, tourism, and so on, and this was translated into high

170. Thus, for example, in state-religious elementary education, the average weekly hours per student is 2.81. In the general state education, the average is 1.86 weekly hours. In the non-Jewish education, the number stands at 1.63 weekly hours per student. Wide discrepancies exist in the junior high schools as well. In the state religious schools, an average of 2.71 hours per week is allocated per student. In the Jewish general state schools, the average is 2.04 weekly hours. In the Arab state schools, the number reaches only 1.49 weekly hours. *Id.* at 4.

171. YAEL FISHBEIN, ON INEQUALITY IN PRIMARY EDUCATION FUNDING (2003) (Hebrew).

172. THE ROTLEVI REPORT, *supra* note 144, at 249–52.

173. See SHLOMO SWIRSKI & ALON ATKIN, ELIGIBILITY FOR MATRICULATION ACCORDING TO SETTLEMENT: 2001–2002, 5 (2003). The deep disparities between Mizrahi and Ashkenazi students have narrowed, but not disappeared. There is currently vigorous debate amongst academics, politicians, and policymakers as to whether these disparities

property tax income. Other localities were small, peripheral, and devoid of land reserves or other sources of income. Local governments preferred to externalize costs before adjusting the level of local taxes to the cost of the services they provide, by over-exploiting land resources (excessive build-up of commercial areas because of their tax potential),¹⁷⁵ by trying to “snatch” land resources (by instigating border disputes with neighboring localities),¹⁷⁶ and by driving away poor residents to nearby localities.¹⁷⁷

Localities with land resources with valuable economic potential exploited these assets to their very maximum to prevent wealthy residents from being driven away, and thereby avoided realistic raises in residential property taxes. The 2000 State Comptroller Report found that no correlation exists between the rate of local taxes and the socio-economic level of localities.¹⁷⁸ In other words, local governments offered packages of services-taxes that were not commensurate with the preferences of their residents in terms of the relation between local taxes and the type and quality of services provided or even corresponding to the residents’ payment abilities, but rather in accordance with the locality’s ability to raise money from sources other than the residential property tax. This ability to raise capital was related, above all, to the basic state of the locality, its geographic location, its lands and resources, its squeeze-out ability deriving from the path dependence of industrialists and merchants. Accordingly, economically weak groups from different communities (Arabs, Mizrahis, ultra-orthodox Jews) found themselves living in homogeneous, underprivileged localities or in homogeneous neighborhoods in heterogeneous wealthy or average

175. See NAHUM BEN-ELIA, *THE FISCALIZATION OF LOCAL PLANNING AND DEVELOPMENT* (Policy Paper 1/39) (2000). This sharp rise in construction was mainly the result of initiatives taken by the local governments, which responded to increasingly strong economic pressures.

176. The increase in boundary disputes between localities in Israel over the last two decades is clear proof of the attempt to find an alternative to property taxes as a means of raising funds. For the most part, by way of this procedure, local governments sought to increase the size of their jurisdictions so that they would include commercial and industrial territories, which would be subject to high local taxes. ERAN RAZIN & ANNA HAZAN, *MUNICIPAL BOUNDARY CHANGE PROCEDURES: LOCAL DEMOCRACY VERSUS CENTRAL CONTROL* (Policy Paper 1/40) (2000); ERAN RAZIN & ANNA HAZAN, *MUNICIPAL BOUNDARY CHANGES IN ARAB LOCAL AUTHORITIES* (Policy Paper 1/44) (2001); Shlomo Hasson & Eran Razin, *What Is Hidden Behind a Municipal Boundary Conflict?*, 9 POL. GEO. Q. 267 (1990).

177. Localities like Tel-Aviv have attempted to settle residents eligible for public housing in adjacent localities such as Holon and Bat-Yam, so that the locality could evade the high costs of caring for these “problematic” populations. See Blank. *supra*

localities. The residential segregation was reproduced, therefore, not only in order to ensure the efficient provision of services according to the “preference” stockpile, but also to safeguard the status quo of those same lucky people who found themselves living in a locality with many profit-yielding assets, which translated into generous “self”-funding for schools in the locality.

2. THE SHIFT TO SELF-MANAGED SCHOOLS

Not only self-generated funding but also the move to self-based management of schools contributed to the increased disparities amongst schools between and within localities. Starting as a small-scale experiment, self-based management became the official “education policy” of the state: since 1997 hundreds of schools across the country have shifted to the self-management system.¹⁷⁹ Indeed, the Dovrat Committee recently adopted self-management as one of the fundamental principles of the necessary reform of the state education system.¹⁸⁰ A self-managed school is defined as an autonomous unit, both economically and pedagogically, that maintains the state-like character of the education it provides in terms of implementing the state core curriculum and ethnic integration.¹⁸¹ Schools that adopt the self-management system continue to receive the regular allocations from the Ministry of Education and the local government in the form of an “education basket” for each student attending the school.¹⁸² However, they are also given incentives to raise funds independently, mainly by renting the school structures in the afternoon hours and during vacations, but also by private fund-raising and cooperation with commercial entities (including permitting commercial advertisements on school premises).¹⁸³ The schools have been given discretion to use the additional monies they raise on supplementary curriculums, enrichment hours, club activities, improvement of existing infrastructures, and renovating the school.

179. Six hundred and thirty schools were self-managed in 2002: approximately 45 percent of the elementary schools and 10 percent of the high-schools. See WEINSTEIN REPORT, *supra* note 91, at 46. The experiment was launched in 1996 with nine schools and, in 1997, extended to forty-three schools. See VOLANSKY, *supra* note 82, at 213.

180. This matter received particular attention in the Principal Recommendations Report. See DOVRAT REPORT, *supra* note 145, at 60–63 (Recommendations 2.9–2.16).

181. VOLANSKY, *supra* note 82, at 213.

182. In fact, the schools are given incentive to shift to self-management with a special adjustment grant provided at the time of the move to this system. *Ministry of Education*, <http://www.education.gov.il/planning> (last visited May 23, 2004) (describing the details of the education basket and the various criteria that determine its size); see also *Model Contract between the Ministry of Education and Local Governments for the Shift to Self-Management*. <http://www.education.gov.il/planning> (last visited

This funding structure has obvious advantages. Schools are valuable real-estate properties that are only partially exploited because of the short school-day and the long vacations. Where there is demand for premises like those inhabited by schools, renting the property during hours that the school is vacant seems to be to everyone's advantage. Moreover, turning the school into a (semi-)closed economic unit certainly has the potential to increase the responsibility of every school to run itself with greater economic efficiency and to encourage it to be more accountable with regard to the costs of its activities and its various expenditures. But these advantages notwithstanding, it is not clear that self-management can improve the quality of schools.¹⁸⁴ More importantly, this system threatens the equality of public education, with concern that it will induce schools and groups of parents to exclude weak students and will reinforce segregation on the basis of class and ethnic origin. This fear derives from two principal reasons: first, the ability to raise funds varies drastically in accordance with schools' spatial location and the basic economic value of their real estate property.¹⁸⁵ A school that is located in the heart of Tel Aviv has the potential to raise far greater funds from renting its property than a school located in South Tel Aviv, Jaffa, an Arab village, or a Mizrahi development town.¹⁸⁶ Corporations and advertisers will regard students from the affluent neighborhoods of North Tel Aviv, Jerusalem, and Haifa as a far more attractive audience than students from poor families in an Arab village or in Netivot (a disadvantaged Mizrahi peripheral town) and will, therefore, offer schools in "good" neighborhoods greater amounts of money to run advertising campaigns in the school.¹⁸⁷ This reality is likely to

184. Education, as I have noted, is fundamentally contingent on its consumers. Good schools are essentially schools with a sufficient amount of good students to pull the entire class upwards. Unlike the private producer, it is not clear that the school can do anything to increase its "efficiency" and become more attractive to students, when its competitors have such obvious advantages in terms of student populations and sources of funds, which are almost exclusively dependent on the location and identity of the students. Imposing competition on these schools in this state of affairs is likely to cause their speedy collapse, since their remaining good students will quickly abandon them, before they have the chance to do something, even minimally, to improve efficiency or quality. Fennell notes that in the private market, as well, per Hirschman, a mass exodus of customers can cause bankruptcy before the manufacturer has managed to increase efficiency. See Fennell, *supra* note 26, at 30; see also HIRSCHMAN, *supra* note 26, at 24.

185. See YITZHAK FRIEDMAN, *THE COMMUNITY SCHOOL—THEORY AND PRACTICE* (1990); Yotam, Ziv, *A Great Step Backwards*, GLOBES-MONEY, Dec. 20, 2001.

186. This occurred in England and New Zealand. See BEN-ELIA, *supra* note 29.

187. The Gafni Committee was appointed at the beginning of the 1990s to investigate whether there is a risk that raising funds from nonpublic funds is likely to increase inequality in education. See STATE OF ISRAEL—MINISTRY OF EDUCATION AND CUL-

intensify the already existing incentives to groups of strong parents to exclude weak students from the schools their children attend.

Second, giving discretion to the school community as to how to spend the funds it raises is likely to encourage schools to seek greater homogeneity in their student populations, since this will make it facilitate agreement as to how to spend the money raised. This raises the danger of the intensification of the splintering of the public system according to class, ideology, nationality, and religion.¹⁸⁸ There is also a fear that parents will seek greater class homogeneity so that the school's self-generated funding will be used for enrichment classes, supplementary curriculums for outstanding students, and improvement of the school's external appearance, and not to fund special lessons for children with special needs or school food programs for children from underprivileged homes.

The inequality in the funding structure is not a necessary reality and can be tempered if it cannot be completely eradicated. A different system of incentives can be set, by which schools are rewarded for their success at fund-raising, but not in the amount of all the funds they raise. There is no reason to assume that remuneration in a lower amount will hinder the incentive to schools to raise nonpublic funds.¹⁸⁹ Rather, it is only necessary to ensure that the reward is higher than the investment necessary to raise the external funding. For example, a school with a high fund-raising potential will transfer a certain proportion of the monies raised to a general pool from which other schools will share, schools, which, due to their geographic location, size, and unattractiveness to advertisers and donors, cannot raise many resources. This

GAFNI REPORT]. The committee recommended that commercial advertising in schools be subject to the pedagogic supervision of the Ministry of Education and that, in order to promote equality, a rule should be set prohibiting sponsors and advertisers from operating in only one school and requiring them to offer a contract to at least two schools and with at least half of the schools located in development areas or regenerating neighborhoods. The committee's specific conclusions with regard to the ways of preventing the widening of gaps amongst schools were not adopted by the Ministry of Education as a guiding principle. Instead, the ministry focused on the pedagogic aspect: to prohibit aggressive, direct advertising in textbooks and the like—not on the serious problem of the widening disparities. See MINISTRY OF EDUCATION, DIRECTOR-GENERAL DIRECTIVE NO. 57/208-4 (1997); MINISTRY OF EDUCATION, DIRECTOR-GENERAL DIRECTIVE NO. 2000/7(A) (2000); MINISTRY OF EDUCATION, DIRECTOR-GENERAL DIRECTIVE NO. 2003/3(A) (2003); MINISTRY OF EDUCATION, DIRECTOR-GENERAL DIRECTIVE NO. 2003/1(A) (Sept. 1, 2003).

188. See Dan Gibton, *A Sparkle of Freedom or Spark of Disagreement: The Chances and Risks of Democratic Education in Autonomous Schools in Israel*, in EDUCATION TOWARDS THE TWENTY-FIRST CENTURY 146-150 (David Chen ed., 1995).

189. I am certain that only in extreme cases will the investment required of schools

division of the “booty” will achieve two goals: one, it will maintain the incentive for schools to raise funds; and, two, it will create a balance between relative advantaged schools and schools that are at a disadvantage due to the unequal basic state.¹⁹⁰

My critical consideration of the compatibility of jurisdictional competition theory with prevailing reality in the education system and of the internal logic of this theory has made amply clear that they are tainted, particularly in their simplistic variations, by over-optimism. There is a great risk, I argue, that the endeavor to “expand the pie” and increase efficiency will lead to inefficient results, due to negative externalities and restriction of mobility, as well as to ever-increasing social disparities. In addition, the one-sided emphasis on competition and excellence in education, accompanied by unfounded optimism regarding the collective results of private choice, is likely to give rise to deficient solutions, primarily when other important educational values of a liberal multicultural state are overlooked, such as the duty to instill in students qualities that will enable different and diverse communities and people to coexist, despite deep and harsh disagreements among them. I now move to describe this critique in greater detail.

V. Do We Still Even Want Integration?

It is now time to ask the question that hid between the lines throughout the discussion: Why be concerned by the segregated nature of the public schooling system in Israel? Indeed, as long as there is no direct and overt state support for segregation, perhaps we should not interfere with it. If people freely organize themselves in ways that segregate their children, so be it.¹⁹¹ In the United States, it has been argued that all the Constitution requires is that the states make no racial classification and that is all *Brown* ever intended to prohibit.¹⁹² However, the argument

190. This is the stance taken by the Rotlevi Committee, which recommended a middle-road: no sweeping prohibition on raising resources from private sources, but the creation of a “balancing fund” to mitigate the inequality amongst schools. See ROTLEVI REPORT, *supra* note 144, at 254–55.

191. As Ford rightly observed, this claim “echoes the Court in *Plessy v. Ferguson*,” which *Brown* overturned. See Richard Thompson Ford, *Brown’s Ghost*, 117 HARV. L. REV. 1305, 1311 (2004).

192. For a compelling argument in favor of a different interpretation of *Brown*, according to which it should be understood as establishing an antisubordination jurisprudence rather than an anticlassification one, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004); Frank I. Michelman, *Reasonable Umbrage: Race and*

goes, if segregation happens unintentionally, as a result of market forces, group dynamics, and neutral rules that only set the powers of local governments, the Constitution is silent on the issue, and courts will not force desegregation.¹⁹³ In Israel, too, if Arabs and Jews, and Mizrahis and Ashkenazis, choose to live separately and, as a result, send their children to segregated schools, why should the courts have anything to say about it? Moreover, why should such individual preferences be prohibited or even discouraged? Furthermore, if people have true preferences for an integrative schooling system, where free jurisdictional competition exists, localities with integrative educational systems will evolve to cater to such preferences.

Multicultural theorists, too, are loath to disparage free-willed segregation. On the contrary, they point to fact that public education systems are usually not truly universal, instead forcing the culture of one dominant identity group within the state on culturally distinct communities. Thus, establishing segregated schools for communities who desire this arrangement is the ethical response of a state that is committed to cultural recognition. Indeed, I submit that one of the reasons that the jurisdictional competition theory has enjoyed such wide support in recent decades in Israel and the United States is that it appeals not only to utilitarians and wealth-maximizers but also to multiculturalists who seek to harness various state apparatuses, including public education, to advance the recognition of cultural communities' specificity.

To some extent, this article is an attempt to challenge these legal and ethical positions by undermining their underlying premise: that clear preferences, individual or collective, in favor of segregation can be discerned or identified, at least in Israel. The fact that educational segregation is a result of a complicated set of background rules and state-supported economic incentives suggests, I believe, that no endogenous preference can be deduced from the mere fact that people send their children to a segregated school. The prevalence of coercive mechanisms makes it hard to distinguish between the element of free choice and the element of coercion. And since preferences, even freely formed, are amenable to change and plastic to some degree (even if not entirely fluid), it is possible, a growing body of literature suggests, that the law not only mirrors or acknowledges existing preferences, but actually shapes those preferences. It also opens up the possibility that different legal mechanisms help change people's preferences and, in any event,

might provide them with incentives to behave differently. Indeed, my analysis raises the concern that Jewish-Arab educational segregation was no more spontaneous or freely chosen or voluntary than the segregation between Mizrahis and Ashkenazis. Rather, both should be understood in the context of historical residential segregation, local government law, and unrestrained jurisdictional competition.

Yet contemporary writers still draw a sharp distinction between Jewish-Arab segregation, on the one hand, and Mizrahi-Ashkenazi segregation, on the other. While the former is seen as justified, willful, and reflective of genuine preferences of Jews and Arabs alike, the latter is condemned, fought-against, and understood to be a reminder of a shameful past. A primary and central reason for this difference is that whereas Arabs have never been part of the “nation” that the national-Zionist elites sought to build, the immigration of Mizrahis was one of the central objectives of this project. From the ideological standpoint, Arabs are presented as preferring isolation, cultural autonomy, and segregation, even in those instances when there has been ample proof to the contrary. Mizrahis, on the other hand, are continually presented as seeking to be included in the state and society controlled by Ashkenazis and as almost completely devoid of any segregative tendencies. Thus, for example, the isolationist voices in the Mizrahi community (the Black Panther Movement in the 1970s and Sami Shalom Chetrit¹⁹⁴ in the 1990s, for example) were regarded as marginal, whereas the isolationist voices in Arab society drew public attention and reverberations.

Multicultural theorists also often distinguish between the Arabs, who are seen as a true “nomic” community with different cultural norms or a different conception of the good, distinct language and religion (be it Islam or Christianity), and a different national identification,¹⁹⁵ and Mizrahi Jews, who are usually regarded as a subordinated minority, not a nomic community. This is why some scholars are more sympathetic to the idea of maintaining a separate education system for Arabs as part of their right to culture and language, than to the idea of a separate education system for Mizrahis. However, as I have already implied and as the *Kedma* school case exemplified, some radical Mizrahi activists also advocate self-segregation in education for Mizrahis.¹⁹⁶ Indeed,

194. Sami Shalom Chetrit has been one of the most prominent Mizrahi activists in the past decade and a half and is the founder of the *Kedma* schools. See Sami Shalom Chetrit, *Mizrahi Politics in Israel: Between Integration and Alternative*, 29 J. PALESTINE STUD. 51 (2000).

195. I use the term “nomic communities” following Ford and Eisengruber. See Ford, *supra* note 191, at 1412–17; Christopher L. Eisengruber, *The Constitutional Value of*

presently in Israel, not only racial bigots and extreme nationalists advocate re-segregation (or at least the halting of integration). Moderate liberals, minority leaders, and multicultural ideologues question the desirability of integration for a multiplicity of reasons. They see merit in the self-segregation of Mizrahis and Arabs as a means of achieving minority empowerment and self-determination, and they hail separatist tactics as means of mitigating national and racial tensions.¹⁹⁷ It is thus imperative to examine also the substance of the argument for segregation in public education, even though my position is that multiculturalists' and jurisdictional theorists' crucial assumptions regarding free choice and free movement between localities are, it appears, unrealistic.

I now turn to examine some of the substantive arguments concerning educational integration in Israel. I first criticize the notion that fixed and discernible preferences exist regarding segregation. I then point to the destructive impact segregation—even if it is “freely willed”—has on the development of civic qualities amongst the state's citizenry.

A. *Between Freedom and Coercion and the Malleability of Preferences*

There are two main reasons why only modest effort has been made to understand the ongoing segregation in education between Arabs and Jews: first, it has been considered a product of free choice (or the voluntary decisions) of both Arabs and Jews; second, it has been understood as mandated by Israeli education laws. Despite the fact that these two reasons might seem contradictory—how can an action be simultaneously freely chosen and legally mandated?—they are nonetheless presented as going hand-in-hand and as explaining and justifying Arab-Jewish segregation. An example of the first approach is Gavison and Schwartz's claim that “the preference of the Arabs is, usually, not to integrate in the Jewish national educational system. Therefore, with regard to education, *“one should not learn lessons from the struggle to integrate blacks [in the United States] . . . [U]nlike blacks, the consistent preference of the Arabs in Israel was to study in a ‘separate but equal’ system.”*¹⁹⁸

Rosen-Zvi's recent study is an example of the second position. Analyzing in depth the segregation between Ashkenazi and Mizrahi Jews, he explains that his study “deals only with ethnic segregation within

197. Gavison, *supra* note 5, at 38.

198. Ruth Gavison & Ori Schwartz. *Residential Segregation and Discrimination:*

Jewish public schools ignoring altogether *the institutionally mandated segregation* between Arab and Jewish schools.”¹⁹⁹ But Rosen-Zvi also endorses the voluntarist claim, arguing that “[e]ducational segregation between Jewish and Arab schools is desired not only by the Jewish majority but also by the Arab minority that wishes to use the school system as a vehicle of cultural autonomy. . . .”²⁰⁰ Surprisingly, Gavison and Schwartz take the opposite position, asserting that the “preference of the Arabs might actually be a result of external coercion, at least to some degree.”²⁰¹

This oscillation between freedom and coercion—with Arabs both choosing to remain segregated, in the margins of the Israeli polity, and forced to stay there by legal, social, economic, and political coercion—has inhibited almost any significant discussion of educational integration between Jews and Arabs.²⁰² There is no point in denying the existence of separatist Arab voices, as they are indeed ample.²⁰³ In fact, until recently, it was hard to find “serious voices within Israel, from any community [Jewish or Arab], advocating this solution [a unified system of public education]”²⁰⁴ or “a meaningful political power advocating Arab-Jewish school desegregation.”²⁰⁵ However, there may be a turnaround in this lack of pro-integrationist voices, as we can learn from the cases of *Abu-Shamis* and *Hassnian*,²⁰⁶ which show that there are Arabs who wish to go to Jewish schools. The fact that Adala, the most prominent Arab civil rights nongovernmental organization, took it upon itself to bring the *Hassnian* case to court is especially telling.

199. ROSEN-ZVI, *supra* note 7 (emphasis added).

200. *Id.*

201. Gavison & Schwartz, *supra* note 198. In another article, dealing only with educational segregation and the Arab minority in Israel, Gavison argues similarly that racial prejudices and economic and social interests play a role in the ongoing segregation of the Arabs in Israel. Gavison, *supra* note 5, at 38, 67.

202. Gavison’s thoughtful discussion of Arab-Jewish segregation apropos the *Abu-Shamis* case is a rare example. *See id.*

203. *See, e.g.,* Sa’ad Tsartsur, *On the Question of the Education of Minorities, in EDUCATION IN A FORMING SOCIETY* 493 (Aric Karmon & David Zuker eds., 1985) (Hebrew). These voices in fact grew stronger during the 1990s, their institutional manifestation taking the form of political parties and representatives in the *Knesset*. Many have analyzed the transformation that the Arab minority has supposedly undergone since the 1980s. In many ways, this change is epitomized by the self-definition shift from “Israeli-Arabs” to “Palestinians” or “Israeli-Palestinians.” Of course, important changes began prior to the 1990s, with the gradual evolution of local political and economic Arab elites. Nadim Rouhana, *The Political Transformation of the Palestinians in Israel: From Acquiescence to Challenge*, 18 J. PALESTINE STUD. 38 (1989); ISSAM ABU RYA & RUTH GAVISON, *THE JEWISH-ARAB SPLIT IN ISRAEL: CHARACTERISTICS AND CHALLENGES* (1999) (Hebrew).

204. Gavison. *supra* note 5. at 68.

Until very recently, Adala held a clear anti-integrationist position, refusing to represent Arabs who wanted to “assimilate,” for instance, by purchasing land in Jewish-only communities.²⁰⁷ The recent change in its position could suggest that meaningful voices within the Arab minority have begun to endorse integration as either a substantive view or as a strategy for attaining equality.

Clearly, there are undeniable objective reasons why Arabs would not only want but also need a separate educational system for their children. These reasons would include: the need to teach in Arabic in order to preserve it as a minority language; the need to form and teach a curriculum that is sensitive to Arab history and culture; the need to invest more in Arab children in light of their current disadvantaged position; and the fact that it would cost money and take time to bus Jews and Arabs to integrated schools due to the deep residential segregation that currently exists. With regard to Mizrahis, there are serious and compelling claims that because the educational system has, in any event, segregated Mizrahis from Ashkenazis, the time has come to give them at least some autonomy to learn Mizrahi history and culture, free from the shackles of the oppressive national pedagogy. However, important as they are, these considerations are inconclusive and do not necessarily mandate the level of educational segregation of contemporary Israel. On the contrary, the separatist strategy that has been adopted until now may have exacerbated the racial tensions between Jews and Arabs and between Mizrahis and Ashkenazis and may have intensified the disagreements that are expected to be resolved, or at least mitigated, over the years.

Richard Ford has demonstrated how multicultural curriculum, ethnic studies classes, and single-identity schools have sharpened the differences between groups in the United States,²⁰⁸ and may have contributed to the naturalization of group identity and of social relations in general. Rather than challenging social relations and group formation and subordination, multicultural education often locks individuals into their communities and renders contingent social groups natural and fixed. Put differently, multicultural accommodation may actually “produce and enforce the group divisions it claims simply to recognize and accommodate.”²⁰⁹ If this is, indeed, the case, segregation along lines of

207. Adala even criticized the *Ka'adan* decision, in which the Israeli Supreme Court declared state-sanctioned residential segregation in collective settlements illegal. *See ADALA REVIEW*. ???

race, ethnicity, and sexual orientation, even when it is self-imposed and carefully designed to be merely “reflective” of already-existing groups, carries the risk of ossifying and depoliticizing social relations.

B. *The Civic Cost of Segregation*

Deep segregation²¹⁰ in education between Jews and Arabs, rich and poor, Mizrahis and Ashkenazis, secular and religious has particularly impeded one of the fundamental goals of the public education system in a liberal state: the building of a civic nation (as Gavison terms it)²¹¹ or the inculcation of liberal civic values (as Macedo and Gutmann term them).²¹² Not only was individual liberty injured as a result of the overwhelming importance given to place of residence in education, the freedom of choice of weak groups was impaired as a result of the structure of the education system and local government law, which restrict the mobility of these groups. Macedo has demonstrated most compellingly the dual error made by many researchers of education policy who encourage multiculturalism, community autonomy, and unmonitored decentralization in the education system. On the one hand, they assume that liberal civic values (such as tolerance, interest in political community life, and the ability to understand political issues that citizens must decide) will simply emerge by themselves amongst the citizens of the state, even if they are not inculcated by means of the education system. On the other hand, these researchers are certain that liberalism entails neutrality with regard to the conception of good and, accordingly, that true liberalism mandates neutral education with regard to values.²¹³

There is no basis to the optimism with regard to the spontaneous emergence of the qualities required of citizens of a liberal-democratic state,²¹⁴ and many advocates of decentralization in education and free competition suffer from this unfounded optimism. Rather, attaining a “liberal character,” for example, the ability to coexist with people you believe are doomed to burn in hell, is the fruit of an ideological and educational effort. It cannot be assumed that certain qualities and values will be instilled in or observed by citizens if the state—as the body that

210. Segregation, as I describe it, that is the result of incautious and unmonitored adoption of the jurisdictional competition justification of decentralization of education to local government (and of multicultural ideology).

211. Gavison, *supra* note 5.

212. STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* (2000); AMY GUTMANN, *DEMOCRATIC EDUCATION* (1987).

represents the compromises and ongoing dialogue between members of the entire national political community—completely withdraws and makes way for local government, parents, communities, or individuals. It seems that even such ardent libertarians as Friedman and Hayek concede that the state must provide free education to all its citizens because the social costs that are likely to stem from an uneducated citizenry, devoid of the basic qualities necessary to members of developed democratic states, are enormous.²¹⁵ These arguments are applicable also in the context of state involvement to ensure that pupils acquire both the cognitive skills necessary for citizens of developed industrial states as well as the (no less important) civic skills.²¹⁶ Many authors who are troubled by the poor quality of the public system and propose such ideas as privatization, decentralization, and enhanced competition fail to give sufficient thought to the need to safeguard some of the fundamental qualities of the education system, in order for it to cultivate not only smart students with adequate mental capabilities, but also citizens with “liberal” qualities.

On the other hand, those same policymakers and researchers who are aware of the importance of the education system for instilling values and qualities necessary to citizens of a liberal society focus on the desirable curriculum contents, for example, democracy and civics, and neglect the importance of integration (class, religious, ethnic, and national) in cultivating tolerant citizens with inter-community coping abilities. There is a hidden assumption that tolerance, curiosity, and dialogue with the “other” can be taught as theoretical, and not practical, issues,²¹⁷ and that random encounters (between the secular and religious, Arabs and Jews) can make up for what is lacking in practice. However, studies show that mutual tolerance and the ability to conduct a dialogue with the Other are qualities that are best acquired through learning together as a group in an integrative school system.²¹⁸

215. FRIEDMAN, *supra* note 95; FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944).

216. Many authors who support introducing market mechanisms and competition into elementary and secondary education assume that free competition will generate both academic excellence (that is, high grades in evaluation tests) and the desired civic capacities. Such an assumption is problematic, due to its lacking compelling empirical grounds,

217. In Israel, although, under law, all schools receiving state support, including the independent ultra-orthodox stream and the *Mayan Ha'Hinuh HaTorani* (“The Well of Torah Education”) network of schools, are required to implement the Ministry of Education’s core curriculum. In practice, this requirement has not been enforced with regard to the independent schools and the *Mayan Ha'Hinuh HaTorani* schools, but is strictly enforced in Arab schools.

Therefore, I submit that it is precisely the “shape” of the education system—integrative and diverse in student makeup—and not its specific contents (civics and democratic studies, for example) that is crucial for instilling desired civic qualities. The most tangible threat faced by Israeli society is, in my opinion, the deep segregation that characterizes the education system. This reduces the ability of citizens to conduct a dialogue with one another and impairs political, social, and economic give-and-take regarding how the state is run. These issues require more profound consideration than what is currently being conducted in Israel.

VI. Preliminary Thoughts for Future Inquiry and Conclusion

It is often expected that the courts will deliver us from our troubles, and lawyers are repeatedly disappointed when this hope turns out to be hollow.²¹⁹ Even fifty years later and even after segregation proved smarter and stronger, *Brown* still shines, signifying the utopia of racial integration. It is, therefore, hard not to wish for an Israeli version of *Brown*, in which courts will declare segregation illegal, not only when it is state-mandated, but also when it is the outcome of a multitude of factors, as demonstrated in this article. However, a close analysis of the legal rules, baseline conditions, and social contingencies suggest that in order for educational integration to be effective, the following considerations need to be taken into account.

First, given the linkage between residential segregation and educational segregation and in light of the severe de facto limitations on movement between localities for poorer populations, it is imperative that affordable housing be offered more freely, especially to Mizrahis and Arabs. Second, the limitations on inter-local cooperation regarding integration require a higher level of central involvement in devising and implementing the details of the integration plan. Such central support needs to be monetary, symbolic, and legal. Rebellious localities cannot be let off the integration hook. Third, exiting the public system should be costly; those who wish to send their children to exclusive and de facto segregated schools should bear the full cost of their decision. The current system that enables parents to exit the public schooling system yet enjoy close-to-full state funding should be abolished. Fourth, multicultural accommodation should be undertaken with great care and full awareness of its possibly harmful results, such as increased

fragmentation and naturalization of social relations and identities. Fifth, a general reform of Israeli local government law is mandatory for successful integration.²²⁰

One of the dilemmas with which policymakers and researchers have contended over the last few decades is the appropriate balance between local control and central control of the public education system. A high involvement of local governments in education can, in principle, include: setting school curriculums, setting school enrollment districts, deciding the extent of desirable integration of different social groups in the schools, participating in school funding, and so on. In contrast, limited involvement of the local government in the education system could entail no more than implementation of the education policy set by the Ministry of Education, school upkeep and maintenance, student registration, and security arrangements for the schools. Likewise, the central government could be either deeply or superficially involved in the education system, depending on which objectives the state seeks to advance. On the one hand, the central government might do no more than simply set the minimal core curriculum and supervise (closely or not) the activities of the local government in regard to schools. On the other hand, the central government could set specific curriculum in schools and ensure coordination amongst local governments in places where joint action is warranted.

This article investigated the way in which this dilemma of the extent to which the public education system should be decentralized is manifested in the Israeli public education system. Over the last two decades, the involvement of noncentral entities in education in Israel, first and foremost, local governments but also various autonomous education networks,²²¹ has become particularly pronounced. Some researchers claim that this involvement is evidence of the fact that the Israeli public education has been decentralized. The majority, however, assert that the public education system still features a great extent of centralization

220. The limited scope of this article cannot do justice to such a broad topic; however, I must comment that local exclusionary zoning and planning powers need to be curbed; distributive justice schemes amongst localities need to be devised in order to counter historical injustices in land and resource allocation, and that local-central relations need to be reshaped to allow more central control over matters that require coordination without harming local autonomy in areas where the central state has no business.

221. See Dan Gibton, Naama Sabar & Ellen B. Goldring, *How Principles of Autonomous Schools in Israel View Implementation of Decentralization and Restructuring Policy: Risks, Rights and Wrongs*. 22 EDUC. EVALUATION & POLICY ANALYSIS 193

and that, despite the changes it has undergone, the influence and importance of local governments on education are rather negligible. This view has found support with policymakers as well, with most current recommendations focusing on different programs for decentralizing the national public education system.²²² The article has attempted to challenge this prevailing belief and expose the influence of local government on the education system as well as point to the fact that, paradoxically, local control is not always at the expense of central control. The Ministry of Education continues to wield vast supervisory powers, which theoretically should increase central control over education. In many instances, however, the Ministry has chosen *not* to use these powers and thus de facto decentralized various areas of the national education system. The areas in which control was transferred to local governments have been arbitrary and erroneous, thereby contributing to the overall deterioration of the public system, the exacerbation of segregation along national, ethnic, and economic lines, the increase of inequality in the system between students from different social classes and ethnic origin, and the growing inefficiency in the management and infrastructure of the system. Jurisdictional competition theory and multicultural theory have both contributed to these dire outcomes. If Israelis want to be able to talk to each other not only in the Parliament through their representatives—who seem less and less able to do so—they must begin to go to schools together and let their children begin at this process.

222. The principal recommendations submitted in May 2004 by the Dovrat Committee constitute a prominent example of the current broad support amongst Israeli academics and policymakers for decentralizing the education system. According to the Dovrat Report, many of the powers currently held by the Ministry of Education should be transferred, on the one hand, to the schools themselves (“self-management”) and