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Charter Schools and School Desegregation Law

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**CHARTER SCHOOLS AND SCHOOL DESEGREGATION
LAW**

Will Stancil[†]

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I. INTRODUCTION

In Bibb County, Georgia, home to the city of Macon, a racial dividing line runs through the schools. Like many places in this part of the South, most of the population is black. That is reflected in the

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education system: in the countywide school district, 73 percent of children are black, while only 19 percent are white.¹

But one Bibb County school is different. It's a charter school called the Academy for Classical Education. Children are not assigned to the Academy; as with all charter schools, they attend by choice.² To recruit students, the school advertises itself to parents. A section of the school's website asks "Is [this] the place for your child?"³ The website answers by detailing a rigorous curriculum that requires children to "memorize poems, speeches, [and] the sequence of history. . . ."⁴ "Socrates, Aristotle, Bach, Jefferson, Churchill, Mandela . . . have established all that is worthwhile to be learned," the website declares.⁵

The racial demographics of the Academy are the reverse of the county: the school is 72 percent white, 16 percent black.⁶ In a place where Jim Crow exists within living memory, the racial split raises uncomfortable questions.

But the Academy is not alone in this respect. Almost a thousand miles to the northwest, in Saint Paul, Minnesota, is Como Park Elementary School. Located in a heavily diverse area of the city, 91 percent of its students are black, Asian, or Hispanic.⁷ Only nine blocks away, the Twin Cities German Immersion Charter School serves the same grades; its student body is 88 percent white.⁸

At a 2016 public hearing in St. Paul, the director of New Millennium Academy Charter School stood to speak to a judge. Her school was almost entirely made up of Hmong students—94 percent to be exact—and she is trying to explain why it, and other charter

1. *Georgia School Grades Reports: Bibb County*, THE GOV.'S OFF. OF STUDENT ACHIEVEMENT, <https://schoolgrades.georgia.gov/bibb-county> (last visited April 15, 2018).

2. See NAT'L CHARTER SCH. RESOURCE CTR., <https://charterschoolcenter.ed.gov/what-is-a-charter-school> (last visited April 15, 2018).

3. *Is ACE the Place for Your Child?*, ACAD. FOR CLASSICAL EDUC., http://www.acemacon.org/apps/pages/index.jsp?uREC_ID=413106&type=d&pREC_ID=902056 (last visited April 15, 2018).

4. *Id.*

5. *Id.*

6. See *Georgia School Grades Reports: Bibb County*, *supra* note 1.

7. *Como Park Elementary*, MINN. REPORT CARD, http://rc.education.state.mn.us/#mySchool/orgId—10625431000__p—1 (last visited April 15, 2018).

8. *Twin Cities German Immersion Charter School*, MINN. REPORT CARD, http://rc.education.state.mn.us/#mySchool/orgId—74152010000__p—1 (last visited April 15, 2018).

schools, should not be included under state desegregation mandates.⁹ She says that it's because black children are different from her students: "Each culture group has their own. The Hmong, we are very quiet. We are introvert[s]. We don't talk much. The African-American students, they are extrovert[s]. They talk. That's how they are."¹⁰

Earlier during the same hearing, the director of Excell Academy, a charter school that is 92 percent black, read a comment from a student: "You need to think about what you are doing to people of color and whites. If you make a white kid go to a colored school or a colored kid go to a white school, there are a lot of things that can go wrong."¹¹ In all these charter schools, and hundreds more across the country, an old idea seems to be coming back—the idea that education is best provided by separating kids along racial lines.

School segregation was one of the thorniest problems—maybe *the* thorniest—ever tackled by American law. The source of the trouble was simple: even though the Supreme Court decided in 1954 that school segregation must end,¹² racial divides expressed themselves in innumerable ways. In the South, Jim Crow laws formally assigned students to schools based on their race, and permitted no crossing of racial boundaries.¹³ Elsewhere, more nuanced methods of segregation were employed. In cities where racial and ethnic minorities lived in clearly-identified ghettos, formal segregation was rarely necessary; school attendance boundaries simply followed the boundaries of those ghettos.¹⁴ And when

9. *New Millenium [sic] Academy Charter School*, MINN. REPORT CARD, http://rc.education.state.mn.us/#mySchool/orgId—74152010000__p—1 (last visited April 15, 2018).

10. Transcript of Public Hearing at 317, In the Matter of Proposed Rules Governing Achievement and Integration for Minn. (Jan. 7, 2016) (No. 65-1300-32227).

11. Transcript of Public Hearing on Proposed Achievement and Integration Rules at 159 (Jan. 7, 2016).

12. See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (prohibiting "separate but equal" policies in schools).

13. See Ian Millhiser, *American Schools are More Segregated Now Than They Were in 1968, and the Supreme Court Doesn't Care*, THINKPROGRESS (Aug. 13, 2015), <https://thinkprogress.org/american-schools-are-more-segregated-now-than-they-were-in-1968-and-the-supreme-court-doesnt-care-cc7abbf6651c/>.

14. See, e.g., *Cisneros v. Corpus Christi Indep. Sch. Dist.*, 324 F. Supp. 599, 616 (S.D. Tex. 1970); *Crawford v. Bd. of Educ.*, 120 Cal. Rptr. 334, 338 (Cal. Ct. App. 1975).

residential boundaries would not suffice, a bewildering array of student assignment policies, strategic school openings and closures, and optional attendance zones could be deployed to similar effect.¹⁵

The Supreme Court's decades-long campaign against school segregation dealt with its simplest manifestations first. After *Brown v. Board of Education* banned explicit segregation, most of the Court's subsequent segregation cases focused on the nation's bevy of creatively segregated school districts.¹⁶ As the courts have pursued increasingly baroque—though no less harmful—forms of segregation, the idea of overt racial designation in schools has taken on the aura of a historic relic.¹⁷ The unstated assumption is that the United States has simply moved on from such realities.

But in the fast-growing charter school industry, the idea of racially designated schools has not been forgotten at all. Instead, charters have been embraced as a bold new frontier of educational innovation. Their stalwarts defend the virtues of segregated education, at times even claiming that racial groups learn best when they learn separately.¹⁸

Perhaps due to the brazenness with which these racially targeted schools operate, commentators often assume that charter schools must be distinguishable from the intentional, *de jure* segregated systems of decades past.¹⁹ As such, analyses of these schools' legal implications are surprisingly sparse.

This article makes two arguments regarding racially targeted charter schools. First, it asserts that—as it appears at first glance—these schools are unconstitutionally discriminatory on the basis of

15. See *infra* Part II.

16. *Id.*

17. See, e.g., *Cumming v. Richmond City, Bd. of Educ.*, 175 U.S. 528 (1899) (denying relief to black children without a school by rationalizing that such action would reduce the quality of the white school).

18. See, e.g., Jamaal Abdul-Alim, *Education Reformer: Charter Schools Can Be "Culturally Affirming," Not Segregated*, DIVERSE ISSUES IN HIGHER EDUC. (Jan. 29, 2017), <http://diverseeducation.com/article/91850/>.

19. The legal scholarship that exists on this subject has often seemed to approach the legal argument backwards, starting with the assumption that segregated charters must be unconstitutional and working to find ways to distinguish this situation from unconstitutional segregation. See, e.g., Mary E. Wright, *Single/Majority Race Charter Schools: Charting a New Course in the Aftermath of the Failed Mandates of Brown v. Board of Education*, 9 RUTGERS RACE & L. REV. 1, 16 (2007).

race.²⁰ Contrary to many recent assertions, such schools are in no way exempt from constitutional rules barring intentional segregation. Second, this article argues that the operation of such schools, incident to a state charter law, renders the broader swaths of the state's charter and educational system a de jure segregated "dual" system.²¹ Just as a local district's operation of a whites-only school would permit a court to use the full panoply of remedial integration tools to desegregate the whole district, the chartering of racially targeted schools permits the full scope of constitutional remedies on a statewide basis.²²

There are many other questions related to segregation, integration, and charter schools. To what extent should charters be affected by district-wide integration orders? Are charters inevitably segregative, or can they, in some circumstances, promote integration? What practical remedies are most effective for integrating charters? This article leaves these questions for another day, focusing instead on racially targeted charters. Even this narrow discussion, however, cannot be conducted without a significant review of both policy and law.

Part I of this article focuses on charter schools themselves—what they are, the basic shape of segregation among the charter sector, and some brief description of how the resulting segregation came to be.²³ Part II provides an overview of the most important and relevant decisions in the sequence of Supreme Court school desegregation cases.²⁴ Part III applies that law to the problem of racially targeted charter schools.²⁵ Part IV adds some concluding observations.²⁶

II. AN OVERVIEW OF CHARTER SCHOOLS

Charter schools, first introduced in Minnesota in 1991, are still spreading fast.²⁷ As of 2017, forty-three states and the District of

20. See *infra* Part III.A.

21. See *infra* Part III.B.

22. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (discussing throughout the broad range of remedies available).

23. See *infra* Part I.

24. See *infra* Part II.

25. See *infra* Part III.

26. See *infra* Part IV.

27. See Christopher Magan, *MN's Charters [sic] Schools to Get a Boost from Federal Grants, with Maybe More to Come*, PIONEER PRESS (Sept. 28, 2017), <http://www.twincities.com/2017/09/28/mns-charters-schools-to-get-a-boost-from->

Columbia have enacted charter laws.²⁸ The total number of charter schools in the United States is close to 7,000, and those schools enroll approximately 3.1 million students.²⁹ Enrollment is growing by about 200,000 annually.³⁰

Charter schooling is still a small fraction of all schooling. During the 2014–15 school year, only about 5.4 percent of public school students attended a charter.³¹ However, this figure disguises the true impact of these schools, because the geographic distribution of charters is not uniform. Many rural and suburban areas have no charters at all.³² Meanwhile, other areas—primarily aging major cities with high poverty—have dozens or hundreds of charters.³³ In many of these places, a double-digit percentage of students, and sometimes even a majority, enroll in charters.³⁴

The political impact of charters is greater still. For years, charters have been a key focal point of education reform.³⁵ Fierce battles between pro- and anti-charter factions have been a defining feature of education policy debate in the twenty-first century.³⁶ This

federal-grants-with-maybe-more-to-come/; Rachel Cohen, *The Untold History of Charter Schools*, DEMOCRACY (Apr. 27, 2017, 4:26 PM), <https://democracyjournal.org/arguments/the-untold-history-of-charter-schools/>.

28. *Choice & Charter Schools: Law & Legislation*, CTR. FOR EDUC. REFORM (Mar. 22, 2017), <https://www.edreform.com/issues/choice-charter-schools/laws-legislation/>.

29. NAT'L ALL. FOR PUB. CHARTER SCH., ESTIMATED CHARTER PUBLIC SCHOOL ENROLLMENT, 2016–17, at 1, 4 (2017), http://www.publiccharters.org/wp-content/uploads/2017/01/EER_Report_V5.pdf?x87663.

30. *Id.* at 1.

31. *Table 216.90 Public Elementary and Secondary Charter Schools and Enrollment, by State: Selected Years, 1999-2000 through 2014-15*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/digest/d16/tables/dt16_216.90.asp (last visited Oct. 12, 2017).

32. See Laura McKenna, *Why Don't Suburbanites Want Charter Schools?*, THE ATLANTIC (Oct. 1, 2015), <https://www.theatlantic.com/education/archive/2015/10/why-dont-suburbanites-want-charter-schools/408307/>.

33. NAT'L ALLIANCE FOR PUB. CHARTER SCH., A GROWING MOVEMENT: AMERICA'S LARGEST CHARTER PUBLIC SCHOOL COMMUNITIES AND THEIR IMPACT ON STUDENT OUTCOMES 3 (2016), <http://www.publiccharters.org/wp-content/uploads/2016/11/enrollment-share-web1128.pdf>.

34. *Id.*

35. See generally Cohen, *supra* note 27 (describing the history and role that charter schools have had in school reform).

36. See, e.g., Zachary Jason, *The Battle Over Charter Schools*, HARV. ED. NEWS (May 20, 2017, 5:11 PM), <https://www.gse.harvard.edu/news/ed/17/05/battle-over-charter-schools>.

is because both sides have powerful institutional supporters. The “pro” faction has been boosted by a constellation of business leaders and charitable foundations, such as the Gates, Broad, and Walton foundations.³⁷ The tech industry also heavily supports charters.³⁸ So do many Republicans: Donald Trump and the Secretary of Education, Betsy DeVos, are in favor of charter schooling.³⁹ Standing in opposition to charters are, frequently, teachers’ unions, and increasingly, civil rights groups such as the NAACP.⁴⁰

Despite their meteoric growth and significant political presence, what charter schools are, and how they function, is not always well-understood. For the students who attend charter schools, and many of their proponents, perhaps the key feature of charters is that they are so-called “schools of choice.”⁴¹ Students are not assigned to charters in the same way they would be to a traditional public school. Instead, students (or parents) must find, select, and apply for admission to charters.⁴²

37. See, e.g., Valerie Strauss, *Walton Family Steps Up Support for School Choice with \$1 Billion Pledge*, WASH. POST (Jan. 27, 2016), https://www.washingtonpost.com/news/answer-sheet/wp/2016/01/27/walton-family-steps-up-support-for-school-choice-with-1-billion-pledge/?utm_term=.9aa9b4311d42; *Charter School Growth Fund*, BILL & MELINDA GATES FOUND., <https://www.gatesfoundation.org/How-We-Work/Quick-Links/Program-Related-Investments/Charter-School-Growth-Fund> (last visited April 15, 2018).

38. Natasha Singer, *The Silicon Valley Billionaires Remaking America’s Schools*, N.Y. TIMES (June 6, 2017), <https://www.nytimes.com/2017/06/06/technology/tech-billionaires-education-zuckerberg-facebook-hastings.html>.

39. Emanuella Grinberg & Aaron Kessler, *Charter Schools Controversy Will Only Grow Under DeVos*, CNN (Feb. 7, 2017, 3:28 PM), <http://www.cnn.com/2016/12/22/politics/charter-schools-controversy-enrollment-trump/index.html>.

40. See, e.g., Rachel M. Cohen, *Black Organizations Say No—or at Least, Slow Down—to Charter Schools*, AM. PROSPECT (Aug. 8, 2016), <http://prospect.org/article/black-organizations-say-no-or-least-slow-down-charter-schools>.

41. See, e.g., Paul E. Peterson, *Post-Regulatory School Reform*, HARV. MAG. (2016), <https://harvardmagazine.com/2016/09/post-regulatory-school-reform> (last visited April 15, 2018) (“With districts beset by collective-bargaining agreements, organized special interests, and state requirements, choice and competition remain the main levers of reform . . . and many families send their children to their local school more out of necessity than choice.”).

42. When applications for a charter school exceeds the number of open seats, then a lottery system is used. However, lotteries “still tilt in favor of families with sufficient resources and free time to get around town and apply to as many as possible.” Conor Williams, *What Applying to Charter Schools Showed Me About Inequality*, THE ATLANTIC (Mar. 20, 2014), <https://www.theatlantic.com/education/archive/2>

In theory, all student applications are accepted, or, if a school is overenrolled, a lottery is held to ensure blind admissions. In practice, charters have considerable capacity to control the composition of their admitted student bodies.⁴³ Methods of exercising control can include pre-admission parental interviews, targeted advertising, selective discipline, and curricula carefully tailored to appeal to limited groups.⁴⁴ The extent to which charters engage in this sort of behavior is the subject of controversy, particularly the practice of screening out of low-performing students.⁴⁵ From a legal and policy standpoint, the unconventional regulatory structure governing the charter school system is as important as the parental choice mechanisms.

Traditionally, public school districts are created by the state legislature. The legislature gives the district an exclusive right to operate public schools within a geographic boundary.⁴⁶

Charter schools were devised in the mid-1980s by “public policy entrepreneurs,” most notably Minnesota’s Ted Kolderie, who felt that the “exclusive franchise” exercised by traditional school districts was akin to an anti-competitive monopoly, inspiring mediocre academic performance.⁴⁷ These advocates pushed for an alternative system that would enable independent schools and districts to be founded irrespective of geographic boundaries.⁴⁸ Doing so would theoretically create market competition that would improve academic outcomes, cut costs, and provide a greater variety of options for parents.⁴⁹

014/03/what-applying-to-charter-schools-showed-me-about-inequality/284530/.

43. See generally *Clear Student Enrollment and Lottery Procedures*, NAT’L ALLIANCE FOR PUB. CHARTER SCHS, <http://www.publiccharters.org/law-database/clear-student-recruitment-enrollment-lottery-procedures/> (last visited April 15, 2018).

44. See, e.g., *About Us*, IMHOTEP INST. CHARTER HIGH SCH., <https://www.imhotep-highschool.com/about-us.html> (last visited April 15, 2018) (describing an educational program tailored to African principles).

45. See, e.g., Kate Taylor, *At a Success Academy Charter School, Singling Out Pupils Who Have ‘Got to Go’*, N.Y. TIMES (Oct. 29, 2015), <https://www.nytimes.com/2015/10/30/nyregion/at-a-success-academy-charter-school-singling-out-pupils-who-have-got-to-go.html> (describing how one successful charter school was accused of “weeding out weak or difficult students”).

46. See, e.g., TED KOLDERIE, PROGRESSIVE POL’Y INST., *BEYOND CHOICE TO NEW PUBLIC SCHOOLS: WITHDRAWING THE EXCLUSIVE FRANCHISE IN PUBLIC EDUCATION 8–9* (1990), <http://files.eric.ed.gov/fulltext/ED327914.pdf>.

47. *Id.*

48. *Id.* at 16.

49. *Id.* at 2.

With that said, implementation of charter schooling varies state by state. Typically, the state empowers certain groups—potentially including public school districts, universities, and nonprofits—to issue charters for new schools.⁵⁰ The charters last for a set time, usually five years.⁵¹ Meanwhile, the issuers (usually known as “authorizers”) are free to pursue whatever academic priorities or focus they wish.⁵² Authorizing entities can be diverse, and sometimes odd. For example, one of Minnesota’s largest and most successful authorizers is the Audubon Society of the North Woods, an outdoors center.⁵³ Another Minnesota authorizer is a community center in Minneapolis’s poorest neighborhood, which has chosen to specialize almost entirely in authorizing schools that serve disadvantaged children in urban settings.⁵⁴

Charter school authorizing is not completely open-ended. State charter laws usually impose some standards for the issuance of a charter.⁵⁵ For instance, a prospective school might be required to meet certain organizational or financial requirements.⁵⁶ With that said, charter schools are also usually unbound by the bulk of regulations pertaining to a state’s schools, which often include instructional and curriculum requirements and labor regulations.⁵⁷ In addition, because regulatory compliance is primarily enforced at

50. Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563, 574–76 (2001).

51. *Id.* at 576.

52. *Id.* at 576–77.

53. See AUDOBON CTR. OF THE NORTHWOODS CHARTER SCH. DIV., <http://auduboncharterschools.org> (last visited April 15, 2018).

54. *Charter School Authorizers*, MINN. DEP’T OF EDUC., http://w20.education.state.mn.us/MdeOrgView/contact/contactsByContactType?contactRoleTypeCode=CHARTER_AUTH (last visited April 15, 2018). Pillsbury United Communities authorized twenty-seven charters in 2016. *Id.* Of these, twenty were 90 percent nonwhite or greater. *Id.* Excluding “virtual schools,” Pillsbury authorized only a single school that is less than 74 percent nonwhite or low-income: a specialty sober academy with forty-four students. *Id.*

55. See *50-State Comparison*, EDUC. COMM’N OF THE STATES (June 2014), <http://ecs.force.com/mbdata/mbquestNB2?rep=CS1419> (providing a list of requirements and exemptions for charter schools in all fifty states).

56. *Id.*

57. *Id.* As this Article will further show, the differences in charter schools also generally include a lack of regulations pertaining to civil rights violations and selection criteria. See Erica Frankenberg, Genevieve Siegel-Hawley, & Jia Wang, *Choice Without Equity: Charter School Segregation and the Need for Civil Rights Standards*, 19 EDUC. POL’Y ANALYSIS ARCHIVES 46 (2011).

the time of the issuance of a charter, and indirectly by the authorizer instead of directly through the state, day-to-day regulatory oversight is greatly reduced.⁵⁸ As a result, public control of charters is far more attenuated than in traditional schools.

Because charter schools are publicly funded, free to attend, and ultimately the creation of a state legislature, most people consider them to be public schools.⁵⁹ The schools themselves, however, are private entities and are operated as nonprofit or for-profit enterprises.⁶⁰ Thus, in practice, charters combine features of both public and private schooling.

As with any school, charters require a steady stream of funding to operate. This is typically provided on a per-student basis by the state.⁶¹ Many charters also rely substantially on donations from foundations and other philanthropy.⁶² It should be noted that this funding system creates a competitive incentive for schools: a charter school's ability to fund operations is heavily dependent on its ability to find an educational "niche" that will attract a sufficient number of enrollees.⁶³ Moreover, depending on a state's funding formula, school aid can vary on the basis of student characteristics, with low-income and minority students receiving greater funding in an attempt to equalize other disparities.⁶⁴ Charters therefore may have

58. See Sandra Vergari, *The Regulatory Styles of Statewide Charter School Authorizers: Arizona, Massachusetts, and Michigan*, 36 EDUC. ADMIN. Q. 730 (2000).

59. See, e.g., *Facts About Charters*, NAT'L ALL. FOR PUB. CHARTER SCH., <http://www.publiccharters.org/get-the-facts/public-charter-schools/faqs/> (last visited April 15, 2018).

60. See *id.*

61. See, e.g., Minnesota House of Representatives Research Department, *Minnesota School Finance: A Guide for Legislators* 81 (Nov. 2016), <http://www.house.leg.state.mn.us/hrd/pubs/mnschfin.pdf>.

62. Chester E. Finn, Jr., Bruno V. Manno & Brandon L. Wright, *Philanthropy and the Growth of Charter Schools*, STAN. SOC. INNOVATION REV. (Oct. 14, 2016), https://ssir.org/articles/entry/philanthropy_and_the_growth_of_charter_schools

63. *Id.*

64. As of 2013, thirty-seven states included at least one student factor in their school funding formulas, and thirty states awarded extra funding to low-income students. See EDUCATION LAW CENTER, *FUNDING, FORMULAS, AND FAIRNESS: WHAT PENNSYLVANIA CAN LEARN FROM OTHER STATES' EDUCATION FUNDING FORMULAS* 5 (2013), https://www.elc-pa.org/wp-content/uploads/2013/02/ELC_school_funding_report.2013.pdf. For example, Minnesota awards "compensatory revenue" to schools serving students who are free-lunch eligible. See *Financing Education in Minnesota 2016-2017*, MINN. HOUSE OF REPRESENTATIVES FISCAL ANALYSIS DEPT. 16 (Aug. 2017), <http://www.house.leg.state.mn.us/fiscal/files/16fined.pdf>.

an incentive to maximize the number of these high-aid students while minimizing groups that may be especially expensive to serve—for example, special education students.⁶⁵

In some states, most charters are independent and unaffiliated with any other school. Minnesota, for example, has more than two hundred charters, and the clear majority of them maintain independent finances and unique, individual boards.⁶⁶ In other places, such as Chicago, Los Angeles, and New York City, many charters are part of large regional (or national) chains, known as charter management organizations.⁶⁷ These financially-related schools share management, educational techniques, and curricula with other charters in their networks.⁶⁸

A. *Charter School Segregation*

Since their inception, a defining characteristic of charter schools has been their tendency to serve highly racially concentrated student bodies. For example, national attendance data gathered during the 2014-2015 school year showed that 54 percent of charters in the United States were nonwhite segregated and 12 percent were

65. See Marc Tucker, *The School Choice Debate*, EDUC. WEEK: TOP PERFORMERS (Apr. 13, 2017), http://blogs.edweek.org/edweek/top_performers/2017/04/the_school_choice_debate.html (discussing how charter schools have the “incentive and the opportunity” to reject expensive students).

66. Minnesota has an unusually large array of charter school authorizers. See, e.g., Rachel Cohen, *The Complicated History of America’s First Union-Backed Charter School Authorizer*, MINNPOST (Dec. 21, 2016), <https://www.minnpost.com/education/2016/12/complicated-history-americas-first-union-backed-charter-school-authorizer>.

67. See, e.g., KIPP PUBLIC CHARTER SCHOOLS, <http://www.kipp.org/> (last visited April 15, 2018); THE NOBLE NETWORK, <http://www.noblenetwork.org/> (last visited April 15, 2018).

68. See, e.g., KIPP: OUR STRUCTURE, <http://www.kipp.org/schools/structure/> (last visited April 15, 2018).

predominantly white.⁶⁹ Only about a third of charters were diverse.⁷⁰ In comparison, nationally, 32 percent of traditional schools were nonwhite segregated the same year, and 30 percent of traditional schools were predominantly white—many of which were located in heavily white, and sparsely populated, rural areas.⁷¹

Segregation in charters tends to take place at much higher levels of concentration than traditional schools. Among nonwhite segregated charters in 2014, 66 percent were intensely segregated, with less than 10 percent white enrollment.⁷² The equivalent figure for traditional schools was 48 percent.⁷³

And students of color enrolled in a charter school are significantly more likely to attend school in a segregated environment. In 2014, 87 percent of black charter students and 79 percent of Hispanic charter students attended a segregated school compared to 69 percent and 72 percent of traditional school students, respectively.⁷⁴ But once again, it is the intensity of the segregation that stands out. About 69 percent of black charter students and 55 percent of Hispanic charter students are in schools where fewer than one out of ten students is white.⁷⁵ The comparable figures in traditional schools are 37 for black students and 40 percent for Hispanic students.⁷⁶

Across the nation, study after study has confirmed these findings—showing that levels of racial segregation in charter schools are extraordinarily high.⁷⁷ A 2010 nationwide study by the UCLA

69. This data was obtained using the National Center of Education Statistics table generator tool, available at <https://nces.ed.gov/ccd/elsi/tableGenerator.aspx>. The data is on file with author. For the purposes of this analysis, a school is considered segregated if it is more than 60 percent nonwhite, and predominantly white if it is more than 80 percent white. Some commentators prefer the term “white segregated” for predominantly white schools, in order to highlight that segregation of white students is also problematic. While that point is well-taken, the facts here require a narrower definition: a number of predominantly white charter schools cannot be said to be traditionally segregated, but are instead located in rural areas with very small nonwhite populations.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. See, e.g., Ivan Moreno, *US Charter Schools Put Growing Numbers in Racial Isolation*, ASSOCIATED PRESS (Dec. 3, 2017), <https://www.apnews.com/e9c2553>

Civil Rights Project found that “charter schools are more racially isolated than traditional public schools in virtually every state.”⁷⁸ The trend was especially pronounced for black children: 43 percent of black charter students attended a school that was less than 1 percent white.⁷⁹ However, this reality was not limited to a specific race: Hispanic students also experienced a heavy degree of concentration.⁸⁰

The UCLA report also found considerable evidence of “white flight” charters where “white students are overenrolled” compared to surrounding schools.⁸¹ These schools do not appear in every state and region; they are concentrated in the western and southern parts of the United States.⁸² More recent studies have reaffirmed these findings. A 2016 Brookings Report found that “charters are more segregated along racial lines than [traditional public schools], especially for black students,” and “[t]here are also a few cases where the segregation of whites into charter schools is very pronounced.”⁸³

In addition, national figures obscure important regional differences; the nature of charter segregation varies from city to city. For instance, 34 percent of all charter students are white.⁸⁴ But in the Chicago metropolitan area, white students account for only 1.7 percent of approximately 33,000 children in charters, all but ensuring that every charter school is nonwhite segregated.⁸⁵ By contrast, in the Phoenix metropolitan area, 48 percent of charter students are white, and most charter schools have a much higher share of white students than the city they are located in.⁸⁶

4dfd44851a5e56bd57454b4f5; Helen F. Ladd, Charles T. Clotfelter, & John B. Holbein, *The Growing Segmentation of the Charter School Sector in North Carolina* 13 (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Res., Working Paper No. 133, 2015); Robert Bifulco & Helen F. Ladd, *School Choice, Racial Segregation, and Test-Score Gaps: Evidence from North Carolina's Charter School Program*, 26 J. POL'Y ANALYSIS & MGMT. 31 (2007).

78. Frankenberg, et al., *supra* note 57, at 46.

79. *Id.* at 41.

80. *Id.*

81. *Id.* at 47.

82. *Id.*

83. Grover J. Whitehurst, Richard V. Reeves & Edward Rodrigue, *Segregation, Race, and Charter Schools: What Do We Know?*, CTR. ON CHILDREN & FAMILIES AT BROOKINGS 32 (Oct. 2016), https://www.brookings.edu/wp-content/uploads/2016/10/ccf_20161021segregation_version-10_211.pdf.

84. *See supra* note 69.

85. *Id.*

86. *Id.*

And at times, a region can include both white and nonwhite segregated charter schools. The Twin Cities—home to some of the nation’s first charters—offer a compelling case study. Data gathered from the 1995–96 school year showed 55 percent of the region’s charters were nonwhite segregated and another 36 percent were predominantly white.⁸⁷ Only 9 percent of charters that year were diverse.⁸⁸ By comparison, 15 percent of traditional schools were nonwhite segregated and 20 percent were diverse.⁸⁹ Even at this early stage, charters were disproportionately serving children of color.⁹⁰

Since that school year, the number of charters in the Twin Cities has grown from eleven to one 156 schools.⁹¹ But, charters have remained much more segregated than traditional schools, despite a marked increase in racial diversity across other Twin Cities schools.⁹² By 2016, 54 percent of charters were nonwhite segregated, compared to 23 percent of traditional schools; only 26 percent of charters were diverse, compared to 43 percent of traditional schools.⁹³ These numbers, however, disguise the true degree of Minnesota charter segregation. This is because charters are far more likely to be intensely segregated than traditional schools.⁹⁴ In 2016, of the fifty most nonwhite racially concentrated schools in the Twin Cities, forty-five were charters.⁹⁵ Likewise, of the seventy-eight schools in the Twin Cities that were more than 95 percent nonwhite, fifty-nine—or over three quarters—were charters.⁹⁶

Finally, though not the focus of this article, it should be noted that the high correlation between race and poverty means that most segregated charters are also enrolling overwhelmingly low-income

87. *The Minnesota School Choice Project, Part I: Segregation and Performance*, INST. ON METRO. OPPORTUNITY 14 (Feb. 2017), <https://www.law.umn.edu/sites/law.umn.edu/files/imo-mscp-report-part-one-segregation-and-performance.pdf>.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. See generally Natalie Gross, *School Segregation: Are Charter Schools the Problem?*, EDUC. WRITERS ASS’N (Feb. 17, 2017), <http://www.ewa.org/blog-educated-reporter/school-segregation-are-charter-schools-problem> (describing a study that found segregation in charter schools twice as high in traditional schools).

95. INST. ON METRO. OPPORTUNITY, *supra* note 87, at 4.

96. *Id.*

student bodies.⁹⁷ As the UCLA study concluded: “instead of . . . offering parents a real choice out of high-poverty, racially isolated schools, charter schools simply intensify patterns of isolation prevalent among traditional public schools.”⁹⁸

B. *Segregative Charters*

It is relatively uncontested that charter schools are segregated, typically containing high concentrations of nonwhite, and sometimes even white, students.⁹⁹ But does this mean they are *segregative*? In other words, do they produce greater racial isolation than traditional schools, even when serving the same groups? Statistical evidence suggests they do.

A common rebuttal to reports of high charter school segregation is that charters tend to be located in disproportionately nonwhite communities, and are not more segregated than schools in their immediate geographic region.¹⁰⁰ This is only half accurate. It is true that charters are much more likely than traditional schools to be located in segregated or high-poverty neighborhoods.¹⁰¹ However, most scholars who have looked at this question have agreed that, at least in many regions, charters are still more segregated than nearby traditional schools or districts.¹⁰²

These segregative effects are easier to observe in some places than in others. Highly segregated cities, such as Detroit, are served by traditional school districts which are almost entirely nonwhite; comparisons are therefore difficult because both school types are likely to be heavily segregated.¹⁰³ In other cities, however, traditional

97. Frankenberg, et al., *supra* note 57 at 84.

98. *Id.* at 47.

99. Will Stancil, Opinion, *School Segregation is Back—at Charters*, STAR TRIB. (May 15, 2014), <http://www.startribune.com/school-segregation-is-back-at-charters/259463401>.

100. See, e.g., Laura Fay, *Education Reform Groups Decry Associated Press Analysis of Charter School Segregation*, THE 74 MILLION (Dec. 6, 2017), <https://www.the74million.org/education-reform-groups-decry-associated-press-analysis-of-charter-school-segregation/>.

101. For a discussion of some of the considerations involved, see Whitehurst et al., *supra* note 83, at 14–20.

102. See, e.g., *id.* at 5–6.

103. Detroit’s district, for instance, is only two percent white. *Search for Public School Districts*, NAT’L CTR. FOR EDUC. STATS., https://nces.ed.gov/ccd/districtsearch/district_detail.asp?ID2=2601001&District Id=2601001 (last visited April 15, 2018).

school districts remain relatively diverse, so meaningful comparison is possible. For example, in the Twin Cities, 72 percent of black charter students, 68 percent of Hispanic charter students, and 74 percent of Asian charter students attend a school that is less than 10 percent white.¹⁰⁴ The comparable figures for traditional public school students are 16 percent, 11 percent, and 18 percent, respectively.¹⁰⁵

Another approach is to compare relative degrees of racial sorting—i.e., how closely the demographics of charter and traditional schools resemble (or do not resemble) those of the area in which they are located. Nationally, charters tend to show much higher levels of racial sorting than traditional schools.¹⁰⁶ For example, in 2014, 81 percent of all black charter students attended a school with a higher share of black students than the overall student population of their city, compared to 66 percent of black traditional school students.¹⁰⁷ Meanwhile, 72 percent of white charter students were in a school that was whiter than the overall student population of their city, compared to 57 percent of white traditional school students.¹⁰⁸

Other studies have shown similar results. An American Enterprise Institute study compared charter demographics to the five nearest traditional schools.¹⁰⁹ It found that the majority of charter schools were dissimilar to nearby schools along a number of racial and demographic dimensions, although charters were roughly evenly divided between being more diverse and less diverse than their neighbors.¹¹⁰ The 2016 Brookings study drew similar conclusions: “[C]harter schools often enroll more black and poor students than traditional public schools in the same areas, and are more likely to be at one extreme or the other of racial and economic composition than traditional public schools.”¹¹¹

104. See INST. ON METRO. OPPORTUNITY, *supra* note 87, at 13.

105. *Id.*

106. Will Stancil, *Charter Schools Contribute to Racial Sorting and Segregation*, INSTT. ON METRO. OPPORTUNITY (Dec. 12, 2017), <http://blog.opportunity.mn/2017/12/charter-schools-contribute-to-racial.html>.

107. *Id.*

108. *Id.*

109. Nat Malkus, *Differences on Balance: National Comparisons of Charter and Traditional Public Schools*, AM. ENTER. INST. 25 (2016), <http://www.aei.org/wp-content/uploads/2016/08/Differences-on-balance.pdf>.

110. *Id.* at 19–20.

111. Whitehurst et al., *supra* note 83, at 6.

It is also possible to compare charters to nearby neighborhoods. A 2017 Brookings analysis comparing school and residential demographics found that while traditional schools tended to be slightly less white than the nearby population, charter schools were more likely to be “racially imbalanced.”¹¹² This was particularly true among black students, where the imbalance was four times that of traditional schools.¹¹³

Data in the Twin Cities is also illustrative. Chart 1, below, plots school and neighborhood demographics against each other for all Twin Cities public schools.¹¹⁴ While there is a clear relationship between schools and neighborhoods in traditional schools, most charters fall along the top edge of the graph or in the bottom half.¹¹⁵ In other words, despite residential demographics, most charters are heavily segregated, being either significantly nonwhite or predominantly white.¹¹⁶ This trend appears to reflect national research findings.

112. Andre M. Perry, *How Charter Schools Are Prolonging Segregation*, BROOKINGS INSTITUTE (Dec. 11, 2017), <https://www.brookings.edu/blog/the-avenue/2017/12/11/how-charter-schools-are-prolonging-segregation/>.

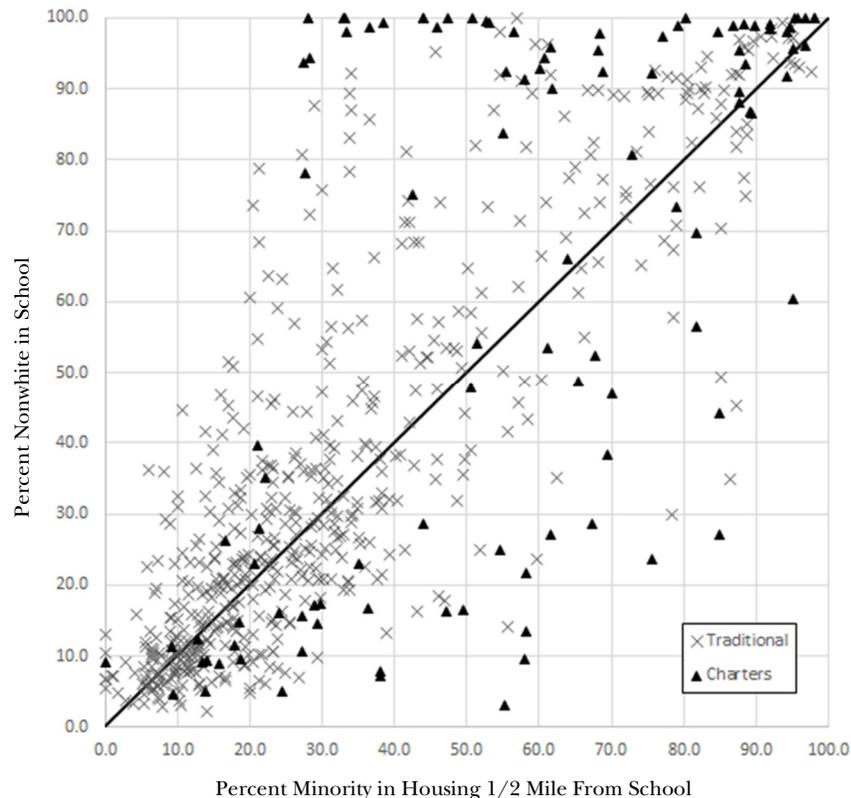
113. *Id.*

114. Data from Minnesota Department of Education, charted by author. *See generally* Data Center, MINN. DEP'T OF EDUC., <http://education.state.mn.us/MDE/Data> (last visited April 15, 2018).

115. *Id.*

116. *See id.*

Academics still debate the precise mechanisms through which charters become segregative. Undoubtedly, parental and student



Schools above the line are less white than their surrounding neighborhood.
 Schools below the line are whiter than their surrounding neighborhood.

choice plays some role. Charters, by leaning heavily on individual choice, allow families to engage in racial self-sorting as well as permit families to indulge in racial prejudice and avoid racially integrated schools.¹¹⁷

In addition, however, there is plentiful evidence of charters intentionally seeking out and recruiting students along racial lines. The remainder of this section will focus on the phenomenon of racial targeting within the charter sector.

117. See Erica Frankenberg et al., *Exploring School Choice and the Consequences for Student Racial Segregation Within Pennsylvania’s Charter School Transfers*, 25 EDUC. POL’Y ANALYSIS ARCHIVES 22, 5–7 (2017).

C. *Racial Targeting in Charters*

There is evidence that a substantial subset of charter schools is not only segregated and segregative, but is also engaged in *racial targeting*.¹¹⁸ In other words, these schools are actively pursuing policies with the aim and effect of creating racially segregated student bodies.¹¹⁹

The rationales for targeting vary, and some charter administrators may even feel that segregation is beneficial for a school. Racially targeted schools might rely on segregation to compete in the “market” for enrollments, by billing themselves as particularly appropriate for students of a certain race.¹²⁰ Alternatively, they may find that segregation makes a school more appealing to parents, by producing a student body free of unwanted racial groups.¹²¹

Segregation can also be used to build political support. Charters often advertise themselves both to political groups and philanthropic organizations as an effective educational intervention for closing the “achievement gap.”¹²² Nonwhite segregated schools

118. See *Are Segregated Charter Schools Like HBCUs?*, INST. ON METRO. OPPORTUNITY (Mar. 1, 2017), <http://blog.opportunity.mn/2017/03/are-segregated-charter-schools-like.html> (noting that Minnesota charter schools’ 1999 exemption from desegregation rules resulted in many charters pursuing covert or overt racial targeting, and concluding that because of this racial targeting, “Minnesota charters have formed a racially divided system . . . Nearly half of charters are heavily segregated and extremely few are diverse or integrated.”); see also *Search for Public School Districts*, *supra* note 103, at 3 (“Many of these schools are true single-race schools. Some explicitly target and recruit students from particular racial or ‘cultural’ groups.”).

119. See, e.g., Frankenburg et al., *supra* note 117, at 7 (“Administrators used strategies such as cream-skimming and targeted marketing as recruitment strategies.”). This article also noted that more than half of charter schools located in cities enrolled at least 90 percent students of color in 2007–08, indicative of considerably higher segregation in urban charters even when compared to their regular, already isolated, public school counterparts. *Id.*

120. See Stancil, *supra* note 106 (noting how the City of Minneapolis was politically pressured into opening a Hmong-based charter school, which resulted in the traditional public school—where such Hmong students would have otherwise attended—becoming nearly homogeneously black).

121. See generally Graham Vyse, *Are Charter Schools Good or Bad for Black Students?*, NEW REPUBLIC (Feb. 1, 2017), <https://newrepublic.com/article/140319/charter-schools-good-bad-black-students> (summarizing the debate over the benefits and drawbacks of racially segregated charter schools and charter schools generally).

122. See, e.g., National Alliance for Charter Schools, *National Alliance Calls*

have several advantages in this regard: they visibly serve a concentration of higher-need students, and they do so without burdening more affluent, white families.¹²³

And in some cases, charter operators may simply believe in the value of racially uniform education. They believe it *protects* children from discrimination, allows curriculum to be tailored to racially characteristic learning styles, or cultivates racial identity among students.¹²⁴

There are many methods through which charter schools can control the racial composition of their student bodies, even while working within the limits of state laws that require equal weighting of applicants.¹²⁵ It is common for charter schools to be built around a theme or educational niche, much like magnet or vocational schools. Over time, schools have used a variety of such niches to improve instruction, recruit students, build community support, or distinguish themselves from other options on the educational “market.”¹²⁶ But in some cases, charter schools’ themes can blur the line between the targeting of special populations, the targeting of particular family educational preferences, and the targeting of specific racial groups.

For example, some of the most popular charter themes include:

- schools with a significant focus on disadvantaged or low-income children;¹²⁷

Attention to Achievement Gap Study (Mar. 22, 2016), <http://www.publiccharters.org/press/national-alliance-calls-attention-achievement-gap-study/> (highlighting that “[n]early 30 percent of the 610 achievement gap-closing schools recognized” by the Education Equality Index study were charter schools).

123. Vyse, *supra* note 121.

124. See, e.g., Natalie Gross, *The Benefit of Racial Isolation*, THE ATLANTIC (Feb. 8, 2017), <https://www.theatlantic.com/education/archive/2017/02/the-benefit-of-racial-isolation/516018/> (quoting one proponent of such racially isolated schools as believing that Minnesota’s self-sorting minorities “don’t really see their schools as segregated or as isolated, they see them as kind of culturally affirming environments for kids that they can’t get in a very white state like Minnesota”).

125. See Nat Malkus & Jenn Hatfield, *Differences by Design? Student Composition in Charter Schools with Different Academic Models*, AM. ENTER. INST. (Feb. 2017), <http://www.aei.org/wp-content/uploads/2017/02/Differences-by-Design.pdf>.

126. See generally *What is a Charter School?*, NAT’L CHARTER SCH. RES. CTR. <https://charterschoolcenter.ed.gov/what-is-a-charter-school> (last visited April 15, 2018) (describing some of the advantages of charter schools gained as a result of greater autonomy over curriculum, personnel, and budget).

127. See, e.g., Eilene Zimmerman, *A High School for the Homeless*, THE ATLANTIC (June 16, 2015), <https://www.theatlantic.com/education/archive/2015/06/a->

- language immersion schools, often serving immigrant communities;¹²⁸
- “no excuses” schools—a term for schools with an intense focus on academic performance and harsh discipline;¹²⁹
- schools for kids with disabilities or behavioral problems;¹³⁰ and
- “centric” schools, with curricula and other practices emphasizing a specific ethnic or cultural background.¹³¹

Any of these school types could theoretically appeal to children from diverse racial backgrounds.¹³² In practice, however, most of these schools are likely to disproportionately enroll nonwhite children.¹³³ In part, this is because many of the most popular charter types are built to compensate for perceived shortcomings in urban schools where, very frequently, almost all children are nonwhite. For instance, low-income children are very likely to be nonwhite,

high-school-for-the-homeless/395177/.

128. See, e.g., Scott Elliott, *New Spanish Language Immersion Charter School Gets OK*, CHALKBEAT (June 2, 2015), <https://in.chalkbeat.org/posts/in/2015/06/02/new-spanish-language-immersion-charter-school-gets-ok/>.

129. See, e.g., Matthew Davis & Blake Heller, “No Excuses” Charter Schools and College Enrollment: New Evidence from a High School Network in Chicago, EDUC. FIN. & POL’Y 1 (2017), http://assets.wharton.upenn.edu/~mattda/DavisHeller2015_REVISED.pdf; see also Jersey Jazzman, *What Really Makes a “No Excuses” Charter School?*, NAT. EDUC. POL’Y CTR. (Sept. 12, 2017), <http://nepc.colorado.edu/blog/what-really-makes>.

130. See, e.g., Arianna Prothero, *Special Education Charters Renew Inclusion Debate*, EDUC. WEEK (Sept. 16, 2014), http://www.edweek.org/ew/articles/2014/09/17/04_specialneedscharters.h34.html.

131. See, e.g., Rachel M. Cohen, *The Afrocentric Education Crisis*, AM. PROSPECT (Sept. 2, 2016), <http://prospect.org/article/afrocentric-education-crisis>.

132. Scholars sometimes treat “centric” or “culturally focused” schools as inevitably segregated, but this is simply not so. Some non-European-oriented schools serve diverse or integrated student bodies. For instance, Yinghua Academy, a Chinese-oriented charter serving Northeast Minneapolis, boasts an integrated student body. Jane A. Peterson, *An American School Immerses Itself in All Things Chinese*, N.Y. TIMES (Oct. 26, 2014), <https://www.nytimes.com/2014/10/27/education/an-american-school-immerses-itself-in-all-things-chinese.html>. Indeed, in these circumstances, “centric” charters represent the benefits of integration as recognized by social science, including: cross-cultural and cross-racial contact, exposure to diversity and unfamiliar experiences, as well as greater facility with unfamiliar cultural environments. *Id.*

133. See generally Colum. U. Mailman Sch. of Pub. Health, *America’s Youngest Children Most Likely to Live in Poor Economic Conditions*, SCIENCE DAILY (Feb. 8, 2017), <https://www.sciencedaily.com/releases/2017/02/170208164638.htm>.

particularly in the urban districts where charters are most common.¹³⁴ Likewise, “no excuses” schools market themselves to parents—often black—who perceive traditional public schools as chaotic, corrupt, dangerous, and beset by disruptions.¹³⁵ In this context, racial targeting can quickly become an extension of a charter’s self-selected mission.

“Thematic” targeting may often be enough to heavily influence a charter’s racial composition. But in terms of mechanisms available to charters, this is just the start. During the recruitment and enrollment process, schools have many other ways to attract certain racial groups—or steer away students from disfavored groups.

The most obvious of these is simply being open about racial preferences or cultural focus.¹³⁶ These schools are, of course, still required to accept applications from all students, regardless of race, and admit students in a race-blind fashion.¹³⁷ Nonetheless, parents who read that a charter is “dedicated to Hispanic education” or “promotes self-reliance in the African American community” can be expected to understand for whom the school is intended.¹³⁸ Charters need only promise “an immersion experience in Korean language

134. *See id.*

135. *Id.* at 5; *see generally* Editorial Board, *Chaos and Exodus at Chicago Public Schools*, CHI. TRIB. (Sept. 29, 2016), <http://www.chicagotribune.com/news/opinion/editorials/ct-cps-enrollment-decline-teachers-strike-vote-edit-20160929-story.html> (arguing that teacher strikes aid in creating a “chaotic” environment); Juan Perez, Jr., *Feds: CPS Consultant Made Millions Through ‘Corrupt Process From Beginning to End’*, CHI. TRIB. (Mar. 14, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-chicago-school-supers-scandal-met-20170314-story.html> (highlighting Chicago Public Schools’ (CPS) involvement with no-bid education consulting contracts awarded by the CEO of CPS, whom the companies helped install); Julia Burdick-Will, *School Violent Crime and Academic Achievement in Chicago*, 86 SOCIOLOGY EDUC. 343 (2013), <https://doi.org/10.1177/0038040713494225>. (“Of the approximately 100 high schools in Chicago, two thirds called the police to intervene in at least one violent incident on school grounds during the first seven months of the 2009–2010 school year and one quarter of schools called the police more than 17 times.”).

136. *See, e.g., About Us*, IMHOTEP INST. CHARTER HIGH SCH., <https://www.imhotephighschool.com/about-us.html> (last visited April 15, 2018) (“Imhotep is an African Centered, science, mathematics, and technology-learning center. . .”).

137. *See id.*

138. *See Mission*, ASPIRA INC. OF PENNSYLVANIA, <http://www.aspirapa.org/home/ourstory/mission/> (last visited April 15, 2018); *Our Mission*, HARAMBEE INST. OF SCI. & TECH. CHARTER SCH., <http://www.histcs.org/> (last visited April 15, 2018).

and culture,” or to “embrace the Hmong culture,” and rely on parental common sense to do the rest of the work.¹³⁹

Often, such statements focus ambiguously on culturally-oriented education. But at times, schools come close to stating an outright racial preference.¹⁴⁰ Consider, for instance, New Millennium Academy, a charter school in St. Paul. It describes itself as a “K-8 School founded in 2008 to serve the growing needs of the Hmong population in the Twin Cities.”¹⁴¹ Its mission is to “create an environment of high academic literacy while preserving Hmong Culture and literacy.”¹⁴²

Targeting can also be supplemented or amplified by suggestive clues about the intended racial demographics of a school. The school’s name (*e.g.*, Academia Cesar Chavez or Sojourner Truth Academy) or advertised curriculum may carry clear racial overtones.¹⁴³ Alternatively, a school’s teaching staff may be predominantly of a single racial group. Some schools mention the principles of Nguzo Sana, an “African wellness model,” in their materials—a clear marker that they are oriented towards black children.¹⁴⁴

Reliance on this latter sort of suggestive targeting seems especially common among predominantly white charter schools.¹⁴⁵ Overt targeting of white children is probably politically untenable. However, schools that signal a heavily European orientation seem to attract disproportionately white enrollment.¹⁴⁶ One means of doing so is European language immersion. For example, in the rapidly segregating Twin Cities suburb of Brooklyn Park, more than 80

139. *See About Sejong Academy*, SEJONG ACAD., <http://www.sejongacademy.org/home-1/> (last visited April 15, 2018); *CSE’s Mission*, COMMUNITY SCH. OF EXCELLENCE, <http://www.csemn.org/about/mission-and-vision-statement> (last visited April 15, 2018).

140. *See id.*

141. *About Us*, NEW MILLENNIUM ACAD., <http://www.newmillenniumacademy.org/schools.cfm?subpage=223310> (last visited April 15, 2018).

142. *See id.*

143. *See Mission*, CESAR CHAVEZ SCH., <http://www.cesarchavezschool.com/mission/> (last visited Nov. 11, 2017); *Who We Are*, SOJOURNER TRUTH ACAD., <http://www.sojournertruthacademy.org/who-we-are> (last visited April 15, 2018).

144. *See, e.g., Our Values*, HARVEST PREPARATORY SCH., <http://www.harvestpreparatory.org/our-values/> (last visited April 15, 2018).

145. *See id.*

146. *See id.*; Sarah Butrymowicz, *A New Round of Segregation Plays Out in Charter Schools*, THE HECHINGER REPORT (July 15, 2013), <http://hechingerreport.org/as-charter-schools-come-of-age-measuring-their-success-is-tricky/>.

percent of the children in the public school district are nonwhite.¹⁴⁷ But, in one Brooklyn Park “charter school of Russian language and culture,” the school’s student body is 96 percent white.¹⁴⁸ A few miles away, in Saint Paul, is the Twin Cities German Immersion academy (mentioned in the Introduction); the school is 88 percent white,¹⁴⁹ while the closest traditional school serving the same grade levels is 8 percent white.¹⁵⁰

Other schools which may engage in suggestive signaling for white families are the so-called “classical academies,” which typically promise “rigorous” instruction in an ultra-traditional setting, often with a heavy emphasis on philosophy or the Western canon.¹⁵¹ For example, the Thomas Jefferson Classical Academy, located in Cleveland County, North Carolina, describes its curriculum as follows: “During the dialectic or logic stage (early adolescence), Socratic questioning, logical argumentation, and discursive reasoning come to the fore. Later, during the rhetoric stage (later adolescence), teachers emphasize public speaking, presentations, and a synthesis of the knowledge gained in the various disciplines.”¹⁵² The Thomas Jefferson Academy is 83 percent white and 7 percent black,¹⁵³ even though it is situated within a countywide district which is 62 percent white and 28 percent black.¹⁵⁴ The Georgia school mentioned in the opening of this article, the Academy for Classical

147. See *supra* note 69.

148. See NASHA SKOLA CHARTER SCH., <http://nashashkolamn.org/> (last visited April 15, 2018); see also *Nasha Shkola Charter School*, MINN. REPORT CARD, http://rc.education.state.mn.us/#mySchool/orgId—74208010000__p—1 (last visited April 15, 2018).

149. See *Welcome*, TWIN CITIES GERMAN IMMERSION CHARTER SCH., <http://www.tcgis.org/> (last visited April 15, 2018); MINN. REPORT CARD, http://rc.education.state.mn.us/#mySchool/orgId—74152010000__p—1 (last visited April 15, 2018).

150. See About Como Park Elementary, <https://www.spps.org/domain/3899> (last visited April 15, 2018).

151. See, e.g., *Our Program*, THOMAS JEFFERSON CLASSICAL ACAD., <http://tjca.teamcfa.school/academics/our-program/> (last visited April 15, 2018).

152. *Id.*

153. See *Thomas Jefferson Classical Academy Student Body*, U.S. NEWS & WORLD REPORT (2014–2015), <https://www.usnews.com/education/best-high-schools/north-carolina/districts/thomas-jefferson-classical-academy/thomas-jefferson-class-academy-14252/student-body> (last visited April 15, 2018).

154. *Quick Facts: Cleveland County, North Carolina*, U. S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/clevelandcountynorthcarolina/PS/T045216> (last visited April 15, 2018).

Education, is also a classical academy. Such schools are not uncommon. Nova Classical Academy in St. Paul has an enrolled student body that is 76 percent white, although it is found in a school district where 79 percent of students are of color.¹⁵⁵

Once a school becomes sufficiently racially identified, even the mildest nudges can help maintain a desired racial mix. Many schools feature classroom pictures on their websites, which parents usually visit during the application process. The website of the Russian culture school mentioned above features pictures of blonde-haired, white children being taught by a blonde-haired, white teacher.¹⁵⁶ In contrast, the website for Sojourner Truth Academy features a video of black children playing on a playground.¹⁵⁷ Parents are not blind to the implications of these images. In other words, the more racially uniform a school becomes, the easier it becomes to maintain the ethnic composition of the student body going forward.

There are other, difficult-to-evaluate avenues through which racial targeting can be achieved. Schools that require a parental interview as part of the admission process offer a private, off-the-record forum for racial steering.¹⁵⁸ Discipline is extremely elevated at many charters, and reports abound of schools simply suspending unwanted children until they voluntarily withdraw.¹⁵⁹ In a school built to be a homogeneous culture capsule, there are many subtle opportunities to ensure that children from other groups feel unwelcome and unwanted.

155. See Anthony Lonetree & Mary-Jo Webster, *Rising Exodus of Students Puts More Pressure on Minnesota Schools*, STAR TRIB. (Sept. 17, 2017), <http://www.startribune.com/students-in-flight-part-1-st-paul-enrollment-declines-force-hard-budget-choices-exodus-puts-pressure-minnesota-schools/443065933/#1> (“Higher Ground Academy is almost entirely black, and Nova Classical Academy is 76 percent white.”); NOVA CLASSICAL ACAD., <http://www.novaclassical.org/> (last visited April 15, 2018); see also ST. PAUL PUB. SCHS., <https://www.spps.org/Page/2965> (last visited April 15, 2018).

156. NASHA SHKOLA, <http://nashashkolamn.org> (last visited April 15, 2018).

157. SOJOURNER TRUTH ACAD., <http://www.sojournertruthacademy.org> (last visited April 15, 2018).

158. Stephanie Simon, *Special Report: Class Struggle: How Charter Schools Get Students They Want*, REUTERS (Feb. 13, 2013, 6:08 AM), <https://www.reuters.com/article/us-usa-charters-admissions/special-report-class-struggle-how-charter-schools-get-students-they-want-idUSBRE91E0HF20130215>.

159. See DANIEL J. LOSEN ET AL., CHARTER SCHOOLS, CIVIL RIGHTS AND SCHOOL DISCIPLINE (UCLA Ctr. for Civ. Rts. Remedies 2016); see also Kate Taylor, *supra* note 45.

Finally, charters can lean on community social dynamics to drive enrollment. In Minneapolis, a number of Somali-targeted charters have recently emerged to take advantage of the rapid rise in the city's East African immigrant population.¹⁶⁰ Enrollment for these schools often relies on word-of-mouth recommendations within the immigrant community.¹⁶¹ Teachers and parents have relayed to this author a number of concerns about these charters benefiting from rumors within the African immigrant community—and at times, appearing to take advantage of immigrants' limited knowledge of English and unfamiliarity with the American public education system. For instance, some immigrant Somali families have reportedly enrolled their children in Somali-centered charter schools after hearing (false) rumors that traditional public schools would serve their children pork, in violation of Islamic tenets.¹⁶²

In similar fashion, Saint Paul contains several charters that target Hmong families.¹⁶³ These schools have been caught in several major disputes when parents and administration sought to assure that the schools would enforce traditional Hmong cultural practices, sometimes over objections by staff.¹⁶⁴ In cases like these, it is impossible to fully unravel the interplay between parental beliefs and the school's own advertising and targeting. However, what is unquestionably true is that these school are economically reliant on the recent immigrant community to generate a steady stream of enrollments.

Racialized community concerns are not restricted to minority groups. The most widespread and corrosive community dynamic

160. See, e.g., BANAADIR ACAD., <http://mtcs.org/banaadir/> (last visited April 15, 2018); HIGHER GROUND ACADEMY, <http://www.hgacademy.org/> (last visited April 15, 2018).

161. See Fauzeyya Rahman, *Word of Mouth Major Factor for Parents Charting Charter School Course*, HOUS. CHRON. (Nov. 7, 2015), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Word-of-mouth-major-factor-for-parents-charting-6617645.php>.

162. See Christeta Boarini, *Somalis in Schools: One in Three Chooses Charters in Twin Cities*, TC DAILY PLANET (Feb. 14, 2012), <https://www.tcdailyplanet.net/somalis-schools-one-three-chooses-charters-twin-cities/> (highlighting that charter schools make special accommodations, including not serving pork).

163. E.g., HOPE CMTY. ACAD., <http://www.hope-school.org> (last visited April 15, 2018).

164. Susan Du, *The Wrath of Mo*, CITY PAGES (Jan. 6, 2016), <http://www.citypages.com/news/the-wrath-of-mo-7943862>.

exploited by charter schools is white flight.¹⁶⁵ Scholarship in the past decade has found an uptick in the number of suburban charters in diversifying districts, often with notably whiter enrollments than nearby traditional schools.¹⁶⁶ This strongly suggests that white parents, fearful of sending their children to diverse schools, are fleeing to charters. Moreover, it suggests that charters are opening, at least in some cases, specifically to take advantage of this racial dynamic.

D. Increasing Conflict Over Charter Racial Targeting

For most of their existence, charter operators have been permitted to create segregated schools with little outside interference. However, resistance to charter segregation is slowly building. In 2014, the United States Department of Education issued a “Dear Colleague” letter providing guidance on the interaction of desegregation rules and charter schools.¹⁶⁷ The letter reminded authorities that “[c]harter schools located in a school district subject to a desegregation plan (whether the plan is court-ordered, or required by a federal or state administrative entity) must be operated in a manner consistent with that desegregation plan.”¹⁶⁸

There is also evidence that concerns over charter segregation have begun to seep into the political consciousness. An annual opinion poll on education found that public support for “the formation of charter schools” declined from 51 percent in 2016 to 39 percent in 2017.¹⁶⁹ Support for charters was only 37 percent among black families, historically a bastion of support for the idea of charter schooling.¹⁷⁰ A number of civil rights organizations,

165. George Joseph, *What Betsy Devos Didn't Say About School Choice*, CITYLAB (Jan. 19, 2017), <https://www.citylab.com/equity/2017/01/what-betsy-devos-didnt-say-about-school-choice/513269/>.

166. See, e.g., *Charter Schools in the Twin Cities: 2013 Update*, INST. METRO. OPPORTUNITY 6–7 (Oct. 2013); Ladd et al., *supra* note 77, at 7.

167. See Catherine E. Lhamon, U.S. Dep't of Educ., Office for Civil Rights, “Dear Colleague” Letter on Charter Schools (May 14, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405-charter.pdf>

168. *Id.*

169. Martin R. West, et al., *The 2017 EdNext Poll on School Reform*, EDUC. NEXT (Sept. 8, 2017), <http://educationnext.org/2017-ednext-poll-school-reform-public-opinion-school-choice-common-core-higher-ed/>.

170. *Id.* Black families are also consistently the strongest supporters of school integration. A recent poll showed that 61 percent of black respondents thought the

including the NAACP and affiliates of the Black Lives Matter movement, have taken increasingly critical positions on charter schooling.¹⁷¹ In 2016, the NAACP called for a charter moratorium, citing charters schools' role in increased segregation and racial concentration.¹⁷²

On the other side, some charter supporters have rallied to defend segregated schools.¹⁷³ As concern over charter segregation has grown, prominent advocates have begun attacking the underlying research, casting doubt on the benefits of integrated education, and arguing that charters show racially isolated education can be made to work.¹⁷⁴

A major Associated Press report on charter segregation in late 2017 produced an up swell of rebuttals along these lines.¹⁷⁵ In response to the report, the National Alliance for Public Charter Schools jabbed at the idea that integration or segregation were valid policy considerations, saying in a statement that “[a]cademics, attorneys, and activists can hold any opinion they want about public charter schools and other families’ school choices,” but “[i]n the end, parents’ and students’ opinions are the only ones that matter.”¹⁷⁶ In a separate article, that organization’s senior vice president for advocacy responded more aggressively, blaming the story on “revanchists” and “professional anti-reformers,” and concluding that these groups were “trying to fabricate a segregation story to deny black students educational opportunity.”¹⁷⁷ Shavar

government should enforce racial balance, compared to 28 percent of whites. *Id.*; see *YouGov Poll on School Segregation*, YOUGOV (Dec. 16–18, 2015), https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/82ik29mdp/w/tabs_HP_Racial_Segregation_20151218.pdf.

171. Cohen, *supra* note 27.

172. *Id.*

173. See Abdul-Alim, *supra* note 18.

174. See *id.* (“[S]ome critics say charter schools that serve predominantly African-Americans, Latinos or Native Americans are ‘segregated,’ [but] such schools can be ‘culturally affirming’ and should not be lumped with schools that are segregated in the traditional sense of the word.”).

175. See Moreno, *supra* note 73.

176. *Response to the Associated Press Examination of the Racial Makeup of Public Charter Schools*, NAT’L ALLIANCE FOR PUB. CHARTER SCHS. (Dec. 4, 2017), <https://www.publiccharters.org/latest-news/2017/12/04/response-associated-press-examination-racial-makeup-public-charter-schools>.

177. Amy Wilkins, *Response: An Off-Target Analysis of Schools and Segregation Is Yet Further Evidence that Charters are Gaining Ground—and Opponents Are Getting Desperate*, THE 74 MILLION (Dec. 6, 2017), <https://www.the74million.org/article/response->

Jeffries, head of the influential charter advocacy group Democrats for Education Reform, took a similarly affronted tone, contending that “public charter schools . . . serve only 6% of the nation’s public school students” and, he alleged, were therefore too small to be responsible for segregation.¹⁷⁸ Jeffries continued with what has become a talking point among integration skeptics: “[W]e take issue with the assumption that Black and Brown children can’t learn unless they attend school alongside White children.”¹⁷⁹

One particularly surprising response was from Sonia Park, director of the Diverse Charter Schools Coalition. Despite her organizational affiliation, Park argued that school diversity could be an advantage but was “not a necessary characteristic for all schools.”¹⁸⁰ “[U]nlike the education establishment, it is not something we seek to force on all schools,” she wrote.¹⁸¹ Park also asserted that charters, as schools of choice, could not truly be segregated, because “[s]egregation is when government assigns you by race to inferior schools” and that “when black parents . . . choose a culturally affirming school that has a similar population, that is not segregation.”¹⁸² Park is a veteran of President Obama’s Department of Education, where she served as a senior policy advisor supervising charter grant programs.

But by 2017, recognition that school integration poses a serious problem for charters had been building for years in the education reform community, which had begun to produce a stable of reliable integration skeptics. Those included Peter Cunningham, a former assistant secretary of the United States Department of Education during the Obama administration, and the current executive director of pro-charter news website Education Post.¹⁸³ In a 2016 *US*

an-off-target-analysis-of-schools-and-segregations-is-yet-further-evidence-that-charters-are-gaining-ground-and-opponents-are-getting-desperate/.

178. *DFER National President Shavar Jeffries Statement on the Associated Press Study on Segregation and Charter Schools*, DEMOCRATS FOR EDUC. REFORM (Dec. 4, 2017), <https://dfer.org/dfer-national-president-shavar-jeffries-statement-associated-press-study-segregation-charter-schools/>.

179. *Id.*

180. Sonia Park, *Charter Schools Do Not Further Segregation*, REAL CLEAR EDUCATION (Nov. 22, 2017), https://www.realcleareducation.com/articles/2017/11/22/charter_schools_do_not_further_segregation_110230.html.

181. *Id.*

182. *Id.*

183. EDUC. POST, <http://educationpost.org/network/peter-cunningham/> (last visited April 15, 2018).

News article entitled *Is Integration Really Necessary?*, Cunningham asked, “Should America spend hundreds of billions more to reduce poverty and should we risk more bitter battles to reduce segregation, or should we just double down on our efforts to improve schools?”¹⁸⁴ Another oft-cited skeptic was Chris Stewart, a Minnesota charter advocate, education blogger, and former board member of the powerful pro-charter group Students for Education Reform.¹⁸⁵ Stewart is a major proponent of “culturally sensitive” segregated education, and a frequent critic of integration—at one point referring to integration as “cultural death.”¹⁸⁶ Stewart has strongly opposed the notion that segregation in charters bears any resemblance to the historical practice.¹⁸⁷ He has also suggested that the creation of racial enclaves is a parental prerogative—including, on at least one occasion, the creation of white enclaves.¹⁸⁸

E. *Things Come to a Head in Minnesota*

Minnesota, the first state to implement a charter school law,¹⁸⁹ is currently at the epicenter of the legal and rhetorical battle over

184. Peter Cunningham, *Is School Integration Necessary?*, US NEWS & WORLD REPORT (Aug. 15, 2016), <https://www.usnews.com/opinion/articles/2016-08-15/segregated-schools-may-not-be-that-bad>.

185. See EDUC. POST, <http://educationpost.org/network/chris-stewart/> (last visited April 15, 2018).

186. Mackenzie Mays, *The Complexity of Covering School Segregation*, EDUC. WRITERS ASS’N (July 11, 2016), <http://www.ewa.org/unassigned-grant/complexity-covering-school-segregation>. See generally Abdul-Alim, *supra* note 18.

187. Chris Stewart, *Misunderstanding Rosa Parks and the Meaning of Integration*, EDUC. POST (Dec. 1, 2015), <http://educationpost.org/misunderstanding-rosa-parks-and-the-meaning-of-integration/>.

188. This surprising statement occurred at a debate on Stewart’s podcast. Confronted with the argument that “cultural-affirmation” could be used to create whites-only schools, Stewart replied:

How about we just do this; how about we just say if I want to have access to culturally affirming black schools or native American schools . . . if white folks aren’t yet adroit and adept enough to understand why that makes sense historically, socially and they have all this fancy book learning and they can’t understand why that would be okay just for us, then cool. What’s the difference? I am okay with you having a German school.

The Politics of Integration, ROCK THE SCHS. WITH CITIZEN STEWART (Dec. 9, 2015), <https://audioboom.com/posts/3924847-episode-24-the-politics-of-integration>.

189. Claudio Sanchez, *From a Single Charter School, a Movement Grows*, N.P.R. (Aug. 31, 2012, 6:19 PM), <http://www.npr.org/2012/09/02/160409742/from-a>

racial targeting in charters.¹⁹⁰ An ongoing debate over the scope of state civil rights rules has produced strong criticism of charters' role in segregation—and some of the most expansively pro-segregation rhetoric encountered in American politics in many years.¹⁹¹

Minnesota's school integration/desegregation rule, drafted in its current iteration in 1999, exempts charter schools from school district integration plans.¹⁹² This exemption has long been criticized by civil rights advocates.¹⁹³ In 2016, the Minnesota Department of Education attempted to redraft the rule with the goal of eliminating the exemption and requiring segregated charters to file integration plans alongside traditional schools.¹⁹⁴ Almost simultaneously, a group of local parents and community organizations filed a lawsuit, alleging unlawful segregation of Minnesota schools, including

single-charter-school-a-movement-grows.

190. See, e.g., Taylor Gee, *Something is Rotten in the State of Minnesota*, POLITICO (July 16, 2016), <https://www.politico.com/magazine/story/2016/07/minnesota-race-inequality-philando-castile-214053> (identifying Minnesota as “home to some of the worst racial disparities in the country” but quoting Minnesota's NAACP president supporting segregated schools over integrated schools); Alejandra Matos, *Minnesota School Integration Proposals Draw Fire*, STAR TRIB. (Jan. 6, 2016), <http://www.startribune.com/minnesota-school-integration-changes-draw-fire/364436471/> (citing community leaders' advocacy for culturally targeted charter schools).

191. See, e.g., Gross, *supra* note 124 (framing “segregated” and “isolated” as “culturally affirming”); Joshua P. Thompson, *Confusing and Disappointing Decision in Lawsuit Against Charter School*, PAC. LEGAL FOUND., <https://pacificlegal.org/confusing-and-disappointing-decision-in-lawsuit-against-charter-school/> (last visited April 15, 2018) (arguing against regulation of charter schools).

192. MINN. R. 3535.0110 (8) (2017) (“[S]chool does not mean . . . charter schools”). The rule's origins lie in a 1972 Minneapolis desegregation case, and it has been through a number of (politically contentious) iterations. See Margaret C. Hobday, Geneva Finn, and Myron Orfield, *A Missed Opportunity: Minnesota's Failed Experiment with Choice-Based Integration*, 35 WM. MITCHELL L. REV. 936, 946–964 (2009).

193. See Rachel M. Cohen, *School Desegregation Lawsuit Threatens Charters*, AM. PROSPECT (Jan. 26, 2016), <http://prospect.org/article/school-desegregation-lawsuit-threatens-charters> (chronicling historical reactions to segregation issues in the Twin Cities).

194. See *Integration Rules*, MINN. DEP'T OF EDUC., <http://education.state.mn.us/MDE/about/rule/rule/deseg/> (last visited April 15, 2018) (providing Minnesota's attempts at rulemaking).

charter schools.¹⁹⁵ Among the violations alleged was the exclusion of charters from the desegregation rules.¹⁹⁶

The state's charter industry responded in force to these two challenges. At a state rulemaking hearing, dozens of charter administrators and employees showed up to voice opposition to their schools' inclusion in civil rights rules.¹⁹⁷ A handful of schools joined forces and hired attorneys to fight the proposed removal of the exemption provision.¹⁹⁸ In addition to submitting legal briefs on the rulemaking process, these same attorneys intervened in the desegregation lawsuit.¹⁹⁹ In what appeared to be a collateral attack on the state's rulemaking, the attorneys asked that the district court issue a declaratory judgement stating that "charter schools are statutorily exempt from the State's desegregation/integration rules and requirements," and an injunction "to bar any attempt by Plaintiffs to pursue a remedy . . . which undoes or restricts charter schools' statutory exemption."²⁰⁰ Several notable Minnesota school choice advocates authored editorials decrying the state's proposal to require integration plans from charters.²⁰¹ National education reform journalists also published pieces criticizing the idea that charters were—or could be—segregated.²⁰²

195. See Cohen, *supra* note 193; Complaint, Cruz-Guzman v. State, No. 27-CV-15-19117 (Minn. Dist. Ct. Mar. 17, 2016)

196. *Id.*

197. Matos, *supra* note 190.

198. Memorandum of Law in Support of the Disapproval of MDE's Proposed Desegregation/Integration Rules Due to Four Substantive Defects, Proposed Rules Relating to Achievement and Integration 33, In re Proposed Rules Relating to Achievement & Integration, OAH No. 1300-32227 (2016) [hereinafter Memorandum Disapproving Desegregation].

199. Intervenors' Memorandum of Law in Support of Their Five-Part Motion at 23–24, Cruz-Guzman v. State, No. 27-CV-15-19117 (Minn. Dist. Ct. Mar. 17, 2016), *rev'd*, 892 N.W.2d 533 (Minn. Ct. App. 2017).

200. *Id.*

201. Robert Wedl & Bill Wilson, Opinion, *In Minnesota, We Must Think Broadly About School Integration*, STAR TRIB. (Dec. 31, 2015), <http://www.startribune.com/in-minnesota-we-must-think-broadly-about-school-integration/363960211/> (attacking the proposed regulations as a massive increase in the scale of transportation required to facilitate truly integrative metro schools, and an erosion of the parental right to choose the best educational opportunities for their children).

202. See Beth Hawkins, *How Minnesota's Push to Integrate Schools Sparked a War Against Charters Serving Minority Families*, 74 MILLION (2016), <https://www.the74million.org/article/how-minnesotas-push-for-integrated-schools-is-sparking-a-war-against-charters-serving-minority-families/>.

Of particular note are the specific arguments adopted by the charter movement. In many states, charters have defended their segregated student bodies as merely reflective of surrounding neighborhoods.²⁰³ But because Minnesota charters are visibly more segregated than the state's neighborhood schools, this defense has not been available.²⁰⁴ As a result, charters have been forced to adopt a more proactive defense that focuses on the alleged merits of segregation.²⁰⁵

Several of these defenses made by charter supporters and administrators include statements about the importance of respecting racial differences in personality and learning styles.²⁰⁶ While mounting these defenses, Minnesota charter advocates have typically referred to segregated schools as "culturally affirming" or "culturally specific."²⁰⁷ In practice, these terms appear to be little more than a euphemism for racial segregation, as they are applied to any racially isolated school regardless of the particulars of its curriculum. Defenders of "culturally affirming" schools have not proposed any firm criteria for differentiating such schools from charters that are segregated but *not* "culturally affirming."

Nonetheless, the Minnesota charters' legal briefs asserted the legal novelty of culturally focused schools, arguing that it is "important to recognize that parents who choose to send their children to culturally-specific schools . . . are *not* like the parents and

203. *E.g.*, Gross, *supra* note 124 ("[Charter school proponents] say the national data [regarding racial segregation in charter schools is] misleading, since so many charters serve inner-city neighborhoods.").

204. John Hechinger, *Segregated Charter Schools Evoke Separate But Equal Era in U.S.*, BMG PURSUITS (Dec. 21, 2011), <https://www.bloomberg.com/news/articles/2011-12-22/seggregated-charter-schools-evoke-separate-but-equal-era-in-u-s-education> (discussing the polarization in charter schools, where, as of 2009–10, a high percentage of white majority student body charter schools and an even higher percentage of single race, nonwhite student body charter schools existed).

205. *See, e.g.*, Hawkins, *supra* note 202 (discussing that Higher Ground Academy, a racially segregated school in St. Paul serving predominately black students, had standardized test scores well above the scores of black students in the local traditional school); *see also* CTR. FOR EDUC. POL'Y RES., STUDENT ACHIEVEMENT IN MASSACHUSETTS' CHARTER SCHOOLS 10 (2011) <http://economics.mit.edu/files/6493> (last visited April 15, 2018) ("Urban [Boston charter] schools generate much larger positive [academic results] for non-Whites and free lunch-eligible applicants than for White applicants (in fact, the [net result] for White middle schoolers is essentially zero).").

206. *See supra* text accompanying notes 9–10.

207. *See, e.g.*, Gross, *supra* note 124; Matos, *supra* note 190.

families in the *Brown v. Board* era who had no such choice.”²⁰⁸ The schools characterized themselves as literally powerless to segregate: “[A]s applied to charter schools, the allegation of ‘segregation’ is particularly irrelevant. By law, charter schools have no power to assign students to any particular school.”²⁰⁹

The schools also suggested that even if they were segregated, the harms would be minimal. The Minnesota Department of Education “presented *no* evidence that greater diversity in charter schools results in higher academic achievement.”²¹⁰ Ultimately, the charters’ case boiled down to the idea that parental choice was a core educational value which trumped any sort of state-enforced racial integration. The schools’ legal memorandum summed it up neatly:

[I]s achieving some undefined notion of “integration” more important than allowing parents the right to choose where to send their children? If parents wish to send their child to a culturally-specific charter school, then should that choice be denied because of some notion that “racial balance” might be impacted and the attendant belief that diversity is more important than parental choice?²¹¹

At the administrative hearing, a staffer at an all-black charter school put things more colloquially: “I wouldn’t want other students and parents to not have a choice of where . . . to place their students.”²¹² He continued, “It just doesn’t sound right to me[,] being a person who chose to go to a racially segregated school.”²¹³

Ultimately, the proposed desegregation rule was rejected by an administrative law judge on a variety of grounds, including skepticism that it had been extended appropriately to charters.²¹⁴ The desegregation lawsuit is ongoing and, at the time of this writing,

208. Memorandum Disapproving Desegregation, *supra* note 198, at 13.

209. Letter from Cindy Lavorato, Att’y for Charter Schs., to Ann O’Reilly, Admin. L. Judge (Jan. 27, 2016) (on file with author).

210. Memorandum Disapproving Desegregation, *supra* note 198, at 19.

211. *Id.* at 11.

212. Transcript of Public Hearing at 185, In re Proposed Rules Relating to Achievement & Integration, OAH No. 1300-32227 (2016), http://education.state.mn.us/mdeprod/idcplg?IdcService=GET_FILE&dDocName=MDE034928&RevisionSelectionMethod=latestReleased&Rendition=primary.

213. *Id.* at 185–86.

214. In re Proposed Rules Relating to Achievement & Integration, OAH No. 65-1300-32227 (2016), https://mn.gov/oah/assets/1300-32227-education-achievement-and-integration-rule-report_tcm19-194466.pdf (laying out in its entirety the chief administrative law judge’s findings and conclusions on the matter).

is awaiting a decision by the Minnesota Supreme Court.²¹⁵ But with their ever-growing embrace of intentional, overt segregation, charters raise greater legal challenges for Minnesota and states across the country.

III. THE DESEGREGATION CASES

School desegregation is a large, textured area of law, developed across dozens of cases in the half-century following *Brown v. Board of Education*.²¹⁶ But today, it is also treated as a dying field. The perception is that if the book is not quite closed on judicial desegregation, it is at least in its closing chapters.

This is because the Supreme Court decided that court-ordered school desegregation, at least at the federal level, can only follow in the wake of racial segregation caused by government action.²¹⁷ Only when government policies create an unconstitutional “dual system” can courts step in.²¹⁸ Courts can maintain jurisdiction for as long as necessary to render the dual system unitary, but once they do so, they must then terminate their jurisdiction.²¹⁹ They may not, the Supreme Court has held, reopen a case—even if non-governmental factors threaten to re-segregate a school.²²⁰ In other words, the law of federal school desegregation appears to be directed at a specific

215. Allison McCann, *When School Choice Means Choosing Segregation*, VICE NEWS (Apr. 12, 2017), <https://news.vice.com/story/when-school-choice-means-choosing-segregation>.

216. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (hereinafter *Brown I*). See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Milliken v. Bradley*, 433 U.S. 267 (1977).

217. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (“The objective [of desegregation] remains to eliminate from the public schools all vestiges of state-imposed segregation.”).

218. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 536 (1979) (affirming judgment against the board because it “had not responded with sufficient evidence to counter the inference that a dual system was in existence in Dayton in 1954”).

219. *Id.* at 536; *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (hereinafter *Brown II*) (“During the period of this transition, the courts will retain jurisdiction of these cases.”).

220. *Seattle Sch. Dist. No. 1*, 551 U.S. at 721 (“We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation [by law], and that the Constitution is not violated by racial imbalance in the schools, without more.”); see Jason Lance Wren, Note, *Charter Schools: Public or Private? An Application of the Fourteenth Amendment’s State Action Doctrine to These Innovative Schools*, 19 REV. LITIG. 135, 151–52 (2000).

historical evil: the government's division of schools, mostly between black and white students, in the early- to mid-twentieth century.

Thus, these cases have a starting and stopping point and, as time moves further from the period in which they originated, they may seem to diminish in importance. Because the earlier segregative policies have been phased out,²²¹ no new government-created dual systems are (it is assumed) being created today. As such, the opportunities to extend desegregation law into new territory are (it is again assumed) nonexistent. To the extent federal judicial desegregation continues today, it mostly takes the form of the ongoing resolution of historical discrimination.²²²

In recent years, the locus of legal attention has not been intentional segregation, historical or otherwise. Instead, it has been determining the exact circumstances under which non-judicial authorities can pursue integration, and the methods by which they can do so, without running afoul of the same equal protection principles that bar segregation itself.²²³

In short, the Supreme Court's segregation cases started with the premise that segregation must be ended, then asked practical questions about when, where, and how it should be done. Today, an educational equal protection case is more likely to begin with the premise that segregation is forbidden, and then try to determine whether a particular present-day practice is forbidden for the same reasons. As we will see, charter schools may turn that logic on its head, and rejuvenate the earlier genre of case.

A. *The Early Cases*

Brown v. Board of Education established the basic principle of school desegregation—that “separate but equal” was no longer valid in an educational setting.²²⁴ However, *Brown* did not address the

221. See *Brown I*, 347 U.S. 483, 495 (1954) (holding a segregative policy unconstitutional and initiating phase-out of all school such policies).

222. See, e.g., *Davis v. Hot Springs Sch. Dist.*, 833 F.3d 959 (8th Cir. 2016); *Stout v. Jefferson Cty. Bd. of Educ.*, 250 F. Supp. 3d 1092 (N.D. Ala. 2017); *Cowan v. Bolivar Cty. Bd. of Educ.*, 186 F. Supp. 3d 564 (N.D. Miss. 2016).

223. See, e.g., Maria Blanco, *The Impact of the Supreme Court's Decision in Parents Involved on California's Anti-Affirmative Action Law and California's Constitutional Mandate to Reduce de Facto Segregation*, 69 OHIO ST. L.J. 1073, 1077–78 (2008); see Lisa B. Epperson, *True Integration: Advancing Brown's Goal of Educational Equity in the Wake of Grutter*, 67 U. PITT. L. REV. 175, 187–190 (2004).

224. See Wren, *supra* note 220, at 135.

implementation of that principle. Given the extraordinary political resistance to integration, and the incredible array of forms it had taken across the country, further guidance was needed. The problem worsened with the Court's instruction, in *Brown II*, that desegregation be undertaken "with all deliberate speed."²²⁵

For nearly a decade, states and school districts successfully dodged implementation of *Brown* without facing serious scrutiny from the Supreme Court—most dramatically in Virginia, where, as part of so-called "massive resistance," many schools and the entire Prince Edward County public school system were shuttered in order to prevent integration.²²⁶

After a decade, the Supreme Court finally reentered the scene, affirming a lower court's decision requiring the reopening of Prince Edward schools.²²⁷ In doing so, it dashed the segregationists' hopes that *Brown* could be ignored or overturned through delay and intransigence. But this also initiated the next phase of resistance to integration, wherein local officials devised a vast array of schemes and arguments that, they hoped, would prove they had complied with *Brown* despite the persistence of segregated schooling.²²⁸ This in turn led to a series of groundbreaking decisions, discussed below, in which the Supreme Court defined what sorts of discrimination created a "dual system" that violated *Brown*, the scope of dual systems in different circumstances, and the scope of remedies permitted.

1. *Green (1968)*

Green v. County School Board of New Kent County represented the Court's first attempt to draw these lines.²²⁹ New Kent County was located in rural Virginia and had previously maintained racially separate schools.²³⁰ Segregation was maintained entirely through busing: the county's black and white students were evenly distributed, and bused to their respective schools no matter where they lived.²³¹ Facing legal action, the school board adopted what the Court termed a "freedom-of-choice" plan, under which students

225. *Brown II*, 349 U.S. 294, 301 (1955).

226. *Griffin v. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 221–24 (1964).

227. *Id.* at 234.

228. *See id.*

229. 391 U.S. 430 (1968).

230. *Id.* at 432–33.

231. *Id.* at 434.

could select whichever school they preferred to attend.²³² In practice, all white students remained at the previous white-designated school and only 15 percent of black students transferred out of the previous black-designated school.²³³ Nonetheless, the school board maintained it had met its obligation to desegregate under *Brown*, by eliminating the rules which had led to formal legal segregation.²³⁴

The Supreme Court disagreed. The Court held that because of the county's previous dual system, "the fact that in 1965 the Board opened the doors of the former 'white' school to Negro children and of the 'Negro' school to white children merely begins, not ends, our inquiry. . . ."²³⁵ Having established the unconstitutionality of its segregated system, the county's obligation was to desegregate the system, not to merely undo the rules that had made it unconstitutional.²³⁶ Indeed, undoing the rules had not in any way reversed the segregation.

Except for the extent to which it accomplished desegregation, the board's freedom-of-choice plan was irrelevant to the question. It was neither disallowed, nor sufficient.²³⁷ The court noted that "[a]lthough the general experience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation, there may well be instances in which it can serve as an effective device."²³⁸ But school demographics indicated that this was not such an instance.²³⁹ As a consequence, the courts and the district remained under a duty to eliminate racial discrimination "root and branch."²⁴⁰

232. *Id.* at 433.

233. *Id.* at 441.

234. *Id.* at 437.

235. *Id.*

236. *Id.* at 439 ("It is incumbent on the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation.").

237. *See generally id.* (requiring the school board to take affirmative action in adopting a plan to desegregate the school system without placing the burden on the parents).

238. *Id.* at 440.

239. *Id.*

240. *Id.* at 439.

2. Swann (1971)

Swann v. Charlotte-Mecklenburg Board of Education took the underlying insight of *Green*—that the historical operation of a dual system created a proactive obligation to remedy that segregation—and expanded it in several directions.²⁴¹ It helped advance the law of school desegregation beyond both the basic principles of *Brown* and the relatively simple facts of *Green*, creating a robust system of judicial remedies.

Swann centered around the segregated Charlotte-Mecklenburg district. Like *Green*'s New Kent County, Charlotte's school district had previously operated an explicit Jim Crow system, with racially designated schools.²⁴² Charlotte's system, however, was quite large: more than 100 schools and 80,000 students, spread across 550 square miles.²⁴³ In fact, much of the segregation in the district was arguably not the product of strict student assignment at all. While black and white families were evenly dispersed throughout New Kent County, Charlotte, like most large cities, contained a heavy degree of residential segregation.²⁴⁴ Thus, school attendance boundaries, by cleaving to neighborhood boundaries, maintained segregation independently of any explicit racial assignment.²⁴⁵

The *Swann* Court confronted the questions of what sort of remedies were required in a city like Charlotte, and what equitable powers a court could exercise to achieve those remedies.²⁴⁶ To begin, the Court acknowledged that “[r]ural areas . . . could make adjustments more readily than metropolitan areas with dense and shifting populations, numerous schools, and congested and complex traffic patterns.”²⁴⁷ Nonetheless, the Court did not retreat from its commitment to ending and erasing the products of state-sponsored segregation.²⁴⁸ It continued: “The task is to correct . . . the condition that offends the Constitution.”²⁴⁹

241. 402 U.S. 1 (1971).

242. *Id.* at 7.

243. *Id.* at 6.

244. *See id.* at 7–9.

245. *Id.* at 7.

246. *Id.* at 15–18 (discussing array of remedies).

247. *Id.* at 14.

248. “The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation.” *Id.* at 15.

249. *Id.* at 16.

In pursuit of this end, the Court held that courts possessed broad remedial powers.²⁵⁰ It confirmed that district courts were permitted to use racial ratios and were not restricted to so-called “colorblind” strategies when considering staff assignments.²⁵¹ It also noted that “when necessary” courts should exercise oversight over school openings and closures to ensure that they were not used to “perpetuate or re-establish” a dual system.²⁵²

But the bulk of the Court’s decision focused on the most controversial set of remedial actions: those that altered student assignment. These remedies included the use of racial quotas, which the Court held were permissible when used as a flexible starting point, rather than “an inflexible requirement.”²⁵³ Allowed remedies also included busing and the redrawing of attendance zones, both of which the Court decided were broadly permissible in the pursuit of remedial integration.²⁵⁴

In addition, *Swann* confronted the vexed question of whether the elimination of a dual system also required the elimination of “one-race” schools in segregated neighborhoods.²⁵⁵ Here, the Court’s answer was more nuanced. It recognized that “the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law.”²⁵⁶ With that said, the Court could not help but be troubled by such schools, noting that “[t]he district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools.”²⁵⁷ Moreover, “[t]he court should scrutinize such schools,” and local authorities must “satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.”²⁵⁸ *Swann* did not provide a conclusive, rote answer on

250. *See id.* (stating that “the nature of the violation determines the scope of the remedy”).

251. *Id.* at 18–19, 25.

252. For example, courts sought to prevent efforts to build new schools in white areas far from diverse or nonwhite neighborhoods, or shuttering schools that, due to neighborhood change, were becoming racially mixed. *See id.* at 21.

253. *Id.* at 25.

254. *See id.* at 27–31.

255. *Id.* at 25–27.

256. *Id.* at 26.

257. *Id.*

258. *Id.*

how to treat single-race schools. But it showed that they are cause for concern in a segregated system and highlighted that, to the extent they are the product of discriminatory action, they must be integrated.

Finally, *Swann* revisited the basic structure of federal desegregation remedies, reiterating that “judicial powers may be exercised only on the basis of a constitutional violation.”²⁵⁹ The corollary would be that when a school district was declared unitary, the court’s jurisdiction was then terminated.²⁶⁰ “[F]urther intervention by a district court should not be necessary,” *Swann* concluded, “in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter . . . the racial composition of the schools.”²⁶¹

3. *Keyes (1973)*

Until *Keyes v. School Dist. No. 1*, the landmark desegregation cases had focused primarily on Southern school districts. In *Keyes*, the Court confronted a question of immense importance outside the Jim Crow South: absent a system of formal racial assignment, when is evidence of intentional discrimination sufficient to create an unconstitutionally segregated dual system?²⁶²

Keyes focused on Denver, Colorado.²⁶³ Denver had never instituted the sort of “statutory dual system” that was commonplace in the South, where schools were given explicit racial designations.²⁶⁴ As in the Charlotte-Mecklenburg district in *Swann*, residential patterns in Denver ensured that most of the city’s schools were de facto segregated, with “core city” schools less than 30 percent white, compared to 66 percent white districtwide.²⁶⁵ For the most part, however, there was no evidence that racial concentration was intentional government policy.

Nonetheless, the *Keyes* plaintiffs were able to locate a subset of Denver schools, in the Park Hill area, which had indeed been deliberately segregated, using a combination of attendance

259. *Id.* at 16.

260. *Id.* at 32.

261. *Id.*

262. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973).

263. *Id.* at 191.

264. *Id.* at 198.

265. *Id.* at 206, 195–96.

boundaries, optional attendance zones, and feeder schools.²⁶⁶ These schools contained about 38 percent of the black students in the district, but only about 5 percent of the district's overall student population.²⁶⁷ The plaintiffs contended that this rendered Denver a segregated system. The defendants countered that intentional segregation, even if it had occurred, was confined to Park Hill and therefore could not support a finding that the district was a dual system (and the resulting imposition of districtwide remedies).²⁶⁸ The trial court sided with the defendants, holding that segregation in Park Hill was "irrelevant" to the rest of the district, and required the plaintiffs to prove that intentional, de jure segregation had taken place in all of the city's schools before it could declare Denver a dual system.²⁶⁹

The Supreme Court disagreed on several grounds. First, it recognized that the racial composition of a subset of schools can impact the composition of other schools within the same system. With "a high degree of interrelationship among [Denver's] schools," a policy of "official segregation in Park Hill affected the racial composition of schools throughout the district."²⁷⁰ The Court suggested that segregative policies in a subset of schools can only be detached from the broader system if those schools constitute "separate, identifiable, and unrelated units."²⁷¹

But the Court also held that a segregated school system may be considered a dual system even if the intentionally segregated schools within it are a "separate, identifiable, and unrelated unit."²⁷² The *Keyes* court continued: "[A] finding of intentional segregation . . . in one portion of a school system is highly relevant to the issue of the board's intent with respect to other segregated schools in the system."²⁷³ In other words, if one part of a school system is intentionally segregated, it strains credulity to believe that segregation elsewhere in the system is accidental, inadvertent, or undesired.

266. *Keyes v. Sch. Dist. No. 1*, 303 F. Supp. 289, 290–94 (D. Colo. 1969).

267. *Keyes*, 413 U.S. at 199.

268. *Id.* at 200.

269. *Id.* at 205–06.

270. *Id.* at 204 (citation omitted).

271. *Id.*

272. *Id.* at 205.

273. *Id.* at 207.

In application, when school authorities operate intentionally segregated schools, *Keyes* places the burden on the district to establish that any other segregated schools under their purview are not also intentionally segregated. “[A] finding of intentionally segregative school board actions in a meaningful portion of a school system” is sufficient to establish “a prima facie case of unlawful segregative design on the part of school authorities.”²⁷⁴ Notably, this presumption ignores administrative or geographic boundaries: even if segregation occurs in different or unrelated areas, “there is high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system.”²⁷⁵

And while the *Keyes* presumption is rebuttable, it is not easily rebutted. “[I]t is not enough,” held the Court, “that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions.”²⁷⁶ Instead, they must “adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions.”²⁷⁷ Should they fail to do so, the entire system must be desegregated, “root and branch.”²⁷⁸

If this standard was likely to result in small segregative acts leading to broad remedies, the Court did not object. The Court characterized it as “common sense” that a “systematic program of segregation” is a “predicate for a finding of the existence of a dual school system.”²⁷⁹

The *Keyes* decision greatly reduced the burden on plaintiffs and greatly expanded the legal stain of intentional racial segregation. In effect, *Keyes* placed school authorities who promulgated or promoted segregative policies under a sharp judicial eye, and assumed that any other segregation occurring on their watch was intended or welcomed. It also freed plaintiffs from the exhausting process of overcoming the presumption of good faith every time an allegation implicated a new corner of a school system. In the Court’s words: “We have never suggested that plaintiffs in school

274. *Id.* at 208.

275. *Id.*

276. *Id.* at 210.

277. *Id.*

278. *Id.* at 213 (citing *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430, 438 (1968)).

279. *Id.* at 201.

desegregation cases must bear the burden of proving the elements of de jure segregation as to each and every school or each and every student within the school system.”²⁸⁰

There are two other components of *Keyes* that remain highly relevant today. In addition to its holding that a “systematic program of segregation” triggers a presumption of a dual system, the *Keyes* court provided some guidance on what may constitute a “systematic program.”²⁸¹ Factors include “a practice of concentrating Negroes in certain schools by structuring attendance zones or designating ‘feeder’ schools on the basis of race [having] the reciprocal effect of keeping other nearby schools predominantly white;”²⁸² “the practice of building a school . . . to a certain size and in a certain location, ‘with conscious knowledge that it would be a segregated school;’”²⁸³ “the drafting of student transfer policies;”²⁸⁴ and “the transportation of students” in a segregative fashion.²⁸⁵ The Court also expressed concern over subtle practices that “have the clear *effect* of earmarking schools according to their racial composition.”²⁸⁶ It noted that “common sense dictates the conclusion that racially inspired school board actions have an impact beyond . . . the subjects of those actions.”²⁸⁷ As we will see, these considerations have important implications today.²⁸⁸

Finally, *Keyes* dealt with a critical issue of racial classification in segregation suits. While the early school segregation cases had dealt with systems that were segregated between black and white students, Denver was what the Court termed a “tri-ethnic” community: black, white, and Hispanic.²⁸⁹ The trial court in *Keyes* concluded that a school was segregated if it was either 75 percent black or 75 percent Hispanic.²⁹⁰ The Supreme Court disagreed, stating that it was erroneous to separate black and Hispanic students when defining a segregated school.²⁹¹ While it recognized that Hispanic students

280. *Id.* at 200.

281. *See id.* at 201–02.

282. *Id.* at 201.

283. *Id.* (quoting *Keyes v. Sch. Dist. No. 1*, 303 F. Supp 279, 285 (D. Colo. 1969)).

284. *Id.* at 202.

285. *Id.*

286. *Id.* (emphasis added).

287. *Id.* at 203.

288. *See infra* Part III.

289. *Keyes*, 413 U.S. at 195.

290. *Id.* at 196.

291. *Id.* at 197.

were an identifiable class for purposes of the Fourteenth Amendment, it also noted that “[Hispanic students] and Negroes ha[d] a great many things in common.”²⁹² Schools with a “combined predominance” of the two groups may also have been segregated, even if the groups were not segregated from each other.²⁹³ In other words, the relevant boundary for school segregation was white students and nonwhite students—not boundaries between each individual racial category.

4. *Other Cases*

Perhaps the most heavily-criticized of the Supreme Court’s desegregation cases remains *Milliken v. Bradley*, decided in 1974.²⁹⁴ In *Milliken*, the Court considered a remedial integration plan for Detroit, drawn by a federal district court, which included a number of neighboring suburban districts.²⁹⁵

The district court held that Detroit, but not its neighboring districts, operated a dual system.²⁹⁶ Nonetheless, the lower court judge held that a Detroit-only plan would inevitably produce an entirely black inner-city school district surrounded by predominantly white suburban districts, and thus ordered the district to desegregate.²⁹⁷

The Supreme Court reversed the lower court’s plan. It characterized the plan as having “shifted focus” from the unmaking of a dual system to the creation of a particular degree of racial balance.²⁹⁸ In doing so, it said, the lower court had impinged upon a “tradition” of “local control over the operation of schools.”²⁹⁹

Justice Rehnquist, writing for the Court, admitted that “no state law is above the Constitution.”³⁰⁰ But, echoing *Swann*, he asserted that “the scope of the remedy is determined by the nature and extent of the constitutional violation.”³⁰¹ Thus, “[b]efore the boundaries of

292. *Id.*

293. *Id.* at 198.

294. 418 U.S. 717 (1974).

295. *Id.* at 730.

296. *Bradley v. Milliken*, 338 F. Supp. 582, 588, 595 (E.D. Mich. 1971).

297. *Milliken*, 418 U.S. at 735.

298. *Id.* at 740.

299. *See id.* at 741.

300. *Id.* at 744.

301. *Id.* (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)).

separate and autonomous school districts may be set aside . . . it must first be shown that there has been a constitutional violation within one district that produces significant segregative effect in another district.”³⁰²

The *Milliken* decision severely undercut the ability of courts to aggressively work towards the elimination of segregation.³⁰³ Because outlying school districts had rarely been part of a dual system—if for no other reason than because they served very few children of color—they were theoretically safe from most judicially imposed remedies.³⁰⁴ They therefore became prime destinations for white flight. Families seeking an escape route from integration plans could now simply move to expensive neighborhoods on the urban fringe.³⁰⁵

Meanwhile, the Supreme Court’s equal protection jurisprudence has swung away from the practical realities of school desegregation and toward the establishment of a formal system for deciding discrimination claims. In *Washington v. Davis*, the Court sharply limited the scope of most equal protection claims by holding that a law or act does not merit strict scrutiny merely because it has a racially discriminatory effect; instead, plaintiffs must show a racially discriminatory purpose.³⁰⁶ In *Arlington Heights v. Metropolitan Housing Development Corp.*, claims were limited even further.³⁰⁷ Under *Arlington Heights*, discriminatory intent could be established through the application of several factors, but a showing of discriminatory intent merely shifted the burden to the defendant, who could nonetheless escape liability by demonstrating the absence of a discriminatory effect.³⁰⁸

As the difficulty of demonstrating equal protection violations increased, and as school districts increasingly abandoned their most racially discriminatory policies, the wave of school desegregation cases began to ebb. Today, the few that remain are holdovers: remnants of decades-old fights where judges still struggle to

302. *Id.* at 744–45.

303. See Myron Orfield, *Milliken, Meredith, and Metropolitan Segregation*, 62 UCLA L. REV. 364, 369 (2015).

304. See *id.* at 436–38.

305. *Id.*

306. 426 U.S. 229, 240 (1976).

307. 429 U.S. 252, 264–65 (1977).

308. *Id.*

eliminate dual systems and the constitutional injury of historic discrimination. Racially targeted charter schools could change that.

IV. APPLICATION OF THE DESEGREGATION CASES TO CHARTER SCHOOLS

Racial targeting in charter schools raises two broad questions. First, are racially targeted charters constitutionally permissible? And second, if they are not, what are the implications under school desegregation law?

A. *Racially Targeted Charter Schools Are Unconstitutionally Segregated*

At the outset, many racially targeted charter schools are almost certainly violative of equal protection principles. The equal protection regime established by *Washington v. Davis* and *Arlington Heights* requires a showing of both disparate impact and discriminatory intent.³⁰⁹ Both elements are easily met in the case of racially targeted schools.

Although forbidden from overtly barring students based on race—in theory, any student is permitted to apply and will receive equal admissions consideration—such schools still intentionally classify students along racial lines.³¹⁰ As discussed above, many racially targeted schools freely admit to favoring students from certain groups, for reasons both pedagogical and practical. This preference alone, stated aloud by a publicly funded school, represents a form of disparate treatment on the basis of membership in a protected class.³¹¹ However, *Arlington Heights* provides a process for uncovering the discriminatory intent behind even more-subtle forms of racial targeting, including a “sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”³¹² In the case of racially targeted schools, practices such as the institution of racially-oriented curricula, soft steering of parents, and targeted advertising are all compelling evidence of intent.

And any school that successfully targets by race will have a clear disparate impact: a student body with disproportionate racial demographics, differing in an obvious fashion from the surrounding

309. *See id.* at 265.

310. *See, e.g.,* McCann, *supra* note 215.

311. *Id.*

312. *Arlington Heights*, 429 U.S. at 266.

neighborhood or other nearby schools.³¹³ Thus, without a showing of a compelling government interest justifying racial classifications by these schools—and no obvious candidates present themselves—those classifications are likely unconstitutional.³¹⁴

This conclusion seems straightforward and yet most scholars have resisted it. Instead, a substantial portion of scholarly writing on racially targeted or “centric” charters has attempted to argue that such schools fall into some sort of loophole drawn in *Brown v. Board of Education*. For instance, one author asserted that “the rationale of *Brown* has no application where persons of African descent are not subjected to racial segregation” but instead “choose to separate their children.”³¹⁵ But such efforts invariably fail because *Brown* is unambiguous about racial segregation.³¹⁶ For instance, the same author, after arguing *Brown*’s holding is compatible with racially targeted charters, is nonetheless forced to reject the case’s core principle: “[T]he *Brown* Court’s erroneous characterization of racially separate schools as ‘inherently unequal’ must be rejected in favor of a more accurate assessment of the status of racially separate schools.”³¹⁷

Still, even scholars who recognize the unavoidable equal protection problems raised by racially targeted charter schools have seem concerned with the apparent basic unfairness of this conclusion.³¹⁸ Many racially targeted schools are, after all, small components of a very large and very segregated system. “It seems impossible to imagine the Supreme Court holding unconstitutional

313. In the cases of racially targeted schools located in homogeneously segregated cities or regions—e.g., Afrocentric schools in Detroit—it may be possible to argue that the schools’ improperly discriminatory intent did not create a discriminatory outcome, because segregated enrollment was inevitable regardless of the racial targeting. This assertion, however, is weakened by charters’ lack of formal attendance boundaries. Because charters do not serve a clearly defined set of neighborhoods, their demographics are not predetermined.

314. A more difficult question is posed by schools engaged in targeting that is, at least superficially, not racial in nature but still highly likely to result in segregated student bodies. For example, a “no excuses” schools serving disadvantaged children. However, as will be shown below, it may not be necessary to reach those difficult cases.

315. Wright, *supra* note 18, at 16.

316. *Brown I*, 347 U.S. 483, 495 (1954) (“[I]n the field of public education the doctrine of ‘separate but equal’ has no place.”).

317. Wright, *supra* note 18, at 48–49.

318. E.g., Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563, 613 (2001).

an Afrocentric charter school within the city of Detroit, which is overwhelmingly African American,” wrote one scholar.³¹⁹ “The charter school would be just as segregated as any other public school in Detroit.”³²⁰

There is some truth to this. Applying pure equal protection principles to racially targeted charter schools is sure to raise this sort of knotty question. Is it fair that a single school be asked to desegregate an entire city—or in lieu of a city?

But these knotty questions are not new. They have already been untangled, to a significant degree, by the Supreme Court’s desegregation cases. Charter schools are a recent development, but school segregation is not.³²¹ By applying the rules developed under *Brown* and its progeny to charter segregation, it becomes possible to shift the burden of resolving segregation from individual schools onto the broader educational system.

B. *Racially Targeted Charter Schools Likely Create a Dual System*

When a state actor racially discriminates on the basis of race, it raises equal protection questions. But when a state actor racially discriminates on the basis of race *and does so for the purpose of creating school segregation*, the implications extend beyond run-of-the-mill equal protection principles. These actions return us to the law of school desegregation: *Brown*, *Green*, *Swann*, and *Keyes*.³²² In each of these cases, the Supreme Court confronted the specific problems attendant to the resolution of an unconstitutional dual system. Under this body of law, the determination that an “agency of the State has deliberately attempted to fix or alter demographic patterns to affect the [school’s] racial composition” allows courts to find the existence of a dual system and to retain jurisdiction to dismantle that system.³²³

If racially targeted charter schools create a dual system, there is no reason to reinvent the legal wheel; instead, one can apply the principles of desegregation law to determine what legal and judicial

319. *Id.*

320. *Id.*

321. *See, e.g.,* Mullins v. Belcher, 134 S.W. 1151 (1911) (denying children attendance at a Caucasian school because they were one-sixteenth African American).

322. *See supra* Part II.

323. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 32 (1971).

remedies are viable and appropriate. On balance, the operation of racially targeted charters likely does create a dual system. In a number of ways, racially targeted charters resemble the historical dual systems addressed by the Supreme Court. In fact, a school system containing many racially targeted charters closely resembles the factual circumstances of *Green*: racially identified and designated schools, serving an unrestricted geographic area, in which children are permitted to attend with ostensible “freedom-of-choice.”³²⁴ As in *Green*, parental choice is not directly restricted by school policy. Nonetheless, the intended regime of racial sorting shines through, both in intent and effect.

Keyes also contains language that suggests that racially targeted charters may constitute a “systematic program” of segregation.³²⁵ *Keyes* states that policies that “have the clear effect of earmarking schools according to their racial composition” may serve as evidence of an unconstitutionally segregated dual system.³²⁶ The creation and operation of charters with implicit or explicit racial preferences—especially when multiple such schools, targeting different racial groups, appear in close proximity—closely resembles the “earmarking” forbidden by *Keyes*.³²⁷

The Supreme Court precedent provides no example of a circumstance that *does not* likely create a dual system. *Swann* directly addresses the constitutional implications of single-race schools, finding that “the existence of some small number of one-race, or virtually one-race, schools” is not automatically “the mark of a system that practices segregation by law.”³²⁸ However, the *Swann* court noted that courts must “scrutinize such schools,” and determined that the “racial composition is not the result of present or past discriminatory action” by school authorities.³²⁹ This passage of the *Swann* opinion was addressing instances where neighborhood demographics created a single-race school, which is difficult to apply directly to a choice-based school like a charter. However, on balance, this passage suggests that one single segregated charter, while perhaps unconstitutional on its own, may not create a dual system.

324. *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 431–32 (1968).

325. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 201–02 (1973).

326. *Id.* at 202.

327. *See id.*

328. *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 26 (1971).

329. *Id.*

The more of such schools that appear in relative proximity, however, the more likely it is that a dual system exists.

C. *What is the Extent of a Charter-Based Dual System?*

Unlike traditional school districts, charter schools do not have explicit jurisdictional boundaries.³³⁰ Thus, even if they do constitute a dual system, it is not immediately clear how far the dual system extends. Does it include only the unconstitutional charters? Does it include all charters in a district or state? Or does it include traditional schools, as well?

Once again, the case most relevant to this inquiry is *Keyes*, which dealt with the implications of a limited “program of racial segregation” within a broader educational system.³³¹ Since racially targeted charter schools function like many historical “systematic program[s] of racial segregation,” the case’s reasoning can be extended to charters with relative ease.³³²

Faced with a program of segregation within a limited subset of schools, *Keyes* asked whether the schools in question were “separate, identifiable, and unrelated.”³³³ Otherwise, the entire system was to be considered a dual system.³³⁴

Charter schools may well be separate and identifiable, but cannot claim they are unrelated to the districts surrounding them. Administrative distinctions aside, charter laws are designed to place charters in direct competition with traditional schools for students and resources.³³⁵ Charters are also in competition with each other. As a result, under the principle delineated in *Keyes*, the existence of a systematic program of segregation in racially targeted charter schools is likely to convert, at the very least, the surrounding district into an unconstitutional dual system.

But *Keyes* did not stop there. It also created a presumption that any segregated school served by the same educational authorities

330. See KOLDERIE, *supra* note 46, at 16–17.

331. *Keyes*, 413 U.S. 192–93.

332. *Id.* at 193; see, e.g. Erika K. Wilson, *The New School Segregation*; Robert A. Margo, *Race and Schooling in the South, 1880–1950: An Economic History*, Ch. 5 (1994), 102 CORNELL L. REV. 139, 148–54 (2016).

333. *Keyes*, 413 U.S. at 203.

334. *Id.*

335. Ed Grabianowski, *How Charter Schools Work*, HOWSTUFFWORKS, <https://people.howstuffworks.com/charter-school2.htm> (last visited April 15, 2018).

that created the program of segregation is also intentionally segregated.³³⁶

Unlike single school districts, the state actor most responsible for charter schools is the state legislature. State legislatures enact charter laws and implement sets of regulatory standards for schools and authorizers.³³⁷ These laws extend statewide, to all charters equally. To the extent that any state legislature creates a “systematic program of segregation” by permitting the formation of racially targeted charters, the *Keyes* presumption of an intentionally segregated dual system may well extend to *all segregated charters*.³³⁸ In most places, this constitutes a clear majority of all charters.

With regards to other segregated charters, *Swann*’s discussion of single-race schools is also relevant. *Swann* noted that single-race schools, appearing within a known dual system, are cause for concern; courts that should seek to achieve the “greatest possible degree of actual desegregation” and should thus consider eliminating such schools.³³⁹

However, the *Keyes* presumption may be carried further still. A state legislature that creates racially targeted charters is also responsible for creating and administering the state’s entire education system. It can be plausibly argued that, within a state with racially targeted charters, the *Keyes* presumption of a dual system should extend to *any and all* segregated schools or districts.³⁴⁰

A practical consideration that favors a broad application of the *Keyes* presumption is the way that racially targeted charter schools exploit preexisting school segregation. Often, these schools present themselves as alternatives to segregated, traditional school systems.³⁴¹ Decades before the invention of charter schools, the *Keyes* court recognized this dynamic, noting that “[i]ntentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation.”³⁴²

336. *Keyes*, 413 U.S. at 208.

337. See, e.g., LISA LARSON, MINN. H.R., INFORMATION BRIEF, CHARTER SCHOOLS (2005), <http://www.house.leg.state.mn.us/hrd/pubs/chrtschl.pdf> (describing Minnesota’s charter school laws).

338. See *Keyes*, 413 U.S. at 193, 208.

339. *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 26 (1971).

340. See *Keyes*, 413 U.S. at 208.

341. See Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 Yale L.J. 317, 319–320 (1976) (discussing the implications of a broad application of the *Keyes* presumption).

342. *Keyes*, 413 U.S. at 211.

In other words, applying *Keyes* to racially targeted charter schools reduces the sense that they are being unfairly singled out. Instead, it places these schools in their appropriate context: as the most visible extension of a broadly segregated educational system, which, to this day, through novel policies and practices, educates children along racial lines.

D. Implications for Remedies

Once a finding of a dual system is made, courts have an obligation to dismantle that system “root and branch.”³⁴³ Under *Swann*, they also have enormous remedial authority to do so.³⁴⁴ This includes the authority to evaluate attendance according to flexible racial ratios; to create or alter attendance boundaries; to arrange for transportation of children; to monitor school closings and openings; and to attempt to eliminate single-race schools if they originate from unconstitutional segregation.³⁴⁵

It is beyond the scope of this article to provide an overview of the full array of equitable powers available to a court when attempting to resolve a dual system. Over the past half-century, a great many approaches have been tried; some have failed—often because of limited scope—while others have broadly succeeded.³⁴⁶ Modern-day courts pursuing desegregation will have the benefit of hindsight and historical experience. And scholars have made great progress in sorting between effective and ineffective desegregation remedies.³⁴⁷

But relying on racially targeted charter schools to support a finding of a dual system also gives modern-day courts an advantage their historical predecessors did not have. Because previous findings

343. *Id.* at 213 (citing *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 438 (1968)).

344. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22–31 (1971).

345. *Id.*

346. See, e.g., Rachel Cohen & Will Stancil, *Will America's Schools Ever Be Desegregated?*, PACIFIC STANDARD (Dec. 5, 2017), <https://psmag.com/education/will-americas-schools-ever-be-desegregated/>; Alana Semuels, *The City that Believed in Desegregation*, THE ATLANTIC (Mar. 27, 2015), <https://www.theatlantic.com/business/archive/2015/03/the-city-that-believed-in-desegregation/388532/> (discussing the attempts of Louisville, Kentucky and the surrounding area to integrate their public-school system).

347. See, e.g., Mark Kelley, *Saving 60(b)(5): The Future of Institutional Reform Litigation*, 125 YALE L.J. 272, 301 (2015) (explaining that through the holding of *Horne v. Flores*, the Supreme Court made it easier for state and local institutions to modify or dissolve the institutional reform decrees to which they are bound).

of a dual system all focused on traditional, geographically constrained districts, they were sharply limited by the equity principles in *Milliken*.³⁴⁸ Remedies, powerful though they were, could not be easily extended across district lines.

Charters alter this reasoning. Charter schools' enrollment reaches across district lines—as do their segregative effects. A court empowered to remedy a dual system including charters could exercise the full array of powers envisioned in *Swann*, but would not necessarily face the geographic limitations of *Milliken*.³⁴⁹ Freed of those limitations, many new remedial possibilities emerge.

V. A FINAL NOTE

It is easy to imagine objections to the conclusions above. After all, they envision aggressive application of judicial precedent that has lain mostly dormant for years. If carried through to their logical end, they reopen the way to large-scale remedial school desegregation, restarting a process that was thought to have mostly concluded decades ago. This could subject a high number of American schools—potentially even the vast majority of schools—to aggressive desegregation remedies, once again bending courts towards the task of eliminating the stain of unconstitutional discrimination. People are naturally wary of such broad measures.

Should they be? Perhaps not. *Brown*, *Swann*, and *Keyes* are all still good law.³⁵⁰ But more importantly, the underlying logic of those cases is sound, and does not become any less sound when applied to modern factual circumstances.

When the state permits the creation of racially classified schools, should it not be a sign that broad measures are needed? Policymakers are not blind to the types of charter schools their rules and laws are producing. They are not deaf to the appeals of civil rights advocates, who point to the open racial sorting many charters engage in. And they are surely not ignorant of how charters can be used to sustain and intensify existing patterns of educational segregation.

To the extent that those policymakers are using charter schools as an instrument of resegregation, why should the presumptions of *Keyes* not apply? Is it not reasonable to suspect that the same

348. See *Milliken v. Bradley*, 418 U.S. 717, 753 (1974).

349. See *id.* at 790.

350. See *supra* Part II.

segregative motives that resulted in an all-white “classical academy” might also result in the creation of an all-black “no excuses” school? Is it hard to believe that a lawmaker who approves of one might also approve of the other? History shows us that these ideas have often traveled together.

Keyes said that “[w]here school authorities have been found to have practiced segregation in part of a school system, they may be expected to oppose system-wide desegregation.”³⁵¹ Has the nation’s experience with segregated charters, serving segregated cities, suggested that this expectation needs to be in any way amended? Do we see the purveyors of racially isolated charters racing to integrate nearby traditional schools?

Today, many charters claim to have discovered the wisdom of dividing students into racial groups. How new is this wisdom, really?

In the end, if we have trouble accepting the enormous consequences of applying school desegregation law to charter schools, it may not be because the law is ill-considered or wrongly applied. It may be because we are—still—not prepared to confront the enormity of our legacy of school segregation.

351. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973).

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