The Color of Choice: Race and Charter Schools

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This Article critiques the ever-expanding charter school movement from an Equal Protection standpoint. The author argues that some charter schools that are exclusively geared toward one racial or ethnic group—whether it be African American, Asian, Latino, Native American, or white—are unconstitutional, even if the schools employ a racially neutral student admissions policy. Mild attempts at integration, however, are constitutional. When states require (as twelve states do) that their charter schools seek racial and ethnic balance, the states are not engaged in unconstitutional race conscious decision making. Further, school desegregation principles adequately protect the school desegregation process from encroachment by charter schools. Thus, this analysis reveals a Supreme Court that is, to a limited degree, prointegration, but opposed to any explicit attempt at segregation, even if that segregation is done in the best interests of the child.

I. CHARTER SCHOOL PRIMER ............................................................. 574
   A. The Basics ............................................................................. 574
      1. Requesting Authority....................................................... 575
      2. Authorizing Authority..................................................... 575
      3. The Charter..................................................................... 576
      4. Curriculum and Instruction .......................................... 576
      5. Student Enrollment ......................................................... 577
      6. Racial and Ethnic Balance ............................................. 578
   B. Equal Protection Concerns .................................................. 581

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563
Today choice is a popular way to reform American education, deemed as failing. By offering parents a variety of schools in which to educate their children (a “cafeteria” plan, if you will), the theory predicts improved educational outcomes.¹ In practice, the choice

¹ This stands in stark contrast to the 1970s, when busing away from the neighborhood school was the evil. In response to busing for desegregation purposes, both the federal government and states enacted legislation lauding neighborhood schools. In 1974, Congress passed the Equal Education Opportunities and Transportation of Students Act. 20 U.S.C. §§ 1701-1758 (1994). The Act declared that “the policy of the United States [is] that . . . the neighborhood is the appropriate basis for determining public school assignments.” Id. § 1701(a); cf. OKLA. STAT. ANN. tit. 70, § 1210.203 (West 1998) (requiring since 1970 that “[i]nsofar as practicable, each pupil shall be assigned to the school nearest his residence”).
theory has supported a variety of programs. For example, Arizona grants parents the choice of any public school in the state; Milwaukee offers publicly funded vouchers for private schools, whether they are religious or not; Illinois allows a tax credit for private school tuition; and private groups fund vouchers for New York City private schools.


3. Wis. Stat. Ann. § 119.23 (West Supp. 2000) (Milwaukee Parental Choice Program); see also infra note 7 (discussing constitutional challenges to the Milwaukee program and other voucher programs).


5. The privately funded vouchers are essentially scholarships for primary and secondary pupils to attend private schools. The Children's Scholarship Fund (CSF) is the largest, with an initial fund of $180 million. Edward Wyatt, Financier Uses Scholarships to Spur Action, N.Y. Times, May 20, 2000, at B1. Even though parents must contribute up to $1000 a year toward tuition, the response has been overwhelming. Id. In 1999, close to 1,250,000 parents competed for 40,000 scholarships, which were awarded by a lottery. Id.; see also Paul E. Peterson, School Choice: A Report Card, 6 Va. J. Soc. Pol'y & L. 47, 60-62 (1998) (discussing the availability of private vouchers). The CSF subsequently created special funds for New York City. See Wyatt, supra; see also Lynette Holloway, Many Students Are Using School Vouchers Financed by Private Donation, N.Y. Times, Mar. 7, 1999, § 1, at 43 (describing other private scholarship funds for New York City students). A similar program is the Children's Educational Opportunities Foundation. The Foundation's Horizon program offers private vouchers to all low-income students living in the Edgewater Independent School District, a predominately Hispanic, low-income school district in San
The most widely and rapidly growing available choice today is a charter school—essentially a public school exempt from a variety of legal obligations in exchange for the promise of delivering particular results. With charter schools, children can decide between their assigned public school or one of a number of charter schools, which can offer a range of educational programs. While the public voucher programs in Cleveland, Florida, and Milwaukee have been enmeshed in litigation over the constitutionality of including religious private schools, the charter school movement has flourished. The first

Antonio, Texas. See Anastasia Cisneros-Lunsford, First-Grader Set to Get Horizon School Voucher, SAN ANTONIO EXPRESS-NEWS, June 17, 1998, at 1B.

6. Charter schools vary greatly from state to state. A more detailed definition of charter schools can be found infra Part I.A.

7. Four Supreme Court Justices clearly appear willing to support public vouchers to religious schools. See Mitchell v. Helms, 120 S. Ct. 2530, 2544 (2000) (plurality opinion) (finding that "[i]f aid to schools, even 'direct aid,' is neutrally available and ... first passes through the hands ... of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion'""). Less certain is whether a fifth Justice will also support such vouchers. See id. at 2556 (O'Connor, J., concurring, joined by Breyer, J.) (finding the plurality's opinion "troubling" in its treatment of neutrality of aid).

The Milwaukee voucher program, modified after it was held unconstitutional under the Wisconsin state constitution, includes religious schools. See Jackson v. Benson, 578 N.W.2d 602, 607-09 (Wis. 1998).

The Cleveland program has been declared unconstitutional. See Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000) (holding that the voucher program in Cleveland violated the Establishment Clause). See generally Margaret A. Nero, Case Comment, The Cleveland Scholarship and Tutoring Program: Why Voucher Programs Do Not Violate the Establishment Clause, 58 OHIO ST. L.J. 1103 (1997) (examining Simmons-Harris and Supreme Court precedent in this area and concluding that the Cleveland program is constitutional).

Florida's Opportunity Scholarship Program gives publicly funded vouchers to students who have attended a school that has been deemed to be "failing" two out of the previous four years. Fla. Stat. Ann. § 229.0537 (West Supp. 2000). This choice includes public, religious, or private schools. See id. A state appeals court reversed a ruling that the program was unconstitutional under the Florida Constitution's requirement that the state fund free education through a system of "public" schools; the federal claims regarding the Establishment Clause violation are now being litigated. See Mark Walsh, Fla. Court Overturns Ruling Against Voucher Program, EDUC. Wk., Oct. 11, 2000, at 19. Vouchers in Florida recently meet another roadblock: Only two schools are now deemed "failing" because of an increase in test scores. See Jessica L. Sandham, Vouchers Stall as Fla. Schools Up Their Scores, EDUC. Wk., July 12, 2000, at A1; Walsh, supra. Efforts for vouchers for religious schools in Massachusetts have been denied on state constitutional grounds. See John Gehring, Two Strikes Hit Mass. Effort to Repeal Voucher Barrier, EDUC. Wk., June 7, 2000, at 20.

Public voucher programs exist elsewhere. Puerto Rico also has a publicly funded voucher program for private and parochial schools. See James A. Peyser, School Choice: When, Not If, 35 B.C. L. Rev. 619, 631 (1994). Maine and Vermont also provide vouchers, but the programs are less controversial. The two states pay the tuition for students in rural school districts without their own public schools but exclude religious schools from the program. Challenges to the exclusion of religious schools have failed. See Strout v. Albanese, 178 F.3d 57, 66 (1st Cir.) (upholding the Maine program), cert. denied, 120 S. Ct.
opened in 1992, and in seven years, the number of charter schools grew to more than 1600, educating 430,000 students in thirty-one states and the District of Columbia. The number would be even higher if space were available: Seven out of ten charter schools currently maintain waiting lists. Charter schools enjoy broad bipartisan, multiracial support, and even have their own week of national celebration.

329 (1999); Bagley v. Raymond Sch. Dep’t, 728 A.2d 127, 147 (Me.) (also upholding the Maine program), cert. denied, 120 S. Ct. 364 (1999); Chittenden Town Sch. Dist. v. Dep’t of Educ., 738 A.2d 539, 563-64 (Vt.) (holding that Vermont’s tuition reimbursement program must exclude sectarian schools), cert. denied, 120 S. Ct. 626 (1999). Students enrolled in the Houston Independent School District who are personally not succeeding and are attending a “low performing” school are entitled to enroll in a few nonreligious private schools through the school district’s program of “educational contracting.” Darcia Harris Bowman, Voucher-Style Program Offers Clues to Paige’s Outlook, EDUC. Wk., Jan. 10, 2001, at 39. Only two students have been able to take advantage of the program because few qualified private schools have agreed to accept the vouchers. See Melanie Markley, HISD Chief Will Discuss Private Option, HOUSTON CHRON., June 6, 2000, at 17A.


10. See generally Daniel, supra note 4, at 35 (discussing the Bush administration’s support of choice); Stephen Eis dorfer, Public School Choice and Racial Integration, 24 SETON HALL L. REV. 937, 937 (1993) (discussing Presidents Reagan and Bush’s support of charter schools); William Haft, Charter Schools and the Nineteenth Century Corporation: A Match Made in the Public Interest, 30 ARIZ. ST. L.J. 1023, 1026 n.16 (1998) (commenting that, “[g]iven the current widespread political support for education reform and the popularity of charter schools, it is difficult to find any public political statements of opposition or even resistance to charter school reform”); Helen Hershkoff & Adam S. Cohen, School Choice and the Lessons of Choctaw County, 10 YALE L. & POL’Y REV. 1, 1 (1992) (reporting President Bush’s support for choice); Peterson, supra note 5, at 53 (describing the support of President Clinton and Bob Dole); Jonathan Schorr, Giving Charter Schools a Chance, NATION, June 5, 2000, at 19, 20 (arguing that “[c]haracters ought to be on the agenda for the left, in part because of their potential to serve as tools of racial and economic justice”). Only teachers’ unions can be counted on to oppose charter schools. See Haft, supra, at 1026 n.16; Peyser, supra note 7, at 622.

11. See generally JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA’S SCHOOLS 206 (1990) (documenting the widespread parental support for choice); Robin D. Barnes, Black America and School Choice: Charting a New Course, 106 YALE L.J. 2375 (1997) (arguing that the charter school movement provides a good opportunity to better the education afforded African-American children); Kevin J. Dougherty & Elizabeth Sostre, Minerva and the Market: The Sources of the Movement for School Choice, in THE CHOICE CONTROVERSY 21, 31-33 (Peter W. Cookson, Jr. ed., 1992) (concluding that African-Americans support choice more than whites); Peterson, supra note 5, at 56-57 (reviewing polling data on support for vouchers by African-Americans, Hispanics, and whites); Smith, supra note 2, at 276-77 (describing polling data on widespread support for choice); Joseph P. Viteritti, Reaching for Equality: The Salience of School Choice, 14 J.L. & POL. 469, 479
Choice may be as American as "apple pie," but so is racism and separatism, and choice has a history of unlawfully segregating students. For example, to avoid placing a child of color next to a white child in the wake of Brown v. Board of Education, states funded private white academies as a way of allowing white parents to choose a free segregated education, and school districts adopted "freedom of choice" plans whereby all parents picked the public school that their child would attend. Because of this history and the resulting (and very much intended) segregation, one frequent concern with the choice movement is its racial ramifications.


17. See, e.g., JEFFREY R. HENIG, RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR (1994) (recognizing a great potential for choice to lead to increased
Relevant data and evaluation reports on segregation in charter schools, most of it produced or commissioned by individual state departments of education, are just now becoming available.\textsuperscript{18} As a group, charter schools are not white or minority enclaves; rather, they are slightly disproportionately minority.\textsuperscript{19} The overall enrollment figures, however, mask segregation that occurs at the individual school level. Some charter schools are integrated, but many others are deeply segregated.\textsuperscript{20} The United States Department of Education has identified twelve states with particularly segregated charter schools (as compared to their surrounding school district),\textsuperscript{21} but that report likely underestimates the level of segregation at the individual school level.\textsuperscript{22}

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\textsuperscript{18} Kevin B. Smith & Kenneth J. Meier, The Case Against School Choice 76-77 (1995) (arguing that "[c]hoise seems to have a real potential to exacerbate the already considerable problems of de facto segregation in the public school system"); Judith Johnson & Alex Medler, The Conceptual and Practical Development of Charter Schools, 11 Stan. L. & Pol'y Rev. 291 (2000) (reporting the widespread concern of increased segregation when charter schools first began).

\textsuperscript{19} A more thorough examination of these studies can be found infra Part II and Appendix.

\textsuperscript{20} Nationally, charter schools enroll eleven percent fewer white students than the public schools, seven percent more African-American students, and three percent more Hispanic students, as compared to the overall student enrollment patterns in the states with open charter schools. See Charter Schools 2000, supra note 8, at 30.

\textsuperscript{21} See infra Part III.A (analyzing student enrollment patterns in charter schools).

\textsuperscript{22} The Department of Education defines a charter school as segregated when its white student enrollment is more than plus or minus twenty percent of the white student population in the surrounding school district. See Charter Schools 2000, supra note 8, at 32. As the Texas evaluation report notes, the twenty percent standard is quite generous. Div. of Charter Sch., Tex. Educ. Agency, Texas Open-Enrollment Charter Schools: Third Year Evaluation, March 2000, at 20 tbl. II.6 (2000) (prepared for the Texas Education Agency by four education research groups) [hereinafter Texas Third Year Evaluation], available at www.tea.state.tx.us/charter/eval99/index.html. Although Texas public schools are traditionally considered to be segregated, the average Texas public school meets a plus or minus nine percent standard. Id. More fundamentally, by focusing only on the white student population, the Department of Education fails to capture a great deal of segregation. For example, when the Texas evaluation applied the Department of Education standard, only thirty percent of the charter schools were deemed segregated. See id. at 19. When the plus or minus twenty percent standard was applied to each of the three predominant racial and ethnic groups in Texas, the number of segregated charter schools more than doubled, to sixty-five percent. See id.

Moreover, individual state evaluation reports have defined their charter schools as too segregated, even when the Department of Education report did not. For example, one evaluation report of the state with the highest number of charter schools, Arizona, concluded that Arizona charter schools had greater segregation than their nearest public schools. See Casey D. Cobb & Gene V. Glass, Ethnic Segregation in Arizona Charter Schools, 7 Educ. Pol’y Analysis Archives 1 tbl. 12 (Jan. 14, 1999), at http://epaa.asu.edu/epaa/v7n1/ (concluding that "[r]elative to students in the public comparison schools, charter students
For many advocates of choice, the racial makeup of the chosen school is of no consequence. Quality is the only concern, and integration is not part of the quality calculus. Yet, the choice movement is generally sensitive to the potential of segregation, in part because the impact of choice on segregation is considered by many to be important in deciding whether to support school choice.

Even more fundamentally, the choice movement cannot excuse itself from racial concerns. Charter schools may be exempt from a wide variety of educational rules, but no one contends that charter schools can define themselves outside the Equal Protection Clause. A charter school, funded with local and state money and approved by state actors, obviously cannot enroll students according to a racially

were more likely to be found in ethnically concentrated schools"); see also Legislative Office for Educ. Oversight, Community Schools in Ohio: First-Year Implementation Report, at ii (2000) (finding substantial disproportionate enrollment in Ohio charter schools).

23. For simplicity, I use the terms "race" and "racial" to include the concepts of "ethnicity" and "ethnic." The Supreme Court's Equal Protection jurisprudence, which is the focus of this Article, makes no legal distinction between race and ethnicity. Only when the terms "ethnicity" or "ethnic" are specially necessary from a legal standpoint—most often when the legislation itself uses the terms—are they used.

24. See Martha Minow, Reforming School Reform, 68 Fordham L. Rev. 257, 272 (1999) (predicting that, "[u]nless choice initiatives try to address the goal of equality along with quality, they will become illegitimate in the eyes of those still committed to the prior wave of reform"); Gary Orfield, School Desegregation After Two Generations: Race, Schools, and Opportunity in Urban Society, in Race in America: The Struggle for Equality 234, 249 (Herbert Hill & James E. Jones, Jr., eds., 1993) (arguing that choice advocates should use "careful planning" to avoid racial segregation).

Choice advocates frequently argue that choice will not foster segregation. See Smith & Meier, supra note 17, at 76-77 (noting that choice advocates often point to private schools in response to claims that choice will lead to segregation); Carol Ascher, Retravelling the Choice Road, 64 Harv. Educ. Rev. 209, 214 (1994) (referencing the "common contention among choice advocates . . . that school choice can 'naturally' desegregate schools"); Peyer, supra note 7, at 626 (arguing that "choice enhances equity by weakening the links between wealth, geography and educational opportunity"); see also infra notes 188-190 and accompanying text (discussing social science research on the connection between choice and segregation).


restrictive student assignment policy. This Article considers three more complicated Equal Protection issues implicated in the charter school movement.

First, twelve states require that their respective charter schools seek a racial and ethnic student enrollment reflective of the surrounding school district. South Carolina’s entire charter school legislation was struck down in May 2000, when a state trial judge declared the state’s racial and ethnic balance provision to be unconstitutional race-conscious decision making. In Part I of this Article, after briefly describing the charter school process, I argue that the judge in that case incorrectly defined the racial and ethnic balance provisions as a racial classification. Although the balance statutes explicitly mention race and ethnicity, a court should generally review these statutes as a form of “non-preferential affirmative action” under a rational basis analysis, rather than strict scrutiny. Under that standard, the balance provisions in South Carolina and elsewhere are constitutional.

Second, some charter schools offer curricula and instruction designed to educate one racial group. Schools offering an Afrocentric-, Armenian-, Hispanic-, Italian-, or Native American-focused curricula not surprisingly attract a like student population. In Part II, I review the literature on the segregation in charter schools and argue that some segregated charter schools likely segregate unconstitutionally on the basis of race.

A third concern is the relationship between school desegregation litigation and charter schools. Some have expressed the concern that school desegregation, with the attending all encompassing orders, will

27. Indeed, most charter school legislation specifically prohibits discrimination in admission. See infra note 151 and accompanying text.
28. See infra Part I.A.6 (reviewing the legislation).
29. See infra notes 161-167 and accompanying text (examining the South Carolina case).
30. See Michelle Adams, The Last Wave of Affirmative Action, 1998 Wis. L. Rev. 1395, 1396 (calling such action “soft” affirmative action); see also Kim Forde-Mazrui, The Constitutional Implications of Race-Neutral Affirmative Action, 88 GEO. L.J. 2331, 2332, 2335 (2000) (defining “policies designed to create racial diversity without relying on racial preferences” as “alternative action” and also using the term “race-neutral affirmative action”).
31. See infra Part I.B.5 (arguing that the legislation survives a rational basis analysis).
32. See Minow, supra note 24, at 282 (characterizing choice theories as “premised on self-segregation and sorting, and ... encouraging [ing] competitors to slice off sectors, to skim for excellence, to celebrate competition over dialogue, and exit over debate”).
33. See infra notes 192-195 and accompanying text (providing examples of centric charter schools not reflective of their surrounding school districts).
34. See infra Part II.B.
forestall the charter movement.\textsuperscript{35} Others have expressed a different concern—that charter schools will be used to avoid school desegregation obligations.\textsuperscript{36} In Part III, I argue that school desegregation has hampered the charter school movement in only a few situations and that imposing school desegregation obligations on charter schools is entirely appropriate.\textsuperscript{37} I also contend that charter schools have had a minimal effect on the desegregation process to date.\textsuperscript{38}

These three concerns have been largely ignored in the existing legal scholarship surrounding choice. Many have examined the constitutionality of publicly funded vouchers to religious schools,\textsuperscript{39} but legal scholarship on the interaction between choice and race is sparse.\textsuperscript{40} Further, while much has been written about the important and difficult question of the desirability of Afrocentric schooling and about the constitutional need for race-neutral student admissions,\textsuperscript{41} few address a different concern examined here.\textsuperscript{42} Can charter schools be

\textsuperscript{35} See infra notes 284-285, 290-298 and accompanying text.
\textsuperscript{36} See infra notes 299-307 and accompanying text.
\textsuperscript{37} See infra Part III.
\textsuperscript{38} See infra notes 290-298 and accompanying text.
\textsuperscript{40} For legal scholarship at least recognizing the issue, see Eleanor Brown, Black Like Me? "Gangster" Culture, Clarence Thomas, and Afrocentric Academies, 75 N.Y.U. L. REV. 308, 351 n.181 (2000) (raising the issue); Jonathan B. Cleveland, School Choice: American Elementary and Secondary Education Enter the "Adapt or Die" Environment of a Competitive Marketplace, 29 J. MARSHALL L. REV. 75, 139-43 (1992) (discussing the desegregation implications of charter schools); Daniel, supra note 4, at 38-39, 47-52 (examining the Equal Protection implications of charter schools); Bisdorfer, supra note 10, at 954-57 (considering the Equal Protection concerns surrounding choice); Haft, supra note 10, at 1045-46 (raising constitutional questions but not answering them).
\textsuperscript{41} See, e.g., Brown, supra note 40, at 323; Kevin Brown, Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education, 78 IOWA L. REV. 813 (1993); Sonia R. Jarvis, Brown and the Afrocentric Curriculum, 101 YALE L.J. 1285 (1992); Smith, supra note 2, at 299. For a discussion of the opposition to Afrocentric curriculum, see Brown, supra note 40, at 310 n.4, 343-51. For information regarding the establishment of Afrocentric schools in various cities, see id. at 309 n.3 (Detroit, Milwaukee, and Pittsburgh); id. at 311 nn.6-7 (Washington, D.C. and Kansas City); id. at 320 n.33 (New York City); Haft, supra note 10, at 1046-47 & nn.136-37 (Detroit); Sharon Keller, Something to Lose: The Black Community's Hard Choices About Educational Choice, 24 J. LEGIS. 67, 75-81 (1998) (Detroit).
\textsuperscript{42} Three articles raise the issue at least indirectly. See Brown, supra note 40, at 351 n.181 (recognizing that Afrocentric schools may violate the Fourteenth Amendment and
exclusively geared toward one racial group—whether it be African American, Native American, Asian, Latino, or white—even if the schools employ a racially neutral student admissions policy?\textsuperscript{43}

This Article undertakes a purely interpretative aim: How would the Supreme Court's Equal Protection jurisprudence answer these questions?\textsuperscript{44} The conclusions, however, have normative implications. For example, these questions offer important insights as to the Court's discrimination jurisprudence. Interestingly, application of Supreme Court case law to charter schools reveals that states can pursue integration in their charter schools, but only by limited means, and that some, but not all, segregated charter schools likely violate the Equal Protection Clause.\textsuperscript{45} Thus, applying Supreme Court jurisprudence, on its own terms, to charter schools reveals a Court that is, to a limited degree, prointegration, but opposed to any explicit attempt at segregation, even if that segregation is done in the best interests of the child, and particularly if that segregation involves minority segregation.\textsuperscript{46} Those who support charter schools as an avenue to apparently advocating a nondiscriminatory admissions policy, but not discussing whether Afrocentric schools can be unconstitutional, even with a nondiscriminatory admissions policy; Jarvis, supra note 41, at 1297-1302 (tackling the issue from a First Amendment and unequal outcomes approach); Keller, supra note 41, at 87, 95 (allowing that Afrocentric academies are "vulnerable to legal challenge because the selection of the curriculum is so race-aware," which will, in turn, limit the use of choice for a "strong Afrocentric male academy"). A student note argues that public schools should be able to limit admission to African-American schools under the Fourteenth Amendment, but the argument depends heavily on Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), which was overruled by Adarand Contractors, Inc. v. Pena, 515 U.S. 200 (1995). See Christopher Stetskal, Note, Creating Space for Racial Difference: The Case for African-American Schools, 27 HARV. C.R.-C.L. L. REV. 187 (1992).

43. See infra Part II.B.5.


45. See infra Part II.B.

46. See infra notes 240-242 and accompanying text (arguing that the Supreme Court's baseline for evaluating discrimination is based on the dominant white culture, which makes the Court more ready to see discrimination when segregation is pursued for minority-based reasons).
create schools designed to educate one race may need to re-think their position.\footnote{For example, the National Alliance of Black School Educators supports Afrocentric charter schools. See Brown, supra note 40, at 320 n.33. The Urban League has also sponsored Afrocentric charter schools. See, e.g., CHARTER SCHOOL DIRECTORY, supra note 8, at 203 (Urban League of Pittsburgh Charter School); Deb Kollars, Charter School Plan to Go to Grant Board, SACRAMENTO BEE, July 16, 2000, at B1 (Greater Sacramento Urban League). Not all Urban League schools have an Afrocentric focus. See PEARL ROCK KANE, NEW JERSEY CHARTER SCHOOLS: THE FIRST YEAR 1997-98, at 51 (1998) (describing the Jersey City Community Charter School, founded by the Urban League of Hudson County, as modeled after state curricular standards).}

I. CHARTER SCHOOL PRIMER

A. The Basics


For a more detailed examination of charter school legislation, see Haft, supra note 10, at 1034-41. The Center for Education Reform also maintains a comprehensive Internet site analyzing each state’s law. That site can be found at http://www.edreform.com. State
most directly implicate the Equal Protection Clause: requesting authority, authorizing authority, the charter itself, curriculum and instruction, student enrollment, and racial and ethnic balance provisions. Each is discussed in turn below.

1. Requesting Authority

In most states, anyone or any organization can request a charter.53 Sororities,54 involved parents, for-profit companies,55 concerned teachers, and advocacy groups have the means to access public education money, and all have received charters in one state or another. This is entirely consistent with the charter school movement that heralds a need for new ideas and competition to improve education for everyone. By offering public education money to a large group, the charter movement predicts that new ideas and competition will foster educational improvement for all students.

2. Authorizing Authority

While almost all states allow almost anyone or any group to petition for a charter school, legislation can be more restrictive on who can grant a charter. Usually, either a school district, with some right of appeal to the state board of education, or the state board of education can be an authorizing agency.56 Several states also permit higher

constitutional challenges to charter school legislation have largely failed. See Haft, supra note 10, at 1050-56.


54. For example, the Alpha Kappa Alpha sorority organized the Ethel Hedgeman Lyle Academy in St. Louis, Missouri. See Matthew Franck, 800 Pupils Already Have Enrolled in Three Charter Schools in St. Louis, St. Louis Post-Dispatch, Apr. 18, 2000, at A1.


education institutions to grant a charter school petition. In reviewing a petition for public money for a charter school, the authorizing entity performs more than a ministerial function. Rather, the authorizing agency must evaluate the petition according to legislatively specified standards. Approval is not automatic, and charters can be subsequently revoked by the authorizing agency for noncompliance with the terms of the charter or applicable law.

3. The Charter

A charter school is created when a requesting authority petitions for charter school funding and that petition is granted by an authorizing agency. The charter, or contract, between the requesting authority and authorizing agency details almost all aspects of the charter school, i.e., its location, board of trustees, teachers and staff, student admission policies, curriculum, instruction, evaluation, and transportation means. The charter must also specify what the charter school promises to achieve. The terms of the charter must be approved by the authorizing agency. The charter is valid for a specified term, typically at least five years.

4. Curriculum and Instruction

Although many states require their charter schools to participate in statewide accountability measures such as standardized tests, charter schools are not confined to a particular curricular or instructional approach, so long as the approach is nonsectarian. Indeed, the charter school is intended to foster new approaches, and innovative curriculum and instruction are key parts of educational reform. Thus, it is entirely appropriate for a school to tailor its

57. E.g., FLA. STAT. ANN. § 228.056(3) (West Supp. 2000); MICH. COMP. LAWS ANN. § 380.501(2)(a) (West 1997); MINN. STAT. ANN. § 124D.10(3) (West Supp. 2001); MO. ANN. STAT. § 160.400(2) (West 2000); N.Y. EDUC. LAW § 2851(1) (Mckinney Supp. 2000); N.C. GEN. STAT. § 115C-238.29B(e)(2) (1999); WIS. STAT. ANN. § 118.40(2r)(2)(b) (West 1999).


curriculum or instruction to appeal to a particular section of parents; in fact, charter schools are dependent on parental support (as exercised by choice), which can be garnered by a variety of techniques.

5. Student Enrollment

Most, if not all, states require that students be enrolled on a first-come, first-served basis. In cases of over-subscription, students are selected through a mandatory lottery. Even the few states that do not explicitly require selection by lottery are likely to still use lotteries. Federal charter funds are only available to schools employing a lottery in cases of overenrollment, and the Department of Education has worked actively with states to enforce this requirement. Few other enrollment requirements restrict admission in any meaningful fashion. Many states do, however, allow charter schools to focus on at-risk children.

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62. This is contrary to the admissions policies advocated by John E. Chubb and Terry M. Moe. In their influential book advocating choice, they argue that schools should be able to base their enrollment "on whatever criteria they think relevant," so long as they are nondiscriminatory. Chubb & Moe, supra note 11, at 221-22.


65. See Johnson & Medler, supra note 17, at 300 (reporting that the Department of Education has required Colorado and New Mexico to use lotteries in order to receive federal charter school funds).

66. For example, charter schools can be limited to students in the surrounding school district, e.g., COLO. REV. STAT. ANN. § 22-30.5-104(3) (West Supp. 1999), or open to all students in the state (usually with preference to students in the school district), e.g., ARIZ. REV. STAT. ANN. § 15-184(A) (West Supp. 1999); CAL. EDUC. CODE § 47,605(d)(2)(B) (Deering Supp. 2000); DEL. CODE ANN. tit 14, § 506(a) (1999); IDAHO CODE § 33-5206(1) (Michie Supp. 2000). But enrollment tied to academic record, interests, or discipline rates is rare. See, e.g., ALASKA STAT. § 14.03.265(a) (Michie 1998) (allowing charter schools to "be designed to serve ... students who will benefit from a particular teaching method or curriculum"); DEL. CODE ANN. tit 14, § 506(b)(3)(c) (1999) (providing a preference to students with an interest in the charter's subject matter or teaching style); TEX. EDUC. CODE ANN. § 12.111(6) (Vernon Supp. 2000) (allowing that "the charter may provide for the exclusion of a student who has documented history of a criminal offense, a juvenile court adjudication, or discipline problems under Subchapter A, Chapter 37," the general discipline provision for Texas public schools). Most states specifically deny the basis of admission on academic and achievement measures. See, e.g., OHIO REV. CODE ANN. § 3314.06(B) (West Supp. 2000) (providing "[t]hat the school may not limit admission to students on the basis of
6. Racial and Ethnic Balance

Twelve states have passed legislation addressing the racial and ethnic composition of their charter schools. Nevada and South Carolina have the most specific provisions; both require the charter school population to be within plus or minus ten percentage points of a specified student population. More common is requiring charter schools to seek an undefined racial and ethnic balance in their student enrollment. Wisconsin’s approach is typical. It requires that the charter school petition include “[t]he means by which the school will achieve a racial and ethnic balance among its pupils that is reflective of the school district population.” California, Connecticut, Florida, Kansas, Minnesota, New Jersey, North Carolina, Ohio, and Wyoming have similar laws. Authorizing agencies can deny charter school

intellectual ability, measures of achievement or aptitude, or athletic ability”). Only a handful of states allow enrollment to be limited to a particular geographic area other than school district boundary lines. See id. § 3314.06(B) (allowing “[t]hat admission to the school may be limited to . . . residents of a specific geographic area within the district, as defined in the contract”). Texas allows the charter to specify the served geographic area. See TEX. EDUC. CODE ANN. § 12.055(b) (Vernon Supp. 2000) (statute for campus or program charter); id. § 12.111(13) (statute for open-enrollment charter school).

67. See infra notes 186-187 and accompanying text (discussing at-risk provisions as an excuse for minority segregation).

68. Specifically, Nevada requires that

[i]f the board of trustees of the school district in which the charter school is located has established [attendance zone lines for traditional schools], the charter school shall, if practicable, ensure that the racial composition of pupils enrolled in the charter school does not differ by more than 10 percent from the racial composition of pupils who attend public schools in the zone in which the charter school is located.

NEV. REV. STAT. ANN. § 386.580(1) (Michie 2000). South Carolina is even more stringent: “U[nder no circumstances may a charter school enrollment differ from the racial composition of the school district by more than ten percent.” S.C. CODE ANN. § 59-40-50(B)(6) (Law. Co-op. 1999). Thus, the Nevada statute is written in terms of practicality, while the South Carolina statute is written as an absolute rule.

69. WIS. STAT. ANN. § 118.40(1m)(b)(9) (West 1999).

70. See CAL. EDUC. CODE § 47,605(b)(4)(G) (Deering Supp. 2000) (providing that a charter school petition may be rejected for failing to provide the “means by which the school will achieve a racial and ethnic balance among its pupils that is reflective of the general population residing within the territorial jurisdiction of the school district”); CONN. GEN. STAT. ANN. § 10-66bb(c)-(d) (West Supp. 2000) (requiring that “the State Board of Education shall consider the effect of the proposed charter school on the reduction of racial, ethnic and economic isolation in the region in which it is to be located” and that petitions “include a description of . . . the student admission criteria and procedures to . . . promote a diverse student body”); FLA. STAT. ANN. § 228.056(9)(a)(8) (West Supp. 2000) (mandating that the charter application include “[t]he ways by which the school will achieve a racial/ethnic balance reflective of the community it serves or within the racial/ethnic range of other public schools in the same school district”); KAN. STAT. ANN. § 72-1906(d)(2) (Supp. 1998) (requiring that “pupils in attendance at the [charter] school must be reasonably reflective of the racial and socio-economic composition of the school district as a whole”); MINN. STAT.
applications or terminate charters for failure to comply with these provisions.\footnote{71}

\footnote{71} In California, a petition may be denied if it “does not contain reasonably comprehensive descriptions” of how the racial and ethnic balance will be achieved. \textsc{Cal. Educ. Code} § 47,605(b)(5)(G) (Deering Supp. 2000). In Connecticut, the state board of education must consider the proposed charter school’s racial and ethnic impact. \textsc{Conn. Gen. Stat. Ann.} § 10-66bb(e) (West Supp. 2000). Florida states that the “criteria for approval of the charter shall be based on” a variety of factors, including the racial and ethnic balance provisions. \textsc{Fla. Stat. Ann.} § 228.056(9)(a) (West Supp. 2000). Kansas mandates that racial and ethnic balance provisions are required “to qualify for establishment or continuation.” \textsc{Kan. Stat. Ann.} § 72-1906(d) (Supp. 1998). Minnesota’s handling of racial and ethnic balance is more permissive, allowing that “[a] charter school may limit admission to” predominately nonwhite neighborhoods “as long as the school reflects the racial and ethnic diversity of the specific area.” \textsc{Minn. Stat. Ann.} § 124D.10(9) (West Supp. 2000). New York’s law states that the student admission policy “shall, to the maximum extent practicable, seek the enrollment of a cross section of the community’s school age population including racial . . . factors.” \textsc{N.J. Stat. Ann.} § 18A:36A-8(e) (West 1999). North Carolina requires the racial and ethnic balance provisions be met within one year of operation. \textsc{N.C. Gen. Stat.} § 115C-238.29F(g)(5) (1999). In Ohio, the racial and ethnic balance provisions must be found in the charter school contract, and a contract may be terminated or nonrenewed for failure to comply with any term of the contract. \textsc{Ohio Rev. Code Ann.} § 3314.07(B)(1)(c) (West 1999). Rhode Island only allows recommendation of a charter school petition that contains information regarding “a program to encourage the enrollment of a diverse student population.” \textsc{R.I. Gen. Laws} § 16-77-4(b) (Supp. 1999). In Wisconsin, the racial and ethnic balance provisions are required for a successful petition. \textsc{Wis. Stat. Ann.} § 118.40(1m)(b)(9) (West 1999). Wyoming only allows the granting of a petition that
Unanswered is how the charter schools are to achieve racial and ethnic balance. Enrollment is still first-come, first-served, or, in cases of oversubscription, admission is determined by a lottery. As a result, student enrollment policies themselves cannot guarantee integration. Quotas or other race-conscious methods of selecting students are clearly prohibited. Thus, to fulfill the balance provisions, schools must employ methods outside of student selection, such as outreach to and recruitment of parents and students and unique approaches to fundamental school issues such as curriculum, instruction, siting, and staffing. These means can easily affect student enrollment patterns, even when selection is entirely race-neutral.

Because the means to guarantee actual integration through enrollment policies (racial student enrollment ratios being the most obvious) are prohibited, legislators apparently did not intend to mandate actual, exact balancing. Rather, the provisions appear to reflect a legislative aversion to segregation and disparate impact. Legislators have required that charter schools be developed in ways

includes a “stating” of the means to achieve racial and ethnic balance. WYO. STAT. ANN. § 21-3-203(b) (Michie 1999).


73. See infra notes 86-91 and accompanying text.

74. The impact of these matters, and others, on student enrollment patterns is discussed infra Part II.B.3.
attractive to all parents. Given the history of using parental choice to foster segregation,\textsuperscript{75} a legislative concern that charter schools not be segregated naturally arises. The next subpart considers the constitutionality of these racial and ethnic balance provisions.

B. Equal Protection Concerns

Given the Supreme Court's recent, frequent use of the Equal Protection Clause to strike down race-conscious actions,\textsuperscript{76} the mention of race and ethnicity in charter school legislation triggers consideration of familiar (albeit inconsistent) law.\textsuperscript{77} This subpart first examines Equal Protection jurisprudence in four categories: racial classifications, purportedly race neutral actions, racial matters, and permissible race consciousness. It then evaluates the constitutionality of racial and ethnic balance provisions in charter school legislation. Lastly, this subpart analyzes the Title VI implications of the statutes.

1. Racial Classifications

A state- or federally-sponsored racial classification is deemed to be intentional discrimination because of the terms of classification and therefore is subject to strict scrutiny.\textsuperscript{78} Thus, the classification is constitutional only if it serves a compelling governmental interest and is narrowly drawn to achieve that interest.\textsuperscript{79} This is true even if the classification is benign in the sense that it is designed to favor minority interests.\textsuperscript{80} Relatedly, animus is unnecessary.\textsuperscript{81} Although the Court

\textsuperscript{75} See supra notes 15-17 and accompanying text.


\textsuperscript{77} For citations to the inconsistency in Equal Protection jurisprudence, see supra note 44.

\textsuperscript{78} See, e.g., Hunt, 526 U.S. at 546.

\textsuperscript{79} See, e.g., Adarand, 515 U.S. at 227. See generally Forde-Mazui, supra note 30, at 2359-64 (exploring in detail the meaning of strict scrutiny); Rubenfeld, supra note 44, at 438-44 (same).

\textsuperscript{80} See Adarand, 515 U.S. at 226; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989) (plurality opinion); id. at 520 (Scalia, J., concurring in judgment). See generally Rubenfeld, supra note 44, at 433 (noting that “when the Court has applied strict scrutiny to a race-conscious measure designed to assist minorities, it has never upheld the measure”).

\textsuperscript{81} See David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U. Chi. L. Rev. 935, 962-64 (1989) (arguing that Brown v. Board of Education may have come out differently if animus were actually required); Kathleen M. Sullivan, After Affirmative Action, 59 Ohio St. L.J. 1039, 1047 (1998) (noting that the Supreme Court’s definition of
affirmative action is not dependent on “animus or hostility rooted in notions of racial supremacy or inferiority”).


84. Croson, 488 U.S. at 493 (plurality opinion); see also Miller v. Johnson, 515 U.S. 900, 915 (1995) (declaring that “race-based decisionmaking is inherently suspect”).

85. When an action is neither a racial classification nor a race-neutral measure with discriminatory intent, the action is evaluated under the forgiving rational basis standard. Then, the challenged law only denies equal protection if it is not “rationally related to a legitimate state interest.” See, e.g., City of Cleburne, 473 U.S. at 440.

86. See Adams, supra note 30, at 1436.

87. See Adarand, 515 U.S. at 229-30 (reasoning that “whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection”); Croson, 488 U.S. at 493 (plurality opinion) (noting that the challenged program “denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race”); see also Adams, supra note 30, at 1436 (noting that in Adarand “‘racial classifications’ are consistently linked to ‘unequal treatment’”); Sullivan, supra note 81, at 1047 (describing the Supreme Court’s definition of affirmative action as “requiring the formal use of race as a criterion for legal advantage or disadvantage”).


conscious set asides of public construction contracts, and race-conscious voting districts drawn to comply with the Voting Rights Act. In each instance, a program, by its explicit terms, treated persons differently because of their race.

2. Purportedly Race-Neutral Actions

Like racial classifications, a race-neutral action will be subject to strict scrutiny if the purpose of that action is the unequal treatment of persons because of their race. Here, intent is not inferred from the language behind the action because, unlike racial classifications, the language is race-neutral. Instead, intent is almost always proven with circumstantial evidence. Again, animus is not necessary. Intent is more than “awareness of consequences.” Rather, causation is at play.

90. See Adarand, 515 U.S. at 238-39 (remanding to evaluate minority set asides under strict scrutiny); Croson, 488 U.S. at 508 (plurality opinion) (deeming minority set asides unconstitutional).


92. See Hunt v. Cromartie, 526 U.S. 541, 546 (1999) (stating the standard of review); Personnel Adm’r v. Feeney, 442 U.S. 256, 272 (1979) (holding that “even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose”); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (requiring “[p]roof of racially discriminatory intent or purpose . . . to show a violation of the Equal Protection Clause”). The Court at times refers to race-neutral laws enacted with discriminatory intent “as an implicit racial classification.” Forde-Mazrui, supra note 30, at 2335 n.18. Nor may a facially neutral law be discriminatorily applied on the basis of race. See Yick Wo v. Hopkins, 118 U.S. 356 (1886) (finding a discriminatory application of race-neutral laundry regulations); see also Washington v. Davis, 426 U.S. 229, 241 (1976) (reasoning that “[a] statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race”). Racial classifications are also only subject to strict scrutiny if intent is shown; however, intent is typically inferred from the language of the classification. See, e.g., Hunt, 526 U.S. at 546 (noting that “[w]hen racial classifications are explicit, no inquiry into legislative purpose is necessary”). An excellent examination of discriminatory intent, to which I am deeply indebted, is Selmi, supra note 44.

93. See, e.g., Hunt, 526 U.S. at 553 (noting that “outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence”). The Court articulated three primary factors to consider in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). Courts must consider the severity of the discriminatory impact, the “historical background of the decision,” and the history of the challenged action. Id. at 267.

94. See Selmi, supra note 44, at 292 & n.53 (concluding that, with one possible exception, the Court has applied the Feeney test without requiring “animus or illicit motive . . . for establishing intent”). But see Reva B. Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2189 (1996) (defining discrimination as “a state of mind akin to malice”).

95. Feeney, 442 U.S. at 279; see also Hernandez v. New York, 500 U.S. 352, 360 (1991) (quoting Feeney); McCleskey v. Kemp, 481 U.S. 279, 297-98 (1987) (same). Professor Selmi cites two instances of the Court’s refusal to apply the Feeney test. See Selmi,
In the oft-quoted language of *Feeney*, the action must be taken “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effect.”

The “reversing the groups test” is one of the more accurate explanations of the Supreme Court’s approach to intent. As articulated by Professor David Strauss, the test asks, “Suppose the adverse effects of the challenged government decision fell on whites instead of blacks . . . . Would the decision have been different? If the answer is yes, then the decision was made with discriminatory intent.” In sum, discriminatory intent targets causation—did race concerns trigger a different outcome?

Thus, in the area of voting rights, statutes that were designed to disenfranchise African Americans through race-neutral means, such as grandfather clauses, literacy clauses, criminal record provisions, and at-large elections, have been subject to strict scrutiny because of their

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96. *Feeney*, 442 U.S. at 279. Applying the test, the Court upheld the constitutionality of a state statute affording veterans a preference for civil service employment. See id.

97. See Strauss, supra note 81, at 956-57 & n.71 (basing the test, in part, on prior explanations of discriminatory intent); see also Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147-48 (1976) (articulating the “group disadvantaging principle”). Professor Strauss has criticized the test for its speculativeness. Strauss, supra note 81, at 965-68, 990-91; see also Crump, supra note 44, at 304 n.118 (granting that the “test has merit as a heuristic device” but “introduces such a large component of speculation that the answer often may be determined by the decision-maker’s idiosyncratic expectations”); Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1038-38 (1987) (also deeming the Feeney test to be speculative); Selmi, supra note 44, at 293 (recognizing the difficulty in applying the test but arguing that the speculativeness of the test is a lesser problem than others have contended); Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 753 n.3 (1991) (recognizing the “difficulty” of applying the standard).

98. Strauss, supra note 81, at 957.

99. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 568 (1997) (reasoning that “a facially neutral law will be regarded as creating a race or national origin classification only if there is proof of both a discriminatory impact to the law and a discriminatory purpose behind it”); Forde-Mazrui, supra note 30, at 2348 (characterizing recent affirmative action cases as “establish[ing] that a ‘discriminatory purpose’ exists whenever the government selects a course of action at least in part ‘because of’ its adverse—or beneficial—effects upon a racial group”); George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117, 127 (1995) (allowing that only when a practice makes a difference is there discrimination); Selmi, supra note 44, at 294-95 (contending that intentional discrimination occurs with different treatment “because of . . . race”). Professor David Crump argues that “the government’s purposelessness, or failure to articulate a race-neutral explanation” is the “determinative” factor for the Court when addressing intent. Crump, supra note 44, at 288.

100. Although some of these cases were decided under the Fifteenth Amendment, the cases have been applied in the Fourteenth Amendment context as well. See, e.g., *Shaw I*, 509 U.S. 630, 644-45 (1993).
discriminatory purpose and held unconstitutional.\textsuperscript{101} In these cases, 
voters were deemed to have been treated differently because of their 

race.

3. Racial Matters

The Court has also applied strict scrutiny to a third category of 
laws.\textsuperscript{102} These laws explicitly concern racial matters and are not 
racially neutral by their terms. But neither are the laws neatly 
categorized as racial classifications; they are not facially explicit in 
their different treatment. Such matters have arisen in three Supreme 
Court cases: \textit{Hunter v. Erickson}, which addressed an anti-housing 
discrimination charter amendment,\textsuperscript{103} and \textit{Washington v. Seattle School 
District No. 1}\textsuperscript{104} and \textit{Crawford v. Board of Education},\textsuperscript{105} both of which 
concerned anti-busing voter initiatives.\textsuperscript{106}

In determining whether to subject such laws to strict scrutiny, the 
Supreme Court appears most concerned with whether the law is, in 
fact, a racial classification.\textsuperscript{107} Yet, at times the Court seems interested 
in whether intentional discrimination is behind the laws—a concern in 
race-neutral law analysis\textsuperscript{108}—while at other times the Court appears

\textsuperscript{101} See, e.g., \textit{Hunter v. Underwood}, 471 U.S. 222, 230-32 (1985) (holding that the 
disenfranchising of those convicted of crimes of “moral turpitude” was race-neutral but was 
acted with a discriminatory purpose and thus unconstitutional); \textit{Rogers v. Lodge}, 458 U.S. 613, 619 (1982) (finding discriminatory intent in the operation of an at-large election 
scheme); \textit{Gaston County v. United States}, 395 U.S. 285 (1969) (literacy test); \textit{Guinn v. United States}, 238 U.S. 347, 365 (1915) (grandfather clauses); \textit{see also} \textit{Thornburg v. Gingles}, 
478 U.S. 30, 74 (1986) (at-large elections); \textit{Anderson v. Martin}, 375 U.S. 399, 404 (1964) 
(race of all candidates on ballots). But see \textit{City of Mobile v. Bolden}, 446 U.S. 55, 67-68 

\textsuperscript{102} Professor Sunstein puts the \textit{Hunter} line of cases in a separate category of laws 
“that qualify neither as facially neutral nor as facially discriminatory and that, while not as 
suspicious as the latter, ought not to receive the deference due to the former.” Cass R. 
REV. 127, 150. But see \textit{Chemerinsky, supra} note 99, at 555-56 (classifying the cases as 
“[f]acial classifications burdening both whites and minorities”).

\textsuperscript{103} 393 U.S. 385, 390 (1969).
\textsuperscript{104} 458 U.S. 457 (1982).
\textsuperscript{105} 458 U.S. 527 (1982).
\textsuperscript{106} See \textit{id. at} 535-36; \textit{Seattle}, 458 U.S. at 462-63.

\textsuperscript{107} See \textit{Julian N. Eule, Judicial Review of Direct Democracy}, 99 YALE L.J. 1503, 

\textsuperscript{108} See \textit{Seattle}, 458 U.S. at 471, 486 n.30 (discussing the motive behind the 
initiative); L. Darnell Weeden, \textit{Affirmative Action California Style—Proposition 209: The 
Right Message While Avoiding a Fatal Constitutional Attraction Because of Race and Sex}, 21 
SEATTLE U. L. REV. 281, 293 (1997) (arguing that motive analysis drives the \textit{Hunter} line of 
cases). But see Vikram D. Aran & Evan H. Caminker, \textit{Equal Protection, Unequal Political 
\textit{Hunter} and \textit{Seattle} as not based on “a finding of invidious intent”).
concerned with the political process implications of the acts.¹⁰⁹ Further complicating the matter is the impossible task of reconciling the three cases.¹¹⁰

In deciding whether to subject the challenged law to strict scrutiny, the Court clearly focuses on determining whether the law results in unequal treatment.¹¹¹ Only when the Court declares that a law results in unequal treatment does the Court apply strict scrutiny. In Hunter, for example, the Court examined Akron’s amendment to its city charter.¹¹² The amendment required that any antidiscrimination housing ordinance passed by the city council first be approved by a majority of citizen voters before becoming effective.¹¹³ The Court reasoned that the amendment, while facially neutral, still imposed a burden that fell “on the minority.”¹¹⁴ Strict scrutiny was applicable, and the amendment was declared unconstitutional.¹¹⁵

Likewise, in Seattle, the Court examined a Washington voter initiative that barred desegregative busing unless court-ordered.¹¹⁶ The initiative, aimed at a voluntary desegregation plan adopted by the Seattle School District, was prohibited as a racial classification that burdened minorities.¹¹⁷ The initiative treated voluntary, desegregative busing differently than nondesegregative busing; the Court noted that

¹⁰⁹. See Seattle, 458 U.S. at 474 (describing the challenged law as “remov[ing] the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests”); id. at 485 n.29 (holding that “[i]t is the State’s race-conscious restructuring of its decisionmaking process that is impermissible”); Hunter v. Erickson, 393 U.S. 385, 391 (1969) (reasoning that “plac[ing] special burdens on racial minorities within the governmental process...is no more permissible than denying them the vote, on an equal basis with others”); see also Lee v. Nyquist, 318 F. Supp. 710, 720 (W.D.N.Y. 1970) (holding that the challenged law “operates to disadvantage a minority, a racial minority, in the political process”); aff’d, 402 U.S. 935 (1971); Eule, supra note 107, at 1564-66; Spann, supra note 44, at 250.

¹¹⁰. See Louis Michael Seidman, Romer’s Radicalism: The Unexpected Revival of Warren Court Activism, 1996 Sup. Ct. Rev. 67, 76 (deeming the cases, for “many commentators, as anomalous”); Spann, supra note 44, at 300-01 (characterizing these cases as neither “doctrinally intelligible or viscerally satisfying”); infra note 125 (citing authority for the impossibility of reconciling Crawford and Seattle).

¹¹¹. Vikram Amar and Evan H. Caminker have set forth a two-part test for determining unconstitutionality under Hunter. The law must be “‘racial’ or ‘race-based’ in ‘character’” and “impose[] an unfair political process burden.” Amar & Caminker, supra note 108, at 1026.

¹¹². See Hunter, 393 U.S. at 387.

¹¹³. See id.

¹¹⁴. Id. at 391.

¹¹⁵. See id. at 393.


¹¹⁷. See id. at 463, 486-87.
desegregative busing "at bottom inures primarily to the benefit of the minority, and is designed for that purpose."118

Yet, in Crawford, decided on the same day as Seattle, the Court upheld California's Proposition I.119 This law provided that state courts could only order busing to the extent compelled by the United States Constitution.120 Busing orders based on California state law were, in other words, prohibited.121 Critically, the Court described the law as treating all parents and students alike, regardless of their race. The Court explained:

Proposition I . . . neither says nor implies that persons are to be treated differently on account of their race . . . . The benefit it seeks to confer—neighborhood schooling—is made available regardless of race . . . . Indeed, even if Proposition I had a racially discriminatory effect, in view of the demographic mix of the District it is not clear which race or races would be affected the most or in what way.122

The Court recognized that busing is a race issue; in Crawford, the only busing at issue was busing for the purposes of desegregation.123 Yet, this did not rise to a racial classification because no racial group was particularly burdened or benefited.124 Why the Crawford court permitted court-ordered busing based on state law and did not view it as a benefit for the minority community as the Court had done in Seattle is unexplained. Five Supreme Court Justices who heard both Crawford and Seattle considered the two cases inconsistent.125

118. Id. at 472.
120. See id. at 535.
121. See id. at 531-34.
122. Id. at 537 (footnote omitted). The Court distinguished Hunter. Hunter's law, while neutral on its face, was determined to be a racial classification because "the reality is that the law's impact falls on the minority." Id. at 537 n.14 (internal quotations omitted) (quoting Hunter v. Erickson, 393 U.S. 385, 391 (1969)).
123. See id. at 537-38.
124. See id. at 538 (recognizing "that a distinction may exist between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters").
125. Justice Powell, joined by Chief Justice Burger and Justices O'Connor and Rehnquist, dissented in Seattle. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 488 (1982) (Powell, J., dissenting). The dissent argued that the only distinction between the laws examined in Crawford and Seattle counseled that the law in Seattle was even more clearly constitutional. See id. at 490 n.3 (Powell, J., dissenting) (arguing that neither law imposed a burden on minorities, that both were constitutional, and that the validated California law had the added problem of limiting the authority of state courts to interpret the California constitution). The four would have held both statutes constitutional. See id. (Powell, J., dissenting). Justice Marshall expressly found the cases indistinguishable and would have held both statutes unconstitutional. See Crawford, 458 U.S. at 547-58 (Marshall, J., dissenting); see also Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 705-07 (9th Cir. 1997) (examining the tension between Crawford and Seattle); Lynn A. Baker, Direct
4. Acceptable Race Consciousness

One could define the Supreme Court’s discrimination jurisprudence as forbidding even the consideration of race, outside of the few contexts that satisfy strict scrutiny. Then, perhaps, if a state attempted to redress minority underrepresentation in colleges and universities by improving the quality of primary and secondary education, that action, race-neutral by its terms, but done with the purpose of benefiting minorities, would be subject to strict scrutiny. This reading of the law would essentially require federal and state actors to ignore all race-related issues, even if the programs were entirely race-neutral, because such practices would impermissibly consider race (unless they could satisfy strict scrutiny or fall within the reasoning of Crawford).

Although the Supreme Court’s approach to Equal Protection certainly appears geared toward color-blindness, the Court has never taken its analysis this far. Rather, in some instances the Court has

Democracy and Discrimination: A Public Choice Perspective, 67 CHI.-KENT L. REV. 707, 762 n.220 (1991) (noting that “[s]cholars and judges have made many creative attempts to reconcile Crawford and Seattle”); Eule, supra note 107, at 1566 n.284 (citing legal scholarship that the two cases are inconsistent).

To what extent these cases are affected by the recent affirmative action and redistricting cases is covered in much of the scholarship surrounding Proposition 209, California’s initiative to end state voluntary affirmative action and is a topic beyond the scope of this Article. See, e.g., Amar & Caminker, supra note 108, at 1027-28; Gregory Ellis, Note, Rethinking the Hunter Doctrine, 8 S. CAL. INTERDISC. L.J. 323 (1998); Lisa White Shirley, Comment, Reassessing the Right of Equal Access to the Political Process: The Hunter Doctrine, Affirmative Action, and Proposition 209, 73 TUL. L. REV. 1415 (1999). Some specifically question whether Seattle survives the recent Supreme Court Equal Protection cases. See Derrick A. Bell, Jr., California’s Proposition 209: A Temporary Diversion on the Road to Racial Disaster, 30 LOY. L.A. L. REV. 1447, 1461 (1997) (doubting the “continued viability” of Hunter and Seattle); Spann, supra note 44, at 300-01 (questioning whether the current Supreme Court would follow the Hunter line of cases).

One could read Loving v. Virginia, for example, as holding that using race or gender in a statute equates with a racial or gender classification. See Loving v. Virginia, 388 U.S. 1, 8-9 (1967) (declaring a miscegenation statute unconstitutional). Most advocate a different reading of Loving. See, e.g., Spann, supra note 44, at 191.

See Forde-Mazrui, supra note 30, at 2334, 2348.

See supra notes 119-124 (discussing Crawford). As Professor Sullivan notes, “The view that mere advertence to race is per se discriminatory would jeopardize a variety of familiar governmental practices that take race into account, from racial record keeping in the national census to parental expression of preference for a same-race child in applying for a publicly brokered adoption.” Sullivan, supra note 81, at 1049; see also Spann, supra note 44, at 282-83 (making the same point for the census).

See Forde-Mazrui, supra note 30, at 2346-51 (recognizing that the Supreme Court has “explicitly endorsed ... race-neutral means to remedy disadvantages disproportionately suffered by racial minorities”); Sullivan, supra note 81, at 1039 (arguing that “equal protection cannot forbid all race-consciousness; it must be understood as forbidding only the singling out of persons for race-based harm”); see also Shaw I, 509 U.S. 630, 642 (1993) (“This Court never has held that race-conscious state decisionmaking is impermissible in all
implicitly approved actions undertaken for racial purposes without subjecting the action to a strict scrutiny analysis. The Court has recognized that official actions regarding racial matters must necessarily have racial aspects, and the Court has never required the complete disregard of racial concerns.  

An early example is Washington v. Davis. There, the Court upheld a written examination of police applicants, even though the test had disparate impact against African American applicants; the Court also noted with approval the defendant's efforts to recruit minority police officers, an action that by definition was race-conscious. In City of Richmond v. J.A. Croson Co., which outlawed Richmond's minority construction set asides, the majority also advocated race-neutral devices, even if the devices "would serve to increase the opportunities available to minority business without classifying individuals on the basis of race." Even Justice Scalia, a strong critic of any racial classification, accepted race-neutral programs undertaken for racial reasons:  

A State can, of course, act "to undo the effects of past discrimination" in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race.  

Likewise, in the racial redistricting cases, the Supreme Court arguably permits the consideration of race in the drawing of district boundaries; race just cannot be the "predominant" factor. Allowing  

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1. See Adams, supra note 30.  
3. See id. at 246 (noting that the defendant's "affirmative efforts . . . to recruit black officers . . . negated any inference that the [defendant] discriminated on the basis of race"); see also Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 418 n.22 (1978) (Stevens, J., concurring in part and dissenting in part) (noting the difference between the set aside of admission slots for racial minorities and the "special recruitment policies" of the federal government).  
4. 488 U.S. 469, 509-10 (1989) (plurality opinion). Specifically, the Court noted that "simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect." Id. (plurality opinion).  
5. Id. at 526 (Scalia, J., concurring in the judgment).  
6. See, e.g., Hunt v. Cromartie, 526 U.S. 541, 547 (1999) (applying strict scrutiny only when "race was the 'predominant factor' motivating the legislature's districting
districting to be "performed with consciousness of race" recognizes the reality that legislatures know the racial makeup of the communities upon which they are imposing legislative district lines.

Further, strict scrutiny itself favors the use of race-neutral means to redress racial disparities. To establish that a program is narrowly tailored, part of the strict scrutiny analysis, a court must consider whether race-neutral means could redress the disparity at issue so that the challenged program would be unnecessary. The availability of race-neutral methods to cure the inequality counsels against the adoption of race-conscious programs. Thus, courts of appeals have struck down race-conscious decision making after noting the availability of race-neutral means to address the disparity. Conservatives who have advocated the end to affirmative action have also promoted race-neutral means as an alternative to redress racial disparities.

136. Bush, 517 U.S. at 958 (plurality opinion). Furthermore, a majority of the Court allows that strict scrutiny is not applicable "to all cases of intentional creation of majority-minority districts." Id. (plurality opinion); see also id. at 962 (plurality opinion) (recognizing that "[n]or, as we have emphasized, is the decision to create a majority-minority district objectionable in and of itself"); id. at 1010 (Stevens, J., dissenting) (arguing that "race-conscious districting should not always be subject to strict scrutiny"); id. at 1056 (Souter, J., dissenting) (contending that "not every intentional creation of a majority-minority district requires strict scrutiny"). But see id. at 996 (Kennedy, concurring) (characterizing the plurality's statements regarding majority-minority districts as "dicta" that does not "commit me to any position on the question"); id. at 999 (Thomas, J., concurring in the judgment) (disagreeing with Justice O'Connor's assertion that strict scrutiny is not invoked by the intentional creation of majority-minority districts").


138. See Podberesky v. Kirwan, 38 F.3d 147, 161 (4th Cir.) (holding a race-based scholarship program unconstitutional but allowing that race-neutral "campus job opportunities... and economically reasonable campus housing" may be a better remedy than a scholarship for minority students who have to work and therefore have low graduation rates), amended by 46 F.3d 5 (4th Cir. 1994).

In a variety of contexts, courts of appeals have also upheld race-conscious programs. These programs are not defined as racial classifications, but instead are evaluated under a rational basis standard. Thus, the First Circuit allowed nonvictims to apply to a housing program designed to remedy an injury only suffered by whites so that the housing program would be diverse; the Second Circuit approved a police examination designed to diminish adverse effects suffered by minority applicants, but scored and administered in an identical fashion for all; the Seventh Circuit upheld special efforts to attract white home buyers to an African American neighborhood; the Eighth Circuit affirmed outreach efforts to minorities; and the Eleventh Circuit permitted a new teacher certification examination to be designed to minimize any racially disparate impact. District courts have made similar rulings.

Initiative: An Interpretive Guide, 44 UCLA L. REV. 1335, 1348-49 (1997) (contending that a program “whose topic is a particular race, sex, or ethnic group” is constitutional so long as admission is race-neutral); see also Adams, supra note 30, at 1397-98, 1398 n.13 (citing authority that such affirmative action is “relatively non-controversial”); Forde-Mazrui, supra note 30, at 2349 n.75 (citing conservative support for such actions).

See supra note 85 (stating the rational basis standard).

See Raso v. Lago, 135 F.3d 11, 17 (1st Cir. 1998) (reasoning that the attempt to allow non-West Enders to apply for a housing program designed to remedy wrongfully demolished housing in the West End ensures that the program is available to nonwhites, “almost the opposite of the racial preferences that the Court viewed as questionable in Adarand and the redistricting cases”). One judge dissented, contending that the “defendants’ conduct has had the effect of depriving plaintiffs of a benefit and was prompted by the fact that plaintiffs are mostly white.” Id. at 20 (Stahl, J., dissenting in part). For Judge Stahl,

It remains to be seen whether the Court will press this principle to its outer limit and strictly scrutinize even governmental conduct which, though predominately motivated by a racial purpose, would not appear to burden any person because of his or her race—e.g., a public university’s efforts at recruiting fully qualified applicants of color for its first year law school class.

Id.

See Hayden v. County of Nassau, 180 F.3d 42, 48-49 (2d Cir. 1999) (holding that the desire “to design an entrance exam which would diminish the adverse impact on black applicants. . . . does not constitute a ‘racial classification’” and that “although Nassau County was necessarily conscious of race in redesigning its entrance exam, it treated all persons equally in the administration of the exam”).

See S.-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868, 883-84 (7th Cir. 1991) (holding that the “limited race conscious marketing . . . does not exclude minorities from housing opportunities” and “merely creates additional competition in the housing market”); see also Billish v. City of Chicago, 962 F.2d 1269, 1290 (7th Cir. 1992) (characterizing “aggressive recruiting” practices as “race-neutral procedures”), rev’d on other grounds, 989 F.2d 890 (7th Cir. 1993) (en banc).

See Duffy v. Wolle, 123 F.3d 1026, 1038-39 (8th Cir. 1997) (recognizing that “[a]n employer’s affirmative efforts to recruit minority and female applicants does not constitute discrimination”).

See Allen v. Ala. State Bd. of Educ., 164 F.3d 1347, 1353 (11th Cir. 1999) (noting that a contrary holding “would imperil Title VII, which requires covered employers to ensure
These actions, taken for racial reasons, have been defined as “non-preferential” affirmative action in which the courts have permitted the consideration of race.\(^ {147}\) What distinguishes the acceptable from the unacceptable is not the purpose—either can be done for the purpose of benefiting a racial group. Instead the difference appears to be the program itself. Efforts geared toward outreach or inclusion in the selection pool are generally not deemed a racial classification worthy of strict scrutiny so long as selection is itself race-neutral. The results of the efforts may alter the selection pool (in fact, this is the clear intent of the efforts), but no race-conscious selection methods are employed. In other words, methods designed to avoid disparate impact are permissible when race-neutral selection occurs. If, on the other hand, the outreach and recruitment measures are more than that—if compliance with the measures, for example, would require race-conscious selection devices—then strict scrutiny is applied.\(^ {148}\)


This leads to the question of the lawfulness of the racial and ethnic balance provisions in charter school legislation.\(^ {149}\) The laws in most cases should pass constitutional muster under the Supreme Court’s Equal Protection jurisprudence.\(^ {150}\) The statutes presumably that their selection processes do not result in an unjustifiable discriminatory impact on African-American candidates’); see also Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1571 (11th Cir. 1994) (characterizing waivers of application fees and recruitment of African-Americans as race-neutral).


\(^ {147}\) Adams, supra note 30, at 1396.

\(^ {148}\) See, e.g., Lutheran Church-Mo. Synod v. FCC, 141 F.3d 344, 351 (D.C. Cir. 1998) (holding that the FCC’s affirmative action regulations “extend beyond outreach efforts and certainly influence ultimate hiring decisions” and are therefore subject to strict scrutiny). In denying a petition for rehearing, the court of appeals acknowledged that it is not the case “that any regulation encouraging broad outreach to, as opposed to actual hiring of, a particular race would necessarily trigger strict scrutiny. . . . We of course do not claim . . . that all race conscious measures adopted by the government must be subjected to strict scrutiny.” Lutheran Church-Mo. Synod v. FCC, 154 F.3d 487, 492 (D.C. Cir. 1998) (denial of petition for rehearing). For an argument that the court misunderstood the challenged program, see Adams, supra note 30, at 1446-47.

\(^ {149}\) See supra Part I.A.6 (reviewing racial and ethnic balance provisions found in state charter school statutes).

\(^ {150}\) Professor Sullivan makes a similar argument regarding affirmative action methods designed to ensure diversity in the education setting. She argues that race-neutral means, such as Texas’s top ten percent plan, are permissible because there is no racial
intend more than nondiscrimination, which is explicitly covered elsewhere.\textsuperscript{151} The balance provisions concern race-related matters by their terms, most likely evidencing a legislative desire that no charter school be segregated.\textsuperscript{152} But, given that student enrollment is only permitted on a first-come, first-served basis or by a lottery, the legislators are not mandating race-conscious selection or actual integration. The prohibition against segregation is to be achieved in other aspects of the school operation, i.e., advertisement, outreach, location, and curriculum, among others.\textsuperscript{153} These fundamental issues are to be developed in ways attractive to all races. Inclusion is the goal, to be achieved by having a cross-racial appeal. As a result of the quest for inclusion, no student is burdened or benefited in schooling because of race or ethnicity.

Without different treatment in admission or education, it is hard to define the balance provisions as either racial classifications or unlawful race-neutral measures.\textsuperscript{154} The Court’s approach to both racial classifications and unlawful race-neutral measures depends on some different treatment of individuals based on race. But the necessary differential treatment is not found in these statutes. Because the laws seek, but do not mandate, inclusion, charter school legislation treats all alike in admission and schooling. The statutes compel, in fact, the education of all children whose parents choose the charter school. The only allowable “difference” in the treatment of various races is the requirement that the approach to charter schools be attractive to all racial and ethnic groups found in the school district. Thus, no group is classified differently and no racial classification exists. Further, the provisions could not be deemed race-neutral but unlawful because of discriminatory intent. The quest for inclusion, with entirely neutral classification by the terms of the plan. Sullivan, \textit{supra} note 81, at 1042-43. Further, there is no unlawful purpose: “It is simply not the case that uncovering a purpose to increase racial diversity, in the absence of racially discriminatory means, simultaneously reveals a proxy policy to be a ‘subterfuge’ for discrimination against whites.” \textit{Id.} at 1048; \textit{see also id.} at 1054 (reasoning that “[t]he purpose of achieving racial diversity, standing alone, does not entail a purpose to classify whites on the basis of their race or to make them targets of race-based harm”). \textit{But see Chapin Cimino, Comment, Class-Based Preferences in Affirmative Action Programs After Miller v. Johnson: A Race-Neutral Option, or Subterfuge?,} 64 U. Chi. L. Rev. 1289, 1297 (1997) (arguing that class-based affirmative action can be a “subterfuge” under the redistricting cases and therefore should be subject to strict scrutiny).


\textsuperscript{152} \textit{See supra} text following note 74 (discussing probable legislative intent).

\textsuperscript{153} For a discussion on how school operations can impact the racial and ethnic makeup of its students, \textit{see infra} Part II.B.3.

\textsuperscript{154} \textit{See supra} Part I.B.1-2.
treatment in enrollment and education, should not be declared a discriminatory purpose. This would turn Equal Protection on its head, for it would disallow efforts to avoid disparate impact, even though such impact is evidence of discriminatory intent.

Further, as in Crawford, it is not clear which, if any, racial group would be burdened or benefited by the provisions. The statutes are also not illegal under this line of cases concerning racial matters. In some instances, outreach to whites and other methods of inclusion may be needed, while, in other cases, the effort will be directed to minority racial and ethnic groups. The methods are expected to produce a more diverse pool from which to select applicants, which ultimately may reduce a particular child’s chance for selection. But the efforts only cause a difference in the odds of selection; the racial and ethnic balance provisions themselves require no different treatment in enrollment decisions or education by race. For these reasons, the balance laws should not be deemed unlawful discrimination. Instead, the statutes concern racial and ethnic issues, but compel only nonpreferential affirmative action such as outreach and other approaches to schooling issues. They should be evaluated under the rational basis standard, which they should handily satisfy.

That the laws as a group are appropriately deemed nonpreferential affirmative action, and not quotas, is reflected in the student enrollment data for charter schools. States with racial and ethnic balance provisions still fund charter schools that fail to reflect their surrounding student enrollment. The United States Department of Education has identified twelve states with particularly segregated charter schools (as compared to their surrounding school district). Five of those states (California, Connecticut, Minnesota, New Jersey, New York, and Washington).
and North Carolina) require charter schools to seek student bodies reflective of their surrounding school district.\footnote{160}

A South Carolina trial court judge reached a different conclusion than that argued here. In \textit{Beaufort County Board of Education v. Lighthouse Charter School Committee}, a charter petition was denied, in part, because the petition failed to describe the expected racial composition of the charter school.\footnote{161} In a challenge to the petition denial, a state trial court judge held that South Carolina’s racial and ethnic balance provision “results in an admissions policy which classifies and admits applicants on the basis of race,” even though the legislation also provides that all eligible applicants must be admitted, to the extent space is available, and prohibits admission or preference in admission for any group.\footnote{162} The judge focused on the language of the statute, concluding that a charter school could only exist if it met the racial and ethnic balance provision at all times, and rejecting the school board’s argument “that the provision in question merely expresses the goal of the Legislature that charter schools be racially diverse” and that the statute “specifically prohibits the use of race as an admission criteria.”\footnote{163} Defining the provision as mandating a “racial classification,” which “requires a charter school to use race as a primary factor in its admission process,” the judge applied strict scrutiny to hold the provision unconstitutional under the United States Constitution.\footnote{164}

The judge failed to appreciate, however, the absence of any racial classification, discriminatory intent, or differential treatment by the legislature. The South Carolina statute, although written in absolute

\footnote{160} See supra Part I.A.6.

\footnote{161} 516 S.E.2d 655, 659 (S.C. 1999). The proposed school was located in an area that was approximately seventy-five percent white, compared to the overall school district which was fifty percent white. See Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm., No. 97-CP-7-794, slip op. at 6 (S.C. Ct. Com. Pl. May 8, 2000). South Carolina’s charter law requires that charter schools be governed by the same laws and regulations regarding “civil rights” imposed on other school districts.” S.C. \textsc{Code Ann.} § 59-40-50(B)(1) (West Supp. 1999). Furthermore, the school district had a 1970 agreement with the Department of Education Office for Civil Rights (OCR) that required OCR approval of school openings. \textit{Beaufort}, 516 S.E.2d at 659. The charter school petitioners claimed to be exempt from this requirement. \textit{Id}. The OCR specifically requested that the charter school petitioners comply with the outstanding reporting requirements, but the applicant refused. \textit{Id}. The charter petition was also denied on this and other grounds. \textit{Id}.

\footnote{162} \textit{Beaufort}, No. 97-CP-7-794, slip op. at 2.

\footnote{163} \textit{Id}. Section 59-40-50(B)(6) provides that “under no circumstances may a charter school enrollment differ from the racial composition of the school district by more than ten percent.” S.C. \textsc{Code Ann.} § 59-40-50(B)(6) (West Supp. 1999).

\footnote{164} \textit{Beaufort}, No. 97-CP-7-794, slip op. at 2. Because the legislation lacked a severability clause, the entire act was deemed unconstitutional. See \textit{id}. at 7-8.
terms mandating integration—to the extent permitted by the surrounding school district—imposes no burden on a particular racial or ethnic group. No group is treated differently for the purposes of enrollment or education because of the group’s race or ethnicity. Without differential treatment no racial classifications can be found. Integration is to be achieved only through efforts that do not require selection by race-consciousness. For the same reason, it is impossible to infer the discriminatory intent required for race-neutral laws to fall within strict scrutiny. There is simply no unequal treatment: In some instances, for example, Asians will be affected; in different instances, other groups will be affected. Furthermore, the law cannot cause disparate impact, often the beginning point of proving unlawful discrimination. Compliance with the law ensures no disparity. In the absence of disparity caused by the laws, it is difficult to reach the question of whether the decision makers chose the course of action because of race.

Neither does the judge’s ruling serve to prevent the evils the Court has identified in unlawful race-consciousness—in particular, stereotyping and balkanization. It is hard to imagine how requiring charter schools to reflect their surrounding school district engages in stereotyping. Further, by definition, the state is not attempting to divide its children into separate schools; the goal is entirely integrative. The balance provision requires the pursuit of voluntary integration—i.e., a diverse student population created by parents’ enrollment choices of a state funded and controlled school—and this goal seems entirely consistent with the Supreme Court’s Equal Protection jurisprudence. The denied South Carolina charter school petition, after all, ran afoul of the racial and ethnic balance provisions for its refusal to provide any information on the topic.

165. See, e.g., Bush v. Vera, 517 U.S. 952, 985 (1996) (plurality opinion) (citing jury preemption cases) (concluding that “Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes”); Miller v. Johnson, 515 U.S. 900, 911-12 (1995) (declaring that “[w]hen the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race,” have similar voting interests); United States v. Hays, 515 U.S. 737, 744 (1995) (characterizing the harm of racial redistricting as “threatening to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility” (internal quotations omitted) (quoting Shaw I, 509 U.S. 630, 643 (1993)); Shaw I, 509 U.S. at 647 (concluding that racial districting “reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls”).

166. See Shaw I, 509 U.S. at 657.

167. See supra note 161 and accompanying text.
6. Title VI

The racial and ethnic balance provisions should also be permissible under Title VI of the Civil Rights Act of 1964.\textsuperscript{168} Under Title VI, any "program or activity" receiving federal funds (the "recipient agency") cannot discriminate "on the grounds of race, color, or national origin."\textsuperscript{169} Title VI itself, like the Fourteenth Amendment, only prohibits intentional discrimination.\textsuperscript{170} Plaintiffs need not, however, prove discriminatory intent if they are suing to enforce Title VI regulations that prohibit discriminatory effects.\textsuperscript{171} In this situation, plaintiffs can succeed under a disparate impact claim, similar to the proof of a Title VII action.\textsuperscript{172} The Department of Education has promulgated Title VI regulations that prohibit recipient agencies from engaging in activities that have a racially disproportionate impact,\textsuperscript{173} and courts have held that plaintiffs have a private right of action under these regulations against recipient agencies.\textsuperscript{174}

Actions by state boards of education and local school boards vis-à-vis charter schools are clearly subject to Title VI. Under the institution-wide aspect of Title VI, all parts of the state board of

\begin{itemize}
\item 168. 42 U.S.C. § 2000d (1994). See generally Selmi, supra note 44, at 324 (arguing, in the context of employment discrimination that "the Court's approach in the statutory and constitutional areas is, for all practical purposes, identical").
\item 169. Title VI provides:
\begin{quote}
No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
\end{quote}
\item 171. See id. at 292-94; Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 584 n.2 (1983). See generally 42 U.S.C. § 2000d-1 (requiring every federal agency or department to promulgate regulations to effectuate the command of Title VI).
\item 172. E.g., Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 n.14 (11th Cir. 1993).
\item 173. The Department of Education's regulations specifically require that recipients of federal funds not utilize criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, or national origin or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin. 34 C.F.R. § 100.3(b)(2) (2000).
\end{itemize}
education and local school districts are governed by Title VI if any part receives federal funds, which such entities regularly do.\textsuperscript{175}

A more complicated question is whether Title VI should also cover charter schools individually. The statute defines "program or activity," in part, as "a local educational agency" or "other instrumentality of a State or of a local government, ... any part of which is extended Federal financial assistance."\textsuperscript{176} Charter schools themselves should be defined as a local educational agency or as an instrumentality of a state or school district. Under this provision, Title VI should reach any charter school receiving federal funds, most likely for special education or for the charter school itself.\textsuperscript{177} Title VI's applicability to the unusual charter school receiving no federal funds is a slightly closer question. If the charter school is deemed to be part of a recipient agency such as a state board of education or school district, then the charter schools will be covered by the institution-wide coverage of Title VI.\textsuperscript{178} This seems likely because charter schools receive their funding from state departments of education and local school districts, are usually authorized by such entities, and provide public education. Thus, all charter schools likely fall within the institution-wide coverage provision.

Yet, it is highly unlikely that a plaintiff could make out even a prima facie disparate impact case under Title VI regulations against a state board of education or local school district acting under the racial and ethnic balance provisions. The same is true for a direct claim against a charter school. To make out a prima facie case of disparate impact, a plaintiff must produce evidence that a recipient agency's actions have a racially or ethnically disproportionate impact, and the actions actually caused the impact.\textsuperscript{179} To the extent that student enrollment figures are disproportionate, this would evidence

\textsuperscript{175} See 42 U.S.C. § 2000d-4a. See generally NCAA v. Smith, 525 U.S. 459 (1999) (holding that the NCAA is not subject to Title IX, notwithstanding the fact that it receives dues from recipients of federal funds).

\textsuperscript{176} 42 U.S.C. § 2000d-4a.

\textsuperscript{177} In 1998, the Department of Education estimated, for example, that 900 of the 1200 charter schools then existing received federal charter school funds. See Johnson & Medler, supra note 17, at 295. Federal charter school legislation specifically requires Title VI compliance to receive federal monies. See 20 U.S.C. § 8066(1)(G) (Supp. IV 1998). Any charter school enrolling special education students, who cannot be denied admission based on their special education status, also receives that student's federal special education funds. See Individuals with Disabilities Education Act, 20 U.S.C. § 1412 (1994).

\textsuperscript{178} See 42 U.S.C. § 2000d-4a (providing that "all of the operations" of any state department or local education agency are covered if "any part of [it] is extended Federal financial assistance").

\textsuperscript{179} See, e.g., Elston, 997 F.2d at 1406-07.
noncompliance with the balance provisions rather than the disparate impact required for a Title VI claim. Nor should outreach that is geared in a particular instance to a racial or ethnic group be considered disparate impact. As the Supreme Court’s disparate impact analysis makes clear, the challenged action must actually cause a disparity in outcome.\(^{180}\) Here, selection and education are entirely race-neutral, and the statutory provisions, by definition advocating no inequality in results, cannot cause any actionable disparity.

II. **One-Race Charter Schools**

Related to whether states can require charter schools to attract a racially and ethnically diverse student body is the question of whether a segregated charter school is itself unconstitutional—in some instances “a reverse-\textit{Brown} equal protection problem”\(^{181}\). This Part examines that issue. This Part first summarizes the evidence of segregation in charter schools. It then proceeds to assess the constitutionality of what I label as “centric” charter schools.

\textbf{A. Student Enrollment in Charter Schools}

As a whole, charter schools enroll minority pupils in numbers slightly higher than the student population in traditional public schools in those states.\(^{182}\) The Department of Education has identified nine states that enroll children of color in numbers significantly higher than their enrollment in the surrounding school districts.\(^{183}\) This distinction belongs to Connecticut, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, New Jersey, North Carolina, and Texas.\(^{184}\) Three states are notable for their disproportionately high enrollment of white students, as compared to the enrollment in the surrounding school districts: Alaska, California, and Georgia.\(^{185}\) Illinois, Massachusetts, Michigan, Minnesota, New Jersey, North Carolina, and Texas have

\begin{itemize}
\item Keller, supra note 41, at 88. (allowing that the possibility that “[p]utative empirical effects of an Afrocentric curriculum on a white student could generate a reverse-\textit{Brown} equal protection problem”); see also supra note 42 (citing scholarship recognizing the issue).
\item supra note 19 (providing the enrollment figures for charter schools as a group).
\item \textit{See} CHARTER SCHOOLS 2000, supra note 8, at 2. As I argued earlier, I believe that the report likely underreports the level of segregation in charter schools. \textit{See} supra note 19.
\item \textit{See} CHARTER SCHOOLS 2000, supra note 8, at 2.
\item \textit{See id.}
\end{itemize}
commissioned evaluation reports with detailed information regarding enrollment, which are reviewed in Appendix A.

Many explain the disproportionate enrollment of minority pupils in charter schools by the emphasis on “at-risk” pupils in many charter schools.\textsuperscript{186} Whether at-risk students are disproportionately minority or not, one study that disaggregated the data concluded that non-at-risk schools were still disproportionate.\textsuperscript{187} Apart from this issue, parental choice has been known to foster segregation. Parents have selected schools based on the school’s student enrollment patterns.\textsuperscript{188} More

\begin{itemize}
\item A large number of states give preference to charter school applicants that propose to focus on “at-risk” student populations. \textit{See}, \textit{e.g.}, CAL. EDUC. CODE § 47,605(b) (West Supp. 2000); COLO. REV. STAT. ANN. § 22-30.5-109(3) (West Supp. 1999); D.C. CODE ANN. § 31-2811(a)(3) (1998). Other states require or allow that at-risk students be given a preference for enrollment. \textit{See}, \textit{e.g.}, DEL. CODE ANN. tit 14, § 506(b)(d) (1999); FLA. STAT. ANN. § 228.056(6)(c)(2) (West Supp. 2000); OHIO REV. CODE ANN. § 3314.06(B) (West Supp. 2000). Not all states specifically describe the term “at-risk,” but those that define the term usually focus on socioeconomic status, student-parents, past drop-outs, discipline rates, and achievement scores. \textit{See}, \textit{e.g.}, COLO. REV. STAT. ANN. § 22-30.5-103(a) (West 1998); 105 ILL. COMP. STAT. ANN. 5/27A-3 (West 1998); PA. STAT. ANN. tit. 24, § 17-1703-A (West Supp. 2000); VA. CODE ANN. § 22.1-212.5(B) (Michie 2000). The Tenth Circuit has held that the term “at-risk,” even when defined in terms of “culture,” is not a code word for race. Villanueva v. Carere, 85 F.3d 481, 488 (10th Cir. 1996).

\item \textit{See} TEXAS THIRD YEAR EVALUATION, supra note 22, at 12-13 tbl. II.3. Moreover, the nation’s first charter school, City Academy in St. Paul, focuses on at-risk students but is very diverse and certainly integrated, while other St. Paul charter schools that do not focus on at-risk populations are segregated. Overall the school district is quite diverse: two percent American Indian, thirty-one percent Asian/Pacific Islander, nine percent Hispanic, twenty-three percent African American, and thirty-five percent white. \textit{See} MINN. DEP’T OF CHILDREN, FAMILIES & LEARNING, GENDER AND ETHNICITY BY DISTRICT—GRADES PK-12 FALL ENROLLMENT DATA YEAR 99-00, at 5 (2000) [hereinafter MINNESOTA ENROLLMENT REPORT]. City Academy is twenty-three percent American Indian, sixteen percent Asian/Pacific Islander, seven percent Hispanic, twenty-four percent African American, and twenty-nine percent white. \textit{See} id. at 9. Yet, other St. Paul charter schools are overwhelmingly African American, Asian/Pacific Islander, or white. \textit{See} id. (reporting that Metro Deaf Charter School is ninety-four percent white); \textit{id}. at 10 (noting that Cyber Village Academy is ninety-two percent white, Higher Ground Academy is ninety-seven percent African American, and New Spirit School is eighty-one percent Asian/Pacific Islander).

\item \textit{See} Thomas Fowler-Finn, \textit{Why Have They Chosen Another School System?}, EDUC. LEADERSHIP, Dec. 1993-Jan. 1994, at 60, 60-62 (finding that parents seek to enroll their children in programs with similar children); Mark Schneider et al., \textit{Networks to Nowhere: Segregation and Stratification in Networks of Information About Schools}, 41 AM. J. POL. SCI. 1201 (1997) (demonstrating strong racial networks for parents learning about schools); Smith, supra note 2, at 278 (arguing that “some parents may choose a particular school or district for racially motivated reasons”); Thomas Toch, \textit{Public Schools of Choice, AM. SCH. BOARD J.}, July 1991, at 18, 18-20; Robert D. Wrinkle et al., \textit{Public School Quality, Private Schools, and Race}, 43 AM. J. POL. SCI. 1248, 1252 (1999) (demonstrating, after a survey of Texas schools, that “the greater the percentage of Catholics and the higher the percent black in the district, the higher the private school enrollment”); Amy Stuells & Robert L. Crain, \textit{Do Parents Choose School Quality or School Status? A Sociological Theory of Free Market Education, in THE CHOICE CONTROVERSY, supra note 11, at 75-77 (concluding that a school’s student racial and ethnic makeup influences parental choice). See

\end{itemize}
specificially, minority enrollment in public schools has led some white parents to choose predominately white private schools.\textsuperscript{189} Public school choice in the form of magnet schools and transfer policy has also been found to result in increased segregation.\textsuperscript{190} To the extent that charter schools are integrated, it will also be interesting to see whether the schools become segregated over time, i.e., whether the schools experience "tipping."\textsuperscript{191}

This Article examines the constitutionality of segregated charter schools of another nature, not those produced allegedly because of the at-risk focus of the school or because of parental values. Segregation caused more directly by state action is a more significant concern and the focus of this Part. In some instances, charter schools themselves

\textit{generally} Heinig, supra note 17 (recognizing a great potential for choice to lead to increased segregation); Smith & Meier, supra note 17, at 67 (arguing that "[s]egregation may also be a demand competitors in the education market may find profitable to pursue").

\textsuperscript{189} See Kevin B. Smith & Kenneth J. Meier, \textit{School Choice: Panacea or Pandora's Box}, 77 Phi Delta Kappan 312, 316 (1995) (finding that "[m]inority enrollment in public schools was also a significant predictor of private school enrollments"); see also Smith & Meier, supra note 17, at 76-77 (reviewing social science research on private school enrollment to ascertain whether public school choice will increase or decrease segregation and concluding that increased segregation will result). But see Jay P. Greene, \textit{Civic Values in Public and Private Schools}, in \textit{Learning From School Choice} 96-97 (Paul E. Peterson & Bryan C. Hassel eds., 1998) (analyzing a national sample to demonstrate that private school students are more likely to attend racially mixed classes than their public school counterparts); Peterson, supra note 5, at 74 (concluding that students in private schools are "less racially isolated than their public school peers"). For a review of social science research on the relationship between choice and class segregation, see Richard F. Elmore & Bruce Fuller, \textit{Empirical Research on Educational Choice: What Are the Implications for Policy-Makers?}, in \textit{Who Chooses? Who Loses? Culture, Institutions, and the Unequal Effects of School Choice} 189-93 (Bruce Fuller & Richard F. Elmore eds., 1996).

\textsuperscript{190} Magnet schools, a common desegregation method, have been found to increase segregation when used without racially conscious student assignment practices. See Christine H. Rossell, \textit{The Carrot or the Stick for School Desegregation Policy: Magnet Schools or Forced Busing} 106-08, 197-200 (1990); see also Ascher, supra note 24, at 216 (concluding that "[c]hoice alone has not proven an effective desegregation strategy"). Others have concluded that transfer policies have encouraged segregation. See Hawke, supra note 2, at 620 (concluding that open enrollment has allowed whites to flee minority school districts); McKinney, supra note 2, at 417-18 (arguing that open enrollment has increased segregation).

\textsuperscript{191} With tipping, at a certain minority student enrollment, all, or almost all, whites exit the school. At that point, the school "tips" from a diverse school to an all-minority school. See Eisendorf, supra note 10, at 945 n.38; O'Brien, supra note 13, at 401. Michigan has experienced a different phenomenon in its charter schools. It has had a dramatic decrease in the percentage of minorities enrolled in charter schools. This is due both to the opening of new charter schools with fewer minorities and to the loss of minorities in already existing charter schools. Jerry Horn & Gary Miron, W. Mich. Univ., \textit{Evaluation of the Michigan Public School Academy Initiative: Final Report}, at iv-v (1999) (prepared for the Michigan Department of Education) [hereinafter \textit{Michigan Academy}]; see also Cobb & Glass, supra note 22, tbl. 7 (concluding that charter schools in Arizona became more white over the three-year period studied).
appear designed especially to educate a particular racial group. For example, in Lansing, Michigan, where African Americans make up thirty-three percent of the school district, the El-Haji Malik El-Shabazz Academy, with its Afrocentric curriculum, is almost completely African American.\footnote{192}{A description of the charter school can be found in the C\textsc{harter} S\textsc{chool} D\textsc{irectory}, \textit{supra} note 8, at 143. For the enrollment figures, see M\textsc{ichigan} A\textsc{cademy}, \textit{supra} note 191, app. I.} Likewise, enrollment at the A.G.B.U. Alex & Marie Manogian School in Southfield, Michigan, a charter school with a focus on Armenian language and culture, is almost 100% Armenian.\footnote{193}{See Lynn Schnaiberg, \textit{C\textsc{harter} S\textsc{chools: C}hoice, D\textsc{iversity} M\textsc{ay B}e at O\textsc{dds}}, \textsc{E}d\textsc{uc. Wk.}, May 10, 2000, at 1, 19.} The same is true for Benito Juarez Academy, an overwhelmingly Hispanic charter school in Saginaw, Michigan (where only thirteen percent of the children in the school district are Hispanic),\footnote{194}{A description of the charter school can be found in the C\textsc{harter} S\textsc{chool} D\textsc{irectory}, \textit{supra} note 8, at 138. For the enrollment figures, see M\textsc{ichigan} A\textsc{cademy}, \textit{supra} note 191, app. I.} and Eci Nonpa Woonspe' Charter School in Morton, Minnesota, with its ninety-five percent American Indian student population, as compared to eleven percent in the surrounding school district.\footnote{195}{A description of the charter school can be found in the C\textsc{harter} S\textsc{chool} D\textsc{irectory}, \textit{supra} note 8, at 158. For the enrollment figures, see M\textsc{innesota} E\textsc{nrollment} R\textsc{eport}, \textit{supra} note 187, at 9-10.}

In these situations and others, state actors themselves are providing the opportunity for, and strongly pursuing, a segregated education, and with public money. Afrocentric schools are one example,\footnote{196}{For definitions of Afrocentric schooling, see Brown, \textit{supra} note 40, at 309 n.2; Keller, \textit{supra} note 41, at 82-87.} but schools focusing on other racial groups exist. For the sake of simplicity, I refer to these schools as “centric charter schools.”

The racially distinctive nature of centric charter schools directly conflicts with the racial and ethnic balance provisions found in some charter school legislation and with the goals pursued in school desegregation litigation. But the schools may also be directly contrary to the Equal Protection Clause itself, which is the focus of the next subpart.

\textbf{B. Constitutionality of Centric Charter Schools}

In Detroit and elsewhere, charter schools enroll only one racial group because the surrounding school district overwhelmingly teaches
one race.\textsuperscript{197} This is true whether or not the charter schools are centric, and it seems unlikely that a court would find a constitutional problem with centric schools matching an overwhelming one-race student enrollment in the school district. A court would be hard-pressed to find that the enrollment patterns were caused by the centric nature of the school, and without causation there is no constitutional claim.\textsuperscript{198} Instead, housing segregation would likely be the cause.

If charter schools were required to enroll students outside of the school district or metropolitan area, then causation might be established. But it seems highly unlikely that the Fourteenth Amendment requires charter schools to enroll students outside of the school district or metropolitan area, particularly if transportation costs must be borne by the parent.\textsuperscript{199} Not only has the Supreme Court shown great respect for school district boundaries,\textsuperscript{200} but the relevant pool for enrollment in the charter school is likely to be students already enrolled in public schools in the school district, or perhaps even a smaller area if transportation is not provided and the school district is large.\textsuperscript{201}

In some areas, however, the causation between centric schools and their student enrollment is more complex. Centric schools in

\begin{footnotes}
\footnotetext[197]{See Michigan Academy, supra note 191, app. J. For citations to scholarship examining Detroit Afrocentric schools, see supra note 41.}
\footnotetext[198]{See Chemerinsky, supra note 99, at 568.}
\footnotetext[199]{States vary widely on transportation requirements of charter schools. Some states provide some transportation funding directly to the charter school. See, e.g., Del. Code Ann. tit. 14, § 508 (1999) (mandating that transportation aid follow a student to a charter school unless the school district itself provides transportation). Other states simply require that transportation be addressed in the charter. See, e.g., Colo. Rev. Stat. Ann. § 22-30.5-106(1)(k) (West Supp. 1999).}
\footnotetext[200]{See Milliken v. Bradley, 418 U.S. 717, 741 (1974) (holding that a remedy crossing school district boundaries must prove a violation in the drawing of the lines or in the school district affected by the boundary changes). See generally Shaw I, 509 U.S. 630, 646 (1993) (reasoning that “when members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes”).}
\footnotetext[201]{Granted, charter schools hope to capture private school attendees, but making private school students, even those attending schools or residing within the school district, part of the applicable pool is highly problematic. Capturing private school attendees is a complicated, education-oriented task for which charter schools should not bear legal responsibility. Most charter school legislation is written as an education to be offered for the public school district in which the charter school is sited. See, e.g., supra notes 67-69 (quoting from racial and ethnic balance provisions which are largely based on the surrounding school district). Even using the school district itself as the comparison group may be inequitable. In large school districts, Chicago being an obvious example, it seems unreasonable to expect parents to enroll their children in distant charter schools, especially when transportation is often not provided. See supra note 199 (discussing the transportation obligations of charter schools).}
diverse school districts or in school districts predominately of a
different race than the charter school raise more complicated issues
because causation seems more apparent.

1. State Action

An initial question is whether charter schools themselves are
subject to the Fourteenth Amendment, which only concerns state
action. Most charter school legislation correctly defines charter
schools as public schools. Although a state’s definition is not
dispositive, no reason exists to designate charter schools as nonstate
actors—they are, after all, funded by public money, created and
defined by state legislation, and fulfill state functions. Further, if the
charter schools are not public schools, then charter school legislation
may violate state constitutional requirements regarding the
maintenance of public education. Relatedly, the entities overseeing
the charter school process are overwhelmingly state actors. School
districts and state boards of education exercise a great deal of control
over charter schools, and their actions vis-à-vis the charter school are
also subject to the Equal Protection Clause.

Given that the Fourteenth Amendment applies to charter schools
and, typically, their authorizing entities, a second, and more
complicated issue arises: Can charter schools be one-race schools and
designed to teach that particular race if the surrounding school district
is not disproportionately of that race?

2000).

203. See Minow, supra note 24, at 282-85. For more detailed treatment of whether
charter schools can be considered state actors, see Justin M. Goldstein, Note, Exploring
"Unchartered" Territory: An Analysis of Charter Schools and the Applicability of the U.S.
Constitution, 7 S. Cal. Interdisc. L.J. 133 (1998); Kevin S. Huffman, Note, Charter
Schools, Equal Protection Litigation, and the New School Reform Movement, 73 N.Y.U.
L. Rev. 1290 (1998); Wren, supra note 52. Professor Mark Tushnet has also argued that the
legal rules that the government imposes on public schools can likewise be required of private
schools. See Mark Tushnet, Public and Private Education: Is There a Constitutional
"[t]he fact that policy can be imposed by regulation upon private schools will not answer the
question of whether a resulting regulated system of privatized schools will have the same
potential for responsiveness as the contemporary public system").

Even if charter schools are not state actors, and I think they clearly are, a state actor (i.e.,
the state board of education or a local school district) is often the entity approving the charter
school petition. Further, the funding of the charter school is through public entities. The state
actor, when acting on the charter school petition or funding the charter school, must comply
with the Fourteenth Amendment.

204. See Wall, supra note 39, at 74-77 (discussing state constitutional challenges on
this ground).

205. See supra Part I.A.1-2.
2. Choice

From one perspective, centric charter schools are created by private choice, not state action: Parents choose whether to send their child to a charter school and in which charter school to seek enrollment. Furthermore, for the same reason the racial and ethnic balance provisions are constitutional, one could also argue the constitutionality of centric charter schools. The Equal Protection Clause allows the consideration of racial matters so long as no discriminatory treatment occurs, and centric charter schools properly take into account racial matters in their operation. No explicit barriers to enrollment exist; there is no indication that any charter school has a racially explicit admission policy or practice. Any student is free to enroll in the school. No different treatment in selection occurs. In other words, no facial racial classification is evident, and no discriminatory purpose exists.

This position is most strongly supported by *Bazemore v. Friday*, in which the Supreme Court considered publicly-funded, one-race 4-H and Extension Homemaker Clubs in North Carolina. The clubs were racially identifiable, although they had ended their discriminatory admission policies. The Supreme Court held that the racially-defined nature of the clubs was attributable to personal choice rather than state action. For this reason, the clubs fully complied with the Equal Protection Clause; there was no duty to produce actual integration, or even actual desegregation. The affirmative obligation placed on public education to desegregate to the extent practicable depended on the compulsory nature of education. The clubs, a "wholly different milieu," were segregated as "the result of wholly voluntary and unfettered choice of private individuals." Thus, the policy of nondiscrimination was all the Constitution required to redress past discrimination.

However, the fact that choice is part of the enrollment process cannot always excuse the resulting segregation. In *United States v. Fordice*, the Mississippi higher education desegregation case, the Supreme Court recognized that choice can be improperly influenced by state actors. There, the Court recognized that students both choose whether to attend a public college or university and to which

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207. *See* id. at 407-08 (White, J., concurring) (setting forth the majority's analysis of the issue).
public college or university to apply.\textsuperscript{211} Nevertheless, the segregation present in Mississippi’s colleges or universities could not be excused by the adoption of race-neutral admission policies.\textsuperscript{212} The state still had the responsibility to redress the disparity to the extent the disparity was caused by the state’s actions.\textsuperscript{213} The Court held \textit{Bazemore} inapplicable when the policies from past segregation “perpetuate the racially segregated higher education system.”\textsuperscript{214} Practices not found in the prior unlawful system are subject to a traditional Fourteenth Amendment analysis.\textsuperscript{215} Thus, the state was charged to consider aspects rooted in the unlawful system that may continue to cause segregation.\textsuperscript{216}

Clearly, part of the remedial burden placed on Mississippi was due to the establishment of a prior dual system; the state was under the obligation to dismantle that system and its present day effects to the extent practicable and had not yet achieved an acceptable level of desegregation.\textsuperscript{217} Charter schools, on the other hand, are forbidden from racially restrictive enrollment practices in the first instance,\textsuperscript{218} and there is no evidence that any school has operated under an explicitly discriminatory admissions policy.

Yet, private choice alone should not constitutionalize centric charter schools. The schools are funded with public money, and state actors exercise a great deal of control over the enterprise, from deciding which charter school petitions to approve, to agreeing to the terms of the charter, to deciding whether to revoke, renew, or terminate an existing charter.\textsuperscript{219} State actors and public dollars control, to a large degree, the charter school. Private choice is only part of the charter school. To the extent that state action provides, free of charge, the

\begin{itemize}
\item \textsuperscript{211} See id.
\item \textsuperscript{212} See id.
\item \textsuperscript{213} The Court explained:
\begin{itemize}
\item If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.
\end{itemize}
\item \textsuperscript{214} Id. at 731.
\item \textsuperscript{215} See id. at 732 n.6.
\item \textsuperscript{216} The Court identified four policies: “Admissions standards, program duplication, institutional mission assignments, and continued operation of all eight public universities.”
\item \textsuperscript{217} Id. at 733.
\item \textsuperscript{218} See supra notes 149-153 and accompanying text.
\item \textsuperscript{219} See supra Part I.A.1.
\end{itemize}
tools with which to segregate, then liability should attach as it did in many post-
Brown cases. The next subpart examines whether intentional discrimination could be found in the operation of centric charter schools.

3. Intentional Discrimination

In many respects, a charter school can intentionally create segregated schooling, even with a race-neutral admissions policy. A charter school's design, over which both the requesting and authorizing agency have a great deal of control, impacts dramatically student enrollment. A charter school can be designed to operate as a one-race school through routine school issues. A school's site, curriculum, instruction, staff, faculty, board members, and transportation will all affect the racial composition of the school. A school started by a group of whites, placed in a white neighborhood with no transportation, with an all-white faculty, staff, and board to oversee a Gaelic and Irish curriculum can be expected to enroll an overwhelming number of white students. On the other hand, a school sited in an African American neighborhood, providing no transportation, started by a group of African Americans, staffed by African Americans, guided by an African American board, and structured around an Afrocentric curriculum will overwhelmingly attract African American students. Educators fully realize that their decisions on how to operate a charter school will impact student enrollment patterns, and centric charter schools in some instances appear to be designed by definition to be segregated, publicly funded education.

a. Northern School Desegregation Cases

The creation of one-race centric charter schools is achieved much like school segregation was achieved in the North. Racially explicit student enrollment policies were avoided, but school districts were still able to create white schools and minority schools through the siting of schools, busing of students, and hiring of faculty and staff. These

220. Consider the statement of the Boston Teachers Union President to the establishment of an Afrocentric pilot school:

[It appeared to many on the committee that an Afrocentric school that teaches Swahili and African drum and dance and is based on the principles of Kwanzaa is not going to attract a diverse student population. . . . One person on the committee even said that if we approved a pilot school in South Boston that taught Gaelic and Irish dance and concentrated on Irish literature, we'd be shot for approving it.

Patricia Smith, School Learns a Hard Lesson, BOSTON GLOBE, Nov. 15, 1996, at B1.]
means allowed the creation of racially identifiable schools, eventually held to be unconstitutional.

Consider Keyes v. School District No. 1, the Denver, Colorado school desegregation case in which the Supreme Court first considered school segregation outside of states with racially explicit student assignment policies. 221 There nonstudent assignment practices such as school siting and sizing, transportation, staff, and faculty were used to create an unlawfully segregated school. 222 The Court acknowledged that an unlawfully segregated school system can be created without a racially exclusive student admission policy. 223 Likewise in the Columbus, Ohio school desegregation case, Columbus Board of Education v. Penick (Columbus II), the Court noted that the assignment of teachers and site selection can be part of an unconstitutional system of segregation. 224 In Columbus, the Court recognized that "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose." 225

b. Redistricting Cases

It may seem odd to apply school desegregation liability decisions from the late 1970s to the new idea of charter schools. Yet, the recent redistricting cases in some respects validate the application of the older, northern school desegregation cases to charter schools. In the recent voting cases, the Supreme Court has evidenced a strong opposition to state segregation. Analogizing redistricting to the outlawing of state segregation in public parks, buses, beaches, and schools, the Supreme Court has reasoned that "the State may not,

221. 413 U.S. 189, 191 (1973).
222. Id.
223. See id. at 201. Although then-Justice Rehnquist dissented, his disagreement with the majority concerned a different matter, the presumption of a systemwide dual system because of intentional discrimination in a substantial portion of the school district. See id. at 254 (Rehnquist, J., dissenting).
225. Id. at 464. Then-Justice Rehnquist strongly dissented, partly on the grounds that nonstudent assignment practices such as "construction and siting of schools" were not found to have been racially motivated. Id. at 502 (Rehnquist, J., dissenting). He explained further:

In a school system with racially imbalanced schools, every school board action regarding construction, pupil assignment, transportation, annexation, and temporary facilities will promote integration, aggravate segregation, or maintain segregation. Foreseeability follows from the obviousness of that proposition. Such a tight noose on school board decisionmaking will invariably move government of a school system from the townhall to the courthouse.

Id. at 510 (Rehnquist, J., dissenting).
absent extraordinary justification, segregate citizens on the basis of race."\textsuperscript{226} The redistricting cases are not, however, a perfect analogy to charter schools because of the role of private choice in charter schools. Although individuals largely make their own housing decisions, which directly relates to placement in voting districts, no one would contend that private choice has much of an influence on redistricting. The drawing of boundaries is entirely a state action, and lines change too often to control a person's housing decision. Nor is it clear why most persons would choose their home based on voting districts. The segregation, in other words, is entirely driven by state action. In charter schools, however, the state is not placing any student in a centric charter school, and parents have direct control over choosing the centric charter school, although admission is not guaranteed.\textsuperscript{227} The state is only providing the opportunity for a free, centric education. Thus, it is not clear that the strong antisegregation preference of the redistricting cases would be applied to the charter school setting.

c. Recent School Desegregation Cases

Further, although choice alone cannot constitutionalize centric charter schools, the Supreme Court has recognized the role of private choice in education segregation. The Supreme Court readily accepted the constitutionality of segregation in the education sector when that segregation is deemed to be caused entirely by nonstate actors.\textsuperscript{228} In a recent round of school desegregation cases, the Court appears to envision a world with segregation in public education, but with the disparities caused entirely by nonstate actors to whom no Fourteenth

\textsuperscript{226} Miller v. Johnson, 515 U.S. 900, 911 (1995); see id. at 911-12 (reasoning that "[w]hen the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls'" (quoting Shaw I, 509 U.S. 630, 647 (1993))); Shaw I, 509 U.S. at 657 (arguing that "[f]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire").

\textsuperscript{227} See Eisdorfer, supra note 10, at 955 (recognizing that choice does not "guarantee[] every family its first choice"); Stephen L. Gessner, The Dangers of Fashionable Education Reform, 11 Stan. L. & Pol'y Rev. 235, 237 (2000) (noting that "[t]he reality is that 'choice' is really not the right word to describe school choice. 'Application' describes the movement better, since the demand for the better achieving schools within a district is sometimes so high that students face odds of acceptance as long as those for Ivy League colleges.").

Amendment responsibility attaches. In this sense, the Court allows segregation in schools. Specifically, the Court has accepted disproportionately one-race schools because either the desegregation of these schools is impracticable or the segregation is due to private housing choices. The Court accepts self-segregation in housing as a natural event, not caused by discrimination by a state actor. Disparities in achievement scores likewise can be caused by private forces.

Although the Supreme Court has not overruled the earlier northern school desegregation cases of *Columbus II* and *Dayton II*, the recent school desegregation cases take a different approach to the causation of segregation. The earlier cases rested on the presumption that, absent official state segregation, integration would be achieved. But the Court's recent decisions in *Dowell*, *Freeman*, and *Jenkins* readily accept racial segregation as a consequence of private decision making.

4. Constitutional Charter Schools

Based on the recent Supreme Court decisions, I think it is clear that a court would not find intentional discrimination based on the mere siting of a charter school in a segregated neighborhood. Although requesting and authorizing agencies have great control over siting, a different rule would result in a blanket prohibition on the placement of any charter school in a segregated neighborhood. This would run counter to the school desegregation cases recognizing the private forces behind housing segregation. Traditional public schools are sometimes allowed in segregated neighborhoods, even when the resulting student enrollment is segregated. The Court has a history of readily accepting that schools may be segregated because of private housing choices. School districts have been required to overcome segregation in schools only when their own past or present actions caused the segregation.

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229. *Freeman*, 503 U.S. at 494-95; *Dowell*, 498 U.S. at 250 n.2.


5. Centric Charter Schools

A more difficult issue arises, however, when the purpose of the school can only be regarded as race-specific. When state actors (i.e., the requesting and authorizing agencies and the charter school operators) gear all aspects of the school toward a single racial group, particularly explicit curriculum and instruction, and when the school's explicit mission is to educate solely for the needs of one racial group, the question arises whether the resulting segregation is unconstitutional. The school's approach could be deemed a racial classification given the explicit focus on providing an education for one race, even if the school is designed to benefit that race. Centric charter schools, almost by definition, appear to be conscious efforts to create a one-race learning experience. To restate the language of Feeney, there is more than knowledge of the potential for segregation; indeed the very purpose of the school is segregative. The requisite intent is proven by the terms of the school. For example, an Afrocentric charter school with a fifty percent white student enrollment would not be an Afrocentric charter school. In other words, Afrocentric schools, even when not absolutely prohibiting white enrollment, treat whites (and other races and ethnicities) differently on account of race. The schools are designed to educate African Americans and only African Americans. From a purely interpretive standpoint, I think it likely that centric charter schools, to the extent they do not match their surrounding school district, would be deemed unconstitutional. They are designed to educate one racial group and therefore treat students differently because of their race. Under the Supreme Court's Equal Protection jurisprudence, the schools would probably be deemed unconstitutional race discrimination, most likely as an unlawful racial classification.

236. See Personnel Adm'r v. Feeney, 442 U.S. 256, 279 n.24 (1979) (recognizing that "[w]hat a legislature or any official entity is 'up to' may be plain from the results its actions achieve, or the results they avoid").


238. See Feeney, 442 U.S. at 279; see also supra notes 95-96 and accompanying text (discussing this aspect of Feeney). See generally Shaw I, 509 U.S. 630, 649 (1993) ("[T]hough race neutral on its face, rationally [it] cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.").

239. Benefits for non-African Americans are sometimes recognized, but only as an afterthought. The focus is by definition on the needs of African American schoolchildren. See, e.g., Brown, supra note 40, at 351 n.181 (recognizing a potential benefit for non-African Americans, but advocating that the schools address the special needs of African Americans); Jarvis, supra note 41, at 1502-03 (same).
Yet, this conclusion is troubling for several reasons. Part of the analytical problem is that the intentional creation of a white school seems far-fetched—there is little, if any, need to create schools to focus on the needs of white students or their culture given that schools today already are largely geared toward this baseline. Although charter schools focusing on classical education and America’s founders exist,240 the normative preferences of much of education are already driven by white culture. There is no need to create schools explicitly centered on white culture and educational needs because most schools already so provide. It is only by creating a different educational focus, a minority focus, that Equal Protection issues are likely to arise. Deviation from the educational norm creates an opportunity to create an unlawful racial classification.241 Yet, if the baseline itself has race-specific aspects, here, a “white” orientation, using the Equal Protection Clause to prohibit race-conscious schools differing from the baseline assumptions seems wrong—particularly when the Court so readily has accepted one-race schools in the school desegregation context.242

Outlawing some Afrocentric and similar charter schools is also analytically difficult because the argument could potentially reach college and university study programs focusing on race-specific history, culture, and language, whether it be African American, American Indian, European, Irish, or Mexican American and perhaps even historically black colleges.243 These programs and schools, like

240. See, e.g., CHARTER SCHOOL DIRECTORY, supra note 8, at 9 (American Heritage Academy); id. at 23 (Heritage Academy, Inc.); id. at 57 (Classical Academy); id. at 63 (Heritage School); id. at 190 (Thomas Jefferson Classical Academy); id. at 207 (Arlington Classics Academy).
241. One commentator has aptly explained:
   Such schools are simply ‘normal’ and as such provide a baseline against which education is measured. Deviation from the base-line requires explanation and a race-based explanation will be suspect. Consequently, while courts may be slow to find culpable problems where the minority student is a bad fit with the common curriculum, the same may not be true where the curriculum appears to be moving away from the perceived common student. . . .
   . . . Whatever the larger society is, it is reified and defined only in contradistinction to the different cultural and ethnic traits. The departure from the legitimized norm is noticed, while the roots of the norm are not.
Keller, supra note 41, at 88-89.
242. Consider the statement of this principal: “We’ve had all-boy schools in urban areas for all the wrong reasons. The moment we start to talk about something positive, then the folks come out of the woodwork.” Id. at 67 (internal quotations omitted) (quoting Dr. Clifford Watson, principal of Malcolm X Academy in Detroit, Michigan, as reported in the New York Times).
243. See Špann, supra note 44, at 218 (examining the implications of such programs under Proposition 209).
centric charter schools, may be entirely race-neutral in their admissions, but are usually more attractive to their corresponding racial group.244

Special educational needs clearly attach to some minority school children. The most obvious is special language education for students who are limited English speaking or non-English speaking. The creation of programs for language minority students seems entirely consistent with the special educational needs of these children. Some would also extend the argument to Afrocentric and other centric schools.245

It is also troubling that centric charter schools reflecting their segregated surrounding school district may be permitted, but that centric charter schools not matching their segregated surrounding school district are not permitted. It seems impossible to imagine the Supreme Court holding unconstitutional an Afrocentric charter school within the city of Detroit, which is overwhelmingly African American.246 The charter school would be just as segregated as any other public school in Detroit. It seems incongruous that Afrocentric schools may be constitutionally permissible in predominately African American school districts but not in racially and ethnically mixed or predominately white school districts.

Perhaps the strongest counterargument is that centric schools are not a racial classification because they focus on culture, not race. This argument suggests, for example, that an Afrocentric school is attractive to those who identify with the cultural approach. Not all African Americans and other blacks would be interested in the school, only a select subgroup. Other nonblack racial groups could also be attracted to the school.247 Thus, no racial category is at play. This argument finds support in Hernandez v. New York.248 In that case, the Supreme Court reasoned that even though speaking Spanish is highly correlated with being Latino, the striking of Spanish-speaking jurors was race-neutral.249 The Supreme Court recognized that Spanish speakers are

244. Granted, the Supreme Court has applied different liability standards to higher education than to primary and secondary education, but the comparison is still troubling. See United States v. Fordice, 505 U.S. 717, 730 n.4 (1992).
245. See, e.g., Brown, supra note 40, at 350; Jarvis, supra note 41, at 1291-93.
246. See supra note 197 and accompanying text (discussing centric schooling in Detroit).
247. See Forde-Mazrui, supra note 30, at 2387 (concluding that "neither African-American nor Black culture is a racial category and the purpose of promoting the culture or affecting its members through race-neutral means is neither suspect nor subject to strict scrutiny").
249. See id. at 361.
not a racial group.\textsuperscript{250} Some Latinos speak Spanish, others do not. Following this line of analysis, one could argue that a centric school is race-neutral, even if it highly correlates with race and employs no racial classification.

Yet, centric charter schools are more than cultural centers. These schools, products of state funding and oversight, are designed throughout as a more effective way to educate one race, to the exclusion of the educational needs of other races. The education offered will surely not be appealing to all members of the race targeted by the centric school. Yet, the different treatment of those not targeted by the school will most likely equate with a racial classification.

Further, the Supreme Court’s discrimination jurisprudence is strongly antisegregative when that segregation is created by state action. Centric charter schools, entities funded by public money and maintained by state action, provide the opportunity for a segregated education, just as the state tuition grants and freedom of choice plans allowed in the immediate aftermath of \textit{Brown}.\textsuperscript{251} In an already segregated school district, the purpose of the centric school is not to segregate. A centric school not matching the enrollment of its school district, however, has the purpose to segregate because its purpose is to educate one group to the exclusion of the educational needs of other groups. Thus, even though deeming these schools unconstitutional is troubling for the reasons discussed above, an interpretative approach to the question leads to this conclusion: To the extent that centric charter schools are not reflective of the surrounding school district, then the centric nature of the school causes any segregation in student enrollment. Because charter schools are subject to the Fourteenth Amendment and due to the high level of state action in creating and maintaining the schools, a racial classification should be found. A publicly funded school, typically approved by school districts and state boards of education, is providing the opportunity for a segregated education and is thereby treating students differently based on their race.

\textsuperscript{250} See id. at 361-62.

\textsuperscript{251} See Norwood v. Harrison, 413 U.S. 455, 465 (1973) ("Racial discrimination in state-operated schools is barred by the Constitution and \textquoteleft}[\textit{it is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish}]\textquoteright" (alteration in original) (quoting \textit{Lee v. Macon County Bd. of Educ.}, 267 F. Supp. 458, 475-76 (M.D. Ala. 1967)), \textit{aff'd sub nom. Wallace v. United States}, 389 U.S. 215 (1967) (per curiam); \textit{supra} notes 14-15 and accompanying text (reviewing that history).
Furthermore, the segregation should not survive strict scrutiny. Remedi
ying past discrimination can be a compelling governmental inter
est, but there is no evidence of past discrimination with respect to
the operation of charter schools. General societal discrimination or
segregation by other state actors is insufficient. Even if the Court
also accepts diversity as a compelling governmental interest, centric
charter schools by definition are not pursuing the goal of diversity. In
sum, centric charter schools may, in certain instances, be unconstitu
tionally segregated education.

III. CHARTER SCHOOLS AND SCHOOL DESSEGREGATION LITIGATION

A third Equal Protection issue is the relationship between charter
schools and school desegregation. Three questions arise: Should
charter schools be bound by school desegregation orders covering
their surrounding school district? Will charter schools hinder a school
district’s efforts to desegregate? And will school desegregation
litigation burden the charter school movement?

In this Part, I first consider the school desegregation obligations
of charter schools. The law treats the clear majority of charter
schools as if it would any other public school in a court-ordered school
district (meaning a school district subject to a pending school
desegregation order). I next examine how school desegregation has
impacted the charter school movement. Charter schools operating
in court-ordered school districts have faced, at times, additional
burdens in their operations; yet, the burdens are entirely appropriate
and not unduly onerous. Finally, school desegregation itself is largely
protected from the charter movement, but only because school
desegregation with respect to student segregation requires little.

A. Charter Schools’ Desegregation Obligations

This subpart considers the obligations of charter schools
operating in a school district subject to a pending school desegregation
order.

252. See supra notes 78-84 and accompanying text (stating the strict scrutiny test).
(plurality opinion).
(per curiam) (reviewing recent case law on the acceptability of diversity as a compelling
governmental interest), cert. dismissed, 120 S. Ct. 1552 (2000).
255. See infra Part III.A.
256. See infra notes 279-298 and accompanying text.
257. See infra notes 299-307 and accompanying text.
Charter School Legislation and School Desegregation

Eleven of the thirty-six states with charter school legislation explicitly require that charter schools comply with school desegregation orders or not interfere with the desegregation process.258 Nevada’s statute is typical. It provides that “[a] charter school shall...[c]omply with any plan for desegregation ordered by a court that is in effect in the school district in which the charter school is located.”259 For these states, it is clear that charter schools must conform to pending school desegregation orders, just as other public schools must comply. This usually includes orders regarding student assignment, faculty assignment, staff assignment, transportation, facilities, and

258. See, e.g., Ark. Code Ann. § 6-23-106(a) (Michie 1999) (“The petitioners for a charter school, the board of directors of the school district in which a proposed charter school would be located, and the State Board of Education shall carefully review the potential impact of an application for a charter school on the efforts of a school district or districts to comply with court orders and statutory obligations to create and maintain a unitary system of desegregated public schools.”); Colo. Rev. Stat. Ann. § 22-30.5-104(3) (West Supp. 1999) (“A charter school shall be subject to any court-ordered desegregation plan in effect for the school district.”); Del. Code Ann. tit 14, § 506(a)(5) (1999) (“A charter school shall not...[b]e formed to circumvent a court-ordered desegregation plan.”); 105 Ill. Comp. Stat. 5/27A-4(a) (West Supp. 2000) (“The General Assembly does not intend to alter or amend the provisions of any court-ordered desegregation plan in effect for any school district.”); La. Rev. Stat. Ann. § 17:3991(C)(3) (West Supp. 2000) (“A charter school shall...[b]e subject to any court-ordered desegregation plan in effect for the city or parish school system.”); Nev. Rev. Stat. Ann. § 386.550 (2000) (“A charter school shall...[c]omply with any plan for desegregation ordered by a court that is in effect in the school district in which the charter school is located.”); N.C. Gen. Stat. § 115C-238.29F(g)(5) (1999) (“The [charter] school shall be subject to any court-ordered desegregation plan in effect for the local school administrative unit.”); Ohio Rev. Code Ann. § 3314.06 (West Supp. 2000) (providing that “in the event the racial composition of the enrollment of the community school is violative of a federal desegregation order, the community school shall take any and all corrective measures to comply with the desegregation order.”); Okla. Stat. Ann. tit. 70, § 3-140(B) (West Supp. 2000) (“A charter school shall admit students who reside in the attendance area of a school or in a school district that is under a court order of desegregation or that is a party to an agreement with the United States Department of Education Office for Civil Rights directed towards mediating alleged or proven racial discrimination unless notice is received from the resident school district that admission of the student would violate the court order or agreement.”); Pa. Stat. Ann. tit. 24, § 17-1730-A (West Supp. 2000) (“The local board of school directors of a school district which is operating under a desegregation plan approved by the Pennsylvania Human Relations Commission or a desegregation order by a Federal or State court shall not approve a charter school application if such charter school would place the school district in noncompliance with its desegregation order.”); Va. Code Ann. § 22.1-212.6(A) (Michie 2000) (“A public charter school shall be subject to...any court-ordered desegregation plan in effect for the school division...”).

Arizona allows that a court-ordered school district may notify a charter school that the school district objects to the charter school enrolling its students on the grounds that the enrollment would violate the court order. Ariz. Rev. Stat. Ann. § 15-184(D) (West Supp. 1999). If the charter school still enrolls the child, then no pupil funding for the pupil is provided. See id.

extracurricular activities. Orders regarding quality of education, curriculum, and instruction are also common.

2. Charter Schools in Court-Ordered School Districts

Charter schools operating in states with no explicit legislation requiring compliance with school desegregation orders will also have interactions with pending school desegregation orders. As discussed earlier, school districts and state boards of education often have authorizing authority for a charter school. If that school district or state board of education is subject to a school desegregation order, its actions vis-à-vis the charter school petition must be consistent with the school desegregation duty.

Essentially, this includes (1) compliance with the terms of all orders; (2) desegregation, to the extent practicable, of student assignment, faculty assignment, staff assignment, transportation, facilities, student activities, and, increasingly, quality of education; and (3) demonstration of the school board or district’s good faith commitment to future compliance with the Equal Protection Clause. At its core, this burden requires that school districts and boards not approve charter schools if the schools will unduly interfere with the maintenance and operation of desegregated schools.

The meaning of “unduly” carries with it a great deal of discretion, and the exact contours of the school desegregation burden have been adequately explored elsewhere. Suffice it to say here that school districts and boards are charged with creating racially balanced schools and programs, unless the disparity can be shown (1) to be caused not by a defendant but by a nondefendant force such as poverty, housing preferences, and the like or (2) to be impracticable to redress.

Charter schools could infringe on this obligation in a variety of ways. The charter school itself could be more segregated than the traditional public schools. The obvious method of creating segrega-

260. See Green v. County Sch. Bd., 391 U.S. 430, 435 (1968); see also Parker, supra note 234, at 1164 n.61.
262. See supra Part I.A.2 (discussing who has the authority to authorize charter schools).
264. See, e.g., Parker, supra note 233, at 550-63.
265. See Jenkins, 515 U.S. at 101-02; Parker, supra note 234, at 1172-73.
266. My conversations with Pauline Miller were particularly helpful in thinking about how charter schools could impinge on the school desegregation process.
tion, racially exclusive admission policies, would unquestionably be unconstitutional, even outside of the school desegregation context. More subtle ways to create segregated charter schools would be school siting, staffing patterns, transportation policies, marketing efforts, and curricular themes. As discussed earlier, a charter school’s treatment of routine school issues can affect its student enrollment.

The charter school also has the potential to cause traditional public schools to become more segregated. Students enrolled in charter schools could cause additional segregation in the traditional schools formerly attended by those students. Charter schools could also hire faculty and staff formerly employed by the school district, and the exodus of faculty and staff could have a negative impact on the desegregation of faculty and staff in the traditional schools. In these ways, charter schools could create additional segregation in a court-ordered school district. Parties with control over the charter school petition would need to take into account these concerns when considering the petition.

Furthermore, if it approves a charter school petition, a court-ordered school district or state will very likely need a modification of the outstanding school desegregation order. Thus, the federal courts may become directly involved in the charter school approval process. The approval of a charter petition will likely affect matters that are covered by a court order, particularly student assignment provisions that mandate the schools to which students are assigned. This will necessitate a request for a modification in a court order, which is governed by the standard in *Ruf v. Inmates of Suffolk County Jail,* So long as the charter school’s operation will not negatively impact the desegregative process, the modifications should readily be allowed. School desegregation decrees need not be static, and can be afforded the flexibility to take into account changes in educational policy.


268. *See supra* Part II.B.3. Requiring parental contracts—under which parents make specific promises to the school—or parental volunteer time, as some charter schools mandate, can also affect enrollment patterns.

269. 502 U.S. 367, 383-93 (1992); *see also* Agostini v. Felton, 521 U.S. 203, 216-17 (1997) (holding that the petitioners failed to meet the *Rufo* standard). Courts may grant requests for modifications based upon a change in fact or law that was not formerly anticipated by the parties, so long as the proposed change “is suitably tailored to the changed circumstance.” *Rufo,* 502 U.S. at 391. For more analysis of the *Rufo* standard, see Parker, *supra* note 233, at 536-38.

270. School districts often treat their school desegregation orders as static. *See Parker,* *supra* note 234, at 1212-13, 1216. Yet, the *Rufo* standard for modification is intended to allow changes in order to reflect changes in fact. *See Parker,* *supra* note 233, at 537-38. As
In one situation, however, charter schools may be able to escape a school desegregation order. Some states have no specific requirement that charter schools comply with outstanding school desegregation orders and allow entities other than a school district or state board of education, typically a college or university, to grant a charter. As such, there is no state statute requiring school desegregation compliance. In this situation, no party to the school desegregation case might be implicated in the charter school process, and any school desegregation order addressing the operation of the charter schools would address third parties entirely. Only limited remedies may be imposed on third parties.

This potential problem, however, should be considerably lessened by joining the nondefendant as a necessary party under Federal Rule of Civil Procedure 19. This rule, and similar counterparts, requires the joinder of parties, in the words of the rule, "if in the person's absence complete relief cannot be accorded among those already parties." When an authorizing agency grants or maintains a charter school that impedes the desegregation process, then that agency likely becomes a necessary party under Rule 19 and must be joined unless the joinder presents venue, personal jurisdiction, or subject matter jurisdiction problems.

School districts or states not subject to a school desegregation order would have a lesser burden than court-ordered school districts and states. Then the charter school petition must be considered without discriminatory intent.

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271. See supra Part III.A.1 (discussing how school desegregation litigation focuses heavily today on issues like modification requests).
272. See supra note 57 and accompanying text (citing statutes allowing colleges and universities to authorize charter schools); see also CHARTER SCHOOL DIRECTORY, supra note 8, at 4 (detailing percentages by state for colleges and universities sponsoring charter schools).
273. In the rare cases where a defendant is a state, then a defendant would be involved when the state provided funding or was directly involved in the authorizing process.
275. Fed. R. Civ. P. 19. The solution to this problem was generously suggested by Professor Daniel Levine.
276. Id. 19(a)(1).
277. Id. 19. Given the actions of the authorizing agency/proposed Rule 19 party in the school district, it seems unlikely that venue, personal jurisdiction, or subject matter jurisdiction would preclude joinder.
B. School Desegregation's Impact

Although it is clear that charter schools are bound by school desegregation orders covering their surrounding school district, except in potentially one instance, the interaction between charter schools and school desegregation is less clear. Hundreds of school desegregation orders continue today, particularly in the South and in smaller school districts, but the actual interaction between charter schools and school desegregation has been sparse. Charter schools presently enroll less than one percent of students attending public schools, and the average charter school is exceptionally small. As a result, the enrollment of students in charter schools has had a minimal impact on the racial composition of other public schools. Moreover, more than fifty percent of charter school students are in Arizona, California, and Michigan. Although school desegregation litigation exists in all three states, its presence is certainly not as high as in other states.

As the charter movement grows, however, the relationship will likely become more complicated, and it deserves close monitoring. Congress recently convened an oversight hearing on the issue, and conservatives have expressed consternation that school desegregation has curtailed charter schools in some communities. The Departments of Education and Justice have issued a publication to address the relationship between charter schools and school-districts.

279. See supra notes 271-274 and accompanying text.
280. See Parker, supra note 234, at 1207-10; Parker, supra note 233, at 480 n.16.
281. See CHARTER SCHOOLS 2000, supra note 8, at 18 (concluding that charter schools enroll 0.8% of all students in public schools); id. at 20 (comparing the median size of a charter school—137 students—to that of a public school—475 students). The District of Columbia and Arizona, however, had at least four percent of their public school enrollment in charter schools. See id. at 18.
282. See CHARTER SCHOOLS 2000, supra note 8, at 18.
284. The hearing was held October 14, 1999, before the United States House of Representatives Committee on the Judiciary, Subcommittee of the Constitution and specifically concerned the Department of Justice, Civil Rights Division's treatment of charter schools. See Civil Rights Division of the United States Dep't of Justice Regarding Charter Schools: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 106th Cong. 1 (1999) [hereinafter Hearings].
285. See Clint Bolick, Bill Lann Lee's War on Charter Schools, WALL ST. J., Mar. 22, 1999, at A23 (arguing that the Civil Rights Division "has launched a campaign to stop charter schools in their tracks"). Mr. Bolick's testimony before Congress on the issue can be found in Hearings, supra note 284, at 30-34.
under court order. The relationship between charter schools and school desegregation is also interesting because one is a reform effort focused exclusively on quality, while the other is concerned most directly with equality. Thus, by analyzing the interaction, one is also exploring the interaction between quality and equity.

The publication by the Departments of Education and Justice provides an incredibly small amount of guidance. Essentially, it requires that charter schools ascertain whether they reside in a court-ordered school district and, if so, contact the federal government for advice on how to proceed. The publication provides no other specific advice, thereby leaving the charter school to the mercy of the individual governmental official handling the case. Charter schools deserve more tangible information on school desegregation obligations, particularly so they can avoid legal fees that may escalate as contact with the government increases. With more concrete suggestions on how to comply with school desegregation principles, charter schools may be able to curtail legal expenses.

With a few exceptions, school desegregation litigation has not proven, however, to be an impediment to the operation of charter schools. Federal courts have approved their opening in court-ordered school districts. This is not to argue that school desegregation has had no impact on the opening of charter schools. In

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287. For more on the relationship between equality education movements and quality education movements, see Minow, supra note 24.

288. See Applying Federal Civil Rights Laws, supra note 286, at 8-10.

289. For example, the guidance could include plain descriptions of the school desegregation process—how suits typically begin, how modifications of orders occur, and how termination of the suit happens. The guidance could also provide fundamental information on typical school desegregation remedies and the remedial obligation.

290. See Johnson & Medler, supra note 17, at 299. The Johnson and Medler article is an article by Education Department officials that concludes that, “In most circumstances, compliance with desegregation orders and plans has not been raised by charter school operators as a barrier to the establishment of new charter schools.” Id.; Hearings, supra note 284, at 52-66 (statement of Anita Hodgkiss, Deputy Assistant Attorney Gen., Civil Rights Div., Dep't of Justice).

291. See Hearings, supra note 284, at 52-66 (reporting that one charter school was approved for Georgetown County, South Carolina, although others were not approved in Georgetown, and that a charter school was allowed in Monroe, Louisiana); Charter Hypocrisy, WALL ST. J., Oct. 20, 1999, at A26 (reporting that a district court approved a charter school in Baton Rouge, Louisiana, despite Department of Justice opposition); Kristen King, Judge OKs School Sites, Expansion of Charters, ADVOCATE (Baton Rouge), Jan. 27, 2000, at A1 (noting the judge's approval of adding grade levels to charter schools in Baton Rouge); supra notes 287-289.
some communities, notably Baton Rouge, Louisiana, and Benton Harbor, Michigan, charter schools have lead to significant litigation struggles. Even when court approval is quickly forthcoming, the litigation process imposes costs on charter schools, which are generally strapped for cash. But the school desegregation process is not antithetical to charter schools; desegregation remedies are not static and properly should take into account education reform.

The greatest potential for school desegregation to slow the charter school movement is the requirement that charter schools must comply with outstanding orders regarding student assignment. Some courts have required that charter schools comply with racial balance provisions imposed on traditional public schools. Such a

292. The dispute over charter schools in Baton Rouge led to congressional oversight hearings and Wall Street Journal editorials. Hearings, supra note 284 (providing details of the hearing); see Charter Hypocrisy, supra note 291. The district court approved the opening of charter schools—retroactively, for the school board initially failed to request approval. See William Pack, Ruling Rips, Applauds EBR Board, ADVOCATE (Baton Rouge), Aug. 4, 1999, at 1B (quoting the judge as declaring that the school district violated the law when it failed to get approval but deeming the action not a “hanging” offense). The Institute for Justice currently represents additional charter school petitioners in Baton Rouge. See Randy McClain, Funding Isn’t Only Problem, ADVOCATE (Baton Rouge), May 14, 2000, at 10A.

293. Benton Harbor, Michigan, is perhaps the strongest example of the difficulty charter schools have encountered in school desegregation cases in which they do not have the support of the school district. It took the first charter school over a year to get district court approval—approval gained after the charter school negotiated with the plaintiffs on the composition of the school board, student recruitment, curriculum, and annual reporting. See Berry v. Sch. Dist., 56 F. Supp. 2d 866, 869, 884 (W.D. Mich. 1999). Another charter school withdrew its request for district court approval because it could not afford the costs of discovery. See id. at 870 n.1. One charter school complied with discovery but was still held to have provided adequate information on the student recruitment. For this reason, the request was denied. See id. at 872-74. Another charter school complied with discovery and provided the court with extensive information on student recruitment, faculty and staff recruitment, curriculum, school board composition, and diversity training for faculty, staff, and school board members. See id. at 874-78. The charter school petition for state funding was granted, but with several restrictions. See id. at 885-86. The school had to continue good faith efforts to recruit diverse faculty, provide diversity training on an annual basis, add a non-African American board member, invite the plaintiffs to nominate for future board openings, and file interim and annual reports. See id. The charter school also had to comply with portions of the consent decree governing the defendants, including the race-conscious student enrollment requirements. See id. at 882-83. All this was required for a charter school to open in a ninety percent African American school district, with little expectation of meaningful integration of its student body. See id. Still the charter school failed to open. The ruling came in mid-July, and the charter school was unable to renovate the school facilities in time to open two months later. See Lynn Schnaible, Charter School Opening Must Wait Till Next Year, EDUC. WK., Oct. 27, 1999, at 5.

294. See Berry, 56 F. Supp. 2d at 885 (imposing on charter schools the same student assignment requirements placed on the defendants); Kelly Ryan, School Board Holds Off on Revised Charter Plan, St. PETERSBURG TIMES, May 24, 2000, at 4B (reporting that United States District Court Judge Steven Merriday has required that charter schools in Pinellas, Florida, “meet the same race ratios required of other public schools through 2007”).
requirement has the potential to foreclose charter schools that unduly interfere with desegregation of student assignment and might impose substantial burdens on charter schools. In some communities charter schools apparently have been foreclosed because of desegregation issues.\textsuperscript{295} Yet, the Supreme Court has readily allowed segregated, traditional public schools in court-ordered school districts.\textsuperscript{296} Student assignment orders themselves are typically weak and should rarely be that onerous on charter schools. In Benton Harbor, for example, a federal court denied a charter school petition on student assignment grounds because the school failed to provide adequate information on expected student enrollment.\textsuperscript{297} Given that the school district is ninety percent African American, however, it is hard to envision how requiring desegregation of the charter school’s student population would have much of an impact on the proposed charter school.\textsuperscript{298} That would not be so if the charter school were expected to be predominately white, but then the public would be funding white flight, from which school desegregation should be able to protect itself.

A related question is the impact of charter schools on court-ordered districts. Again, reports of the impact have been sporadic, primarily because of the early age and relatively small reach of the movement.\textsuperscript{299} The main complaint from court-ordered school districts is the loss of funds, i.e., that the district needed the money earmarked for charter schools to complete the desegregation process. These complaints are, however, still few in number.\textsuperscript{300} School desegregation should generally be protected from the charter school movement. The law clearly establishes that almost all charter schools must be operated

\textsuperscript{295} See Berry, 56 F. Supp. 2d at 872-74; Hearings, supra note 284, at 52-66 (reporting that the Department of Justice has raised school desegregation concerns about charter schools in St. Helena Parish, Louisiana, and Georgetown County, South Carolina, although other reasons may have lead to the proposals not gaining approval).

\textsuperscript{296} See Parker, supra note 234, at 1177.

\textsuperscript{297} See Berry, 56 F. Supp. 2d at 872-74.

\textsuperscript{298} See id. at 882.

\textsuperscript{299} See supra notes 280-281 and accompanying text (detailing the small impact of current charter schools on public school enrollment patterns).

\textsuperscript{300} See Jenkins v. Missouri, 205 F.3d 361, 368 (8th Cir.) (recognizing that the loss of money to charter schools is one of many “hurdles and obstacles to eliminating the vestiges of the past dual school system”), vacated, 216 F.3d 720 (8th Cir. 2000); Berry, 56 F. Supp. 2d at 878-89 (rejecting a school district’s argument that loss of money to a charter school would hinder the school desegregation process); Federal Judge to Decide Fate of Avoyelles Charter School, Advocate (Baton Rouge), Mar. 23, 2000, at 9B (reporting that a school district opposed a charter school “on financial grounds”).
in ways consistent with the school desegregation obligation. In fact, because much of the equity movement in schools is embodied in legal principles, i.e., the Fourteenth Amendment, Title VI, Title IX, and § 504, the quality movement must comply with legal standards requiring equity. In this sense, equity trumps quality. Yet, equity certainly depends to some extent on funding. To the extent that charter schools represent a significant drain on needed desegregation monies, then quality is allowed to limit equity.

Charter schools have the potential to increase segregation in traditional public schools in the areas of student assignment and faculty and staff assignment. Here, however, the law has readily allowed segregation in traditional public schools, and the same will likely be true for charter schools. In this sense, it is the legal principles themselves that are allowing the segregation; the charter school movement produces no segregation by enjoying a special advantage over legal principles.

The potential for charter schools to harm the school desegregation process is most likely in the states that allow entities other than local and state school boards to authorize the charter and have no specific requirements that charter schools comply with school desegregation decrees. In these instances, the lack of judicial supervision over the process may allow charter schools to circumvent the school desegregation process. No reports of these instances have occurred, but the situation should be closely monitored.

IV. CONCLUSION

In 1963, Freya Anderson and twenty-seven other African American school children first integrated Lee High School in Baton Rouge, Louisiana. She was “greeted by angry whites waving signs telling her to go back to Africa.” Instead, she marched bravely into the school, only to be surrounded by empty desks. She eventually

301. See supra Part III.A. (setting forth the legal obligations of charter schools in court-ordered school districts).
302. U.S. Const. amend. XIV.
306. See supra notes 266-268 and accompanying text.
307. See supra notes 271-274 and accompanying text.
308. See Fred Kalmbach, The Struggle for Desegregation, Mar. 10, 1996, ADVOCATE (Baton Rouge), at 1B.
309. Id.
310. See id.
left Baton Rogue, not for Africa, but for Lansing, Michigan, to work as a public school teacher in a predominately white school district.\textsuperscript{311} Frustrated with the education offered to Lansing’s African American pupils, she left traditional public schools altogether in 1996 to found and direct an Afrocentric charter school in Lansing, Sankofa Shule.\textsuperscript{312}

It would be highly ironic if a court declared Sankofa Shule unconstitutionally segregated.\textsuperscript{313} Yet, the Supreme Court in some respects still protects the nonsegregative ideal often associated with \textit{Brown v. Board of Education}.\textsuperscript{314} The Supreme Court’s Equal Protection jurisprudence allows some nonpreferential affirmative action that is nonsegregative in purpose. States can constitutionally require their charter schools to seek a racial and ethnic balance so long as the admissions policies are not race-conscious.\textsuperscript{315} Likewise, charter schools are generally subject to any outstanding school desegregation order for their respective school districts.\textsuperscript{316} Charter schools designed to appeal to one racial group, however, may run afield of Supreme Court’s antisegregative ideal.\textsuperscript{317} Ms. Anderson and others may rightly find \textit{Brown} a lost cause today, but the Supreme Court remains committed to a limited vision of no state-sponsored segregation.

\textsuperscript{311} See Lisa Ann Williamson, \textit{‘Return to the Past . . . and Go Forward’}, \textit{GRAND RAPIDS PRESS}, Apr. 7, 1996, at E1; \textit{supra} note 192 and accompanying text (providing that Lansing public schools are thirty-three percent African American).


\textsuperscript{313} The constitutionality of this specific school, which has received favorable press, see \textit{supra} authorities cited in notes 311-312, is obviously beyond the scope of this Article.

\textsuperscript{314} 347 U.S. 483 (1954).

\textsuperscript{315} \textit{See supra} Part I.

\textsuperscript{316} \textit{See supra} Part III.

\textsuperscript{317} \textit{See supra} Part II.B.
APPENDIX
CHARTER SCHOOL ENROLLMENT IN SELECTED STATES

1. Illinois

Illinois had thirteen charter schools in the 1998-1999 school year. The schools are overwhelmingly disproportionately minority, which is not surprising because ten are located in Chicago. Yet, patterns of segregation exist. Six of the ten charter schools in Chicago are at least ninety percent African American or Hispanic (compared to public school enrollments of fifty-three percent African American and thirty-three percent Hispanic), and two other Chicago charter schools exceed either the African American or Hispanic public school enrollment by at least fifteen percent. A charter school in Peoria is also disproportionately African American. On the other hand, a charter school in Cahokia District #187 has forty-one percent more white students than the surrounding school district (seventy-two percent versus thirty-one percent). Only two charter schools were remarkably integrated, mirroring the diverse population found in the public schools.

2. Massachusetts

In Massachusetts, minority children have flocked to charter schools, where they constitute forty-three percent of the students in charter schools, as compared to the state average of twenty-three percent. At the school level, however, the clear majority of charter schools are predominantly African American, Hispanic, or white schools. Seventeen of the thirty-four charter schools recently studied were overwhelmingly white, although fourteen of the seventeen white

318. See ILL. STATE BD. OF EDUC., 2000 ANNUAL REPORT ON CHARTER SCHOOLS 3 (2000), available at http://www.isbe.state.il.us/charter/pdffiles/charterannual.pdf. The number increased to seventeen in the following school year. See id. at 1.

319. See id. at 6. For example, ACORN Charter School is 95.12% Hispanic, as compared to 33.42% in the Chicago public schools. See id. Betty Shabazz International Charter School is 100% African American, as compared to 53.15% in the Chicago public schools. See id.

320. See id.

321. See id. (providing enrollment figures for Peoria Alternative Charter School, the first charter school in Illinois).

322. See id.

323. See id. (detailing the student population in Springfield Ball Charter School and Youth Connection Charter School).

schools were located in school districts with very low minority enrollment. 325 Ten schools were disproportionately African American and three other schools were disproportionately Hispanic, as compared to the surrounding school district. 326 Only four schools were racially and ethnically diverse and reflective of the public school population. Boston has the largest number of charter schools covered by the report—seven. 327 Six of the seven were disproportionately African American, with one school being disproportionately white. 328 The white school, not surprisingly, was located in South Boston. 329

3. Michigan

Michigan enrolls a highly disproportionate number of minority students in its charter schools. 330 Part of that disparity is due to the twelve charter schools in Detroit, a predominately African American school district. 331 The attraction of African Americans and other minority groups to charter schools occurs not just in predominately minority school districts, however, and this is what makes Michigan of interest when looking at charter schools and race. The charter schools that generally reflected their surrounding school districts are typically located in either predominately African American or white school districts—where the integration of races can easily be avoided. 332 Only four charter schools, out of seventy-nine studied, were within fifteen percentage points of the surrounding school district and were located in racially and ethnically mixed school districts. 333

325. See Massachusetts Charter School Profiles, supra note 324, at 1-79.
326. See id.
327. See id.
328. See id.
329. See id.
332. See id. at 17. For example, Livingston Developmental Academy is 2.2% African American, compared to the 4.3% African American student population in the surrounding school district, a difference of 2.1%. See id. At the other end of the enrollment spectrum, Thomas-Gist Academy is 99.3% African American, while its surrounding school district is 97.9%, a difference of 1.4%. See id.
333. See Michigan Academy, supra note 191, app. J. For example, Walter French Academy is fifty-nine percent minority (forty-seven percent African American, two percent Asian, five percent Hispanic, and five percent Native American), while the host school
schools that are segregated, as compared to the enrollment in the surrounding school district, are located in more integrated school districts.\textsuperscript{334}

Also of note is the decreasing enrollment of minority students in Michigan's charter schools, even though the overall enrollment figures in the charter schools is growing rapidly. In only three years of charter schools, the total enrollment in Michigan charter schools grew from 5100 students in thirty-eight charter schools to 34,000 students in 137 schools.\textsuperscript{335} Yet, in that same period, the proportion of minorities decreased at least twenty-two percent.\textsuperscript{336}

4. Minnesota

Minnesota also enrolls a disproportionate number of minority students in its charter schools, and individual charter schools serve overwhelmingly African American, American Indian or Alaskan Native, Asian or Pacific Islander, Hispanic, and white populations.\textsuperscript{337} An evaluation concluded that "[h]alf of the schools serve less than district is 51.5% minority (33.4% African American, five percent Asian, twelve percent Hispanic, and 1.1% Native American). The other three schools are New Branches School, New School for Creative Learning, and Vanderbilt Charter Academy. See id.

\textsuperscript{334} There are two exceptions. One is a bilingual school located in Detroit, which has attracted a disproportionate number of Hispanic and white students. The \textit{Michigan Report} appears to have erred in the enrollment figures for this school, the Cesar Chavez Academy. See id. at 17 (providing a 68.1% African American enrollment). The bilingual school is reported in another official state report, with more recent figures than in the \textit{Michigan Report}, to have a disproportionate Hispanic and white population, when compared to the Detroit public school enrollment. See \textit{STATE OF MICH. DEP'T OF EDUC., 1996-97 REPORT TO THE HOUSE AND SENATE COMMITTEES ON EDUCATION: A DESCRIPTION OF MICHIGAN PUBLIC SCHOOL ACADEMIES (CHARTER SCHOOLS) 46-47, 196 (1999) (reporting an enrollment of sixty-one percent Hispanic and thirty-two percent white). The other is the Vista Charter Academy, which is forty-four percent minority, compared to a 2.9% minority enrollment in the host district. See MICHIGAN ACADEMY, supra note 191, app. J.

\textsuperscript{335} See MICHIGAN ACADEMY, supra note 191, at 13.

\textsuperscript{336} See id. at 97. The minority enrollment in charter schools decreased 12.5% between 1995-1996 and 1996-1997 and between ten to twelve percent in the following school years. The report blames the decrease on the opening of charter schools with fewer minorities. See id. The report attributed segregation to the actions of the charter schools. See id. at 95 (concluding that "[w]hile many PSAs cater to minorities and at-risk pupils, there are several PSAs that use a number of mechanisms to structure their learning communities (these mechanisms include absence of busing, selective advertising, requirements for parental involvement, lack of hot lunch programs, etc.").

\textsuperscript{337} See UNIV. OF MN., MINNESOTA CHARTER SCHOOLS EVALUATION (1998) (prepared for the Minnesota State Board of Education), at http://www.youthandu.umn.edu/Reports/charter/default.html. The report analyzed sixteen charter schools and found that the range of white students enrolled in charter schools was zero percent to ninety-nine percent; black, not of Hispanic origin, zero percent to ninety-six percent; American Indian or Alaskan Native, zero percent to ninety-six percent; Asian or Pacific Islander, zero percent to seventy-three percent; and Hispanic, regardless of race, zero percent to twenty percent. See id. tbl. 5.2.
twenty percent students of color and the other half serve over sixty percent of students of color.\footnote{338}

5. North Carolina

North Carolina’s evaluation report measured the segregation in charter schools by examining whether the charter school’s racial and ethnic student populations figures exceeded the range in racial and ethnic student populations in the surrounding school districts.\footnote{339} Thus, the evaluation sought to learn whether the charter school enrolled more minority students than any of the schools in the surrounding school district. Ten of the thirty-three schools enrolled a higher percentage of minority students than any of the public schools.\footnote{340} Five of the ten are over ninety percent nonwhite, even though the surrounding school district is less than fifty percent nonwhite.\footnote{341} Further, five other charter schools enrolled a lower percentage of minority students than any of the public schools.\footnote{342} The majority of charter schools (eighteen, or fifty-five percent of the charter schools) had no greater segregation than the public schools.\footnote{343} Half of these schools, however, significantly exceeded the overall student enrollment figures in the public schools.\footnote{344}

6. Texas

Overall, in Texas charter schools, whites are underrepresented by twenty-three percentage points, while African Americans are overrepresented by twenty percentage points and Hispanics are overrepresented by only four percentage points.\footnote{345} Even at non-at-risk charter schools, the underrepresentation of whites is stark.\footnote{346} The evaluation report hypothesizes that the overrepresentation of minority students may be due to the concentration of charter schools in large urban areas, which have high African American and Hispanic

\footnotesize{\footnote{338} See id.}
\footnotesize{\footnote{339} See N.C. DEP’T OF PUB. INSTRUCTION, CHARTER SCHOOLS EVALUATION SYNTHESIS, REPORT I: SELECTED CHARACTERISTICS OF CHARTER SCHOOLS, PROGRAMS, STUDENTS, AND TEACHERS 26 (1998).}
\footnotesize{\footnote{340} See id. at 27.}
\footnotesize{\footnote{341} See id.}
\footnotesize{\footnote{342} See id.}
\footnotesize{\footnote{343} See id.}
\footnotesize{\footnote{344} See id.}
\footnotesize{\footnote{345} See TEXAS THIRD YEAR EVALUATION, supra note 22, tbl. II.3. The charter school legislation requires an outside evaluation. See TEX. EDUC. CODE ANN. § 12.118 (Vernon 1996).}
\footnotesize{\footnote{346} White students are underrepresented by fifteen percentage points in non-at-risk charter schools. See TEXAS THIRD YEAR EVALUATION, supra note 22, tbl. II.3. Hispanics are underrepresented by only four percentage points, while African Americans are overrepresented by nineteen percentage points. See id.}
populations.\textsuperscript{347} The report also compared the racial and ethnic enrollment in charter schools to their surrounding school districts. Interestingly, at-risk schools were more likely to be “reflective of the communities in which they are located than are the non-at-risk schools.”\textsuperscript{348} Only thirty-five percent of charter schools were defined as “not racially distinctive” when compared to their surrounding school districts.\textsuperscript{349} The racial and ethnic distinctiveness of Texas charter schools is apparent even when comparing the segregation in charter schools to the segregation in public schools. The evaluators found that “the average traditional public school in Texas has an Anglo enrollment that is about nine percentage points above or below the Anglo enrollment for the school district in which it is located. For the average charter school, on the other hand, the difference in Anglo enrollment is about seventeen percentage points—about two times as great.”\textsuperscript{350}

\textsuperscript{347} See id. at 18, tbl. II.5 and accompanying text.
\textsuperscript{348} Id. at 19, tbl. II.5 and accompanying text.
\textsuperscript{349} Id. The evaluators applied a plus or minus twenty percent standard to the African American, Anglo, and Hispanic populations at the charter school and surrounding school district. Any charter school that failed the standard for one racial or ethnic group was deemed to be racially distinctive. See id.
\textsuperscript{350} Id. at 20, tbl. II.7 and accompanying text.