

STILL SEPARATE AND STILL UNEQUAL: THE NEED FOR STRONGER CIVIL RIGHTS PROTECTIONS IN CHARTER-ENABLING LEGISLATION

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Our Nation, I fear, will be ill served by the Court's refusal to remedy separate and unequal education, for unless our children begin to learn together, there is little hope that our people will ever learn to live together.²

-- Justice Thurgood Marshall

I. INTRODUCTION

On the day after *Brown v. Board of Education*³ was decided in 1955, Thurgood Marshall, the then lawyer for the watershed case, predicted that segregation in schools would be eliminated within five years.⁴ Flash forward fifty-six years later and blacks and Latinos attend schools that are actually more segregated than they were four decades ago.⁵ Even now, two out of every five black and Latino students attend intensely segregated schools where the population is 90% to 100% nonwhite.⁶ Sadly, these statistics indicate that Justice Marshall's dream of an integrated school system is still very far from being realized.

The Supreme Court is largely to blame for the failure to desegre-

¹ J.D. University of Southern California (2012).

² *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

³ *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

⁴ Jennifer Hochschild & Nathan Scovronick, *School Desegregation and the American Dream*, in *THE END OF DESEGREGATION?* 25, 28 (Stephen J. Caldas & Carl L. Banston III eds., 2003).

⁵ GARY ORFIELD, THE CIVIL RIGHTS PROJECT, UCLA, *REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE* 3 (2009), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf>.

⁶ *Id.* at 12.

gate America's public schools. Although the Court in *Brown* declared education to be "a right which must be made available to all on equal terms,"⁷ subsequent decisions by the Supreme Court have greatly eroded the promise of integration that *Brown* once embodied.⁸ More recently, in the 2007 decision *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court concluded that the Seattle, Washington, and Louisville, Kentucky, school districts' efforts to achieve diversity through the use of racial classifications in student assignment plans violated the Equal Protection Clause because the plans discriminated on the basis of race even though their motivation was not invidious but rooted in a desire to achieve racial balance.⁹ The consequence of this ruling is to further restrain how elected school boards can combat discrimination by calling into doubt the legality of similar voluntary integration plans to which an estimated 1000 other school districts also subscribe.¹⁰ Once viewed as the champion for educational equality, the Court now represents its greatest barrier.¹¹

However, the legislative and executive branches have done little to push back on the Supreme Court's conservatism.¹² The goal of ending segregation in America's public schools is no longer at the forefront of the education debate.¹³ Instead, the focus of education reform has turned to the

⁷ *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 493 (1954).

⁸ In the 1970s, the Court was already starting to chip away at the power of federal courts to impose remedies in school desegregation cases. See, e.g., *Milliken*, 418 U.S. 717, 745–46 (1974) (holding that in the absence of a showing of a cross-district violation, the district court could not impose an inter-district remedy to end disparate treatment found only within one district); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973) (distinguishing "de jure" segregation from "de facto" segregation and holding that the latter only constitutes a violation upon proof of a discriminatory purpose); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (stating that education is not a fundamental right because it is not explicitly or implicitly guaranteed by the Constitution). By the 1990s the Court further restricted the ability to remedy segregation in schools by holding that federal courts need no longer intervene in desegregation efforts once unitary status—the point at which racial discrimination is "eliminated root and branch" from a school under a desegregation order—was achieved, even if such inaction could lead to resegregation. Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1615–16 (2003) (citing *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247–49 (1991)); *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 438 (1968)).

⁹ See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007).

¹⁰ Lawrence F. Rossow, Lori Connery & Nanette Schmitt, *Limitations on Voluntary School Desegregation Plans: The Seattle and Louisville Cases*, 224 ED. LAW REP. 21, 38 (2007).

¹¹ See Daniel P. Tokaji, *Desegregation, Discrimination and Democracy: Parents Involved's Disregard for Process*, 69 OHIO ST. L.J. 847, 870 (2008).

¹² Chemerinsky, *supra* note 8, at 1599–1600.

¹³ See ORFIELD, *supra* note 4, at 4 (indicating that the Bush-era policies of ignoring race prior to fully solving the true racial issues has only served to further divide the races).

expansion of school choice, with special attention being paid to charter schools.¹⁴ Although charter schools offer an alternative means by which underprivileged minority students may still be able to receive a high-quality education, they too are problematic in the fact that they overlook basic civil rights issues.¹⁵ Charter schools are likely to be more racially isolated than traditional public schools in terms of minority and white segregated learning environments.¹⁶ These schools are also associated with increased levels of economic segregation.¹⁷ Moreover, the dilemma for charter schools is the same dilemma faced by their traditional public school counterparts—they too are constrained by the limits of *Parents Involved in Community Schools v. Seattle School District No. 1*.¹⁸ Charter schools, like public schools, receive federal funding, and because of this, charters are subject to the mandates of Title VI of the Civil Rights Act of 1964, which prohibits any programs or activities that receive federal financial assistance from discriminating on the basis of “race, color, or national origin.”¹⁹

This Note examines how the charter movement has failed to be a civil rights solution to America’s stratified public school system, and it advocates stronger civil rights protections that will ensure that the potential of charter schools to enhance diversity and inclusion is actually realized. Part II discusses how the Supreme Court has impeded the education reform movement by limiting the remedies with which federal courts and democratically elected school boards can address segregation in public schools.

¹⁴ *Charter Schools*, EDUC. WEEK (Aug. 3, 2004), <http://www.edweek.org/ew/issues/charter-schools/>; see also ERICA FRANKENBERG & GENEVIEVE SIEGEL-HAWLEY, THE CIVIL RIGHTS PROJECT, UCLA, EQUITY OVERLOOKED: CHARTER SCHOOLS AND CIVIL RIGHTS POLICY 3 (2009), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/equity-overlooked-charter-schools-and-civil-rights-policy/frankenberg-equity-overlooked-report-2009.pdf> [hereinafter EQUITY OVERLOOKED] (discussing potential racial characteristics and flaws of charter schools).

¹⁵ ERICA FRANKENBERG & GARY ORFIELD, THE CIVIL RIGHTS PROJECT, UCLA, FEDERAL EDUCATION POLICY SHOULD PROMOTE DIVERSITY 3 (2010), available at <http://civilrightsproject.ucla.edu/legal-developments/policy-papers/informing-the-debate-bringing-civil-rights-research-to-bear-on-the-reauthorization-of-the-esea/crp-diversity-brief-2011.pdf>.

¹⁶ ERICA FRANKENBERG, GENEVIEVE SIEGEL-HAWLEY & JIA WANG, THE CIVIL RIGHTS PROJECT, UCLA, CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS 17 (2010), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenberg-choices-without-equity-2010.pdf> [hereinafter CHOICE WITHOUT EQUITY].

¹⁷ *Id.* at 11.

¹⁸ See *infra* notes 157–62 and accompanying text.

¹⁹ Civil Rights Act of 1964, §601, 42 U.S.C. 2000d (2006).

Part III looks at how and why charters have failed to live up to their integrative promise and revisits reasons why diversity is important to education. Finally, Part IV explores the measures that charter schools can take to avoid racial and economic isolation in their student bodies, and it also considers how the current state and federal charter enabling legislation can be changed to encourage charter schools to be inclusive, namely by tying fiscal incentives to diversity.

II. THE SUPREME COURT'S ROLE IN DESEGREGATING PUBLIC SCHOOLS

A. OVERVIEW OF THE COURT'S EQUAL PROTECTION CLAUSE JURISPRUDENCE SINCE *BROWN*

In striking down state-imposed racial segregation in public schools, *Brown I* announced that under the Equal Protection Clause of the Fourteenth Amendment, separate is inherently unequal.²⁰ The Court justified its decision by considering how segregation generates a feeling of inferiority in black children “that may affect their hearts and minds in a way unlikely ever to be undone” and deprives “them of some of the benefits they would receive in a racially integrated school system.”²¹ *Brown I* was a groundbreaking case that ushered in a new era in public schooling, with the federal courts acting as the champions of a movement to push the public school system toward the ideal of equal opportunity.²²

Brown I, coupled with its companion case *Brown II*, which authorized district courts to develop desegregation plans,²³ and the Civil Rights Act of 1964, which made federal funding for schools contingent on ending racial discrimination,²⁴ went far to integrate public schools.²⁵ Whereas in 1964, only 2.3% of black students in the South attended majority white schools, by 1976 Blacks attending majority white schools increased to 37.6%.²⁶

However, by the mid-1970s, as the composition of the Supreme

²⁰ *Brown I*, 347 U.S. 483–494 (1954).

²¹ *Id.* at 494.

²² Molly Townes O'Brien, *Desegregation and the Struggle of Equal Schooling: Rolling the Rock of Sisyphus*, in OUR PROMISE: ACHIEVING EDUCATIONAL EQUALITY FOR AMERICA'S CHILDREN 3, 11–12 (Maurice R. Dyson & Daniel B. Weddle eds., 2009).

²³ *Brown II*, 349 U.S. 294, 301 (1955).

²⁴ Civil Rights Act of 1964, §601, 42 U.S.C. 2000d (2006).

²⁵ See O'Brien, *supra* note 22, at 19.

²⁶ *Id.*

Court began to change with four justices being appointed by Republican President Nixon,²⁷ so did its equal protection jurisprudence.²⁸ In *San Antonio Independent School District v. Rodriguez*, the Supreme Court departed from its offensive stance toward inequality and denied a class of poor Texas school children the benefit of the Equal Protection Clause.²⁹ *Rodriguez* challenged the constitutionality of Texas's system for financing public education through local property taxes.³⁰ The financing system meant that in terms of production of local revenues, even the poorest districts with the highest tax rates could still never come close to matching the richest districts with the lowest tax rates.³¹ The financing system resulted in substantial variations in per-pupil spending; while the most affluent school in the district spent \$594 per pupil, one of the poorest schools spent only \$356 per pupil.³² The plaintiffs argued that such a disparity in funding discriminated against the poor in violation of the Equal Protection Clause.³³

In *Rodriguez*, the district court held that the financing system was unconstitutional because it discriminated on the basis of wealth, which was a suspect classification, and concluded that education was a fundamental right.³⁴ The Supreme Court reversed, rejecting the notion that poverty was a suspect classification that would trigger strict scrutiny,³⁵ and reasoned that only rational basis review was required.³⁶ Furthermore, education was held not to be a fundamental right because it was neither explicitly nor implicitly guaranteed by the Constitution.³⁷

Rodriguez stands out for two reasons. First, it marks the Court's selectivity in choosing which groups should receive the benefit of the Equal Protection Clause. In effect, poor children were denied protection even though they were being discriminated against for their status at birth. Just

²⁷ Republican President Richard Nixon appointed Justice Burger in 1969, Justice Blackmun in 1970, and Justice Powell and Justice Rehnquist in 1972. *Members of the Supreme Court of the United States*, SUPREME COURT OF THE UNITED STATES (Jan. 26, 2011), http://www.supremecourt.gov/about/members_text.aspx.

²⁸ Chemerinsky, *supra* note 8, at 1620–21 (2003).

²⁹ See 411 U.S. 1–2 (1973).

³⁰ See *id.*

³¹ *Id.* at 75.

³² *Id.* at 12–13.

³³ *Id.* at 15–16.

³⁴ *Id.* at 16–17.

³⁵ *Id.* at 55.

³⁶ *Id.* at 28.

³⁷ *Id.* at 34–35.

as one does not choose to be black or white, a woman or a man, a child does not choose to be poor—he or she is born that way. Still, the Court declined to acknowledge that poor children were a discrete and insular minority whose political powerlessness should warrant special judicial consideration.³⁸ Secondly, *Rodriguez* diminishes the status that the law gives to education. While other rights—the right to travel,³⁹ the right to marry,⁴⁰ the right to procreate,⁴¹ the right to custody of one’s children,⁴² the right to control the upbringing of one’s children⁴³—have fundamental status even though they are not enumerated in the Constitution, education does not, even though it is “so basic to the exercise of other constitutional rights, and so basic for success in society.”⁴⁴

A year later, in *Milliken v. Bradley*, the Court struck down a judicially-administered interdistrict remedy of Detroit schools absent a finding that all districts included in the remedial order had themselves engaged in disparate treatment.⁴⁵ The decision established the principle that desegregation remedies must be strictly limited to the extent and nature of the actual constitutional violation.⁴⁶ By restricting the remedy to only the district where the violation was found, *Milliken* “[h]ad the effect of encouraging white flight”—by moving to suburbs, whites could escape the desegregation orders placed on city schools.⁴⁷

By the 1990s federal courts were virtually powerless to remedy segregation. In decision after decision, the Supreme Court reaffirmed that a federal court’s desegregation order must end once the school system achieves unitary status, even if the absence of federal intervention would likely result in resegregation.⁴⁸ Unsurprisingly, throughout the 1990s, seg-

³⁸ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

³⁹ See *Shapiro v. Thompson*, 394 U.S. 618, 629–31 (1969).

⁴⁰ See *Boddie v. Connecticut*, 401 U.S. 371, 382–83 (1971); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

⁴¹ See *Skinner v. Oklahoma*, 316 U.S. 535, 541–43 (1942).

⁴² See *Stanley v. Illinois*, 405 U.S. 645, 651–52 (1972).

⁴³ See *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

⁴⁴ Chemerinsky, *supra* note 8, at 1614.

⁴⁵ *Milliken v. Bradley*, 418 U.S. 717, 745–46 (1974).

⁴⁶ *Id.*; Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 790 (2000).

⁴⁷ Chemerinsky, *supra* note 8, at 1608.

⁴⁸ See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 101–02 (1995) (holding that a disparity in test scores between black and white students was not a sufficient basis for concluding that desegre-

regation in schools intensified.⁴⁹

B. FURTHER RESTRICTING WHAT SCHOOLS CAN DO TO REMEDY
SEGREGATION: *PARENTS INVOLVED*

Although previously the Supreme Court had sought to limit the power of federal courts to remedy segregation and deferred to school boards to craft the remedy, in *Parents Involved* the Court took the opposite position and ultimately struck down the attempts of school boards to address segregation in their districts.⁵⁰ At issue in *Parents Involved* was the constitutionality of the student assignment plans of Seattle and Louisville, neither of which operated legally segregated schools.⁵¹ The Seattle school district adopted a plan that used race as a second tiebreaker to determine which students would fill the open slots at an oversubscribed school.⁵² The Louisville plan required all non-magnet schools to maintain a minimum black enrollment of 15% and a maximum black enrollment of 50%.⁵³

The Supreme Court held that both student assignment plans were unconstitutional because they used racial classifications, which are inherently suspect and therefore trigger strict scrutiny, in ways that were not narrowly tailored to serve a compelling government interest.⁵⁴ The school districts failed to show that their plans would serve a compelling interest in diversity because the plans did not consider race as part of a “broader effort to achieve ‘exposure to widely diverse people, cultures, ideas, and

gation had not been achieved); *Freeman v. Pitts*, 503 U.S. 467, 491 (1992) (“[U]pon a finding that a school system subject to a court-supervised desegregation plan is in compliance in some but not all areas, the court . . . may return control to the school system in those areas where compliance has been achieved [and limit] further judicial supervision to operations that are not yet in full compliance with the court decree.”); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249–50 (1991) (reasoning that a desegregation order should end once the school board has “complied in good faith[,]” and “the vestiges of past discrimination [have] been eliminated to the extent practicable.”).

⁴⁹ GARY ORFIELD, HARVARD CIVIL RIGHTS PROJECT, *SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 3* (2001), available at <http://www.eric.ed.gov/PDFS/ED459217.pdf>.

⁵⁰ Danielle Holley-Walker, *Educating at the Crossroads: Parents Involved, No Child Left Behind and School Choice*, 69 OHIO ST. L.J. 911, 921–23 (2008).

⁵¹ *Parents Involved*, 551 U.S. 701, 709–11 (2007).

⁵² *Id.* at 711–12. If a school was oversubscribed, the district would fill the open slots with a system of “tiebreakers.” The district would first look to see whether an applicant had a sibling already attending that school, and then would assess the racial composition of the school and determine whether admitting an applicant would bring the school into balance with a predetermined ratio of white to nonwhite students. *Id.*

⁵³ *Id.* at 716.

⁵⁴ *Id.* at 720–23.

viewpoints” but instead used race as the sole determinative factor.⁵⁵ Although three other justices joined with Justice Roberts, holding that all racial classifications are inherently suspect, Justice Kennedy’s concurrence, providing the crucial fifth vote to create the majority, suggests that race-conscious remedies may still pass constitutional muster so long as the compelling interest they seek to achieve is a multi-faceted diversity that considers race as only one factor among many.⁵⁶

Ultimately, the majority’s equal protection analysis poses a practical problem for districts seeking to limit racial isolation in their schools.⁵⁷ According to Justice Kennedy, in order to be constitutional, voluntary race-conscious assignment plans must adopt a more nuanced approach that mimics the kind of affirmative action policy that was deemed acceptable in *Grutter v. Bollinger*.⁵⁸ In *Grutter* the use of race in law school admissions was narrowly tailored because race was considered only in addition to other individualized factors.⁵⁹ The law school admissions program did not operate a quota—the practice of fixing a predetermined number of spots for certain minority groups—but merely considered race as a “plus” factor while ensuring that each candidate was reviewed comprehensively against other candidates.⁶⁰ As Justice Kennedy stated in *Parents Involved*, “[i]f those students [of the Seattle and Louisville school districts] were considered for a whole range of their talents and school needs with race as just one consideration, *Grutter* would have some application.”⁶¹

However, in primary and secondary education settings this approach

⁵⁵ *Id.* at 723 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003) (concluding that the University of Michigan Law School had a compelling interest in attaining a diverse student body and that its admissions program was narrowly tailored to serve its compelling interest in obtaining the educational benefits that result from a diverse student body)). By contrast, Seattle used “crude racial categories of ‘white’ and ‘non-white,’” while Louisville classified students as “black or ‘other.’” *Parents Involved*, 551 U.S. at 706, 710. Ultimately, it was the classification itself that violated the equal protection clause, and it did not matter that the purpose of the classification was to include racial minorities. *Id.* at 756–57.

⁵⁶ *Id.* at 720–98.

⁵⁷ *Id.* at 797–98 (Kennedy, J., concurring).

⁵⁸ 551 U.S. 701, 788 (2007) (Kennedy, J., concurring); see Maurice R. Dyson, *De Facto Segregation & Group Blindness: Proposals for Narrow Tailoring Under a New Viable State Interest in PICS v. Seattle School District*, 77 UMKC L. REV. 697, 737 (2009).

⁵⁹ *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003); Suzanne E. Eckes, *Public School Integration and the ‘Cruel Irony’ of the Decision in Parents Involved in Community Schools v. Seattle School District No. 1*, 229 ED. LAW REP. 11 (2008).

⁶⁰ *Grutter*, 539 U.S. at 335 (citing *Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. 616, 638 (1987)).

⁶¹ *Parents Involved*, 551 U.S. at 793 (Kennedy, J., concurring).

would be impractical.⁶² Unlike in the higher education context, students who attend public schools are not competing against each other on an individual basis.⁶³ Whereas undergraduate and graduate schools can afford to be selective, public schools cannot—everyone is guaranteed a spot.⁶⁴ Therefore, an evaluation of each applicant in order to determine if he or she would contribute to Justice Kennedy’s more holistic version of diversity would place a huge burden on already under-resourced schools whose officials would have to appraise thousands of applications each year and open the lines of communication with other schools in order to ensure that each child is guaranteed a spot at some school.⁶⁵ This precisely is one of the benefits of lotteries like the ones mandated by *Parents Involved*; they bypass an extensive and potentially subjective review that might produce unfair results.

Primary and secondary schools are likely to avoid racial classifications entirely and use other shortcuts such as socioeconomic status rather than adopting the kind of application process used in higher education settings.⁶⁶ Socioeconomic status is often correlated with race and has an indirect desegregation effect when used in student assignment plans.⁶⁷ Use of socioeconomic status is likely to pass constitutional muster because it is correlated with wealth, which, according to *Rodriguez* is not a suspect classification,⁶⁸ and therefore would not need to serve a compelling interest or be narrowly tailored to the extent that suspect categories such as race require.⁶⁹

⁶² See Eckes, *supra* note 58, at 11; see also Deborah N. Archer, *Moving Beyond Strict Scrutiny: The Need for a More Nuanced Standard of Equal Protection Analysis for K Through 12 Integration Programs*, 9 U. PA. J. CONST. L. 629, 665 (2007) (noting that “[t]he qualitative and analytical differences between affirmative action and voluntary integration programs in the K–12 context . . . make it clear that strict scrutiny has no place here.”).

⁶³ Eckes, *supra* note 58, at 16.; Archer, *supra* note 61, at 652–53.

⁶⁴ Today, every state and territory of the United States has compulsory attendance laws that require children to enroll in public or private education, or to be home-schooled. *Compulsory Education: Overview*, N. CNTY. LIBRARY SYS., <http://www.ncsl.org/IssuesResearch/Education/CompulsoryEducationOverview/tabid/12943/Default.aspx> (last visited Mar. 14, 2011).

⁶⁵ Archer, *supra* note 61, at 652–53.

⁶⁶ Rossow et al., *supra* note 10, at 40; Alexandra Villarreal O’Rourke, Note, *Picking Up the Pieces After PICS: Evaluating Current Efforts to Narrow the Education Gap*, 11 HARV. LATINO L. REV. 263, 269 (2008); see also discussion *infra* Part IV.A.

⁶⁷ *Id.*

⁶⁸ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973).

⁶⁹ Rossow et al., *supra* note 10, at 40 (“The legal result might be different if challengers to [such a] plan were able to show that the [socioeconomic status] approach is just a proxy for race classifications.”).

Another alternative is to get out of the public education business altogether, a tempting idea that is being furthered by the popularization of charter schools.⁷⁰ If school boards are being thwarted in their efforts to achieve integration, then charter schools may be promising in that they provide an opportunity for private persons to develop an educational model that will fit their community's needs.⁷¹ Because charter schools give power back to local control and are free from the bureaucracy that plagues traditional public schools, they are much less restricted in how they are run and which agendas they can promote.⁷² Therefore, theoretically, if the demand existed, private parties could create a charter school with a multi-racial educational program and a racially and socioeconomically diverse student body.⁷³

III. EDUCATION AT A CROSSROADS

A. THE FAILED POTENTIAL OF CHARTER SCHOOLS

While the cases of the 1970s and 1990s limit how federal courts can remedy school segregation, *Parents Involved* additionally limits how elected school boards can remedy it.⁷⁴ Taken together, these decisions reflect the Supreme Court's great hesitancy towards solidifying the Equal Protection Clause in a way that will curtail discrimination and promote equality.⁷⁵ Rather, the Court problematically insists on a color-blind approach in which the Equal Protection Clause creates a presumption against racial classifications rather than a presumption against racial inequality.⁷⁶ As Justice Breyer noted in his dissent in *Parents Involved*, the effect is to no longer take into account the difference between "state action that excludes and thereby subordinates racial minorities," which the Equal Protection Clause obviously prohibits, and "state action that seeks to bring together people of all races," which the Equal Protection Clause should not

⁷⁰ See Holley-Walker, *supra* note 49, at 936.

⁷¹ See Robin D. Barnes, *Black America and School Choice: Chartering a New Course*, 106 YALE L.J. 2375, 2404 (1997).

⁷² See *id.*; see also Tokaji, *supra* note 10 and accompanying text.

⁷³ See Barnes, *supra* note 70, at 2404–05; see also discussion *infra* Part III.B.

⁷⁴ See *supra* Part II.A–B.

⁷⁵ See *supra* Part II.A–B.

⁷⁶ Matthew Scutari, Note, "The Great Equalizer": Making Sense of the Supreme Court's Equal Protection Jurisprudence in American Public Education and Beyond, 67 GEO. L.J. 917, 942 (2009).

inhibit.⁷⁷

Taking their cue from the Court, the legislative and executive branches have shied away from trying to remedy racial isolation directly, and have instead turned to other means to address educational disparities.⁷⁸ With the 1983 publication of *A Nation at Risk*, a federal report commissioned by the Reagan Administration on the state of public schooling, education policy began to shift from a call to bolster desegregation efforts to a call for “excellence.”⁷⁹ “Public schooling . . . became viewed as more of a private commodity, with increased efforts to find the best schools, whether by means of moving to a district with ‘better’ public schools or through intra- or inter-district choice.”⁸⁰ The discourse around public school education stopped being a problem about the inequalities between different races and social classes—it has become a problem about achievement and the fact that certain schools are lagging far behind.

Politicians have since jumped from one reform idea to the next in pursuit of the “cure-all” for America’s failing public schools.⁸¹ During the Reagan era, it was school vouchers.⁸² Under President Clinton, it was school choice, a movement that was furthered by President George W. Bush with the passage of the No Child Left Behind Act, which encouraged choice by offering a transfer provision to students attending habitually low-performing schools.⁸³ Now during the Obama administration, even greater emphasis is placed on school choice with its message being communicated using the language of marketplace competition.⁸⁴ According to President Obama, competition will improve our schools and only success should be rewarded.⁸⁵ In light of this theory, the President has since implemented Race to the Top, a \$4 billion program funded by the U.S. Department of Education, which provides competitive federal funding to states that are “leading the way with ambitious yet achievable plans for

⁷⁷ 551 U.S. 701, 864 (Breyer, J., dissenting).

⁷⁸ See EQUITY OVERLOOKED, *supra* note 14, at 8.

⁷⁹ *Id.* at 9.

⁸⁰ *Id.* at 9-10 (citing Erica Frankenberg & Chinh Q. Le, *The Post-Seattle/Louisville Challenge: Extra-legal Obstacles to Integration*, 69 OHIO ST. L.J. 1015 (2008)).

⁸¹ DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* 3 (2010).

⁸² EQUITY OVERLOOKED, *supra* note 14, at 9.

⁸³ *Id.*

⁸⁴ *Id.*; see also Susan Eaton & Gina Chirichigno, Op-Ed, *Charters Must Commit to Diversity*, BOS. GLOBE (July 19, 2009), at 9.

⁸⁵ See President Barack Obama, State of the Union (Jan. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

implementing coherent, compelling, and comprehensive education reform.”⁸⁶

Although educational inequity still continues to be a prevailing topic within the political discourse, it has ceased to be framed as a civil rights issue even though segregation in public schools is still a blatant reality. Given the legal and political landscape that education now finds itself in as a result of the Court’s shifting equal protection jurisprudence and the legislature’s change in priorities, it is no surprise that charter schools have gained tremendous popularity.⁸⁷ With their more rigorous academic programs, charter schools at once satisfy the need to offer better educational opportunities in high-poverty, segregated neighborhoods and also complement the idea of improving the quality of education by making it competitive.⁸⁸ Ultimately, the theory behind the charter movement “is that competition with the regular public schools will lead to improvements in both sectors, and that choice is a rising tide that lifts all boats.”⁸⁹

From a civil rights perspective, charter schools are promising because they have great potential to encourage integration.⁹⁰ Unlike regular public schools, charter schools are not restricted to isolating school district boundary lines and therefore can technically attract a student body from a much larger and diverse geographic pool.⁹¹ Some charter schools have done exactly that and have achieved great success in becoming racially and economically diverse while also being high performing.⁹²

For example, High Tech High, a cluster of eleven elementary, middle, and high schools located in San Diego County, has a current population of 56% students of color.⁹³ Since its founding in 2000, 100% of its graduates have been admitted to college, with approximately 80% admitted to four-year programs such as Johns Hopkins University, Massachusetts Institute of Technology, Stanford University, Howard University,

⁸⁶ U.S. DEP’T OF EDUC., *Race to the Top Fund*, ED.GOV (Feb. 24, 2011), <http://www2.ed.gov/programs/racetothetop/index.html>.

⁸⁷ See generally Susan Eaton & Gina Chirichigno, *Op-Ed, Charters Must Commit to Diversity*, BOS. GLOBE, July 19, 2009, at 9; EQUITY OVERLOOKED, *supra* note 14, at 7.

⁸⁸ See EQUITY OVERLOOKED, *supra* note 14, at 8.

⁸⁹ RAVITCH, *supra* note 80, at 136.

⁹⁰ CHOICE WITHOUT EQUITY, *supra* note 16, at 5.

⁹¹ CHOICE WITHOUT EQUITY, *supra* note 16, at 5.

⁹² Michael J. Petrilli, *Is “Separate But Equal” the Best We Can Do?*, EDUC. GADFLY (Dec. 3, 2009), <http://edexcellencemedia.net/gadfly/2009/Gadfly111909.html>.

⁹³ *Our K-12 Schools*, HIGH TECH HIGH, <http://www.hightechhigh.org/?show=schools> (last visited Feb. 27, 2011); *High Tech High School Profile*, HIGH TECH HIGH, http://www.hightechhigh.org/admissions/schoolProfiles/HTH_School_Profile.pdf (last visited Mar. 15, 2011).

University of Southern California, University of San Diego, University of California at Berkeley, New York University, and Northwestern University.⁹⁴ In addition, Academic Performance Index rankings place High Tech High among the highest performing in the state.⁹⁵

Further, Denver School of Science and Technology (“DSST”), which consists of a network of three middle schools and two high schools, is likewise dedicated to building a diverse and academically rigorous community.⁹⁶ All of its first class of seniors, which included 62% minority and 40% low-income students, were accepted into a four-year college or university in Spring 2010.⁹⁷ Moreover, from 2005 to 2007, DSST was the only high school in Colorado to earn an “Excellent” performance rating and “Significant Improvement” growth rating on state report cards based on state testing results.⁹⁸

Finally, Larchmont Charter School is one of the highest performing elementary schools in Los Angeles.⁹⁹ Its Academic Performance Index score for the 2009–2010 school year was 908, which qualified it for an invitation to apply for the California Distinguished School designation.¹⁰⁰ Its student body consists of 40% non-white students, and 40 to 50% of its students qualify for free or reduced-price lunch.¹⁰¹

Nevertheless, even though high-achieving and racially and socioeconomically diverse charter schools do exist, they tend to be the exception rather than the rule.¹⁰² On the flip side are charters like the Knowledge Is Power Program (“KIPP”) and Aspire Public Schools—high-performing charters that cater to racial and ethnic minority and low-income populations¹⁰³—which serve as exemplars for how charter schools can narrow

⁹⁴ *Results*, HIGH TECH HIGH, <http://www.hightechhigh.org/about/results.php> (last visited Mar. 15, 2011).

⁹⁵ *Id.* The California Department of Education reports both federal and state accountability results using the Academic Performance Index (API), which measures the academic performance and growth of schools with a single number ranging from a low of 200 to a high of 1000. CAL. DEP’T OF EDUC., 2009–10 ACADEMIC PERFORMANCE INDEX REPORTS INFORMATION GUIDE 6 (2010), <http://www.cde.ca.gov/ta/ac/ap/documents/infoguide09.pdf>.

⁹⁶ DENVER SCH. OF SCI. & TECH., <http://www.dsstmodel.org/> (last visited Feb. 22, 2011).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *About Larchmont Charter School*, LARCHMONT CHARTER SCH., <http://www.larchmontcharter.org/about.html> (last visited Feb. 22, 2011).

¹⁰⁰ Brochure, LARCHMONT CHARTER SCH. (Aug. 2010) (on file with author).

¹⁰¹ *About Larchmont Charter School*, *supra* note 99.

¹⁰² EQUITY OVERLOOKED, *supra* note 14, at 4.

¹⁰³ At most KIPP schools, 90% of students are from racial or ethnic minority groups, and 70% come from low-income families. Joy Pavelski, *KIPP Charter Schools Close Achievement*

the achievement gap in underserved communities.¹⁰⁴ Although their success should not be dismissed, schools like KIPP and Aspire are still not the norm.¹⁰⁵ For as many great charters that do exist, there is also a handful of underperforming charter schools that should be shut down.¹⁰⁶ Moreover, even the existence of such high-performing charter schools dedicated to serving minority concentrated low-income populations is itself problematic because such environments are persistently linked to various social disadvantages.¹⁰⁷

First, it is inconclusive that charter schools are actually outperforming traditional public schools.¹⁰⁸ According to a study by the Center for Research on Education Outcomes at Stanford University, 37% of charter schools had math gains that were significantly below what students would be expected to achieve in regular public schools and 46% of charters posted math gains that were statistically indistinguishable from the average growth among their traditional public school counterparts.¹⁰⁹ In reading, charter school students realized a growth that was also less than their traditional public school peers.¹¹⁰

Also troubling is that charter schools tend to exacerbate existing patterns of racial and socioeconomic stratification and make up an even more

Gaps, SCH. REFORM NEWS (July 1, 2010),

http://www.heartland.org/ful/27942/KIPP_Charter_Schools_Close_Achievement_Gaps.html.

According to one study, within two years after entry, students experience statistically significant, positive impacts in eighteen of twenty-two KIPP schools in math and fifteen of twenty-two KIPP schools in reading. *Id.* Aspire Public Schools, which operates thirty public charter schools across California, has an overall API score of 824, which makes it one of the highest performing public school systems in the state that serves majority high poverty students. *Academic Achievement*, ASPIRE PUB. SCHS., <http://www.aspirepublicschools.org/?q=results0910> (last visited Feb. 22, 2011); *Press Room Archives*, ASPIRE PUB. SCHS., <http://www.aspirepublicschools.org/?q=node/22> (last visited Mar. 29, 2011).

¹⁰⁴ See Greg Toppo, *KIPP Proves Powerful Point: 'Work Hard. Be Nice.' Tracks a Triumph in Urban Education*, USA TODAY (Feb. 19, 2009), at 10B; *Oprah to Give \$1M to Aspire Campuses*, THE RECORD (Sept. 20, 2010), http://www.recordnet.com/apps/pbcs.dll/article?AID=/20100920/A_NEWS04/9200314/1/A_NEWS07.

¹⁰⁵ John Festerwald, *Many High, Low Achieving Charters: Charter Association Releases Research*, THOUGHTS ON PUBLIC EDUCATION (Feb. 14, 2011), <http://toped.svefoundation.org/2011/02/24/lots-of-high-and-low-achieving-charters/>.

¹⁰⁶ See *id.*

¹⁰⁷ See *infra* notes 115–23 and accompanying text.

¹⁰⁸ See Zach Miners, *Charter Schools Might Not Be Better*, U.S. NEWS & WORLD REP. (June 19, 2009), <http://www.usnews.com/education/blogs/on-education/2009/06/17/charter-schools-might-not-be-better>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

“separate, segregated sector to our already deeply stratified public school system.”¹¹¹ Research shows that charter schools are in fact more racially isolated than traditional public schools.¹¹² From 2007 to 2008, it was reported that 70% of black charter school students attended schools that were racially isolated in which 90 to 100% were minority students.¹¹³ Though less extreme, Latino charter school students were in schools with 90% or more students of color.¹¹⁴ Although Asian charter school students were the least likely of all students of color to be in segregated minority schools, they were still more likely to attend virtually all-minority charter schools than were their same race peers in traditional public schools.¹¹⁵

In addition, studies show that charter schools are associated with heightened economic segregation.¹¹⁶ When comparing the percentage of students by poverty concentration, higher percentages of charter school students attend schools where the concentration of poverty is 76 to 100%.¹¹⁷ More than one in four charter school students attend a school where at least 75% of students are from low-income households, whereas only 16% of students in traditional public schools attend such high poverty levels.¹¹⁸

The tendency for charters to be racially and economically isolated is troubling for several reasons. First, economically and racially segregated schools are persistently linked to educational and life disadvantages.¹¹⁹ According to Gary Orfield, co-director of The Civil Rights Project at UCLA, “[s]tudents in segregated schools, charter or otherwise, are likely to have limited contact with more advantaged social networks . . . and fewer opportunities for living and working in a diverse society.”¹²⁰ Secondly, as the United States experiences its final years as a majority white society,¹²¹ a persisting dual school system will not foster the cross-racial tolerance and understanding that is necessary to prepare current and future

¹¹¹ CHOICE WITHOUT EQUITY, *supra* note 15, at 5.

¹¹² ORFIELD, *supra* note 5, at 7.

¹¹³ CHOICE WITHOUT EQUITY, *supra* note 16, at 37.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 38.

¹¹⁶ *Id.* at 1.

¹¹⁷ *Id.* at 71.

¹¹⁸ *Id.* at 71.

¹¹⁹ *Id.* at 1.

¹²⁰ *Id.* at 7.

¹²¹ *Minorities Expected to be Majority in 2050*, CNN.COM (Aug. 13, 2008), available at http://articles.cnn.com/2008-08-13/us/census.minorities_1_hispanic-population-census-bureau-white-population?_s=PM:US.

generations for membership in a diverse workforce.¹²²

Skills in understanding other groups and working effectively across lines of racial and ethnic difference are already major job assets and will, of course, become increasingly valuable in an ever more diverse society. Successfully integrated schools where children of diverse backgrounds learn to work together and understand each other in a supportive environment are very good settings in which to learn these skills.¹²³

Just as children from less privileged backgrounds may have better access to opportunity in a diverse setting, children from more privileged backgrounds also have much to gain in an environment where they can confront and overcome the biases they might have against low-income minorities, preconceptions that contribute to the perpetuation of social inequality in the first place.¹²⁴

Furthermore, as the Court's reasoning in *Brown I* should remind us, isolation is detrimental to the psychology of minority school children; it stamps them with a "badge of inferiority."¹²⁵ As Professor Charles Lawrence argues, segregation stigmatizes children of color as part of a history of institutionalized racism.¹²⁶

Black school children are not injured as much by a school board's placement of them in a school different from that in which it has placed white children, so much as by the reality that the school exists within a larger system that defines it as the inferior school and its pupils as inferior persons.¹²⁷

Thus, even though the dialogue of education reform may not always lead to this conclusion, integration in public schools is still a goal worth striving for as we try to build a more tolerant society and level the playing fields for historically discriminated populations.

¹²² Scutari, *supra* note 75, at 922.

¹²³ ORFIELD, *supra* note 5, at 7.

¹²⁴ See *Study: White and Black Children Biased Toward Lighter Skin*, CNN.COM (May 13, 2010), available at http://articles.cnn.com/2010-05-13/us/doll.study_1_black-children-pilot-study-white-doll?_s=PM:US.

¹²⁵ See *Brown II*, 347 U.S. 483 (1954), *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

¹²⁶ Scutari, *supra* note 75, at 922 (quoting Charles R. Lawrence III, "One More River to Cross"—Recognizing the Real Injury in *Brown*: A Prerequisite in Shaping New Remedies, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 49, 53 (Derrick Bell ed., 1980)).

¹²⁷ Scutari, *supra* note 75, at 922.

B. THE ABSENCE OF CIVIL RIGHTS PROTECTIONS IN CHARTER ENABLING LEGISLATION

Ultimately, the failure of charter schools to realize their integrative potential can be attributed to three sources: the nature of charter schools themselves, lack of civil rights guidance from the federal government, and inadequate civil rights protections by state legislatures.

First, charter schools reinforce inequality as a result of a self-selection bias.¹²⁸ Because they are competitive, they are prone to excluding various classes of people in the absence of an explicit commitment to diversity.¹²⁹ As a result of their ambitious programs and additional financial resources from corporate sponsors, charter schools often attract the most motivated students in poor neighborhoods and consequently leave the public schools in the same neighborhood worse off because they have lost some of their highest achieving students.¹³⁰ Moreover, charter schools exclude those who do not have access to the educational marketplace because they do not have contact with the social networks through which information regarding school quality is exchanged.¹³¹ A parent may never become aware of the opportunity to apply to a charter because of language barriers or lack of contact with other parents whose children attend the charter.¹³² Additionally, even if a student applies to a charter, there is no guarantee that he or she will be able to attend, especially if admission is based on a lottery system.¹³³ Certain kinds of students, especially those with special needs, may also be dissuaded from applying to charters.¹³⁴ A number of studies have shown that that they tend to enroll fewer students with disabilities than regular public schools in part by employing counseling mechanisms during the admissions process that deters students who participate in special education programs.¹³⁵

In spite of these facts, the need to counteract the tendency for charters to exclude various groups of people has virtually escaped the federal gov-

¹²⁸ See RAVITCH, *supra* note 80, at 135–37.

¹²⁹ See *id.* at 135–36.

¹³⁰ RAVITCH, *supra* note 80, at 135–36.

¹³¹ EQUITY OVERLOOKED, *supra* note 14, at 6.

¹³² *Id.* at 7.

¹³³ See Joann M. Weiner, *Charter School Lottery Gambles with Kids' Futures—and Often Loses*, POLITICS DAILY (July 14, 2010) <http://www.politicsdaily.com/2010/07/14/charter-school-lottery-gambles-with-kids-futures-and-often-l/>.

¹³⁴ See CHOICE WITHOUT EQUITY, *supra* note 16, at 12.

¹³⁵ See *id.* at 12.

ernment's radar.¹³⁶ During President George W. Bush's administration, guidance on charter school compliance with civil rights policy was archived and, since then, the Office of Civil Rights and Department of Education have not been directed to conduct studies on charter schools and civil rights.¹³⁷ Nor does what little guidance that the federal government does provide actually encourage integration.¹³⁸ Current direction from the Department of Education permits charter schools receiving funding under the Public Charter Schools Program¹³⁹ to set test score and grade point average cut-offs as well as parental participation for admission.¹⁴⁰ These requirements have the effect of limiting access for groups of students who do not meet that minimum criteria and therefore make it difficult to achieve a racially and socioeconomically diverse student body.¹⁴¹

States have likewise been ambivalent at addressing the problem.¹⁴² Although diversity provisions are present in all forty states and the District of Columbia, which all allow charter schools, they tend to be ineffective at promoting integration.¹⁴³ These provisions can be classified into three major categories: (1) a provision of general non-discrimination; (2) a requirement that new charter schools do not interfere with an existing desegregation order; and (3) a provision that permits or requires affirmative action.¹⁴⁴

The first category of general non-discrimination offers only a vague commitment to civil rights policy that is likely to be difficult to enforce.¹⁴⁵ The second category, which requires charter schools to show that their existence will not negatively affect current desegregation orders, may have

¹³⁶ See EQUITY OVERLOOKED, *supra* note 14, at 11–12.

¹³⁷ *Id.* at 11–12. The last report on guidance was issued in 2004.

¹³⁸ *Id.* at 12–13.

¹³⁹ The Public Charter Schools Program is a federal program that provides financial assistance to a state's Department of Education to plan, design, and implement new charter schools. U.S. DEP'T OF EDUC., *Charter School Program State Educational Agencies (SEA) Grant*, ED.GOV (Feb. 24, 2011), <http://www2.ed.gov/programs/charter/index.html>.

¹⁴⁰ EQUITY OVERLOOKED, *supra* note 14, at 12–13.

¹⁴¹ See *id.* at 13.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 14. For example, New York's charter legislation prohibits a charter school from discriminating against any student "on the basis of ethnicity, national origin, gender, or disability or any other ground that would be unlawful if done by a school." N.Y. EDUC. LAW § 2854 (McKinney 2010). The provision merely reiterates what the well-settled law is but does not additionally require charter schools to take steps to avoid racial isolation.

less of an impact as desegregation plans end.¹⁴⁶ The third category is probably the strongest and varies depending on whether a state requires or permits affirmative efforts to encourage diversity.¹⁴⁷ For example, California will deny a charter petition if a school board does not reasonably specify the means by which the school will reflect the racial and ethnic balance of the general population living in the school district.¹⁴⁸ Additionally, other states such as Hawaii require a charter application that includes a plan for identifying, recruiting, and selecting students that is not exhaustive, elitist, or segregative.¹⁴⁹

Although these laws in varying degrees show some appreciation for diversity, the wide differences among the states are in stark contrast to the much stronger civil rights protections afforded to magnet schools, another type of school choice that was originally implemented in order to help districts achieve integration.¹⁵⁰ Like charters, magnet schools are typically focused around specialized themes, which are designed to attract student enrollment from more distant areas of the district.¹⁵¹ However, unlike charters, magnet schools are still subject to district regulations.¹⁵²

Magnet schools have been more successful than charters at achieving diversity. On average magnet schools are composed of student populations that are 31% white and 63.5% low-income.¹⁵³ This is due in part to the strong civil rights provisions that are part of all magnet programs, including the option of free transportation and outreach to all racial, ethnic, socioeconomic, and linguistic groups.¹⁵⁴ Moreover, magnet fiscal incentives are directly tied to school diversity—in order to receive funding, magnets are required to design a plan emphasizing the reduction or prevention of racial isolation.¹⁵⁵ Despite their success at achieving diversity, magnets

¹⁴⁶ *Id.* at 13.

¹⁴⁷ *Id.*

¹⁴⁸ See CAL. EDUC. CODE § 47605(b)(5)(G) (2008).

¹⁴⁹ See HAW. REV. STAT. § 302B-5(d)(3) (2007).

¹⁵⁰ EQUITY OVERLOOKED, *supra* note 14, at 10.

¹⁵¹ *Id.* at 11.

¹⁵² *Id.* at 10.

¹⁵³ ERICA FRANKENBERG & GENEVIEVE SIEGEL-HAWLEY, CIVIL RIGHTS PROJECT, UCLA, *The Forgotten Choice? Rethinking Magnet Schools in a Changing Landscape* 19 (2008), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/the-forgotten-choice-rethinking-magnet-schools-in-a-changing-landscape/frankenber-forgotten-choice-rethinking-magnet.pdf>.

¹⁵⁴ EQUITY OVERLOOKED, *supra* note 14, at 11, 19.

¹⁵⁵ *Id.* at 11.

still receive far less in federal funding than do charters.¹⁵⁶

Nevertheless, in spite of the negative data regarding charter schools, there is no indication that their popularity will subside any time soon.¹⁵⁷ In its 2012 budget request to the Department of Education, the Obama administration asked for \$372 million to expand educational options, which includes support for charter schools.¹⁵⁸ U.S. Secretary of Education Arne Duncan also made clear that states that did not lift their current caps on charter schools would be at a serious disadvantage for receiving federal stimulus money.¹⁵⁹ Charter schools are here to stay.

IV. SO NOW WHAT?

Diverse and high achieving charter schools do exist and it is these types of schools that should be the ideal for which is strived. But how do we encourage the creation of diverse schools? In figuring out how to better serve the goal of integration, two questions arise: to what extent can charter schools ensure diversity in their own student bodies and how can states and the federal government encourage charters to be diverse?

A. HOW CHARTERS CAN CREATE DIVERSE STUDENT BODIES

As a threshold issue, it is important to keep in mind that charter schools, like their traditional public school counterparts, are also constrained by the Supreme Court's equal protection jurisprudence that was discussed earlier in Part II. Because charter schools receive federal funding from the Department of Education, they are subject to the mandates of Title VI of the Civil Rights Act of 1964, which prohibit any program or activity that receives federal financial assistance from discriminating on the basis of race, color, or national origin.¹⁶⁰ This constraint is especially germane to a charter school's lottery process, an admissions regulation required by federal law in cases in which a school finds itself having more applicants than available spots.¹⁶¹ According to the Department of Education's non-regulatory guidelines, the lottery need not be completely ran-

¹⁵⁶ *Id.* at 10.

¹⁵⁷ CHOICE WITHOUT EQUITY, *supra* note 16.

¹⁵⁸ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FISCAL YEAR 2012 BUDGET OF THE U.S. GOVERNMENT 71 (2011).

¹⁵⁹ Eaton & Chirichigno, *supra* note 86.

¹⁶⁰ The Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI, 78 Stat. 252 (codified as amended at 42 U.S.C. § 2000d (2006)).

¹⁶¹ See 20 U.S.C. § 7221(i)(1)(G) (2006).

dom and can be weighted so long as they comport with the Civil Rights Act, Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Equal Protection Clause, and applicable state law.¹⁶² Therefore, charters must abide by the analysis announced in *Parents Involved* and cannot rely solely on race to determine the composition of their student body.¹⁶³ In addition, charters may also be constrained by state laws that prohibit the use of race in student assignment plans. For example, California's state constitution prohibits the granting of "preferential treatment to, any individual or group on the basis or race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."¹⁶⁴ Michigan's state constitution similarly prohibits school districts from using affirmative action plans that would assign advantages on the basis of race.¹⁶⁵

Despite such restrictions, several charter schools have been able to work around the limits of *Parents Involved* and state laws, and still successfully achieved racial and socioeconomic diversity in their student bodies while avoiding the use of racial classifications. Common among many of these diverse charter schools is an explicit commitment to diversity in their mission statements as well as the use of socioeconomic status as a weighted component in their lottery systems.¹⁶⁶ Use of socioeconomic status is rooted in the idea that plans that promote socioeconomic diversity will accordingly result in more racially diverse student bodies given that socioeconomic disadvantage is often linked to race.¹⁶⁷

At this point, it is helpful to examine the mission statements and lottery processes of the successfully diverse charter schools referenced in Part III.A and understand how integration is achieved at these schools.

High Tech High

High Tech High's mission "is to develop and support innovative public schools where all students develop the academic, workplace, and citi-

¹⁶² U.S. DEP'T OF EDUC., CHARTER SCHOOLS PROGRAM: TITLE V, PART B NON-REGULATORY GUIDANCE 12 (2004), available at <http://www2.ed.gov/policy/elsec/guid/cspguidance03.doc>.

¹⁶³ *Parents Involved*, 551 U.S. 701, 723 (2007).

¹⁶⁴ CAL. CONST. art. I § 31(a).

¹⁶⁵ MICH. CONST. art I, §26.

¹⁶⁶ See *infra* notes 165–82 and accompanying text.

¹⁶⁷ O'Rourke, *supra* note 66.

zanship skills for postsecondary success.”¹⁶⁸ Its goals include “serv[ing] a student body that mirrors the ethnic and socioeconomic diversity of the local community” and “increas[ing] the number of educationally disadvantaged students in math and engineering who succeed in high school and post-secondary education.”¹⁶⁹

High Tech High is strategically located in downtown San Diego, an area outside any particular residential neighborhood.¹⁷⁰ Although the school is in a mainly white section of the city, it is only a short bus or trolley ride from most low-income neighborhoods.¹⁷¹ Through a grant with the U.S. Department of Labor, bus service is offered to students commuting from those low-income, predominantly black and Latino communities.¹⁷² Students living in higher-income areas of the city commute to school on their own and are willing to make the trek because of the school’s stellar academic reputation.¹⁷³

As part of their admissions process, the school uses a computerized lottery based on an applicant’s zip code in order to create a student body that represents all areas of the city.¹⁷⁴ The lottery system also assigns a statistical advantage to applicants who qualify for free or reduced-price lunch.¹⁷⁵

Denver School of Science and Technology

Denver School of Science and Technology’s mission is:

[To provide students with] a diverse student body with an outstanding secondary liberal arts education with a science and technology focus. By creating powerful learning communities centered on core values and a shared commitment to academic excellence, [the school aims to] . . . increase the number of underrepresented students (girls, minorities and economically disadvantaged) who attain college science and liberal arts

¹⁶⁸ *About High Tech High*, HIGH TECH HIGH, <http://www.hightechhigh.org/about/> (last visited Feb. 27, 2011).

¹⁶⁹ *Id.*

¹⁷⁰ Jean Kluver & Larry Rosenstock, *Choice and Diversity: Irreconcilable Differences?*, LITERATURE: LARRY ROSENSTOCK, http://dp.hightechhigh.org/~lrosenstock/lit_diversity.html (last visited Mar. 17, 2011).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Admissions FAQ*, HIGH TECH HIGH, http://www.hightechhigh.org/admissions/HTH-AdmissionsFAQ.php#what_are_the_criteria_for_admission_to_High_Tech_High (last visited Feb. 27, 2011).

degrees.¹⁷⁶

In determining admissions for their middle and high schools, the Denver School conducts two separate lotteries, one for Morgridge Scholars (students who qualify for free or reduced-price lunch) and another for the general population.¹⁷⁷ The number of students in Morgridge Scholars equals the amount needed to make up 40% of the entering class.¹⁷⁸ General population students fill the remaining spots.¹⁷⁹

Larchmont Charter School

Larchmont Charter School was founded by a handful of parents who were committed to creating an alternative neighborhood school that would reflect the rich diversity of the community.¹⁸⁰ The mission of Larchmont Charter School “is to provide a socioeconomically, culturally and racially diverse community of students with an exceptional public education.”¹⁸¹ In working towards this goal, the school tries to ensure a diverse pool of applicants from which to draw its student body.¹⁸² To achieve this, the school conducts extensive outreach by distributing flyers throughout the area and finding champions in the community who will recruit parents to apply.¹⁸³

The school’s lottery process is conducted through a staggered drawing that prioritizes three different groups: (1) siblings of current students; (2) children of founding parents, board, and staff; and (3) applicants who qualify for free and reduced-price lunch.¹⁸⁴ Available spaces in each grade

¹⁷⁶ *Mission and Vision*, DSST PUB. SCHS., <http://dsstpublicschools.org/about-us/mission-and-vision/> (last visited Feb. 27, 2011).

¹⁷⁷ *DSST Stapleton High School Lottery Process*, DSST PUB. SCHS., <http://dsstpublicschools.org/enrollment/enrollment-information/dsst-stapleton-high-school/dsststapleton-high-school-lottery-process/> (last visited Feb. 27, 2011); *DSST Stapleton Middle School Lottery Process*, DSST PUBLIC SCHOOLS, <http://dsstpublicschools.org/enrollment/enrollment-information/dsst-stapleton-middle-school/middle-school-lottery-process/> (last visited Feb. 27, 2011).

¹⁷⁸ *Id.*; *DSST Stapleton Middle School Lottery Process*, *supra* note 174.

¹⁷⁹ *DSST Stapleton High School Lottery Process*, *supra* note 176; *DSST Stapleton Middle School Lottery Process*, DSST PUBLIC SCHOOLS, *supra* note 176.

¹⁸⁰ Interview with Brian C. Johnson, Executive Director, Larchmont Charter School, in L.A., Cal. (Mar. 17, 2011).

¹⁸¹ *About Larchmont Charter School*, LARCHMONT CHARTER SCH., <http://www.larchmontcharter.org/about.html> (last visited Feb. 22, 2011).

¹⁸² Johnson, *supra* note 179.

¹⁸³ Johnson, *supra* note 179.

¹⁸⁴ *LCS Lottery Process*, LARCHMONT CHARTER SCH., <http://www.larchmontcharter.org/documents/LCS-Lottery-Process.pdf> (last visited Feb. 27,

level are assigned based on lottery numbers in the order of these priorities.¹⁸⁵

Ultimately, what all three schools have in common is an explicit commitment to a broader conception of diversity, one that is cognizant of both race *and* socioeconomic status and taps into the kind of holistic diversity that *Parents Involved* imagined. Moreover, what helps these schools to realize this goal is a workable plan that takes into account school accessibility to different communities, creation of a diverse applicant pool, and a weighted lottery process that is based on socioeconomic status.¹⁸⁶

Use of socioeconomic status as a proxy to race is not just limited to charter schools—traditional public schools seeking to diversify their student bodies have likewise taken socioeconomic status into consideration when assigning students to schools.¹⁸⁷ Today, about seventy districts have socioeconomic integration policies.¹⁸⁸ Moreover, this move toward using socioeconomic status instead of race has led to successful results.¹⁸⁹ In most cases, low-income students in school districts, which account for socioeconomic status in their assignment plans, are doing better than low-income students in segregated school districts.¹⁹⁰

Nevertheless, targeting socioeconomic status alone will not always result in racial diversity.¹⁹¹ This is especially true for large urban school districts with high concentrations of low-income students.¹⁹² The case of San Francisco Unified School District is one cautionary example.¹⁹³ The school district, which was once under a court-ordered desegregation plan

2011).

¹⁸⁵ *Id.*

¹⁸⁶ These charters also rely on their reputations as high performing schools with a positive school culture that encourages mutual respect among different communities to motivate both low-income and higher-income families alike to apply. See Johnson, *supra* note 179; Kluver, *supra* note 169.

¹⁸⁷ Mary Ann Zehr, *More Districts Factoring Poverty into Student Assignment Plans: Socioeconomics Replacing Race in School Assignments*, EDUC. WEEK, May 12, 2010, at 1.

¹⁸⁸ *Id.*

¹⁸⁹ *See id.*

¹⁹⁰ *Id.*

¹⁹¹ O'Rourke, *supra* note 66, at 269–70.

¹⁹² O'Rourke, *supra* note 66, at 271 (“Such plans will likely be ineffective for large urban school districts with high concentrations of low-income students, such as those in San Francisco, Los Angeles, New York, and Chicago.”).

¹⁹³ See Jonathan D. Glater & Alan Finder, *School Diversity Based on Income Segregates Some*, N.Y. TIMES, July 15, 2007, at A24 (The student assignment policies of the San Francisco Unified School District is one cautionary example.).

that mandated that no racial or ethnic group could constitute more than 45% of the student enrollment at any regular school,¹⁹⁴ has since adopted a plan that uses a diversity index that considers socioeconomic status instead of race to assign students who choose oversubscribed schools.¹⁹⁵ Although the hope was that the plan would continue to foster racial diversity, school officials have found that the school district is actually resegregating.¹⁹⁶ The number of schools in which 60% of students belong to the same racial group in one grade has risen from thirty schools in the 2001–2002 academic year to fifty schools in 2005–2006.¹⁹⁷

Use of socioeconomic status is also problematic because it is jurisprudentially disingenuous. On the one hand, districts that want to promote the worthy goal of integration in their schools have been forced into a position of having to redefine how they may promote diversity without using their most obvious tool—race.¹⁹⁸ Employing socioeconomic status, which is often correlated with race, is an easy and obvious shortcut to achieving the same desired results.¹⁹⁹ On the other hand, when the intent remains the same and socioeconomic status is merely acting as a euphemism for racial classifications for which the Court has already expressed its distaste, it is questionable whether such plans are really tapping into the kind of race-neutral means of achieving diversity that Justice Kennedy imagined in his concurrence in *Parents Involved*.²⁰⁰

¹⁹⁴ *History of School Assignment*, S.F. UNIFIED SCH. DIST., <http://portal.sfusd.edu/template/default.cfm?page=policy.placement.assignment.history> (last visited Feb. 27, 2011).

¹⁹⁵ *Current Student Assignment System*, S.F. UNIFIED SCH. DIST., <http://portal.sfusd.edu/template/default.cfm?page=policy.placement.assignment.current> (last visited Feb. 27, 2011). The consent decree expired in 2005. Julie D. Soo, *Back to School for Integration: Catch-22 of Excellence and Diversity Without Race*, ASIAN WEEK (Aug. 26, 2006), http://news.newamericamedia.org/news/view_article.html?article_id=0b132aaf51dd1f6e6a877f8335b4aa8f.

¹⁹⁶ Glater & Finder, *supra* note 192.

¹⁹⁷ Glater & Finder, *supra* note 192.

¹⁹⁸ See *supra* notes 48–59 and accompanying text.

¹⁹⁹ See *supra* notes 64–66 and accompanying text.

²⁰⁰ See *Parents Involved*, 551 U.S. 771, 789 (2007) (“School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance and other statistics by race. These mechanisms are race-conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.”). Theoretically, the Court could strike down a plan that uses socioeconomic status if it could be shown that it is only being used as a proxy for race. However, given the Court’s stated preference for race-neutral alternatives

For these reasons, it may be more prudent for charter schools to expand their concept of diversity as they work toward creating integrated student bodies.²⁰¹ As discussed above, even though it is impractical for charter schools to adopt the type of time-consuming application review that is used in higher education settings,²⁰² their lottery processes can still be changed in a way that is race-conscious, and therefore more exacting in its pursuit of racial diversity, but still nuanced such that it would pass constitutional muster under *Parents Involved*. Ideally, in a charter school's lottery process, a statistical advantage would be assigned to a type of applicant who is most likely to be underrepresented in the school's population. This would be similar to High Tech High's lottery system, which accounts for a student's zip code while also conveying a statistical advantage for low-income students.²⁰³

For example, a charter school located in a predominantly white middle-class neighborhood may ascribe statistical advantages to an applicant who is an English language learner, qualifies for free or reduced-price lunch, comes from a single parent home, or lives in a different geographic area. Moreover, in states without laws that explicitly prohibit public schools from giving preferential treatment on the basis of race, race may also be a factor in this formula so long as it is one factor among many and not the most significantly weighted component. This race-conscious, multi-factor consideration would more likely succeed in achieving racial and socioeconomic diversity than use of socioeconomic status alone.

However, in order to legitimize this race-conscious method, pursuant to *Grutter*, charter schools may also have to define a point at which their race-conscious policies must end.²⁰⁴ Part of the problem in *Parents Involved* was that there was "no logical stopping point" to use of the school districts' race-conscious plans.²⁰⁵ In *Grutter*, the Court announced a twenty-five year goal in which law schools like the University of Michigan

and socioeconomic status's mere quasi-suspect classification, such a disposition would be highly unlikely especially if it can be shown that a school is using socioeconomic status to achieve more than just racial diversity. This would not be a difficult burden of proof given that schools have been broadening their notion of diversity and typically no longer simply define diversity by race alone.

²⁰¹ See Charles E. Dickinson, Note, *Accepting Justice Kennedy's Challenge: Reviving Race-Conscious School Assignments in the Wake of Parents Involved*, 93 MINN. L. REV. 1410, 1436–44 (2009).

²⁰² See *supra* notes 60–63 and accompanying text.

²⁰³ See *supra* notes 171–72 and accompanying text.

²⁰⁴ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 320 (1986) (plurality opinion)).

²⁰⁵ *Parents Involved*, 551 U.S. 701, 731 (2007).

would no longer need to use race as a criteria to further the interest of diversity.²⁰⁶ Similarly for charter schools, that twenty-five year ending date may also be necessary.²⁰⁷

Yet another alternative is for charter schools to purposefully locate themselves in diverse neighborhoods. For example, Larchmont Charter School, which is situated in a highly diverse area in Los Angeles,²⁰⁸ uses its location to draw upon a broad and diverse cross-section of its community.²⁰⁹ For those charters located in more homogeneous neighborhoods, providing access to free transportation should also be made available to ensure that students from more distant areas of the district have the opportunity to attend.²¹⁰ Although transportation is costly, charter schools that receive substantial amounts of private funding may be able to afford this option.²¹¹ Moreover, to counter the self-selection bias that is characteristic of charter schools and to ensure that students from a variety of backgrounds apply, it is crucial that all charter schools conduct outreach with the community at large to raise awareness about their schools.²¹²

B. HOW STATES AND FEDERAL GOVERNMENT CAN SUPPORT DIVERSITY

In order for charter schools to have the incentive to create diverse schools, states must push them in that direction. As discussed earlier in Part III.A, some states have already acknowledged the importance of diversity in their charter enabling legislation by requiring an application for a charter start-up to specify a plan for identifying, recruiting, and selecting students that is not “exhaustive, elitist, or segregative.”²¹³ Other states, like California require that a petition specify the means by which a charter plans to achieve a racially balanced student body.²¹⁴ The plan must be reflective of the general population of the area in which the charter is locat-

²⁰⁶ *Grutter*, 539 U.S. at 343.

²⁰⁷ See Dickinson, *supra* note 200, at 1440–41.

²⁰⁸ *Larchmont Profile*, L.A. TIMES, <http://projects.latimes.com/mapping-la/neighborhoods/neighborhood/larchmont/> (last visited Feb. 27, 2011).

²⁰⁹ See Brochure, *supra* note 99.

²¹⁰ Johnson, *supra* note 179.

²¹¹ See Richard Rothstein, *When Billionaires' Goals Do Harm*, N.Y. TIMES (Oct. 6, 2010), <http://www.nytimes.com/roomfordebate/2010/10/05/can-100-million-change-newark-schools/when-billionaires-goals-do-harm>.

²¹² See, e.g., *About Larchmont Charter School*, LARCHMONT CHARTER SCH., <http://www.larchmontcharter.org/about.html> (last visited Feb. 22, 2011).

²¹³ See HAW. REV. STAT. § 302B-5(d)(3) (2007).

²¹⁴ See CAL. EDUC. CODE § 47605(b)(5)(G) (2009).

ed and gives the school district's governing board the authority to deny the petition if it fails to set forth specific facts to demonstrate its plan.²¹⁵ At the very least, all states should similarly commit to these requirements and additionally grant preference to petitions that demonstrate a commitment to creating diverse and inclusive schools and not just schools that will cater to academically low-achieving students.

However, whether states will independently enact such legislation is debatable. In order for all states to uniformly move in this direction, the federal government—which controls the purse strings that enable the start-up and operation of charter schools—must also intervene.²¹⁶ More specifically, federal legislation should mimic guidelines governing magnet schools by tying public funding for charter schools to school diversity.²¹⁷

Current federal legislation governing magnet schools states the purpose of magnet schools as assisting “the elimination, reduction, or prevention of minority group isolation in elementary schools and secondary schools with substantial proportions of minority students.”²¹⁸ In expecting magnet schools to serve this function, the federal government requires the petition to establish a magnet school to include a description of how a federal grant “will be used to promote desegregation, including how the proposed magnet school programs will increase interaction among students of different social, economic, ethnic, and racial backgrounds.”²¹⁹ In effect the statute conditions federal funding on creation of a school environment that will foster diversity and inclusion.

Current federal charter legislation, however, has a markedly different tone.²²⁰ Nowhere in 20 U.S.C. § 7221, which addresses the purpose of charter schools, is there any reference to any civil rights ideals.²²¹ Rather, the stated purpose of this legislation is to merely:

[I]ncrease national understanding of the charter schools model by—

- (1) providing financial assistance for the planning, program design, and initial implementation of charter schools;
- (2) evaluating the effects of such schools, including the effects on

²¹⁵ *Id.*

²¹⁶ See OFFICE OF MGMT. & BUDGET, *supra* note 158 (showing the budget for the Department of Education).

²¹⁷ EQUITY OVERLOOKED, *supra* note 14, at 20.

²¹⁸ 20 U.S.C. § 7231(b)(1) (2002).

²¹⁹ 20 U.S.C. § 7231d(b)(1)(A) (2002).

²²⁰ See generally *id.* at 17–24 (discussing multicultural accommodation in the United States and abroad).

²²¹ See *id.*

students, student academic achievement, staff, and parents;

(3) expanding the number of high-quality charter schools available to students across the Nation; and

(4) encouraging the States to provide support to charter schools for facilities financing in an amount more nearly commensurate to the amount the States have typically provided for traditional public schools.²²²

Subsequent sections also fail to mention any obligation to promote the “increased interaction” that is characteristic of the magnet school provisions.²²³ Most notable is § 7221(b), which specifies the minimum application requirements for a charter, and only asks that an application for a federal grant include information about management operations, parental involvement, community outreach, and how a charter’s curriculum will meet a state’s student achievement standards.²²⁴ There is no requirement that an application identify how the charter school will achieve a diverse student body.²²⁵

Amending the federal government’s charter enabling legislation to more closely resemble the provisions that govern magnet schools will go a long way toward pushing states to also change their own laws in order to more closely align with federal law and to directly compel petitioning charter schools to craft plans that will encourage diversity. Specifically, the federal law can be amended in two ways. Section 7221, which sets out the purpose of legislation, can be changed to acknowledge the integrative promise of charter schools. For example, § 7221 could be appended to read more like § 7231(a)(4)(A) of the magnet school provision: It is the purpose of this subpart to increase national understanding of the charter school model by . . . (5) fulfilling the potential of charter schools to foster meaningful interaction among students of different social, economic, ethnic, and racial backgrounds. Furthermore, § 7221(b), which specifies conditions for a federal grant, should be amended such that a grant is made conditional on a plan that details how the school will create a diverse student body.

Lastly, in addition to changes in federal legislation that will be more demanding of charter schools to be diverse, these laws must be enforced in order to be effective. The Office of Civil Rights has not issued guidance on the relationship between charter schools and federal civil rights law

²²² *Id.*

²²³ *See* 20 U.S.C. § 7221(a)-(j) (2006).

²²⁴ *See* 20 U.S.C. § 7221(b)(1)-(3) (2006).

²²⁵ *See id.*

since 2000.²²⁶ An updated set of guidelines as well as federal and state oversight will be needed to ensure that these civil rights requirements are enforced.²²⁷

V. CONCLUSION

Education is a well-recognized right.²²⁸ Every state, with the exception of Iowa, has some kind of constitutional recognition of the right to education.²²⁹ Most Americans also believe that integration is beneficial for everyone.²³⁰

In surveys among young adults, 60% believe the federal government ought to make sure that public schools are integrated, while the same percentage of black respondents do not merely favor integrated education but believe that it is absolutely essential that the population of a school be racially diverse. Only 8% of blacks and only 20% of whites say that this is not of much importance.²³¹

Even though we value the importance of education and believe in the benefits of integration, our actions often speak otherwise. The Supreme Court has seriously obstructed the means by which state and local governments may deal with the growing resegregation of public schools with an interpretation of the Equal Protection Clause that inhibits state action that is meant to help the very insular groups that the clause is supposed to protect. Moreover, the political process has shown little resistance to the Court's jurisprudence and has more or less conceded on the issue. Taking their signal from the Court in the aftermath of *Parents Involved*, school districts are now backing off attempts to bring about diversity and are instead returning to the model of neighborhood schools, which will likely lead to resegregation and concentrated poverty in certain schools.²³² In effect, we are returning to the very scenario against which *Brown* stood.

²²⁶ EQUITY OVERLOOKED, *supra* note 14, at 12.

²²⁷ *Id.* at 19-20.

²²⁸ See CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTIONS AND WHY WE NEED IT MORE THAN EVER 187 (2004).

²²⁹ *See id.*

²³⁰ JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA 233 (2005).

²³¹ *Id.*

²³² Stacy Teicher Khadaroo, *Busing to End in Wake County, N.C.: Goodbye, School Diversity?*, THE CHRISTIAN SCI. MONITOR (Mar. 24, 2010), <http://www.csmonitor.com/USA/Education/2010/0324/Busing-to-end-in-Wake-County-N.C.-Goodbye-school-diversity>.

Charter schools, however, have the potential to resist such tendencies. Although the education reform movement has characterized charter schools more as an alternative means by which minority children from low-income communities may have an opportunity to receive a quality education and less as a tool by which to achieve integration, charter schools can and should strive to be more than just another form of school choice. They should work toward being a civil rights solution. Charter schools can be both diverse and high achieving and stand as a model for our public education system, a place where children of all backgrounds can learn together and learn to live together—just as Justice Marshall would have us imagine.