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## From the Failure of Desegregation to the Failure of Choice

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## From the Failure of Desegregation to the Failure of Choice

Wendy Parker\*

### ABSTRACT

*As we commemorate the fortieth anniversary of the St. Louis school desegregation litigation, a natural question is how current education reform efforts impact the status of and potential for school integration. This Article examines how the push for school choice impacts school desegregation in Missouri specifically and the United States generally. The evidence reveals that while our student population is becoming more diverse and the prevalence of all-white schools is diminishing, the pattern of high-poverty, high-minority, low-performing schools persists. Charter schools—the most common form of school choice—actually exacerbate the segregation of poor and minority school children. As a first step in rectifying the segregative impact of charter schools, this Article proposes that the federal government require more inclusionary practices by charter schools for states to receive federal funding for their charter schools. Otherwise, we once again allow current reform efforts to continue our history of segregated, unequal schooling.*

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## INTRODUCTION

School desegregation once promised to transform us into a country of equality through the power of integration. When Minnie Liddell and others filed *Liddell v. Board of Education* forty years ago in 1972, surely they felt great hope for integrated schooling,<sup>1</sup> even if

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1. See generally Robert W. Tabscott, *Minnie Liddell's Quest*, ST. LOUIS BEACON (Sept. 29, 2009), [https://www.stlbeacon.org/#!/content/20621/minnie\\_liddells\\_quest](https://www.stlbeacon.org/#!/content/20621/minnie_liddells_quest).

that hope was tempered with understandable frustration with their school district.<sup>2</sup> Missouri, which by constitution and statute had once segregated its schools,<sup>3</sup> was a relative latecomer to school desegregation, but its two school desegregation cases had great potential.<sup>4</sup> Plaintiffs in both Kansas City and St. Louis had partial, but remarkable, success in avoiding the Supreme Court's restrictions on interdistrict remedies.<sup>5</sup> Both took novel and expensive approaches to promoting actual integration in their cities and surrounding suburban school districts.<sup>6</sup>

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2. For example, in the 1972–73 school year, 148 of the city's 181 elementary and high schools were at least 90 percent of one race. *See Liddell v. Bd. of Educ.*, 469 F. Supp. 1304, 1329 (E.D. Mo. 1979), *rev'd and remanded sub nom. Adams v. United States*, 620 F.2d 1277 (8th Cir. 1980). The city's school district had experienced a dramatic transformation that began even before *Brown v. Board of Education*. Its white student population declined significantly between 1953 and 1963, while the overall student population increased dramatically. *See id.* at 1328–29.

3. *See id.* at 1313.

4. The Kansas City suit was not filed until 1974. *See Sch. Dist. v. State*, 460 F. Supp. 421, 427 (W.D. Mo. 1978) (noting that the Kansas City case was originally filed by the Kansas City, Missouri School District (KCMSD), along with a class represented by four minor children of KCMSD school board members, against thirty-five metropolitan area school districts and other defendants from the States of Missouri and Kansas and the federal government), *appeal dismissed on jurisdictional grounds*, 592 F.2d 493 (8th Cir. 1979); *see also Liddell*, 469 F. Supp. at 1309 (detailing the individual plaintiffs and their suit in 1972 against the St. Louis City school district, the State of Missouri, and various officers of those political subdivisions).

5. *See Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 741, 745 (1974). In *Milliken I*, the Supreme Court restricted the availability of interdistrict remedies. These limitations effectively confined remedies to the area within a single school district's boundary lines. Twelve years after *Liddell* was filed, the Eastern District of Missouri and the 8th Circuit both approved an expansive interdistrict transfer program proposed in a settlement agreement developed by the plaintiffs and defendants. Although participation in the program was "voluntary" for suburban school districts, those districts were threatened with court sanctions if they did not volunteer and meet the plan's requirements. The program was strongly successful for those city students able to secure one of the program's limited transfer opportunities. *See generally Liddell v. Missouri (Liddell VII)*, 731 F.2d 1294, 1298, 1302 (8th Cir. 1984) (en banc) (generally approving settlement agreement establishing a voluntary, interdistrict transfer program and St. Louis magnet schools). For the positive impact of the transfer program and magnet schools on student achievement, see JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART* 195–96 (2010). Kansas City embarked on an expensive quest to improve its schools, in part, to create "suburban comparability" and thereby to attract white, suburban students. Attracting suburban students into KCMSD proved largely illusive, and the Supreme Court ultimately deemed suburban comparability an impermissible remedial goal. *See generally Missouri v. Jenkins (Jenkins III)*, 515 U.S. 70, 90–91 (1995).

6. For an interesting history of the negotiations that led to the St. Louis voluntary interdistrict plan, see D. Bruce La Pierre, *Voluntary Interdistrict School Desegregation in St. Louis: The Special Master's Tale*, 1987 Wis. L. REV. 971 (1987). For an examination of the

Yet, both cases amply demonstrate the difficulties of actualizing the transformative power of *Brown v. Board of Education*.<sup>7</sup> The Kansas City and St. Louis desegregation cases are now officially completed,<sup>8</sup> but integration and educational success have largely eluded both school districts. Extreme segregation persists in both school districts,<sup>9</sup> and both have lost their state accreditation.<sup>10</sup>

Today we rarely expect or hope for integrated schools.<sup>11</sup> School desegregation litigation is all but over,<sup>12</sup> and our schools too often

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interdistrict plan in Kansas City, ordered by the district court but substantially limited by the Supreme Court, see Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 492–95, 497–500, 503–06 (1999).

7. 347 U.S. 483 (1954).

8. See Liddell v. Bd. of Educ., 2011 U.S. Dist. LEXIS 132526 (E.D. Mo. Nov. 16, 2011) (memorandum and order approving a joint settlement agreement between the parties and retaining jurisdiction to enforce the agreement); Jenkins v. Kansas City, Mo. Sch. Dist., 516 F.3d 1074, 1079 (8th Cir. 2008) (noting the declaration of unitary status in 2003 and amending the 2003 order).

9. For the 2011–12 school year, traditional public schools in the Kansas City School District enrolled 15,826 students and only 8.9 percent were white. See *2011 Kansas City District Report Card*, MO. DEP'T OF ELEMENTARY & SECONDARY EDUC., <http://mcds.dese.mo.gov/guidedinquiry/School%20Report%20Card/District%20Report%20Card.aspx?rp:SchoolYear=2011&rp:SchoolYear=2010&rp:SchoolYear=2009&rp:SchoolYear=2008&rp:DistrictCode=048078> (last modified Aug. 8, 2012). For the 2011–12 school year, traditional public schools in the St. Louis City school district enrolled 23,576 students and only 13.5 percent were white. See *2011 St. Louis City District Report Card*, MO. DEP'T OF ELEMENTARY & SECONDARY EDUC., <http://mcds.dese.mo.gov/guidedinquiry/School%20Report%20Card/District%20Report%20Card.aspx?rp:SchoolYear=2011&rp:SchoolYear=2010&rp:SchoolYear=2009&rp:SchoolYear=2008&rp:DistrictCode=115115> (last modified Aug. 9, 2012). In contrast, in 1953–54, before St. Louis began to lose its white student population to the suburbs, student enrollment in those schools was 89,475, and 65.5 percent of the students were white. See Liddell, 469 F. Supp. at 1329.

10. See A. G. Sulzberger, *Kansas City, Mo., School District Loses Its Accreditation*, N.Y. TIMES, Sept. 20, 2011, at A21; Malcolm Gay, *State Takes Control of Troubled Public Schools in St. Louis*, N.Y. TIMES, Mar. 23, 2007, at A12.

11. Michelle Adams, *Radical Integration*, 94 CAL. L. REV. 261, 264 (2006) (“Integration no longer captivates the progressive imagination; it no longer moves those concerned with eliminating racial inequality.”); Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1334 (2004) (concluding that “the influence of *Brown* is thirty years past its peak”); John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655, 686 (2001) (“[I]ntegration no longer remains a primary or even secondary goal in education.”); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 251 (1999) (“It seems unfashionable these days, if not atavistic, to talk seriously about ways to increase racial integration.”); James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 155 (2007) (“The rest of the country appears to have turned its back on integration.”).

12. See Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1627–28 (2003); Wendy Parker, *The Future*

remain segregated.<sup>13</sup> Yet, almost everyone still proclaims faith in the truth of *Brown*.<sup>14</sup>

What explains this disconnect between the persistence of school segregation and the iconic status of *Brown*? At best, we are merely weary from the battle.<sup>15</sup> More likely is that we have disconnected *Brown* from its transformative potential and relegated integration to the back of the bus as either impractical or unimportant. Other educational reforms capture our attention as more effective.

This Article, written in the spirit of honoring Mrs. Liddell, who remained committed to integration throughout her life,<sup>16</sup> explores the consequences of forgoing school integration in the context of charter schools. What I discover is deeply troubling. Charter schools, which are growing fast with broad political support, pursue excellence without concern for integration.<sup>17</sup> This is true for both racial/ethnic and economic integration. Through the practice and design of charter schools, we have more segregation, not less, and only conflicting evidence of educational excellence. All the more disturbing is the use of public money to support this segregation.

Part I reveals how the design of charter schools allows and facilitates segregation. Part II exposes how charter schools in practice exacerbate racial and economic segregation in Kansas City and St. Louis and throughout the United States. In practice, charter schools actually create fewer opportunities for integrated education than the

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*of School Desegregation*, 94 NW. U. L. REV. 1157, 1158–59, 1178–80 (2000).

13. See Wendy Parker, *The Failure of Education Reform and the Promise of Integration*, 90 TEX. L. REV. 395, 419–21 (2011) [hereinafter Parker, *The Failure of Education Reform*].

14. See, e.g., DERRICK BELL, *SILENT COVENANTS* 3 (2004) (describing *Brown* as the “equivalent of the Holy Grail of racial justice”).

15. JONATHAN KOZOL, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA* 240 (2005) (quoting Roger Wilkins’s contention that we are “morally exhausted” with integration efforts).

16. Mrs. Liddell remained committed to integration until her death in 2004 at the age of sixty-four. See Dale Singer, *Education Trends Could Jeopardize Gains Won by Liddell Case, Speakers Say*, ST. LOUIS BEACON (Mar. 23, 2012) (quoting a statement made by Mrs. Liddell’s son, Michael, at a Washington University School of Law symposium on the status of desegregation efforts); see also Tabscott, *supra* note 1 (quoting Mrs. Liddell’s testimony at a 1997 desegregation hearing: “There is only one moral course—to provide all of our children quality, integrated education.”).

17. I strongly disagree with this disconnect. Parker, *The Failure of Education Reform*, *supra* note 13, at 407–11; Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L. REV. 1, 37–40 (2008).

unconstitutional “freedom of choice” plans did in the 1960s.<sup>18</sup> Part III argues that federal policy must be changed to rectify the pattern of high-poverty, high-minority schools in Missouri and elsewhere. This year, the federal government will award hundreds of millions of dollars to charter schools—with no concern that the money will subsidize and increase segregation.

That must change. Otherwise, we are publicly funding a pattern of high-poverty, high-minority schools, largely to the detriment of student success and our country’s future.

## I. CHOICE & CHARTER SCHOOLS

This Part considers one of the most prominent educational reform efforts of the twenty-first century: choice.<sup>19</sup> It specifically examines the national push for charter schools and how the State of Missouri promotes and limits the use of charter schools. When one carefully examines the design of charter schools, one discovers that the foundation of charter schools allows, and to a certain extent promotes, segregation. Like freedom-of-choice plans in the 1960s, charter schools today are designed not only to allow segregation, but to facilitate segregation.<sup>20</sup>

### A. Choice

School choice is not new. The year after *Brown*, free-market economist Milton Friedman articulated his vision of public vouchers to cover private school tuition.<sup>21</sup> White Southerners tried their best to continue segregation through a variety of choice mechanisms.<sup>22</sup> While many focus on the role of choice in fostering segregation, the

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18. See *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 437–38 (1968) (outlawing such plans as a desegregation remedy because of their ineffectiveness).

19. The other high-profile reform effort of the twenty-first century is accountability, most notably reflected in the federal No Child Left Behind Act, discussed briefly *infra* Part III.A.2.

20. This connection to freedom-of-choice plans is discussed *infra* Part II.C.

21. See Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 123 (Robert A. Solo ed., 1955).

22. See Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691, 1709–14 (2004) [hereinafter Parker, *Connecting the Dots*].

truth is that choice has been used both to thwart<sup>23</sup> and to promote school desegregation.<sup>24</sup> For example, civil rights activists used choice in opening Mississippi Freedom Schools during the Mississippi Freedom Summer of 1964.<sup>25</sup>

What is new about choice is not its presence in school assignment. What is new about school choice is its *formal* disconnect with school integration. While in the past school choice was used by both advocates and opponents in the battle over school desegregation, today choice is completely disconnected from the value of desegregation, as if choice were neutral in promoting or discouraging integration or as if student demographics were of no concern.<sup>26</sup>

### B. Charter Schools

#### 1. Nationally

The most available form of choice today is a charter school.<sup>27</sup> Starting with President Reagan, the Executive Branch has actively

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23. For example, in the aftermath of *Brown*, some Southern school districts adopted “freedom-of-choice” plans that eliminated segregation by law and replaced it with segregation largely maintained by parental choice. *See generally id.* (detailing theoretically “race neutral” assignment practices enacted in the aftermath of *Brown*). In 1968, the Supreme Court deemed freedom-of-choice plans ineffective in achieving the constitutionally mandated goal of school desegregation. *Green*, 391 U.S. at 437–38.

24. Magnet schools are a typical school desegregation remedy. They often successfully attract affluent and/or white parents to send their children to schools organized by themes and often located in predominately poor, minority neighborhoods. *See* Erica Frankenberg & Genevieve Siegel-Hawley, *Choosing Diversity: School Choice and Racial Integration in the Age of Obama*, 6 STAN. J. C.R. & C.L. 219, 224–26 (2010). For a discussion of some of the problems with magnet schools, see Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 826 (2011) (noting that magnet school programs can “sometimes produce diverse enrollments while reducing diversity in the non-magnet schools” and implying that magnet schools reduce funding for non-magnet schools, all to the detriment of those not attending magnet schools). Voluntary transfer policies are also often employed to foster integration. *See* Frankenberg & Siegel-Hawley, *supra*, at 226–27.

25. *See* James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287, 1295–1300 (2005). Professor Forman traces the role of choice employed for the benefit of African Americans to the Reconstruction Period. *See id.* at 1291–95.

26. *See generally* RYAN, *supra* note 5, at 304.

27. Charter schools are public schools and receive public funding, but they need not abide by all of the rules imposed on other public schools. Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 566, 576–77 (2001) [hereinafter Parker, *The Color of*

promoted charter schools.<sup>28</sup> As a candidate in 2008, President Obama proposed doubling charter school funding, a commitment he is fast fulfilling.<sup>29</sup> In fact, today it is difficult to find groups opposed to charter schools. Those most likely to oppose charter schools are an unlikely pair: teachers' unions and suburban parents.<sup>30</sup>

Today over five thousand charter schools educate almost two million children.<sup>31</sup> As states compete for Race to the Top funding, which supports charter schools,<sup>32</sup> and as Congress increases federal funding for charter schools,<sup>33</sup> that number is expected to continue to

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*Choice*]. State legislation authorizes charter schools and delineates where charter schools can operate as well as who may authorize and operate charter schools. *Id.* at 575–76. In 1991, Minnesota was the first state to pass legislation enabling the formation of charter schools. *Closing the Achievement Gap: Charter School FAQ*, PUB. BROAD. SERV., <http://www.pbs.org/closingtheachievementgap/faq.html#q13>. Other intradistrict and interdistrict choice mechanisms used by various districts include magnet schools, transfer policies, and private school tuition vouchers. See generally RYAN, *supra* note 5, at 185–209.

28. See Stephen Eisdorfer, *Public School Choice and Racial Integration*, 24 SETON HALL L. REV. 937, 937 (1993) (discussing the support of Presidents Reagan and George H. Bush for charter schools); Frankenberg & Siegel-Hawley, *supra* note 24, at 228–29 (detailing the support of Presidents Clinton and George W. Bush for charter schools); Paul E. Peterson, *School Choice: A Report Card*, 6 VA. J. SOC. POL'Y & L. 47, 53 (1998) (noting that President Clinton as well as presidential candidate Bob Dole supported charter schools); see also Frankenberg & Siegel-Hawley, *supra* note 24, at 228 (“Competitive funding for charters grew exponentially, rising from \$6 million in federal grant money in 1995 to \$217 million in 2005.”).

29. See Frankenberg & Siegel-Hawley, *supra* note 24, at 229, 244.

30. RYAN, *supra* note 5, at 201 (“Suburbanites, in general, seem less interested in charter schools. In fact, in some suburban districts, charter schools are seen not only as unnecessary but as an insult to local public schools and a threat to property values.”); Suhrid S. Gajendragadkar, Note, *The Constitutionality of Racial Balancing in Charter Schools*, 106 COLUM. L. REV. 144, 151–52 (2006) (“Public school teacher unions feel threatened because charter school teachers are not unionized.”). For a discussion of the concentration of charter schools in urban areas, see *infra* Part I.C.3.

31. These figures are for the 2010–11 school year and come from a pro-charter school group, the National Alliance for Public Charter Schools. See *Public Charter Schools Dashboard: Schools Overview*, NAT'L ALLIANCE FOR PUB. CHARTER SCH., <http://dashboard.publiccharters.org/dashboard/schools/page/overview/year/2011> (last visited Aug. 21, 2012); *Public Charter Schools Dashboard: Students Overview*, NAT'L ALLIANCE FOR PUB. CHARTER SCH., <http://dashboard.publiccharters.org/dashboard/students/page/overview/year/2011> (last visited Aug. 21, 2012). The U.S. Department of Education reported almost five thousand charter schools during the 2009–10 school year, with a total of 1.6 million students. See *Numbers and Types of Public Elementary and Secondary Schools From the Common Core of Data: School Year 2009–10*, NAT'L CTR. FOR EDUC. STATISTICS, tbl.2, at 7; tbl.3, at 9, <http://nces.ed.gov/pubs2011/2011345.pdf>.

32. See *infra* Part III.A.1.

33. See *infra* Part III.B.

rise.<sup>34</sup> Yet, the overall percentage of public school students attending charter schools is still quite small—less than 4 percent.<sup>35</sup>

Charter schools are designed to promote educational excellence not through integration or segregation, but instead by creating a competitive market for public educational dollars.<sup>36</sup> With the addition of charter schools, public school monopolies on public educational monies end. Instead, traditional public and charter schools would compete for public funding. By increasing competition, the theory holds, both traditional public and charter schools would improve educational offerings, for the benefit of all students.<sup>37</sup>

Individual parents play a significant role in ensuring that this competition works. Parents or other caregivers must be willing and able to reject their assigned traditional public school for a presumably better charter school, and likely must provide their own transportation to that school.<sup>38</sup>

Charter schools do not charge tuition and cannot explicitly select their students.<sup>39</sup> Student assignments are largely first-come, first-served.<sup>40</sup> If there are more applications than spaces,<sup>41</sup> most states require lotteries to determine student admission.<sup>42</sup>

Not surprisingly, some charter schools are better than others.<sup>43</sup> Overall, the educational success of charter schools is mixed.<sup>44</sup>

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34. In 2006–07, the number of charter schools was just under four thousand; that number has increased every year to the current estimate of more than five thousand. See *Public Charter Schools Dashboard: Schools Overview*, *supra* note 31.

35. *Id.*

36. See James Forman, *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839, 842–45 (2007).

37. *Id.* at 850–51; see also Gajendragadkar, *supra* note 30, at 147–48.

38. For a detailed look at transportation policies for charter schools by state, see ERICA FRANKENBERG ET AL., CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION & THE NEED FOR CIVIL RIGHTS STANDARDS 60, Appendix B at 113–20 (2010), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenber-choices-without-equity-2010.pdf>. Appendix B demonstrates that most states do not require charter schools to provide transportation.

39. RYAN, *supra* note 5, at 198.

40. Parker, *The Color of Choice*, *supra* note 27, at 577.

41. *Id.*

42. *Id.* The rules for lotteries, however, can at times serve as opportunities for segregation. See Frankenberg & Siegel-Hawley, *supra* note 24, at 242 n.11.

43. RYAN, *supra* note 5, at 221–28.

44. See generally *Multiple Choice: Charter School Performance in 16 States*, CTR. FOR

## 2. Missouri

Missouri passed its charter school legislation in 1998, and until recently restricted charter schools to Kansas City and St. Louis City, both predominately minority school districts.<sup>45</sup> The state's first charter schools opened in Kansas City for the 1999–2000 school year; St. Louis City charter schools followed the next school year. Any non-profit organization sponsored by an entity listed in the statute can operate a charter school, with the Missouri state education board charged with monitoring statutory compliance.<sup>46</sup> Missouri's charter school laws include no requirements about the demographics of students enrolled in its charter schools, other than prohibiting discrimination in student enrollment.<sup>47</sup>

Charter schools have a strong presence in both school districts. About one in three St. Louis City public school students attends a charter school.<sup>48</sup> In Kansas City, that rate is slightly higher.<sup>49</sup>

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RES. ON EDUC. OUTCOMES AT STAN. U. (2009), [http://credo.stanford.edu/reports/MULTIPLE\\_CHOICE\\_CREDO.pdf](http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf) (finding that, on average, charter schools are slightly less successful than traditional public schools); WHERE CHARTER SCHOOL POLICY FAILS: THE PROBLEMS OF ACCOUNTABILITY & EQUITY (Amy Stuart Wells ed., 2002) (examining twenty-seven charter schools and noting that “charter schools are so diverse and so disparate in terms of their quality and viability that it would be misleading to generalize about the success or failure of these schools . . .”); RON ZIMMER ET AL., CHARTER SCHOOLS IN EIGHT STATES, at xii (2009) available at [http://www.rand.org/pubs/monographs/2009/RAND\\_MG869.pdf](http://www.rand.org/pubs/monographs/2009/RAND_MG869.pdf) (noting that academic performance varies among individual schools, whether charter or traditional).

45. See MO. REV. STAT. § 167.400.2 (2005). Recent legislation has allowed charter schools to be operated elsewhere in the state. See *Charter Schools Bill Becomes Law*, COLUM. DAILY TRIB., June 28, 2012, at A2.

46. MO. REV. STAT. § 160.400(2) (2006).

47. *Id.* § 160.410.1-.3.

48. Specifically, 11,526 students were enrolled in schools operated by nineteen St. Louis charter organizations (some operating more than one school facility) as of fall 2011. Charter school enrollment data was obtained from Missouri's Department of Education website. See *St. Louis Charter School Fall Enrollment Data 2011–12*, MO. DEP'T OF ELEMENTARY & SECONDARY EDUC., <http://dese.mo.gov/divimprove/charterschools/documents/2011-2012StLouisCharterSchoolsEnrollment2.pdf> (last visited Aug. 21, 2012). In comparison, 23,576 students were enrolled in St. Louis City traditional public schools for that school year. See *2011 St. Louis City District Report Card*, *supra* note 9. Those statistics produce a charter school enrollment rate of nearly 33 percent for students in the St. Louis City public school system.

49. Specifically, 10,003 students were enrolled in schools operated by twenty-two Kansas City charter organizations as of fall 2011. See *Kansas City Charter School Fall Enrollment Data 2011–12*, MO. DEP'T OF ELEMENTARY & SECONDARY EDUC., <http://dese.mo.gov/divimprove/charterschools/documents/2011-2012KansasCityCharterSchoolsEnrollmentpdf.pdf>. In comparison, 15,826 students were enrolled in Kansas City School District traditional public

### C. Segregation by Design

Unless we expect everyone to make the same choice, the nature of choice is permitting and validating difference. Choosing an ice cream flavor distinguishes ice cream lovers by taste. School choice is similar. It allows parents to enroll their children according to the parent's values, rather than accepting a student assignment from the school district. Dean Martha Minow notes well the consequences of allowing parental choice: we are changing public schooling from creating a community value to satisfying individual desires.<sup>50</sup>

The question becomes whether school choice facilitates self-segregation by race and class. The answer appears to be a strong "yes." Social science research indicates that parental choices vary by both race and class.<sup>51</sup> Parents of all races generally prefer a school in which their child's race is in the majority.<sup>52</sup> Access to information and transportation also affects whether a parent is able to make a choice and effectuate that choice—and those factors vary by race and class as well.<sup>53</sup> Based on this research focusing on parental preferences and parental resources, one would expect methods of choice to increase racial and economic segregation. This mirrors the self-segregation we see throughout American life.

This Part puts aside these aspects of the practice of choice that facilitate racial and economic segregation. Instead, it asks a different question: have we *designed* charter schools to allow and/or promote self-segregation by race and class? In other words, does charter school legislation facilitate our tendency to self-segregate, or attempt to restrain it?

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schools for that school year. See *2011 Kansas City District Report Card*, *supra* note 9. Those statistics produce a charter school enrollment rate of nearly 39 percent for the students in the Kansas City public school system.

50. Minow, *supra* note 24, at 848 (School choice "converts schooling to private desires. It obscures continuing inequalities in access and need; it invites self-separation unless collectively controlled. It treats the aggregation of separate decisions as free when the result so often impedes freedom and equality.").

51. See Parker, *The Failure of Education Reform*, *supra* note 13, at 414–20 (summarizing social science research demonstrating that parental choice varies by class and race).

52. See *id.* at 414, 415 n.152, 418; Parker, *The Color of Choice*, *supra* note 27, at 600 and n.188.

53. See Parker, *The Failure of Education Reform*, *supra* note 13, at 414 and nn.149–50.

Here I identify three main attributes of charter school legislation that enable racial and economic segregation. First, enabling statutes either do not impose any enforceable integration standards or are completely silent on the importance of integration. Second, and even more troubling, charter schools can be and often are designed to appeal to particular religious or racial/ethnic groups. Third, charter schools are intended as a reform effort primarily for city parents, to be executed in segregated school districts. Designing charter schools primarily for poor and/or minority students contributes greatly to their segregative impact. Each of these ways of segregation by design is discussed in turn below.

### 1. Lack of Statutory Integration Requirements

The overwhelming majority of states require no attention to diversity and integration by their charter schools for charter schools to receive and maintain a charter.<sup>54</sup> Only twelve of the forty states and the District of Columbia authorizing charter schools have any integration or diversity requirements at all.

Nevada and South Carolina have the strictest provisions because they have specific numerical goals. Nevada's statute mandates that charter school enrollments be within ten percentage points of the student demographics of the school district in which the charter

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54. See Parker, *The Color of Choice*, *supra* note 27, at 578–80 (detailing such statutes for twelve states as of 2001). For an analysis of the constitutionality of these provisions, see Gajendragadkar, *supra* note 30, at 166–80 (arguing that statutes with flexible diversity provisions pass strict scrutiny tests, but strong provisions that effectively “function as quotas” do not). A challenge to South Carolina's diversity provisions was eventually dismissed as moot after South Carolina's legislature modified its statute to “increase[] its [racial] deviation allowance to 20% and excuse[] the new 20% requirement altogether if a noncompliant charter school could prove that it operates in a racially nondiscriminatory manner.” See *Beaufort Cnty. Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 576 S.E.2d 180, 182 (S.C. 2003); Gajendragadkar, *supra* note 30, at 157–60.

school is located.<sup>55</sup> South Carolina mandates a more forgiving standard—twenty percentage points.<sup>56</sup>

California, Florida, Kansas, New Jersey, North Carolina, and Wisconsin do not specify any defined percentage, but generally require that their charter schools reflect the racial composition of the student enrollment in the surrounding school district.<sup>57</sup> Connecticut, Hawaii, Ohio, and Rhode Island require a more general commitment to ensuring diverse student populations in their charter schools.<sup>58</sup>

In sum, of the forty-one jurisdictions allowing charter schools, only twelve pay some sort of statutory attention to integration.

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55. NEV. REV. STAT. ANN. § 386.580.1 (West 2009) (requiring charter schools in “zones of attendance” to “ensure that the racial composition of pupils enrolled . . . does not differ by more than 10% from the racial composition of pupils who attend public schools in the zone” if the zone’s “population is 100,000 or more,” but also offering “if practicable” and distance learning exceptions).

56. S.C. CODE ANN. § 59-40-70(D) (Supp. 2011) (requiring that if a “charter school’s enrollment differs from the enrollment of the local school district . . . by more than twenty percent,” the sponsoring school district board can reject a charter school’s application or revoke a previous charter approval, but only if the board finds that the charter is operating in a discriminatory manner). The provision also applies to those applying for a charter. *See also id.* § 59-40-70(G).

57. *See* CAL. EDUC. CODE § 47605(b)(5)(G) (West 2009) (requiring charter schools to “achieve a racial and ethnic balance among [their] pupils that is reflective of the general population . . . of the school district”); FLA. STAT. ANN. § 1002.33.7(a)(8) (West 2012) (directing a charter applicant to state in its application how it 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) (2000) (mandating that a charter school’s students “must be reasonably reflective of the racial and socio-economic composition of the school district”); N.J. STAT. ANN. § 18a:36A-8(e) (West 1996) (directing that “[t]he admission policy of the charter school shall, to the maximum extent practicable, seek the enrollment of a cross section of the community’s school age population,” including race and other factors); N.C. GEN. STAT. § 115C-238.29F(g)(5) (1996) (requiring that charter schools “reasonably reflect” the demographics of their surrounding school districts); WIS. STAT. ANN. § 118.40.1(b)(9) (West 2012) (requiring an applicant to include procedures for achieving “a racial and ethnic balance among its pupils that is reflective of the school district population”).

58. *See* CONN. GEN. STAT. ANN. § 10-66bb(c) (West 2012) (requiring the State Board of Education to consider the proposed charter’s effect on the “reduction of racial, ethnic and economic isolation in the region in which it is to be located” when reviewing applications); HAW. REV. STAT. § 302B-5(d)(3) (2007) (requiring charter schools to develop a “plan for identifying, recruiting, and selecting students that is not exclusive, elitist, or segregationist”); OHIO REV. CODE ANN. § 3314.03(A)(7) (West 2012) (requiring a charter school to “achieve racial and ethnic balance reflective of the community it serves”); R.I. GEN. LAWS ANN. § 16-77.3-2(a)(10) (West 2010) (directing proposed charter applicants to describe enrollment procedures, criteria, policies, or recruitment programs that “encourage the enrollment of a diverse student population”).

Twenty-eight states and the District of Columbia make no mention of either diversity or integration.

Even the states requiring some attention to student demographics have limited enforcement measures. A South Carolina charter school running afoul of the racial standard need only prove that the school is not “operating in a racially discriminatory manner.”<sup>59</sup> Likewise, Nevada requires the integration only “if practicable.”<sup>60</sup>

I found no specific, statutory guidance on how the schools were to attain racial balance. I found no state that included any provisions on producing integration.<sup>61</sup> Instead, charter school legislation treats all students alike in terms of admission and outreach efforts. Given the differences by race and class embedded in choice,<sup>62</sup> treating everyone alike almost guarantees segregative outcomes.

Not surprisingly, even states with racial balancing provisions have segregated charter schools. An examination of charter schools in Nevada and South Carolina, the only states with specific numerical diversity requirements, reveals that their charter schools still suffer from segregation. Through a quick study of the states’ websites, I easily discovered schools in each state that were segregated when compared to the school’s surrounding school district. For example, in Nevada, Rainbow Dreams Academy is more than 90 percent black,<sup>63</sup> while its surrounding school district (Las Vegas, Clark County) is 12 percent African American.<sup>64</sup> That same school district, which is 32 percent white,<sup>65</sup> also has a charter school, Beacon Academy of Nevada, with a 62 percent white student population.<sup>66</sup>

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59. See S.C. CODE ANN. § 59-40-70(D) and *supra* note 56.

60. See NEV. REV. STAT. ANN. § 386.580.1.

61. Parker, *The Color of Choice*, *supra* note 27, at 580 (“Rather, the provisions appear to reflect a legislative *aversion* to segregation and disparate impact.”).

62. See *supra* notes 51–53 and accompanying text.

63. See *2010–2011 School Accountability Summary Report 2*, RAINBOW DREAMS ACAD., [http://www.rainbowdreamsacademy.com/2010-11\\_District\\_Accountability\\_Report.pdf](http://www.rainbowdreamsacademy.com/2010-11_District_Accountability_Report.pdf) (last visited Aug. 22, 2012) (91.3 percent of the student enrollment is African American; an additional 7.3 percent is multiracial; no white students are enrolled).

64. See *2010–2011 School Accountability Report 3*, CLARK CNTY. SCH. DIST., [http://ccsd.net/schools/pdf/acc\\_pdfs\\_2011/2010-2011\\_District\\_Accountability\\_Report.pdf](http://ccsd.net/schools/pdf/acc_pdfs_2011/2010-2011_District_Accountability_Report.pdf).

65. See *id.*

66. See *Adequate Yearly Progress Report for 2011–2012 School Year*, BEACON ACAD. OF NEV., [http://beaconacademynv.org/Content/UserUpload/file/AYP\\_pg1.pdf](http://beaconacademynv.org/Content/UserUpload/file/AYP_pg1.pdf) (last visited Aug. 13, 2012).

In South Carolina, approximately 13 percent of the charter schools are virtual, online schools.<sup>67</sup> One such school operating in Columbia, South Carolina, is 68 percent white,<sup>68</sup> while the two school districts in Columbia are overwhelmingly African American.<sup>69</sup>

The disconnect between charter school legislation promoting racial balance and the practice of segregation is not new. An earlier study by the U.S. Department of Education identified twelve states with high rates of segregation in their charter schools.<sup>70</sup> Yet, five of the states listed also required racial balancing in their charter schools.<sup>71</sup> In sum, the reality of charter school operations contradicts legislative racial balancing provisions, suggesting their ineffectiveness and meaninglessness.

## 2. Identity Schools

The easiest way to segregate and avert any statutory provisions on inclusion is to establish a type of charter school designed to appeal to a particular racial/ethnic or religious group.<sup>72</sup> While by law the schools must be open to all students, special-identity schools certainly increase segregation in charter schools.<sup>73</sup>

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67. See *South Carolina Charter Schools (Composite) 2011–2012*, S.C. ST. DEP'T OF EDUC., available at <http://ed.sc.gov/agency/se/school-transformation/charter-special-focus/documents/CharterList2011-12COMPOSITEforWEB.pdf> (Jan. 18, 2012). For the 2011–12 school year, South Carolina had forty-seven charter schools. Six were described as online, virtual, or e-schools. *Id.*

68. See *South Carolina Calvert Academy: 2011 Annual School Report Card 6*, S.C. ST. DEP'T OF EDUC., <http://ed.sc.gov/data/report-cards/2011/elem/c/e4701007.pdf> (last visited Aug. 22, 2012) (showing 130 white students out of 191 students total).

69. Columbia, South Carolina has two school districts: Richland 1 and Richland 2. Richland 1 is nearly 76 percent African American, while Richland 2 is nearly 57 percent African American. See *Richland 1 School District: 2011 Annual District Report Card*, S.C. ST. DEP'T OF EDUC., <http://ed.sc.gov/data/report-cards/2011/district/c/D4001999.pdf> (last visited Aug. 22, 2012) (showing 1,006 African American students and 1,331 students total); *Richland 2 School District: 2011 Annual District Report Card*, S.C. ST. DEP'T OF EDUC., available at <http://ed.sc.gov/data/report-cards/2011/district/c/D4002999.pdf> (last visited Aug. 22, 2012) (showing 920 African American students, out of a total of 1,620).

70. *The State of Charter Schools 2000: National Study of Charter Schools 2*, OFFICE OF EDUC. RESEARCH & IMPROVEMENT, U.S. DEP'T OF EDUC., [www2.ed.gov/PDFDocs/4yrprt.pdf](http://www2.ed.gov/PDFDocs/4yrprt.pdf).

71. Parker, *The Color of Choice*, *supra* note 27, at 594–95. The five states are California, Connecticut, Minnesota, New Jersey, and North Carolina. *Id.*

72. *Id.* at 601–02.

73. See MARTHA MINOW, IN *BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK* 125, 135–36 (2010).

Minnesota provides an interesting example. Its statute once required attention to racial balance.<sup>74</sup> Even then, the state had a number of “special-identity” schools.<sup>75</sup> The state eventually dropped its racial balancing provision,<sup>76</sup> and it continues its pattern of schools designed to appeal to particular racial and ethnic groups.

For example, St. Paul, Minnesota has several charter schools that by design attract a segregated student population. Charter schools in St. Paul include a Dugsi Academy intended to attract East African children,<sup>77</sup> a Twin Cities German Immersion School designed for those interested in speaking German,<sup>78</sup> a St. Paul’s Hmong College Prep Academy catering to Hmong children,<sup>79</sup> Academia Cesar Chavez for “advocating Latino cultural values in an environment of familia and community,”<sup>80</sup> and a Four Directions Charter School for “lifelong learning for American Indian students.”<sup>81</sup>

Not surprisingly, each school’s student enrollment mirrors its educational focus. The Dugsi Academy is 100 percent African American, Hmong College Prep Academy is nearly 77 percent Asian, Academia Cesar Chavez is 92 percent Latino, and Four Directions Charter School is 61 percent American Indian.<sup>82</sup> And all within a

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74. See Parker, *The Color of Choice*, *supra* note 27, at 579 n.71. The current version of the statute omits the racial balancing provision, and, in addition, includes no provision prohibiting discrimination on the basis of race. See MINN. STAT. ANN. § 124D.10(9) (West 1999).

75. See Parker, *The Color of Choice*, *supra* note 27, at 600 n.187, 602.

76. See ST. PAUL PUBLIC SCHOOLS 10, [http://www.spps.org/uploads/SPPS\\_History.pdf](http://www.spps.org/uploads/SPPS_History.pdf).

77. The school’s 2010–11 Annual Report emphasizes that the school seeks diversity, and also notes that its students are primarily recent immigrants from East Africa. *2010–11 Annual Report* 3, DUGSI ACAD., TWIN CITIES, MINN., <http://www.dugsiacademy.org/Upload2/204257/docs/Dugsi%20Academy%20Annual%20Report%2011.pdf> (last visited Aug. 22, 2012).

78. The school’s website home page states that the school was started “under the sponsorship of the Germanic-American Institute.” See TWIN CITIES GERMAN IMMERSION SCH., <http://www.tcgis.org/index.html> (last visited Aug. 22, 2012).

79. The welcome page at the school’s website notes that its “curriculum [is] enriched and informed by Hmong culture and language.” See HMONG COLL. PREP ACAD., <http://www.hmongacademy.org/index.php1> (last visited Aug. 22, 2012).

80. See *English Homepage*, ACADEMIA CESAR CHAVEZ, [http://www.cesarchavezschool.com/AcademiaCesarChavez\\_English.html](http://www.cesarchavezschool.com/AcademiaCesarChavez_English.html) (last visited Aug. 22, 2012).

81. See *Home Page*, FOUR DIRECTIONS CHARTER SCH., <http://fdcsabout.blogspot.com> (last visited Aug. 22, 2012).

82. School enrollment data collected by the Minnesota Department of Education for all public schools is available online at *Data Reports and Analytics*, MINN. DEP’T OF EDUC., <http://education.state.mn.us/MDEAnalytics/Data.jsp> (last visited Aug. 22, 2012).

single city, paid for with public money.<sup>83</sup> Minnesota is not unique. States throughout the United States have special-identity charter schools.<sup>84</sup>

This closely mirrors the harm identified by *Brown*: state-funded, public education that is intended for only one identifiable racial/ethnic group. Granted, enrollment is not formally restricted by law. Yet enrollment is intended to be restricted in *operation*. The idea of separate education sanctioned by law is one of the harms denounced by *Brown*. Identity schools, founded on parental choice but allowed and funded by public money, come too close to violating *Brown*'s foundational principles.

### 3. Location Limits Choice and Reinforces Segregation

The geographic placement of charter schools also facilitates segregation.<sup>85</sup> Missouri's pattern of charter schools in urban school districts but not suburban ones is common.<sup>86</sup> Many states restrict charter schools to urban school districts or school districts with low student performance.<sup>87</sup> Other states have statutory provisions giving preference to charter schools intended to serve "disadvantaged" students.<sup>88</sup> This design concentrates charter schools in cities with large populations of minority and low-income children, away from suburban, white, and/or affluent school districts.

The comparative absence of charter schools in suburban school districts is partly a function of parental preference. Professor Jim

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83. For an analysis of whether schools with a religious focus are constitutional under the First Amendment, see Gabrielle Marie D'Adamo, Note, *Separatism in the Age of Public School Choice: A Constitutional Analysis*, 58 EMORY L.J. 547 (2008).

84. See RYAN, *supra* note 5, at 201; Parker, *The Color of Choice*, *supra* note 27, at 601–03; D'Adamo, *supra* note 83, at 547–48.

85. FRANKENBERG, *supra* note 38, at 60 ("The geographic skew of charter schools helps to explain some of the aggregate differences in student composition between charter and traditional public schools.")

86. *Id.* at 57 ("Nationally, charter school students are far more likely to attend schools located in cities, especially large cities, than traditional public school students.")

87. RYAN, *supra* note 5, at 201 ("At least twelve statutes, for example, require that priority be given to charter schools that serve poor, minority, or low-achieving students."); FRANKENBERG, *supra* note 38, at 59 (referencing Ohio as a state allowing charter schools only in a "challenged school district").

88. Parker, *The Color of Choice*, *supra* note 27, at 577, 600, and nn.186–87.

Ryan makes the important observation that parents in suburban school districts often oppose entry of charter schools into their school districts.<sup>89</sup> The primary reasons for this are money and school satisfaction. Charter schools are perceived as draining educational dollars from existing public schools.<sup>90</sup> Suburban parents, generally satisfied with their schools, do not desire another choice and want to retain all monies for their schools. As a result, charter schools are less frequent in suburban school districts throughout the United States.<sup>91</sup>

That makes charter schools destined to operate largely in cities with high proportions of minority and low-income students.<sup>92</sup> In theory, students from neighboring school districts can attend the city charter schools, but practice differs from theory. Charter schools are most often designed for poor students, often African American and Latino, and not designed for more affluent or white students. Designing charter schools primarily as a reform for cities certainly assures their segregation.

That approach also imposes responsibility for the success of charter schools on the backs of poor parents. The entire charter school movement depends on parents' ability to make and successfully implement the choices that will improve the education their children receive.<sup>93</sup> Yet, as a method of reform for the most disadvantaged, charter schools require much of parents with limited resources as a starting point. It seems ironic, at best, that charter schools are designed to harness the power of individual action but then must rely on the power of those parents with the fewest resources. Poor parents are quite simply at a disadvantage when

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89. RYAN, *supra* note 5, at 201 (“[I]n some suburban districts, charter schools are seen not only as unnecessary but as an insult to local public schools and a threat to property values.”).

90. *Id.*

91. For the 2009–10 school year, the National Center for Education Statistics, a unit of the Department of Education, observed that 55 percent of charter schools are located in cities, 21 percent in suburbs, 8 percent in towns, and 16 percent in rural areas. *Charter School Enrollment*, NAT’L CTR. FOR EDUC. STATISTICS, [http://nces.ed.gov/programs/coe/indicator\\_cse.asp](http://nces.ed.gov/programs/coe/indicator_cse.asp) (last visited Aug. 22, 2012).

92. GARY ORFIELD & CHUNGMEI LEE, *BROWN AT 50: KING’S DREAM OR PLESSY’S NIGHTMARE?* 34 (2004), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-50-king2019s-dream-or-pleddy2019s-nightmare/orfield-brown-50-2004.pdf>.

93. *See supra* note 38 and accompanying text.

required to “shop” for a public school.<sup>94</sup> Yet, this is the educational option our policy makers often embrace as the solution to failing schools.

## II. CHARTER SCHOOLS & SEGREGATION

While Part I revealed how the design of charter schools facilitates segregation, this Part turns to actual student enrollment in charter schools. Are charter schools more segregated than traditional public schools (which themselves have long been known for remarkable segregation)? The evidence consistently demonstrates that charter schools increase the number of schools hyper-segregated by race, ethnicity, and income status, likely in ways detrimental to their students’ educational success. This Part documents that pattern in Missouri and throughout the United States.

### A. *Missouri*

#### 1. *St. Louis*

St. Louis City public schools, both traditional and charter, are notable for the prevalence of hyper-segregated, minority schools. By this, I mean schools with at least a 90 percent minority population. Forty-two St. Louis City traditional public schools (out of a total of sixty-nine)<sup>95</sup> are at least 90 percent minority.<sup>96</sup> This results in 61

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94. Frankenberg & Siegel-Hawley, *supra* note 24, at 229–30; *see also* Minow, *supra* note 24, at 833 (noting that “not all families are informed and equipped to navigate the increasingly complex process of selecting among educational options, and some of the most disadvantaged students will lose out as a result”); Parker, *The Failure of Education Reform*, *supra* note 13, at 414, 414 n.150 (summarizing the social science research on the difficulty choice places on poor parents).

95. I excluded from the tallies of schools in both St. Louis and Kansas City buildings with no students or located in detention facilities or hospitals.

96. Statistics in this section are taken from enrollment data for all school buildings organized by school district and made available online by the Missouri Department of Elementary and Secondary Education. *See* Missouri Comprehensive Data System: *Building Demographic Data*, MO. DEP’T OF ELEMENTARY & SECONDARY EDUC., <http://mcds.dese.mo.gov/quickfacts/Pages/District-and-School-Information.aspx>. Only two Kansas City charter schools of the 162 total traditional and charter schools in St. Louis City and Kansas City had Latino enrollments of 90 percent or more; no traditional or charter public schools in either St. Louis City or Kansas City were more than 90 percent white. *Id.*

percent of St. Louis City traditional public schools being hyper-segregated by race.

A higher percentage of St. Louis City charter schools are hyper-segregated. Eighteen out of twenty-six charter schools have at least 90 percent minority populations, resulting in a percentage rate of 69 percent. Thus, we see the continuing pattern of hyper-segregated schools at both the traditional and charter schools, with charter schools slightly more hyper-segregated by race.

St. Louis racially hyper-segregated public schools are also highly segregated by class. In all of the forty-two traditional public schools with total minority enrollments of 90 percent or more, at least 80 percent of all 2011–12 students qualified for the federal free or reduced meals (FRM) program.

The pattern is the same in the city's charter schools: all of the eighteen charter schools with at least 90 percent aggregate minority enrollment reported FRM membership of 80 percent or more.

## 2. Kansas City

Kansas City, Missouri public schools are also hyper-segregated by race and class. Fifty-six percent of traditional public schools (eighteen out of thirty-two) have at least 90 percent minority enrollment. Kansas City charter schools are also more segregated in Kansas City. Twenty-six out of thirty-five charter schools (74 percent) enroll 90 percent or more minority students.

Kansas City traditional public schools that are hyper-segregated by race also are highly segregated by economics. All traditional public schools hyper-segregated by race/ethnicity reported having at least 80 percent of their students qualifying for free or reduced meals. Similarly, 96 percent of the charter schools hyper-segregated by race/ethnicity were also overwhelmingly economically poor in student enrollment.

The following table summarizes the racial/ethnic and economic hyper-segregation percentages for Kansas City and St. Louis City charter and traditional public schools. As the table shows, charter schools are more likely than traditional schools to be racially and ethnically hyper-segregated. And, as is the case with their traditional

counterparts, virtually all of those hyper-segregated charter schools are hyper-segregated by economics.

<b>TYPE OF SCHOOL</b>	<b>90% + Minority</b>	<b>90% + Minority and 80% + FRM</b>
KC Traditional Public Schools	56%	100%
KC Charter Schools	74%	96%
SL Traditional Public Schools	61%	100%
SL Charter Schools	69%	100%

### 3. White Enrollment in Charter Schools

Professor Jim Ryan argues for expansive choice in city school districts as a way to entice suburban parents back into city homes and schools.<sup>97</sup> Experience shows that Missouri charter schools do attract a number of white students, but not significantly more than traditional schools. Overall, Kansas City charter schools have an approximately 9 percent white student population, as do Kansas City's traditional public schools.<sup>98</sup> The white enrollment rate in St. Louis City charter schools at just more than 12 percent is slightly lower than in the city's traditional public schools, where white enrollment is closer to 14 percent.

It is possible that charter schools are increasing the overall number of white students enrolling in Kansas City and St. Louis City public schools: parents of today's charter school students might not have chosen the city's traditional public schools if a charter school were not available.<sup>99</sup> Information on how parents would have made educational decisions for their children in the absence of charter school opportunities is not, however, readily available.

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97. See RYAN, *supra* note 5, at 286–91.

98. *Id.*

99. On a national level, charter school students are less likely to be white than traditional public school students. See FRANKENBERG, *supra* note 38, at 27, tbl.4.

*B. National Studies*

The increased segregation by race and, to a lesser extent class, is not unique to Missouri. Part of that segregation is due to African American (but not Latino) children being more likely to enroll in charter schools than their white peers.<sup>100</sup> Once the students are enrolled, minority students are more often placed in segregated charter schools, as compared to traditional public schools. Looking at hyper-segregated minority schools (at least 90 percent minority student enrollment), one report concluded that “70% of black charter school students [in the nation] attend intensely segregated minority charter schools . . . or *twice* as many as the share of intensely segregated black students in traditional public schools.”<sup>101</sup> Latino segregation is less extreme but still of concern: in 2007–08, “half of Latino charter students were in schools with 90% or more students of color.”<sup>102</sup>

That report also concluded that hyper-segregation continues throughout the nation at the economic level as well: “[m]ore than one in four charter school students attended a school where at least three-quarters of students were from low-income households.”<sup>103</sup> Not surprisingly, the student most likely to attend a high-minority, high-poverty school is African American or Latino.<sup>104</sup>

The disagreement about charter school segregation is not its existence but its extent: how much more segregated are charter schools than traditional public schools? The answer to that question depends on how the comparison is defined.

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100. *Id.* at 27. *See also id.* at 27, tbl.4 (showing that charter schools are 39 percent white and 32 percent black, compared to traditional public school enrollment at 56 percent white and 16 percent black). Interestingly, Latino students have comparable enrollment rates in charter schools and traditional public schools. *Id.* at 28. But when this data is disaggregated at state and regional levels, the pattern is less clear, although in all regions “black students are over-enrolled in charter schools as compared to their regional public school percentage.” *See id.* at 29–33.

101. *Id.* at 4, 37.

102. *Id.* at 37.

103. *Id.* at 71. This pattern was not true for white charter school students. *See id.* at 73 (“White students, however, experience lower exposure to poor students in charter schools than they do in traditional public schools.”).

104. *Id.* at 72–73 (“[M]ore than 9 out of 10 charter schools where at least 90% of students were black and Latino also contained a majority of students from low-income households.”).

The highest level of segregation is found when charter schools are compared to statewide traditional public school enrollment. That comparison certainly overstates, however, the level of charter school segregation.<sup>105</sup> Given that charter schools are concentrated (often by law) in minority neighborhoods,<sup>106</sup> one would generally expect charter schools to have a much higher minority enrollment than that found statewide. It seems silly to expect a student in El Paso, for example, to attend a charter school in Houston, hundreds of miles from home. Even a much shorter commute of twenty miles within a large metropolitan area seems unlikely as well, as most charter schools do not provide transportation.<sup>107</sup> Given that charter schools are overwhelmingly located in cities with predominately minority public school student enrollment, their student bodies typically (and I argue by design) reflect their surrounding neighborhoods.<sup>108</sup>

Instead of statewide comparison, the more informative comparison would be to the school district in which the charter school sits or the broader metropolitan area. The segregation in charter schools is typically larger when charter school enrollment is compared to the surrounding metropolitan school enrollment, which includes whiter, suburban school districts.

A January 2010 report by the Civil Rights Project/Proyecto Derechos Civiles (CRP) used metropolitan student enrollment data on the theory that most if not all charter schools do not confine their student enrollment to children living within traditional school district boundary lines.<sup>109</sup> For example, in Missouri, suburban children who

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105. A state may be overwhelmingly white but its minority populations concentrated in urban areas. In some cases, those urban areas with high concentrations of minority populations are the only areas in the state where charter schools are permitted. Also where the minority population is small and evenly distributed throughout an overwhelmingly white majority state, all minority charter school students may attend white-dominated schools. For example, one report noted that in Idaho “charter school students across all races attend schools of white isolation: majorities of students of all races are in 90–100% white charter schools.” *Id.* at 43. The report then contrasts this with Arkansas, where “the percentage of students in segregated white schools varies substantially by race.” *Id.* The difference, however, is almost certainly due to Idaho’s extremely white population, in contrast to the more diverse population of Arkansas.

106. *See supra* Part I.C.3.

107. *See supra* note 38 and accompanying text.

108. *See supra* Part I.C.3.

109. *Civil Rights Project’s Response to “Re-analysis” of Charter School Study*, CIVIL RIGHTS PROJECT 1–2 (Apr. 29, 2010), <http://civilrightsproject.ucla.edu/news/news-and->

can participate in Kansas City and St. Louis City voluntary transfer programs can also enroll in charter schools in those cities.<sup>110</sup> Given that charter schools are intended to cross school district lines, the CRP researchers argue that it is fair to compare charter school demographics with those of the surrounding metropolitan area.

With this comparison group employed for thirty-nine cities, and aggregating the data, CRP reported that 45 percent of charter schools in metropolitan areas were hyper-segregated, compared to 25 percent of traditional public schools in those same metropolitan areas, a twenty-point difference.<sup>111</sup> In other words, charter schools were almost twice as likely to be hyper-segregated by race or ethnicity, a sharp increase.

If the charter schools are instead compared only to their surrounding school districts, that difference drops from 20 percent to 10 percent, as found by scholars at the University of Arkansas when they aggregated the raw data for CRP's eight largest metropolitan areas by school district and compared charter school segregation data only to data for the school district in which the charter schools reside.<sup>112</sup>

While CRP looked to the theory of charter schools—they are intended to cross segregated neighborhoods to provide more choice—the University of Arkansas scholars examined the reality of charter schools. That is, charter schools overwhelmingly enroll students from within their surrounding school districts. Either way, however, charter schools are more segregated by race than the traditional

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announcements/2010-site-news/crps-response-to-re-analysis-of-charter-school-study/crp-response-to-reanalysis-choice-without-equity.pdf; Gajendragadkar, *supra* note 30, at 145 (“Charter schools possess the potential to increase integration levels because their student enrollments are not limited by district boundary lines.”).

110. MO. REV. STAT. § 160.410.1(2) (2006).

111. CRP reports its data by metropolitan statistical area, or MSA. *See, e.g.*, FRANKENBERG, *supra* note 38, at 35–36, tbl.7. A group of scholars at the University of Arkansas used an alternate methodology, aggregating CRP's raw data by school district to produce district-level segregation comparisons. *See* Gary Ritter et al., *A Closer Look at Charter Schools and Segregation: Flawed Comparisons Lead to Overstated Conclusions*, 10 EDUC. NEXT 69, 71–72 (2011), [http://educationnext.org/files/EdNext\\_20103\\_69.pdf](http://educationnext.org/files/EdNext_20103_69.pdf) (criticizing Civil Rights Project metropolitan area methodology, arguing that comparisons within districts are more methodologically appropriate, and finding that intradistrict methodologies produce far more favorable hyper-segregation comparisons between charters and traditional public schools).

112. Ritter, *supra* note 111, at 71–72.

public schools located nearby. With their more restricted definition of the comparison pool, the Arkansas researchers demonstrated that 53 percent of traditional public schools were hyper-segregated, compared to 63 percent of the charter schools in those school districts.<sup>113</sup>

Kansas City, Missouri is one metropolitan area studied by both the CRP and the University of Arkansas, and it demonstrates how differences in comparison groups can impact the numbers. Comparing Kansas City charter school enrollment with Kansas City metropolitan area traditional public school enrollment, CRP reported a 79 percent difference between charter school hyper-segregation and traditional public school hyper-segregation—85 percent hyper-segregation in charter schools compared to 6 percent in traditional public schools.<sup>114</sup> Comparing Kansas City charter schools to the school district in which they reside, University of Arkansas researchers found a difference of 61 percent, still a significant difference, but much less than 79 percent.<sup>115</sup>

Another way to determine whether charter schools increase segregation is to compare the demographics of a student's charter school to those of the traditional public school from which that student transferred. The RAND Corporation (RAND), a nationally recognized non-profit research organization, reported on five large metropolitan areas (Chicago, Denver, Milwaukee, Philadelphia, and San Diego) and two states (Ohio and Texas) after tracking individual students as they moved from traditional schools to charter schools.<sup>116</sup> RAND found that in five of the seven areas studied (Denver, Philadelphia, Ohio, San Diego, and Texas), African American students transferred from traditional public schools to charter schools with a slightly greater minority population.<sup>117</sup> The same pattern was also generally true but to a lesser degree for white students in all

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113. *Id.* at 72, fig.1.

114. FRANKENBERG, *supra* note 38, at 41, tbl.10.

115. See Gary Ritter et al., *Supplemental Material for "A Closer Look at Charter Schools and Segregation,"* EDUC. NEXT Appendix tbl.3, [http://educationnext.org/files/20103\\_Ritter\\_Supplement.pdf](http://educationnext.org/files/20103_Ritter_Supplement.pdf) (last visited Aug. 23, 2012).

116. ZIMMER, *supra* note 44, at xii, tbl.2.3 at 14–17, 18.

117. *Id.* at 18.

seven areas: they generally transferred to charter schools that were whiter than the traditional public school from which they came.<sup>118</sup>

This is striking in that it demonstrates that charter schools actually increase the segregative experiences of their students. But the degree of additional segregation was not high in either situation. Only one area exhibited an increased segregation differential in excess of 10 percent for African American students, and segregation of white students never increased by more than 10 percent in any area when white students moved from traditional to charter schools.<sup>119</sup> Yet, the study still demonstrated that charter schools are giving their students a more segregative experience than those students had in traditional public schools. I found no national study demonstrating that charter schools decreased school segregation.

In sum, national studies to date have consistently found that charter schools are more segregated than the schools in their surrounding metropolitan areas and even in their surrounding school districts.<sup>120</sup> These findings are consistent with earlier research on the segregation found in charter schools.<sup>121</sup> Charter school segregation is also consistent with social science research finding that parental preference varies by race and class, as does parental access to information and resources needed to effectuate choice.<sup>122</sup>

Given the problems typically associated with high-minority, high-poverty schools, any increase in the number of such schools is cause for serious concern. Charter schools, so far, are not leading us toward integration, but instead toward segregation.

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118. *Id.*

119. *Id.*

120. For summaries of other research documenting the trend toward segregation in particular cities or states, see FRANKENBERG, *supra* note 38, at 9–13; Frankenberg & Siegel-Hawley, *supra* note 24, at 245 n.124; Amy Stambach & Natalie Crow Becker, *Finding the Old in the New: On Race and Class in US Charter School Debates*, 9 RACE, ETHNICITY & EDUC. 159, 161 (2006); Leland Ware & Cara Robinson, *Charters, Choice, and Resegregation*, 1 DEL. L. REV. 1, 11–12 (2009).

121. See Parker, *The Color of Choice*, *supra* note 27, at 600–01 nn.188–90 (detailing the research as of 2000).

122. See *supra* notes 51–53 and accompanying text.

*C. Today's Freedom-of-Choice*

This Part argues that charter schools are more segregative in practice and theory than the outlawed freedom-of-choice plans of the 1960s. By concentrating charter schools in cities and allowing special-identity schools, charter schools segregate more than freedom-of-choice plans.

One of the South's attempts to thwart the integrative reach of *Brown* was offering parents "freedom of choice" for student assignments.<sup>123</sup> The plans were entirely race neutral in language, and gave all parents the choice as to which public school to send their children. In 1968, the Supreme Court struck down one such plan for its ineffectiveness in desegregating the rural county's school system.<sup>124</sup> As that plan was implemented, no white children sought to attend the African American school. African American children did, however, increasingly apply to attend the white school. Yet, after two years of the plan's operation, 85 percent of the district's African American children still attended a 100 percent minority school.<sup>125</sup>

The central problem with charter schools is not that they offer educational choice, particularly for city parents. The parents certainly deserve more options for effective schooling for their children. In fact, society in general would benefit with better city schools.

The problem is not choice, but the choices offered. The choice between a traditional public school and a charter school too often is a choice of which high-minority, high-poverty school to attend.<sup>126</sup> Such schools are undoubtedly the hardest schools to operate successfully;<sup>127</sup> yet, too often they are the only options offered. The limited nature of the choices afforded is a natural consequence of the

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123. See Parker, *Connecting the Dots*, *supra* note 22, at 1709–14 (examining how the South attempted to avert integration through race neutral student assignment plans).

124. *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 439–40 (1968) ("Not a single white child has chosen to attend the [African American] school.").

125. The number of African American children attending the white school increased from 35 in 1965 to 111 in 1966, but "85% of the Negro children in the system still attended the all-Negro [ ] school" even though roughly half of the district's 4,500 population of school-aged children were African American. *Id.* at 432, 441.

126. See Parker, *The Failure of Education Reform*, *supra* note 13, at 416.

127. See generally RYAN, *supra* note 5, at 277–78.

theory that charter schools should be concentrated in city school districts.<sup>128</sup>

The chances of converting high-poverty, high-minority charter schools into places of integrative learning are surely slim as well. No one really expects whites in significant numbers to choose these charter schools.<sup>129</sup> Charter schools offer different curricula and different educational approaches, but they do not offer anything different from the perspective of student demographics.

In this respect, charter schools afford less choice than that given in rural Virginia in the aftermath of *Brown*. Students in the 1960s were offered very different school experiences through the freedom-of-choice plans: an African American school or a white school. Most charter schools do not offer that type of choice. In that sense, charter schools are often more segregative than the freedom-of-choice plans of the 1960s.

Further exacerbating the limits of the demographic choices offered through the charter school movement are “special-identity” charter schools<sup>130</sup>—another opportunity for segregated learning experiences financed with public money. They offer minority parents yet another opportunity to choose to self-segregate. That choice, “freely-executed,” then gives both white parents and the school district’s governing body a perfect excuse to wash their hands of any involvement in or responsibility for the educational experience for that child. Special-identity charter schools represent the antithesis of *Brown*’s integrative ideal, particularly given their public funding and their legislative creation. The next Part considers the role of the federal government in promoting charter schools, and their attending segregation.

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128. See *supra* Part I.C.3.

129. See generally Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community* (A Continuing Conversation with John Ely on Racism and Democracy), 114 YALE L.J. 1353, 1355 (2005) (recounting the difficulties of convincing his middle-class neighbors, both African American and white, to send their children to the nearby, predominately minority elementary school). This tendency was also true under the regime rejected by *Green*—no white parent chose the African American school, and it is unlikely anyone expected them to do so. See *supra* note 124 and accompanying text.

130. See *supra* Part I.C.2.

### III. FEDERAL GOVERNMENT & CHARTER SCHOOLS

This Part examines the role of the federal government in promoting and funding charter schools. It begins by examining how choice is encouraged by two broad federal programs, Race to the Top (RTT)<sup>131</sup> and No Child Left Behind (NCLB).<sup>132</sup> Neither does much to further the goal of school integration; rather, both allow segregative choice. I then examine how federal fiscal policy largely ignores the value of diversity in education, awarding millions of dollars for educational initiatives that segregate. Finally, I propose that this system must change, or we will repeat the immediate aftermath of *Brown* when public dollars funded segregation.

#### A. RTT & NCLB

##### 1. RTT

President Obama's signature education initiative is Race to the Top, a way for states to compete for and win additional federal funding.<sup>133</sup> The RTT application process rewards states that "ensure successful conditions for high-performing charters and other innovative schools."<sup>134</sup> This section is worth up to forty points, out of five hundred possible points.<sup>135</sup> Specifically, a state can receive points for not limiting the number of charter schools, giving charter schools "equitable funding compared to traditional public schools," and providing state funding for charter school facilities.<sup>136</sup>

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131. See generally American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §§ 14005–14006, 123 Stat. 115, 282–84; *Race to the Top Program: Executive Summary*, *infra* note 133.

132. See generally No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended at 20 U.S.C. §§ 6301–8962 (2006)).

133. For an official description of the operation of the program and its charter school provisions, see *Race to the Top Program Executive Summary*, U.S. DEP'T OF EDUC. 3, 7, 11, 13 (Nov. 2009), <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>.

134. Race to the Top Fund, 74 Fed. Reg. 59,688, 59,804 (Nov. 18, 2009) (adopted as final rule with minor changes to the criteria for award of points pursuant to that charter school rating factor at 75 Fed. Reg. 4464 (Jan. 27, 2010) (to be codified at 34 C.F.R. Subtitle B, Chapter II)).

135. *Id.* at 59,813, 59,825.

136. *Id.* at 59,804.

The U.S. Department of Education has emphasized, however, that charter schools are not the sole answer to solving educational inequity and closing the achievement gap.<sup>137</sup> Yet, the additional points did inspire many states to open up their charter school laws, and RTT has certainly increased and will continue to increase the number of charter schools throughout the nation.<sup>138</sup>

## 2. NCLB

The No Child Left Behind Act of 2001, adopted in 2002 and amended in 2006, promotes school choice in general through its sanction provisions for schools not meeting their NCLB requirements.<sup>139</sup>

First, NCLB specifically mentions conversion to a charter as one way to improve a low-performing school.<sup>140</sup> Second, students attending failing schools have the opportunity (in theory at least) to transfer to another public school.<sup>141</sup>

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137. *Id.* at 59,691, 59,768. In fact, two Phase I top-scoring states, Delaware and Tennessee, received only thirty and thirty-one of the possible forty points for their charter school laws. *See Race to the Top Fund: States' Applications, Scores and Comments for Phase I*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/programs/racetothetop/phase1-applications/index.html> (last visited Aug. 23, 2012). Other states had higher charter school rating factor scores, but were not winners. *Id.*

138. *See, e.g.*, Jennifer Medina, *State Looks at Doubling Cap on Charter Schools*, N.Y. TIMES, Jan. 15, 2010, at A16 (describing New York's quest to conform its charter school laws to meet RTT priorities, although some opposed the total elimination of a cap on the number of charters); Lynn Bonner, *Legislature Votes to Lift Cap on Charter Schools*, CHARLOTTE OBSERVER, June 10, 2011, available at <http://www.charlotteobserver.com/2011/06/10/2365346/legislature-votes-to-lift-cap.html> (describing North Carolina's elimination of its 100-school cap on the number of charter schools, but silent on whether or not the changes were proposed in response to RTT selection factors).

139. For a discussion of the role of charter schools in the No Child Left Behind initiative, see *No Child Left Behind and Charter Schools: Giving Parents Information and Options*, U.S. DEP'T OF EDUC. 38 (May 2007), <http://www2.ed.gov/nclb/choice/charter/nclb-charter.html> (last visited Aug. 23, 2012). For the Obama Administration's discussion of "redefining the federal role in education," a somewhat vague critique of the No Child Left Behind program, see *A Blueprint for Reform: The Reauthorization of the Elementary and Secondary Education Act*, U.S. DEP'T OF EDUC. 39–41 (2010), <http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf> (last visited Aug. 23, 2012).

140. A school continually failing to make adequate yearly progress must be restructured. *See* 20 U.S.C. § 6316(b)(8)(A), (B). Charter schools are one restructuring option. *Id.* § 6316(b)(8)(B).

141. Students attending schools that have failed to make adequate yearly progress for at least two consecutive years must be given a chance to transfer to a school "not identified for

The sanctioning provisions of NCLB, however, have likely had a minor effect on changing the demographics of public schools, both traditional and charter, because they are so rarely invoked.<sup>142</sup> The more significant impact of NCLB is the addition of Charter School Program funding. This funding, along with other sources of federal grants, is addressed in the next Part.

### *B. Federal Money*

#### 1. The Money

A pro-charter school group lists over one hundred avenues for federal grant money.<sup>143</sup> The largest amount of grant money available recently is federal stimulus spending through the Investing in Innovation (i3) fund. These grants are awarded by the Department of Education for the purpose of “improving student achievement.”<sup>144</sup> The i3 program lists many aspects of improving student achievement, but completely omits integration as relevant, whether the integration is racial or economic.<sup>145</sup> The federal government awarded \$646 million for education initiatives through the i3 program in 2010.<sup>146</sup> Amounts distributed in 2011 were substantially less but still significant, totaling \$148 million.<sup>147</sup>

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school improvement,” with transportation provided. 20 U.S.C. § 6316(b)(1)(E)(i), (b)(9). Priority for transfers is given to the “lowest achieving children from low-income families.” *Id.* § 6316(b)(1)(E)(ii).

142. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 946–47 (2004).

143. See *Finding Federal Funding for Charter Schools: A User’s Guide*, NAT’L RES. CTR. ON CHARTER SCH. FIN. & GOVERNANCE 3, 24–28 (Aug. 2009), [http://www.charterresource.org/files/TFP\\_CharterSchools\\_Users\\_Guide.pdf](http://www.charterresource.org/files/TFP_CharterSchools_Users_Guide.pdf).

144. See *Investing in Innovation Fund (I3): Purpose*, U.S. DEP’T OF EDUC. OFFICE OF INNOVATION & IMPROVEMENT, <http://www2.ed.gov/programs/innovation/index.html> (last visited Aug. 23, 2012).

145. *Id.* (listing as goals improving “student achievement or student growth, closing achievement gaps, decreasing dropout rates, increasing high school graduation rates, or increasing college enrollment and completion rates”).

146. *Investment in Innovation Fund (I3): Funding Status*, U.S. DEP’T OF EDUC. OFFICE OF INNOVATION & IMPROVEMENT, <http://www2.ed.gov/programs/innovation/funding.html> (last visited Aug. 23, 2012).

147. *Id.*

Charter schools have won some of these grants. Most notably, the KIPP Foundation—a very successful charter school operator of high-minority, high-poverty charter schools<sup>148</sup>—recently won a five-year grant worth \$50 million.<sup>149</sup> Other charter schools have also successfully applied for i3 funding.<sup>150</sup>

The most longstanding federal program for funding charter schools is the Charter School Program (CSP). That program began in 1995, with less than \$5 million distributed for charter school improvement.<sup>151</sup> By 2011, that amount had increased to almost \$200 million.<sup>152</sup>

In 2011, CSP changed its funding guidelines to recognize the importance of promoting diversity. Specifically, applicants can receive up to five points out of a possible total of 110 for “[p]rojects that are designed to promote student diversity, including racial and ethnic diversity, or avoid racial isolation.”<sup>153</sup>

Although adding this factor and these points to the application ranking process is progress, the actual impact of the change appears minor. Diversity is not the aim of the grants—instead the program’s purpose is increasing the number of quality charter schools.<sup>154</sup> The

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148. See RYAN, *supra* note 5, at 223–25. The schools are overwhelmingly minority and highly academically successful. *Id.* Professor Ryan argues that the KIPP model, while successful, cannot be widely duplicated. *Id.*

149. See *Investment in Innovation Fund (I3): California 2010 Scale-Up Grant Abstract*, U.S. DEP’T OF EDUC. OFFICE OF INNOVATION & IMPROVEMENT, <http://www2.ed.gov/programs/innovation/2010/awards/scale-up/ca.html> (last visited Aug. 23, 2012).

150. See *KIPP, New Schools for New Orleans Among Charter Winners of i3 Grants*, NAT’L CHARTER SCH. RES. CTR. (Aug. 5, 2010), <http://www.charterschoolcenter.org/news/kipp-new-schools-new-orleans-among-charter-winners-i3-grants>.

151. See *Charter Schools Program State Educational Agencies (SEA) Grant: Funding Status*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/programs/charter/funding.html> (last visited Aug. 23, 2012).

152. See *id.*

153. 76 Fed. Reg. 4322, 4324 (2011).

154. *Id.* at 4323.

The purpose of the CSP is to increase national understanding of the charter school model (1) by expanding the number of high-quality charter schools available to students across the Nation by providing financial assistance for the planning, program design, and initial implementation of charter schools, and (2) by evaluating the effects of charter schools, including their effects on students, student academic achievement, staff, and parents.

*Id.*

first priority, periodic review and evaluation, gets twice as many points.<sup>155</sup> Moreover, the inclusion of diversity in 2011 does not seem to signal a shift in how money gets awarded. I found no evidence of a grant being awarded for promoting diversity.

## 2. Financing Inequality

Professor Olatunde C. A. Johnson has analyzed recent federal economic stimulus spending in the civil rights context.<sup>156</sup> He makes the compelling argument that the stimulus package has financed housing, transportation, and education in ways that “threaten to preserve and even deepen racial inequality.”<sup>157</sup> Charter school funding—a reform easy to sell to the public—fits this pattern as well.

As revealed earlier, charter schools segregate; they often even segregate more than our already segregated traditional public schools.<sup>158</sup> Yet, when our federal government awards charter schools public money, it never asks whether the charter school is segregated, however one might define that status. Instead, our limited public education dollars subsidize charter schools that segregate. The federal government even promises funding to special-identity charter schools.<sup>159</sup> Charter schools can *choose* to attempt integration, and get an additional five points on their application for CPS funding.<sup>160</sup> But no one is asking or requiring charter schools to integrate because integration is right for our educational system. Nor is anyone asking that charter schools simply not *increase* our current levels of

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155. *Id.*

156. See Olatunde C.A. Johnson, Essay, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154, 155 (2011).

157. *Id.* at 158.

158. See *supra* Part II.

159. One recent notable example of federal funding for an identity charter school is the federal government’s award of \$600,000 to a proposed Tikun Olam Hebrew Language Charter High School in New Jersey. See Michael Winerip, *Rejected 3 Times, School May Still Open Soon, and With a Grant, Too*, N.Y. TIMES, Jan. 18, 2012, at A17. The state had rejected the charter, and many opposed the charter because it would “drain resources from traditional public schools in order to provide a free Jewish education that should be the responsibility of private schools.” *Id.* Yet the federal government deemed the charter worthy of \$600,000 in funding based entirely on the school’s application. That application seems to have included a variety of serious misrepresentations. *Id.*

160. See *supra* note 154 and accompanying text.

segregation. Our federal government spends, with no concern that it finances segregation.

In fact, the federal government is actually *promoting* segregation when it advocates charter schools as a way to help failing school districts and at-risk students. In our country, this focus too often means poor and/or minority school children. These children certainly need and deserve better educational offerings supported by the federal government. But by offering charter schools as a solution to the plight of at-risk children in failing school districts, we will too often concentrate them again in segregated educational environments.

If charter schools had a consistent record of improved educational outcomes, I could see how this focus on charter schools could make sense. But charter schools have a mixed academic record.<sup>161</sup> And although the academic literature exhibits many disagreements, everyone agrees that high-poverty schools, whether traditional or charter, are the hardest to operate successfully.<sup>162</sup> Federal funding to increase their number—by advocating charter schools as a better alternative for education—is ludicrous.

In addition, to operate charter schools for the advantage of at-risk children requires that those typically with the fewest resources—poor parents—make the “right” choices to improve their children’s education.<sup>163</sup> While parents rightly desire options other than failing traditional schools, I fail to see how placing so much responsibility on poor parents will ensure success. This is particularly so given the lack of choices currently available in charter schools.

At the very least, the federal government should condition the awarding of money on a charter school’s inclusion of “deliberate integration dimensions.”<sup>164</sup> Without that component, charter schools become a twenty-first century version of freedom-of-choice plans that locked in de jure segregation—but worse: charter schools too often offer exclusively segregative educational experiences while the freedom-of-choice plans at least offered *some* degree of demographic

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161. See *supra* notes 43–44 and accompanying text.

162. See RYAN, *supra* note 5, at 277–78; Parker, *The Failure of Education Reform*, *supra* note 13, at 409–11.

163. See *supra* note 38 and accompanying text.

164. Minow, *supra* note 24, at 817.

choice.<sup>165</sup> Requiring charter schools to at a minimum pay attention to integration would necessarily entail an end to federal funding of special-identity charter schools. The federal government should not be in the business of financing schools explicitly designed to segregate.

The academic literature is very clear: integrated schools, particularly ones integrated by class, are much more likely to be successful than economically or racially segregated schools.<sup>166</sup> For that reason alone, the federal government should once again embrace integration.<sup>167</sup>

#### CONCLUSION

By its terms, choice has great appeal.<sup>168</sup> As a society we need, however, leadership to determine what kinds of choices we should offer, at public expense, to parents.

Charter schools too often separate out children who have the highest need for quality education into their separate schools, when the evidence is strikingly strong that these schools are too often doomed to failure. We cannot continue to design, operate, and fund charter schools that are returning us to the days of legal segregation.

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165. See *supra* Part II.C.

166. See RYAN, *supra* note 5, at 277–78; Parker, *The Failure of Education Reform*, *supra* note 13, at 407–11.

167. For details on how the Executive Branch of the federal government championed the mandates of the Civil Rights Act in the 1960s and 1970s, see Parker, *Connecting the Dots*, *supra* note 22, at 1720–22. The Clinton Administration took a stronger approach to promoting diversity in charter schools than the current administration. In 2000, Clinton’s Department of Education issued a statement urging charter schools to recruit students from a diverse background. See *Applying Federal Civil Rights Laws to Public Charter Schools*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/offices/OCR/archives/charterqa/charorder.html> (last visited Aug. 24, 2012) (asserting that if a charter school is located in a district with a desegregation plan or court order, the charter school must also comply with that plan or court order and detailing when and how the school must comply). That statement, archived by the Bush Administration, should at the very least be reissued by the Obama Administration.

168. Dean Minow makes the point that “[s]chool choice resonates with the liberal value of autonomy and the market conception of consumer sovereignty.” Minow, *supra* note 24, at 817.