"Race" to the Bottom?: Addressing Student Body Diversity in Charter Schools After *Parents Involved*

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President Obama and Secretary of Education Arne Duncan have advanced the most ambitious federal education agenda in decades. Charter schools are central to their plans, and state receipt of Race to the Top funding was contingent on loosening restrictions on these deregulated schools. Opponents of the charter movement levy many critiques against charter expansion, and recent research suggesting that charter schools are increasingly segregated—in many cases, even more so than their public school counterparts—has added to the growing list of concerns. As part of charter school authorizing statutes, several states passed legislation requiring promotion of diversity within charter school student bodies. However, the Supreme Court's decision in Parents Involved in Community Schools v. Seattle School District *raises questions about the constitutionality of such legislation. This Comment discusses the impact of* Parents Involved *on efforts to increase charter school diversity, and explores whether charter schools—as private actors—may actually be exempt from compliance with* Parents Involved.

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[1]

– Chief Justice Earl Warren, 1954

The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.[2]

– Chief Justice John Roberts, 2007

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[1] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[2] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

It is 2011, more than fifty years after the Supreme Court's monumental decision in *Brown v. Board of Education* outlawed segregation on the basis of race in public education. A student wakes up in the Soundview area of the Bronx. He grabs his backpack, and on the way out the door his mother hands him a packet of tickets that will entitle him to two free meals at the school as part of a federally funded free lunch program for students who live in poverty. He exits his apartment building, which is inhabited mostly by other Latino families, and walks to the bus station to take the BX36 bus to his school: Pablo Neruda Academy for Architecture and World Studies, part of New York City's small-schools choice program open to all New York City students and designed to provide more options for a quality education in the face of many large, failing high schools.[3] He stands in line with hundreds of other students to walk through metal detectors manned by several security staff and finally walks up to the third floor and into his classroom. Despite the promises of *Brown* and the attention it called to the intangible and irreversible harms of segregation,[4] his classroom is essentially monotone. The student body of Pablo Neruda Academy is 73 percent Hispanic or Latino, 26 percent black or African American and less than 1 percent white,[5] mirroring the demographics of the area.[6]

This student's story is surprisingly common. Across the country, the school a student attends is determined primarily by residence, leading to enrollment that reflects widespread residential segregation.[7] Nationally, in

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[3] *See generally Our Schools*, NEW VISIONS FOR PUBLIC SCHOOLS, http://www.newvisions.org/our-schools/overview (last visited Jan. 18, 2011) (describing the creation of 133 small schools in collaboration with the New York City Department of Education to "[p]rovide a rigorous and relevant education for all students").

[4] *Brown*, 347 U.S. at 494 (discussing the negative effects of segregation in the higher education context and expressing the opinion that "[s]uch considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

[5] N.Y. CITY DEP'T OF EDUC., SCHOOL DEMOGRAPHICS AND ACCOUNTABILITY SNAPSHOTS-SCHOOL ENROLLMENT AND DEMOGRAPHICS, http://schools.nyc.gov/Accountability/data/CEP.htm (follow "School Enrollment and Demographics" hyperlink) (last visited Jan. 18, 2011). Pablo Neruda Academy is school 8X305.

[6] N.Y. CITY DEP'T OF CITY PLANNING, BRONX COMMUNITY DISTRICTS 1 & 2, http://www.nyc.gov/html/dcp/pdf/census/puma_demo_06to08_acs.pdf#bx9 (last visited Jan. 18, 2011) (displaying data from the American Community Survey 2006-2008 which encompasses District 9 of the Bronx, including Soundview, and indicating that the population is 70.4 percent Latino or Hispanic, 25.9 percent black or African American and 1.8 percent white).

[7] *See, e.g.*, ERICA FRANKENBERG & GENEVIEVE SIEGEL-HAWLEY, THE CIVIL RIGHTS PROJECT, EQUITY OVERLOOKED: CHARTER SCHOOLS AND CIVIL RIGHTS POLICY 7–8 (2009), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/equity-overlooked-charter-schools-and-civil-rights-policy/frankenberg-equity-overlooked-report-2009.pdf (noting that schools of choice have the potential to disrupt patterns of residential segregation and racial isolation typically replicated in neighborhood schools).

2003, 73 percent of black students and 77 percent of Latino students attended schools that were 50 to 100 percent minority, and 38 percent of students of both ethnicities attended schools that were classified as "extremely segregated," meaning that the student body was 90 to 100 percent minority.[8] Nearly 90 percent of white students attended schools that were more than half white, and two out of every five white students attended a school that was 90 to 100 percent white.[9] This intense level of segregation is problematic, particularly in light of research that suggests minority students experience better educational outcomes, including higher graduation rates and better performance on standardized tests, in integrated schools, and that learning in an integrated environment better prepares minority students for post-high school success in diverse communities.[10] Additionally, many social scientists have suggested that attending integrated schools reduces racial prejudice and "promote[s] cross-racial understanding."[11]

Perhaps even more troubling than the intense racial stratification is the link between school racial composition and the percent of students in poverty. More than 60 percent of black and Latino students attend schools classified as "high poverty," compared with only 18 percent of white students.[12] Given that schools primarily draw funds from property tax revenues, students attending schools in low-income areas are likely to have access to fewer resources and receive instruction from less qualified teachers.[13] This suggests that the social and developmental negatives of attending racially isolated schools are further compounded by disparities in school facilities, extracurricular activities, and instruction.

Despite continuing segregation and evidence of its detrimental impact on student achievement, national attention has focused narrowly on specific test-based educational outcomes and largely ignored diversity as a tool to affect change. The National Commission on Excellence in Education's publication of *A Nation at Risk* in 1983 began calling attention

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[8] GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY 12–13 (2005), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/why-segregation-matters-poverty-and-educational-inequality/orfield-why-segregation-matters-2005.pdf.

[9] *Id.* at 13.

[10] *Id.* at 42.

[11] Brief of 553 Soc. Scientists as Amici Curiae Supporting Respondents at 2, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (Nos. 05-908 & 05-915) [hereinafter Brief of 553 Soc. Scientists].

[12] *See* ORFIELD & LEE, *supra* note 8, at 18.

[13] Brief of 553 Soc. Scientists, *supra* note 11, at 3.

to America's lagging educational achievement,[14] and more recent international reports continue to rank American youths below nations like Latvia and Lithuania in math skills.[15] In light of such statistics, advocates have pushed for a variety of reforms to improve academic outcomes. Among the most popular has been the charter school movement. A charter school is a school that is publicly authorized through legislation but operated by a private or non-profit entity.[16] Charter schools are granted autonomy from many state regulations in exchange for greater accountability for academic outcomes.[17] The intention is to foster innovation while offering choices for students attending public schools that may not be meeting their educational needs.[18]

As of 2009–10, there were 5,453 charter schools operating nationally, and another 465 were scheduled to open in 2010–11, enrolling over 1.7 million students.[19] This represents over 200 percent growth over the past ten years.[20] The Obama administration has prioritized further expansion of the charter movement, tying eligibility for stimulus funds from Race to the Top grants to the loosening of legal caps on the number of charters.[21] A severe shortage of state education funds has made federal funds increasingly desirable and prompted several states to reconsider their limits on charters, often over the strenuous objections of teachers' unions.[22] Despite undisputed mixed outcomes among charter schools generally,[23]

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[14] NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983), *available at* http://www2.ed.gov/pubs/NatAtRisk/index.html.

[15] NAT'L CTR. FOR EDUC. STATISTICS, HIGHLIGHTS FROM TIMSS 2007: MATHEMATICS AND SCIENCE ACHIEVEMENT OF U.S. FOURTH- AND EIGHTH-GRADE STUDENTS IN AN INTERNATIONAL CONTEXT 7 (2008), *available at* http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2009001. More public attention has been drawn to this fact as a result of the recent release of a documentary, *Waiting for Superman*, which focuses on the difficulty of gaining access to the highest performing charter schools and the larger crisis in public education in the United States.

[16] *See* US CHARTER SCHOOLS OVERVIEW PAGE, http://www.uscharterschools.org/pub/uscs_docs/o/index.htm (last visited Jan. 18, 2011).

[17] *Id.*

[18] *Id.*

[19] CTR. FOR EDUC. REFORM, NATIONAL CHARTER SCHOOL & ENROLLMENT STATISTICS 2010 (2010), *available at* http://www.edreform.com/_upload/CER_charter_numbers.pdf.

[20] *See* U.S. DEP'T OF EDUC., THE STATE OF CHARTER SCHOOLS 2000 – FOURTH-YEAR REPORT, EXECUTIVE SUMMARY (2000), *available at* http://www2.ed.gov/pubs/charter4thyear/es.html ("[T]he total number of charter schools sites operating was 1,605 as of September 1999.").

[21] *See, e.g.*, Greg Toppo, *Ready, Set, Race for Education Money; States Rush to Make Changes to Get Part of Stimulus Grant*, USA TODAY, Nov. 4, 2009, at 7D, *available at* http://www.usatoday.com/printedition/life/20091104/topblline04_st.art.htm.

[22] *See, e.g.*, Sam Dillon, *Education Grant Effort Faces Late Opposition*, N.Y. TIMES, Jan. 19, 2010, at A18, *available at* http://www.nytimes.com/2010/01/19/education/19educ.html. The policy arguments for and against charter schools are many, and are beyond the scope of this Comment.

[23] *See, e.g.*, *Multiple Choice: Charter School Performance in 16 States*, CTR. FOR RES. ON EDUC. OUTCOMES (June 2009), http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf

Obama and others consistently point to this reform movement's potential and highlight the success of the nation's highest achieving charters, like KIPP (Knowledge Is Power Program), where students routinely outperform neighborhood schools by significant margins.[24] This new national policy emphasis, coupled with struggling districts that look to charters as the answer to lagging educational outcomes,[25] suggests that the trend towards charter schools will only increase in the coming years.

While charter schools theoretically have the potential to reduce segregation by drawing from larger attendance zones and crafting missions that might appeal to a diverse cross section of students, they are in fact more racially isolated than their public counterparts.[26] Seventy percent of black charter school students attend "intensely segregated" schools.[27] The average white charter school student attends a charter school that is over 70 percent white, despite the fact that white students comprise only 43 percent of charter school enrollees.[28] In an attempt to combat this racial isolation, thirteen states have adopted provisions in their charter-enabling statutes that suggest or require that charter operators take proactive measures to ensure that student enrollment reflects school district demographics.[29] Research suggests that these provisions may help reduce racial isolation and promote diversity.[30] However, the constitutional validity of these

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[hereinafter *Multiple Choice*] (finding that nationally, 17 percent of charter schools exceed performance of neighborhood schools while over a third perform "significantly worse"). The study's methodology is currently in dispute and has been challenged by Caroline Hoxby, an economics professor at Stanford whose extensive research on charter schools has generally found positive outcomes associated with charter attendance. *See* Caroline M. Hoxby, *A Serious Statistical Mistake in the CREDO Study of Charter Schools*, CTR. FOR RES. ON EDUC. OUTCOMES (Aug. 2009), http://credo.stanford.edu/reports/memo_on_the_credo_study.pdf. Regardless of this methodological debate, the contention that some charter schools do not outperform traditional public schools in the neighboring area is not in dispute.

[24] *See* KNOWLEDGE IS POWER PROGRAM, KIPP: REPORT CARD 2009, at 26 (2009), *available at* http://www.kipp.org/about-kipp/results/annual-report-card/annual-report-card/updateapp/false (noting that the average KIPP 5th grader enters with math skills in the 57th percentile and has improved to the 80th percentile by the 8th grade). Eighty-eight percent of students who complete through 8th grade in the KIPP program have matriculated to college, which is noteworthy since the national high school graduation rate hovers at slightly over 50 percent. *See id.* at 28.

[25] *See* Howard Blume & Jason Song, *Vote Could Open 250 L.A. Schools to Outside Operators*, L.A. TIMES, Aug. 26, 2009, *available at* http://articles.latimes.com/print/2009/aug/26/local/me-lausd-schools26 (detailing a plan approved by the LAUSD school board that could turn two-hundred fifty existing LAUSD schools over to charter operators).

[26] Erica Frankenberg & Chugmei Lee, *Charter Schools and Race: A Lost Opportunity for Integrated Education*, EDUC. POL'Y ANALYSIS ARCHIVES, Sept. 5, 2003, at 1, 26, *available at* http://epaa.asu.edu/ojs/article/view/260/386.

[27] *Id.* at 12.

[28] *Id.*

[29] *See infra* Table 1.

[30] *See* FRANKENBERG & SIEGEL-HAWLEY, *supra* note 7, at 15–16 (reporting that interviews conducted with state officials suggested that Oklahoma and Rhode Island had taken proactive measures related to compliance with the racial balance mandates in the charter authorizing statutes); Linda A.

"racial balancing" statutes is doubtful following *Parents Involved in Community Schools v. Seattle School District.*[31] Despite evidence of the educational benefits of diversity and the reality that *Brown's* promise of integrated schools remains unfulfilled, the United States Supreme Court struck down two voluntary integration plans in *Parents Involved.* In doing so, the Court declined to recognize a compelling interest in student body diversity and found that by employing general racial designations and utilizing race as a determinative factor, the school districts had not narrowly tailored their plans to the stated ends.[32]

This Comment explores the potential for and limitations on creating student body diversity in the context of charter schools. Part I begins by discussing types of racial balancing provisions. Part II discusses the Court's decision in *Parents Involved* and the viability of racial balancing provisions following the Court's guidelines for narrow-tailoring in the face of de facto residential segregation. After concluding that the Court's decision in *Parents Involved* renders the most aggressive attempts for charter school integration unconstitutional, I explore an alternative possibility that some charter schools may not be state actors for the purposes of student assignment. Part III summarizes the state action doctrine and surveys the existing cases that purport to apply this framework to charter schools. Next, I apply the various tests to conclude that in states that provide little regulation regarding student enrollment, charter schools are not state actors for the purpose of student assignment and are therefore not governed by *Parents Involved.* Part IV discusses the policy implications of this narrow exemption and suggests some possible approaches available to charter schools to achieve representative diversity in their student body.

I. CHARTER SCHOOL RACIAL BALANCING PROVISIONS

Despite new legal challenges,[33] working for student body diversity is increasingly important given trends of low achievement for minority students attending majority-minority schools.[34] While some legal barriers

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Renzulli, *District Segregation, Race Legislation, and Black Enrollment in Charter Schools*, 87 SOC. SCI. Q. 618, 630–31 (2006) (finding that the presence of such legislation has a statistically significant positive effect on black enrollment).

[31] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747 (2007).

[32] *Id.* at 725–33.

[33] *See infra* Part II for a discussion of the implications of *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701 (2007).

[34] *See* Osamudia R. James, *Business as Usual: The Roberts Court's Continued Neglect of Adequacy and Equity Concerns in American Education*, 59 S.C. L. REV. 793, 805 (2008). James also notes that teacher mobility is positively correlated with higher percentages of black and Latino students and that other important inputs for positive student achievement, such as resources and parental

are recent, knowledge of the detrimental effects of segregated student bodies has been present in educational discourse for some time, and debates over its impact have been particularly prevalent as states looked to charter schools as a means of improving educational outcomes. At the outset of the charter movement, many commentators believed that these schools would provide a new mechanism for white flight, predicting that middle class whites who could not afford to move to the suburbs to escape integration would look to charter schools as a means of ensuring a homogeneous student body.[35] In response to this criticism and early indications that charter schools may contribute to racial isolation, many states included measures in their charter-enabling statutes requiring charter schools to enroll a diverse student body.[36] These provisions took different shape depending on the state, ranging from mandating that school enrollment deviate no more than 10 percent from the neighborhood demographics, to merely requiring that the school not discriminate in admissions.[37] Table 1 summarizes these provisions by breaking them into three categories: "non-discrimination," "outreach or plan to promote reflective diversity," and "mandatory racial balance."[38]

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involvement, are more commonly found at integrated schools because unlike their majority-minority counterparts, they are likely to be in middle-income communities. *Id.* at 804, 807.

[35] *See* Kelly E. Rapp & Suzanne E. Eckes, *Dispelling the Myth of "White Flight": An Examination of Minority Enrollment in Charter Schools*, 21 EDUC. POL'Y 615, 617 (2007) (noting that the fears expressed at the outset of the charter school movement regarding white enrollment have not materialized and that few charter schools enroll a disproportionate number of white students).

[36] *See* Suhrid S. Gajendragadkar, Note, *The Constitutionality of Racial Balancing in Charter Schools*, 106 COLUM. L. REV. 144, 145 (2006) (noting that charter schools have increased racial isolation and that "[r]acial balancing provisions represent an effort to realize the integrative potential of charter schools and enhance their ability to provide improved educational opportunities for all students").

[37] *See* Joseph O. Oluwole & Preston C. Green, *Charter Schools: Racial Balancing Provisions and* Parents Involved, 61 ARK. L. REV. 1, 21–23 (2008) (characterizing various approaches to racial-balancing provisions as "hortatory" and "mandatory").

[38] I define "non-discrimination" as those provisions that merely require charter school compliance with federal and state anti-discrimination laws without further specifics. I interpret this to mean only that these charter schools may not explicitly set out to either enroll a student body of a particular ethnicity or race, or to explicitly exclude a particular ethnicity or race. "Outreach or plan to promote reflective diversity" encompasses those provisions which require charter schools to submit their proposed methodology for student recruitment and enrollment in order to have the charter granted, and to explain how this plan will likely yield demographics reflective of the sending school district.

"Mandatory racial balance" refers to provisions that require, as a condition of grant or maintenance of the charter, that the school enroll a student body that does not deviate from the racial composition of the surrounding school district by more than a specified percent.

TABLE 1[39]

Non-Discrimination	Outreach/Plan to Promote Reflective Diversity	Mandatory Balance
Alaska	California	Nevada
D.C.	Colorado	North Carolina
Delaware	Connecticut	South Carolina[41]
Georgia	Florida	
Idaho	Kansas	
Indiana	Massachusetts[40]	
Iowa	New Jersey	
Louisiana	Ohio	
Maryland	Rhode Island	
Michigan	Wisconsin	
Missouri		
New Hampshire		
New Mexico		
New York		
Oregon		
Tennessee		
Texas		
Utah		
Virginia		
Wyoming		

While there has been limited research on the efficacy of these provisions, they appear at least somewhat helpful in the quest for more highly integrated schools. In contrast to predictions, charter schools have not become "havens" for white students, but instead typically have higher

[39] *See infra* Appendix A. For ease of reading, I have included all citations to the laws referenced in this table therein.

[40] Massachusetts's provision relating to racial balance is different from those in other states because Massachusetts has adopted a plan for cross-district attendance in districts where there is racial imbalance. MASS. ANN. LAWS ch. 76, § 12A (West 2009) ("Any child residing in any city, town, or regional school district and attending therein a public school in which such racial imbalance exists may attend a public school or a publicly authorized non-sectarian school in a city, town, or regional school district in which he does not reside if the school committee of such city or town or the committee of such regional school district has adopted and the board has approved, as provided by this section, a plan for the attendance of such non-resident children therein."). Racial imbalance is defined as a school that is more than 50 percent non-white. *Id.* ch. 71, § 37D.

[41] While South Carolina mandates an acceptable percentage range for deviation from the demographics of the area, operators may receive a waiver to this requirement by showing that they made their "best efforts" to recruit a diverse population. *See* S.C. CODE ANN. § 59-40-70(D) (2004).

concentrations of minority students than their public school counterparts.[42] Black students appear to be over-enrolled in charter schools, while white students are proportionally under-enrolled.[43] For example, in the Northeast, white students constitute 65 percent of public school enrollees, but only 32 percent of students enrolled in charter schools.[44] In that same region, black students constitute only 14 percent of public school enrollees, but represent 49 percent of charter school enrollees.[45] The western United States is the only region that does not follow this pattern. There, white students are 44 percent of traditional public school enrollees but 49 percent of those enrolled in charter schools.[46] However, even in the West, black students are proportionally overenrolled in charter schools as well, representing just 6 percent of public school enrollees while constituting 10 percent of charter school students.[47] Some research also suggests that charter schools in states without racial balancing clauses have a smaller percentage of black students enrolled than those states in which enabling statutes include these provisions.[48] All else equal, the presence of legislation with an explicit racial balance mandate has a statistically

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[42] *See* FRANKENBERG & SIEGEL-HAWLEY, *supra* note 7, at 3 ("[C]harter school segregation levels for black students are even outpacing steadily increasing public school segregation.").

[43] *See generally* Frankenberg & Lee, *supra* note 26 (describing charter school enrollment by race).

[44] ERICKA FRANKENBERG, ET AL., CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS 30–31 (2010), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenberg-choices-without-equity-2010.pdf. The report relies on the 2007–08 common core of data from the National Center for Education Statistics (NCES). The disparity between white enrollment in public and charter schools is actually the highest in the Midwest, where white students are 74 percent of the public school population but only 37 percent of the charter school enrollees. *Id.* Interestingly, in most regions, Latino charter school enrollment is fairly comparable to enrollment in traditional public schools. For exact figures, see *id.*

I would like to note that the CRP's methodology and conclusions have come under attack. *See, e.g.*, Gary Ritter et al., *A Closer Look at Charter Schools and Segregation*, EDUC. NEXT, Summer 2010, at 69, *available at* http://educationnext.org/a-closer-look-at-charter-schools-and-segregaton/. However, Ritter and his colleagues only challenge the notion that charter schools experience a higher level of racial segregation than their traditional public school counterparts. Even if their methodological critiques are sound, they do not challenge the idea that charter schools are still racially segregated. Thus, my analysis of this issue remains salient since conceptually there is no reason for charter schools to mirror the racial segregation of public schools when they can theoretically overcome the barriers posed by residential segregation.

[45] FRANKENBERG ET AL., *supra* note 44.

[46] *Id.*

[47] *Id.* In this region, Latino students are proportionally under-enrolled in charter schools, comprising 39 percent of the public school population but only 34 percent of charter school enrollees. *Id.* See *id.* for statistics regarding student enrollment in other regions—including the South and Border areas—as well as the breakdown for other minority groups.

[48] Renzulli, *supra* note 30, at 618.

significant positive effect on black student enrollment.[49] Additionally, researchers at the Civil Rights Project/Proyecto Derechos Civiles at the University of California, Los Angeles recently recommended the adoption of additional, stronger racial diversity provisions and more effective enforcement of existing laws to combat increasingly segregated charter schools.[50]

Comparative regional enrollment statistics provide only a general picture of school by school enrollment and racial diversity. The Civil Rights Project aggregated the common core data for states with over five thousand students enrolled in charter schools. This effort provides several different descriptive statistics to paint the picture of student body racial diversity in charter schools. The following tables present relevant data at two levels—state and statistical metropolitan area—organized according to the strength of the diversity provisions in the particular states.

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[49] *Id.* at 631 (finding a statistically significant impact of 5.03 percentage points on black student enrollment in states with explicit racial mandates in their charter enabling statute). However, one could argue that this finding alone is not necessarily a positive indicator regarding potential racial isolation or diversity of student body. Without comparison to the percentage of black students in the state as a whole, this finding does not necessarily disturb the data reported by The Civil Rights Project/Proyecto Derechos Civiles, which raises questions about over-representation of minority students in charter schools. For the data compiled by Civil Rights Project/Proyecto Derechos Civiles, see *supra* notes 44–47 and accompanying text.

[50] FRANKENBERG & SIEGEL-HAWLEY, *supra* note 7, at 19–20 ("New federal guidelines and legislation on charter schools should include diversity provisions . . . A number of states have laws with specific provisions but little evidence of enforcement.").

TABLE 2: STUDENTS IN HIGHLY SEGREGATED MINORITY SCHOOLS
(Enrollment of 90–100 percent minority students)[51]

State	% black students enrolled in highly segregated public schools	% black students enrolled in highly segregated charter schools	Difference	% Latino students enrolled in highly segregated public schools	% Latino students enrolled in highly segregated charter schools	Difference
California	43	52	+11	53	50	-3
Colorado	13	54	+41	16	16	0
D.C.	91	96	+5	82	79	-3
Delaware	3	66	+63	5	31	+26
Florida	32	42	+10	38	54	+16
Georgia	41	40	-1	25	24	-4
Indiana	0	0	0	0	0	0
Louisiana	36	83	+47	9	49	+40
Maryland	50	91	+41	33	34	+1
Massachusetts	23	53	+30	23	57	+34
Michigan	51	78	+27	12	46	+34
Missouri	37	92	+54	6	75	+69
North Carolina	35	86	+51	28	88	+60
New Jersey	46	94	+48	40	82	+42
New Mexico	11	41	+30	33	44	+11
Nevada	9	82	+73	36	78	+42
Ohio	34	64	+30	5	13	+8
Oregon	2	35	+33	1	1	0
South Carolina	40	85	+45	4	6	+2
Texas	38	82	+44	52	79	+27
Utah	1	1	0	0	3	+3
Wisconsin	35	70	+35	14	47	+33

Key: Non-discrimination Promotion of reflective diversity Mandatory balance

[51] FRANKENBERG, ET AL., *supra* note 44, at 40 tbl.9. The categorization of the strength of racial balancing provisions is according to my own analysis in Table 1, *supra*.

TABLE 3: PERCENTAGE OF STUDENTS IN INTENSELY SEGREGATED MINORITY SCHOOLS BY METROPOLITAN AREA[52]

Metropolitan Area	Public	Charter	Percentage difference in white students (Charter-Public)[53]
Los Angeles-Long Beach-Santa Ana, CA	53%	89%	3%
San Diego-Carlsbad-San Marcos, CA	24%	27%	1%
San Francisco-Oakland-Fremont, CA	28%	50%	-10%
Fresno, CA	57%	23%	7%
Denver-Aurora, CO	15%	11%	0%
Tampa-St. Petersburg-Clearwater, FL	8%	19%	0%
Atlanta-Sandy Springs-Marietta, GA	27%	22%	-5%
Indianapolis-Carmel, IN	4%	47%	-39%
New Orleans-Metairie-Kenner, LA	17%	76%	-35%
Boston-Cambridge-Quincy, MA	7%	32%	-33%
Flint, MI	12%	29%	-34%
St. Louis, MO-IL	13%	83%	-16%
Durham, NC	18%	23%	4%
Columbus, OH	6%	35%	-19%
Dayton, OH	8%	56%	-55%
Portland-Vancouver-Beaverton, OR-WA	0%	3%	10%
Charlotte-Gastonia-Concord, NC-SC[54]	14%	38%	-8%
San Antonio, TX	31%	86%	-23%
Milwaukee-Waukesha-West Allis, WI	17%	55%	-37%

Key: Non-discrimination Promotion of reflective diversity Mandatory balance

This aggregated data does not offer resounding support for the efficacy of racial balancing provisions. However, without knowing the decision-

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[52] FRANKENBERG, ET AL., *supra* note 44, at 41–42 tbl.10, 102 tbl.A-10. Data was not available for all metropolitan statistical areas, presumably owing to the small number of charter schools in those cities.

[53] This number is the difference between the percentage of area charter school attendees that are white and the percentage of traditional public school attendees that are white.

[54] This statistical area encompasses cities in both North and South Carolina, which have different types of mandatory balance provisions. South Carolina requires no more than a twenty percentage point deviation from the racial composition of the district in which the school is located, *see* S.C. CODE ANN. § 59-40-50(B)(7) (2004), while North Carolina requires that the school attain a student body "reasonably reflect[ive]" of the surrounding community within one year of opening, *see* N.C. GEN. STAT. § 115C-238.29F(g)(5) (2009).

making process utilized by charter school authorizers, or what percentage of the charter schools in a district are established specifically to serve populations that might be disproportionately minority, it is difficult to state conclusively that the provisions are uncorrelated with student body diversity. Absent this additional information, it does appear that those states that specifically address a preference for reflective diversity in charter schools, whether through mandate or suggestion, have somewhat smaller disparities in white enrollment between area public and charter schools. However, in all states, the percent of black students attending highly segregated charter schools is greater (in some cases, over 50 percent greater) than the percentage of black students attending highly segregated traditional public schools. Overall, the data from states with mandatory racial balance or required outreach plans suggests that authorizing boards and states are not prioritizing compliance with these statutory provisions in granting charters.

Despite their potential to mitigate segregation if actively implemented, racial balancing provisions have been controversial—both legally and politically—since their inception. Even prior to the Court's recent announcement of a strong preference for colorblindness articulated in *Parents Involved*, an early legal challenge to an explicit racial balancing provision in South Carolina found the statute unconstitutional. In *Beaufort County Board of Education v. Lighthouse Charter School Committee* (*Beaufort I*),[55] Lighthouse Charter School challenged the denial of its initial charter application. In denying the application, the county board of education cited, among other reasons, a failure to comply with the racial balancing provision of the enabling statute that was in force at the time.[56] This provision specified that "under no circumstances [could] a charter school enrollment differ from the racial composition of the school district by more than ten percent."[57] Lighthouse had not identified its prospective student body, and thus the board believed that in failing to specify its projected enrollment, Lighthouse had not complied with the racial balancing provision.

During the course of the appeal from the denial of the application, the Attorney General intervened to challenge the constitutionality of the statute. The court said that the denial on the basis of failure to comply did not meet the "clearly erroneous" standard for review of administrative decisions, but in light of the Attorney General's intervention, the court

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[55] Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm. (*Beaufort I*), 516 S.E.2d 655 (S.C. 1999).

[56] *Id.* at 658.

[57] S.C. CODE ANN. § 59-40-50(B)(6) (Supp. 1999) (amended 2002).

remanded the case to the circuit court for a determination of the constitutionality of the racial balancing provision.[58]

On remand, the circuit court held that the racial balancing provision violated the Equal Protection Clause of the state constitution, and further that the provision was not severable from the charter school authorizing statute.[59] Because this decision effectively voided the charters granted to many other schools that were already in operation, the legislature intervened while the appeal was pending, passing another charter authorizing act that included a severability component.[60] Subsequently, the legislature also rewrote the racial balancing provision, modifying it as follows:

> [I]t is required that the racial composition of the charter school enrollment reflect that of the [local] school district [in which the charter school is located] or that of the targeted student population which the charter school proposes to serve, to be defined for the purposes of this chapter as differing by no more than twenty percent from that population.[61]

This alteration made the racial balancing provision more permissive, allowing the school's racial composition to deviate from that of the neighboring population by an additional 10 percent. It also permitted the possibility of majority-minority schools by including the "targeted student population" language, which would allow prospective operators to emphasize an ethnic theme or target previously under-served or low-income student groups that tend to be disproportionately comprised of minority students. The legislature further undermined the potential efficacy of the balancing provision by adding a clause that effectively waived the 20 percent requirement except in cases of openly discriminatory admissions and recruitment policies:

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[58] *Beaufort I*, 516 S.E.2d at 661 (noting the Board could determine that Lighthouse was not in compliance with the racial balancing provision due to its failure to identify its prospective students, but that Lighthouse was "entitled to know whether it must satisfy the racial composition requirement before reapplying").

[59] *See* Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm. (*Beaufort II*), 576 S.E.2d 180, 181 (S.C. 2003) (recounting the circuit court's decision in the matter).

[60] *See id.* (noting that both Lighthouse and the Attorney General appealed the ruling on severability and that 2002 S.C. Act No. 265 was signed while appeal was pending, adding a severability clause).

[61] S.C. CODE ANN. § 59-40-50(B)(7) (2004).

> In the event that the racial composition of an applicant's or charter school's enrollment differs from the enrollment of the local school district or the targeted student population by more than twenty percent, despite its best efforts, the local school district board shall consider the applicant's or the charter school's recruitment efforts and racial composition of the applicant pool in determining whether the applicant or charter school is operating in a nondiscriminatory manner . . . . A finding by the local school district board that the applicant is not operating in a racially discriminatory manner shall justify approval of the charter without regard to the racial percentage requirement if the application is acceptable in all other aspects.[62]

Because both sections of the statute were added before the appeal was heard, the court determined that their passage rendered moot the question of the constitutionality of the original, more stringent provision.[63] The court did not address the constitutionality of the modified provisions, nor were they challenged by the Attorney General or Lighthouse.[64]

II. A NEW PRECEDENT: *PARENTS INVOLVED* AND STUDENT BODY DIVERSITY IN THE K–12 CONTEXT

For several years following the *Beaufort* decisions, student body diversity—both in charters and public schools—lay somewhat dormant in the national education debate. The passage of No Child Left Behind sought to bring to light the vast divide in test scores between minorities and white students, bringing race to the forefront of education policy. Despite the increased visibility of disparate racial outcomes, within-school diversity was rarely raised as a policy tool to combat this "soft bigotry of low expectations."[65] However, while *Beaufort* was pending, two court cases—one in Seattle and one in Louisville—were making their way through the federal court system, challenging proactive policies that, like racial balancing statutes in charter schools, sought to ensure racial diversity in the public schools of the respective districts. Though both systems were largely successful at achieving integrated student bodies, challengers

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[62] *Id.* § 59-40-70(D).

[63] *Beaufort II*, 576 S.E.2d at 182 (determining that the original provision was no longer valid, that the provisions of the amended act were "substantially different," and dismissing the appeal as moot).

[64] *Id.* at 180.

[65] George W. Bush, Remarks at the Latin Business Luncheon, Los Angeles, Cal. (Sept. 2, 1999), *in* RENEWING AMERICA'S PURPOSE: POLICY ADDRESSES OF GEORGE W. BUSH JULY 1999—JULY 2000, at 17 (2000).

questioned the legality of these policies under the Fourteenth Amendment. Advocates and educators eagerly awaited the Court's decision, which had the potential to alter the way operators of both charter and public schools conceptualized race in student assignment.

A. An Analysis of Parents Involved

Four years after the South Carolina court found explicit racial balancing in charter schools unconstitutional, the United States Supreme Court considered the voluntary use of race in student assignment plans in *Parents Involved in Community Schools v. Seattle School District.*[66] In Seattle, the school district utilized a binary conception of race—white and non-white—as one of several factors in student assignment at the city's popular and oversubscribed high schools.[67] Race was employed as a secondary tiebreaker if the oversubscribed school's student population deviated by more than 10 percentage points from the district's white/non-white demographics.[68] Louisville, which had recently achieved unitary status and sought to maintain school integration, employed student designations of "black" and "other" to ensure that black students comprised between 15 and 50 percent of the student body.[69] Each city argued that educating students in a racially integrated environment presented a compelling governmental interest and that their plans were narrowly tailored to this interest.[70]

A majority of the Court struck down the plans, with the plurality declining to acknowledge a compelling governmental interest in K–12 student body diversity.[71] Instead, the majority found that neither plan was sufficiently narrowly tailored to its stated objective, and thus the use of race in determining student assignments failed the second prong of strict scrutiny.[72] In distinguishing the present case from that of *Grutter v. Bollinger*, which held that diversity was a compelling interest in the context of higher education,[73] Chief Justice John Roberts, writing for the plurality, wrote that, unlike the admissions policy at issue in *Grutter*, the school districts at issue here did not consider race *as one among many*

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[66] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 551 U.S. 701 (2007).

[67] *Id.* at 710–12.

[68] *Id.* at 712.

[69] *Id.* at 715–16.

[70] *Id.* at 725.

[71] *Id.* at 725–33.

[72] *Id.* at 735.

[73] Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

factors in their student assignment plan.[74] He further objected to the fact that race, when used, was a determinative factor in student placement.[75] Moreover, the fact that race was employed in only a limited number of cases suggested that other race-neutral means could be equally efficacious.[76] The districts failed to demonstrate good faith consideration of such alternative means, which was, and continues to be, fatal to the strict scrutiny analysis of race-based classifications.[77]

The plurality opinion in which Justice Kennedy declined to join, took further issue with the school district's articulated goal of "achieving the educational and social benefits asserted to flow from racial diversity."[78] Because the districts offered no evidence that their particular demographics corresponded to the percentage of representation of different racial groups necessary to achieve the supposed benefits of a diverse student body, Roberts suggested school districts actually sought pure "racial balance" rather than the "diversity" they claimed was furthered by the plans.

However closely related race-based assignments may be to achieving racial balance, that alone cannot be the goal, whether labeled "racial diversity" or otherwise. Chief Justice John Roberts asserted that "[t]o the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end."[79]

Ultimately, the plurality invoked *Brown v. Board of Education* to suggest that the act of classifying children on the basis of race for the purposes of school assignment was unconstitutional.[80] Roberts concluded by saying that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[81]

While Justice Kennedy joined in the judgment and in portions of the opinion, he declined to go as far as the plurality in placing limitations on the use of race in the context of primary education. He found that contrary to the plurality's assertion that the very use of race constituted perpetuation

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[74] *Parents Involved*, 551 U.S. at 722.

[75] *Id.* at 723.

[76] *Id.* at 734.

[77] *Id.* at 735.

[78] *Id.* at 726. The plurality discussion states that the evidence of these benefits is "mixed" despite the fact that a brief was filed on behalf of over five hundred social scientists expressing their support for the Seattle and Louisville plans and their belief in the necessity of diversity in the K–12 context. *See* Brief of 553 Soc. Scientists, *supra* note 11.

[79] *Parents Involved*, 551 U.S. at 733.

[80] *Id.* at 746–47.

[81] *Id.* at 748.

of racial discrimination, the fact that "school districts consider these plans to be necessary should remind us our highest aspirations are yet unfulfilled."[82] However, he objected to the utilization of race in a "crude" fashion, which, in his opinion, reduced students to their racial labels.[83] Kennedy wrote separately to express his belief that diversity and avoidance of racial isolation were compelling interests and thus were legitimate ends for a school district to pursue.[84] Kennedy stated:

> If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.[85]

Kennedy's race-conscious, but not explicitly race-based, suggestions for increasing student diversity included strategic selection of school sites while paying attention to neighborhood demographics and targeted recruitment—methods that would not necessarily trigger strict scrutiny because of their facial neutrality.[86] Despite his preference for avoiding racial classifications, Kennedy did not foreclose this option in limited circumstances, stating that school districts could, "if necessary, [pursue] a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component."[87]

The general consensus among commentators following the Court's fractured decision was that Kennedy's non-binding opinion will come to have precedential value.[88] Between Kennedy's refutation of the plurality's far-reaching dismissal of use of race in student assignment, and the strenuous dissent of the remaining four Justices, there appear to be five votes on the Court for a compelling governmental interest in avoiding

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[82] *Id.* at 782 (Kennedy, J., concurring in part and concurring in the judgment).

[83] *Id.* at 786.

[84] *Id.* at 797–98.

[85] *Id.* at 788–89.

[86] *Id.* at 789.

[87] *Id.* at 790.

[88] *See, e.g.*, Michelle Adams, *Stifling the Potential of* Grutter v. Bollinger*:* Parents Involved in Community Schools v. Seattle School District No. 1, 88 B.U. L. REV. 937, 979 (2008) (noting that Kennedy's opinion, although dicta, should be given "great weight"); James E. Ryan, Comment, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 137 (2007) (stating that Kennedy's opinion "appears controlling").

racial isolation or promoting student body diversity in the K–12 context.[89] However, the Court's decision was generally met with disapproval from many commentators who viewed it as foreclosing potential opportunities for increasing diversity that had been briefly opened by *Grutter*.[90] The plurality's opinion, while asserting faithfulness to *Brown*, misappropriates a notion of "colorblindness" to justify a redirection of race-based jurisprudence.[91] Moving forward, the plurality would seemingly foreclose any explicit use of race in the K–12 school context absent an existing consent decree. Given the history of limited success of non-race-based integration efforts, drawing this artificial distinction between de jure and de facto segregation, to which Kennedy also adheres in his concurrence, severely curtails schools' ability to effectively diversify their student body.[92]

The ultimate impact of *Parents Involved* may be more symbolic than critics of the opinion suggest. Very few districts are currently engaged in active attempts to integrate their student bodies, and even if more chose to pursue this policy goal, most could not achieve diversity reflective of broader society because of high concentrations of one particular ethnic group within their boundaries.[93] For the districts that could realistically prioritize integration, the race-neutral methods that Kennedy left viable may prove difficult to implement due to political or economic feasibility issues. These methods also seem frustratingly roundabout given that the most efficient means of pursuing a racial composition goal would be to employ race—but this approach is presumptively barred by *Parents Involved*. In his Comment on the *Parents Involved* opinion, Professor James Ryan stated that with respect to the goal of integration, the majority

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[89] *See* Adams, *supra* note 88, at 985 (finding five votes for a compelling interest in student body diversity in K–12 education); Ryan, *supra* note 88, at 137 (same). It is worth noting that these articles were written prior to the retirement of Justices Souter and Stevens, both of whom joined the dissent in *Parents Involved*. I will assume, for the purposes of this Comment, that Justices Sonia Sotomayor and Elena Kagan would vote similarly to their predecessors on this issue. There is some evidence that this would likely be the case. *See generally* Jess Braven & Nathan Koppel, *The Sotomayor Nomination: Record Shows Ruling Within Liberal Mainstream*, WALL ST. J., May 27, 2009, at A6 (describing Justice Sotomayor's pattern of rulings before her appointment to the Supreme Court and concluding that her addition to the Court "isn't likely to change the outcome on cases where the Supreme Court typically splits 5–4").

[90] *See, e.g.*, Adams, *supra* note 88; James, *supra* note 34, at 808.

[91] Goodwin Liu, *"History Will Be Heard": An Appraisal of the* Seattle/Louisville *Decision*, 2 HARV. L. & POL'Y REV. 53, 54 (2008) (stating that despite Justice Roberts's claims, the plurality opinion is in opposition to the legacy of *Brown*).

[92] *See* James, *supra* note 34, at 822 (noting that Kennedy's opinion is "marked by a limited understanding of the practical limitations of integration efforts" and that his suggested methods have consistently failed in the past for "lack of community support").

[93] *See* Ryan, *supra* note 88, at 132–33 (noting that students in most districts are "primarily if not exclusively of one race or ethnicity").

"ma[de] the goal itself seem dastardly, while Justice Kennedy accepts the goal but voices intense distaste over the most straightforward means of achieving it."[94] Thus, the decision appears to have made an "already remarkably difficult struggle even harder, if not impossible."[95]

B. Implications of Parents Involved *for Racial Balancing Provisions*

Prior to *Parents Involved*, most racial balancing provisions seemed constitutionally sound under *Grutter*.[96] In recognizing a compelling governmental interest in student body diversity in the context of higher education, *Grutter* appeared to open the door for validation of a compelling governmental interest in student body diversity more generally, which seemingly encompassed the ends pursued by racial balancing provisions. However, even under this broad interpretation of *Grutter*, which was not ultimately adopted by the Court in *Parents Involved*, one commentator expressed concerns regarding the constitutionality of mandatory balance provisions, determining that they would likely fail narrow tailoring.[97]

Following *Parents Involved*, the constitutionality of all racial diversity and balancing provisions was thrown into doubt. In failing to explicitly recognize a compelling governmental interest in student diversity in the K–12 context, the Court left states with only a remedial justification for the explicit use of race in student admissions. General nondiscrimination provisions in the charter school admissions context, however, are likely still constitutionally permissible. They do not explicitly categorize racially, but instead merely prohibit discrimination on the basis of race while requiring compliance with federal and state law. Yet, current evidence about enrollment suggests that such general prohibitions on de jure discrimination do little to eliminate de facto segregation.[98] Therefore, while these provisions are still constitutionally sound, their efficacy in reducing charter school segregation is questionable.

With respect to mandatory and suggested racial balance provisions, states can still make the argument that there is a compelling governmental interest in avoiding racial isolation or improving student body diversity. Kennedy's concurrence, plus the four dissenting justices, generally

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[94] *Id.* at 133.

[95] *Id.* at 156.

[96] Grutter v. Bollinger, 539 U.S. 306, 306–07 (2003).

[97] *See* Gajendragadkar, *supra* note 36, at 176–79 (determining that "strong racial balancing provisions fail . . . narrow tailoring" because they require mechanical use of race as a decisive factor).

[98] *See generally* FRANKENBERG & SIEGEL-HAWLEY, *supra* note 7 (providing statistics regarding significant segregation in charter schools nationally that typically outpaces that of public school counterparts).

recognizes such an interest,[99] suggesting that a majority of the Court would agree that a mandatory or suggested racial balancing provision was in furtherance of compelling governmental ends.[100] However, establishing this interest is only the threshold inquiry of the strict scrutiny analysis. The specific language of the statute and the narrow tailoring analysis are still the key determinants of constitutionality of these provisions.[101]

Mandatory balancing provisions that specify acceptable percentage point deviations from the community racial balance will almost certainly fail strict scrutiny. This outcome is foreshadowed by *Beaufort I*, which found that South Carolina's strict racial balance mandate was unconstitutional even prior to *Parents Involved*.[102] For provisions of this nature to be constitutional, states would have to show a significant history of de jure segregation. Absent such findings, de facto segregation is insufficient to explicitly categorize students and seek to attain racial balance.[103]

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[99] Stuart Biegel has analyzed the multiple compelling governmental interests recognized by the competing opinions in *Parents Involved*. Among them, he enumerates the avoidance of racial isolation and pursuit of a diverse student population (from Kennedy), and from Breyer and the dissent, the combination of the elimination of the enduring impacts of segregation, creating schools that "provide better educational opportunities for all children" and "an effort to help create citizens better prepared to know, to understand, and to work with people of all races and backgrounds, thereby furthering the kind of democratic government our Constitution foresees." Stuart Biegel, *Court-Mandated Education Reform: The San Francisco Experience and the Shaping of Educational Policy After* Seattle-Louisville *and* Ho v. SFUSD, 4 STAN. J. C.R. & C.L. 159, 178–79 (2008) (quoting Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. 1, 551 U.S. 701, 843 (2007) (Breyer, J., dissenting)) (internal quotation marks omitted). Biegel takes the view that this amalgamation of interests and opinions suggest *Parents Involved* represents less of a shift in jurisprudence than has been argued by others, noting "[i]t is arguably difficult to conclude that *Brown* has been overruled when five Justices . . . together determine that numerous interests exist that would justify race-conscious school desegregation under the Fourteenth Amendment." *Id.* at 179.

[100] *See* Adams, *supra* note 88, at 985; Ryan, *supra* note 88, at 137.

[101] *See* Preston C. Green & Joseph O. Oluwole, *The Implications of* Parents Involved *for Charter School Racial Balancing Provisions*, 229 EDUC. L. REP. 309, 324–25 (2008) [hereinafter *Implications of* Parents Involved] (noting that the strength of the provision, and specifically whether the statute imposes strict numeric requirements upon the school, will determine whether the provision survives constitutional analysis); Oluwole & Green, *supra* note 37, at 46–47 (determining that the means used in furtherance of "hortatory" provisions will determine whether or not they pass constitutional muster).

[102] Beaufort Cnty. Bd. of Educ. v. Lighthouse Charter Sch. Comm. (*Beaufort I*), 516 S.E.2d 655 (S.C. 1999); Beaufort Cnty. Bd. of Educ. v. Lighthouse Charter Sch. Comm. (*Beaufort II*) 576 S.E.2d 180 (S.C. 2003).

[103] *See Parents Involved*, 551 U.S. at 720 (finding that only new de jure segregation or a desegregation decree still in force can justify remedial action to attain racial balance); *Implications of* Parents Involved, *supra* note 101, at 324 ("To satisfy the Court's requirements, those states [with mandatory balancing provisions] would need to justify the racial balancing provision with a compelling interest in remedying the effects of past intentional discrimination."); Oluwole & Green, *supra* note 37, at 48–49 (describing that following the Court's opinion in *Parents Involved*, racial balancing on its own is not a compelling governmental interest in the field of public education). Oluwole & Green also note that these plans, in the absence of remedial justifications, fail the narrow tailoring inquiry because they do not include a "logical stopping point." *Id.* at 51.

Suggested racial balance provisions that allow for significant deviation from the reflective racial demographic of the community, and utilize goal-based language rather than mandates, may have a better chance of surviving the narrow tailoring inquiry. However, the Court may still be hostile to these provisions depending on the means employed to achieve the desired "racially diverse" end. If, in pursuit of a generally diverse group of enrollees, the school attempts to utilize quotas or explicitly categorizes each student by race for the purposes of selecting their student body, then the provision would be unconstitutional as applied.[104] Legislatures and schools must simultaneously walk a line between such explicit use of race and vague, general categorizations. In the process of attempting to satisfy the preference for more neutral means of meeting the race conscious ends, Kennedy's opinion still requires that the racial categories utilized not be "broad and imprecise."[105] This raises many questions regarding how schools and policymakers may categorize students in a manner that still complies with Kennedy's opinion. Both districts in *Parents Involved* used binary conceptions of race, categorizing students as white or nonwhite in the case of Seattle, and black or nonblack in the case of Louisville, which Kennedy found problematic.[106] However, Kennedy is very vague regarding how far one must go to remedy this failing.[107] Would it be sufficient to categorize some students as "Asian," or would it be necessary to include subgroups, such as "Chinese," "Japanese," and "Vietnamese"? Kennedy's opinion does not provide as much guidance as policymakers might like.[108]

The use of racially neutral means in attempting to create racially diverse student bodies seemingly would not subject a charter school to heightened scrutiny, and thus a school would only need to demonstrate a rational basis for their actions.[109] While an unweighted lottery might not be narrowly tailored to the desired result of racial composition generally reflective of the community, it might not trigger strict scrutiny because it would not involve the use of racial classifications. As a result, the fact that an unweighted lottery might be potentially under- and over-inclusive with respect to the end of "student body diversity" would be seemingly

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[104] Oluwole & Green, *supra* note 37, at 46.

[105] *Parents Involved*, 551 U.S. at 785 (Kennedy, J., concurring in part); *see Implications of* Parents Involved, *supra* note 101, at 325.

[106] *Parents Involved*, 551 U.S. at 783.

[107] *Id.* at 787–89.

[108] Ryan, *supra* note 88, at 135–38 (noting that Kennedy does not provide any details regarding his proposals, and other than referencing *Grutter* as a starting point, "[t]he rest is left to the imagination").

[109] *See Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring); *Implications of* Parents Involved, *supra* note 101, at 325.

irrelevant to the constitutional inquiry. However, given the trajectory of the Court's race jurisprudence and the explicitly race-based goals articulated in the language of the statutes, it is possible that the very invocation of a race-based ends would be sufficient for the plurality to find that strict scrutiny was applicable to the statute.[110] If this is the case, Kennedy has essentially created a catch-22 for school districts—requiring heightened scrutiny, but permitting only broad race-neutral means that cannot be shown to be narrowly tailored to the race-based ends.

A final consideration in applying *Parents Involved* in this context is to recognize the inherent differences between choice plans within a traditional school district and the elective nature of charter schools. Concerns about denial of educational opportunity may be mitigated by the fact that in applying to a charter school, students and parents are voluntarily submitting to the school's enrollment requirements, and if they do not gain acceptance, they still have undiminished access to their neighborhood school.[111] Moreover, much of the plurality's concerns regarding utilization of race as a factor centered on the potential for stigma.[112] However, because the charter school enrollment process is non-competitive, denial on racial grounds is unlikely to be stigmatizing.[113]

Parents Involved casts doubt on the constitutionality of racial balancing provisions. Racial balancing for the sake of having proportionality is not a compelling governmental end, and simply mandating percentages appears quota-like and thus is not narrowly tailored to the goals of achieving a diverse student body or avoiding racial isolation. However, suggestive provisions that do not mandate percentages

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[110] This argument is an extension of the doctrine of colorblindness. The plurality never explicitly says that race-based ends necessarily trigger strict scrutiny, but it is not far-fetched to presume that the plurality would find that all invocations of race—whether as the means to an end or the ends themselves—require application of heightened scrutiny. Justice Thomas's statements regarding the moral equivalence between the use of race for segregation or integration, *see* Grutter v. Bollinger, 539 U.S. 306, 349–350 (2003) (Thomas, J., dissenting), and Justice Scalia's concurrence in *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681–82 (2009) (Scalia, J., concurring), where he suggests that Title VII itself may be unconstitutional because of its race-based ends, support this contention. Indeed, many scholars have recognized that this is a logical extension of the trajectory of the Roberts' Court's race-based jurisprudence. *See, e.g.*, Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73 (2010) (finding Ricci-type conflation of racial attentiveness and discrimination flowing, in part, from colorblindness doctrine).

[111] *See Implications of* Parents Involved, *supra* note 101, at 315.

[112] *See Parents Involved*, 551 U.S. at 745–48 (equating the experience of race-based classification for the purposes of student assignment in *Brown* with the system employed by Seattle).

[113] *See Implications of* Parents Involved, *supra* note 101, at 315; *cf.* Barbara J. Flagg, *In Defense of Race Proportionality*, 69 OHIO ST. L.J. 1285, 1305 (2008) ("[I]t is immediately problematic when any person is given a racial designation and then treated as if that characteristic was the only one that matter[ed]. . . [but i]n a world in which race continues to affect decisionmaking in deep and intractable ways, is it better policy to disavow the explicit use of racial designations and attempt to grapple with that which lies below the surface, or is it better to meet the problem of racially inequitable resource distribution head on?").

or methodology for attaining a racially diverse student body, or those that approve of those methods articulated by Kennedy in his concurrence, may still be constitutional.[114] While these provisions may be permissible, there are serious questions as to the efficacy of these indirect methods given the current disparate racial enrollment in charter schools and, in particular, the racial isolation that black charter school attendees experience.[115]

III. STATE ACTOR STATUS: WHAT ARE CHARTER SCHOOLS?

Following *Parents Involved*, schools and districts are rightly concerned that efforts to expressly address student racial diversity may be legally vulnerable. The decision seems to put severe limitations on policymakers' ability to alter school composition beyond the default demographics that result from parental choice and residential housing preferences. But what if charter schools were exempt from compliance with *Parents Involved*? The Constitution rarely applies to private actors except under limited circumstances. This principle was elucidated by the Court in the *Civil Rights Cases*, which held that the Fourteenth Amendment applied only to "state actors."[116] Historically, this ruling hamstrung efforts to combat segregation and was used to uphold private discrimination in housing, restaurants, and hotel accommodations.[117] However, given the trajectory of the Supreme Court's recent jurisprudence on issues of race, avoidance of characterization as a state actor for the purposes of the Fourteenth Amendment may free charter schools to explore more direct and effective means of increasing student body diversity. While many commentators and courts have assumed that charter schools are indeed state actors, thorough analysis under Supreme Court state action jurisprudence indicates that this may not be the case for all school functions. If charter schools can retain their "private" status for the purposes of student assignment, they

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[114] *See Implications of* Parents Involved, *supra* note 101, at 324 (noting that provisions which require the adoption of policies targeted towards increasing diversity "might have a greater chance of surviving constitutional review"); Oluwole & Green, *supra* note 37, at 46 ("Given that hortatory provisions do not spell out the means to be used, *Parents Involved* suggests that the Court might be more amenable to such provisions.").

[115] *See generally* FRANKENBERG & SIEGEL-HAWLEY, *supra* note 7 (describing patterns of intense racial isolation and lack of integration generally in charter schools).

[116] Civil Rights Cases, 109 U.S. 3 (1883).

[117] *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171, 177 (1972) (finding failure of a private club to serve a drink to an African-American guest of a member was not state action, nor did the plaintiff have standing to challenge the state's distribution of a liquor license to a club with discriminatory policies); Garner v. Louisiana, 368 U.S. 157, 163, 174 (1961) (finding that the legal prosecution of black patrons who refused to move from white lunch counters was not state action but reversing the conviction for disruption of the peace on due process grounds); Corrigan v. Buckley, 271 U.S. 323, 331 (1926) (upholding a racially restrictive covenant because contracts between private individuals are not state action).

will not be governed by *Parents Involved*, and they may be able to employ a range of different techniques to assure racial balance. This section sets forth the various tests for state action and then applies these tests in the context of charter schools.

A. Close Nexus

The "close nexus" test, set forth in *Jackson v. Metropolitan Edison Co.*, requires that there be a "close nexus" between state regulation and the challenged action.[118] In *Jackson*, a petitioner failed to make payments on her electric bill, and Metropolitan disconnected her service. Jackson challenged the termination of service without due process.[119] The Court held that despite heavy regulation of the utility company by the State, the connection between the State and the disconnection of service was too attenuated to attribute the action to the government.[120] "[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[121]

B. Government Coercion Test

The government coercion test is closely related to the close nexus test. Under the government coercion test, a private entity is a state actor if the State has exercised some coercive power over the entity's decision-making process such that the action can be deemed to be that of the State.[122] In *Blum v. Yaretsky*, Medicaid patients filed a class action suit challenging the ability of state-regulated and state-funded nursing homes to make discharge or transfer decisions without notice or an opportunity to be heard.[123] The Court held that the nursing homes were not state actors because the State had exercised no "coercive" power or "significant encouragement, either overt or covert" over the patient care decisions.[124] The Court went on to say that approval or acquiescence to the decisions was insufficient to demonstrate coercion, and

> [t[hat programs undertaken by the State [that] result in substantial funding of the activities of a private entity is no

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[118] Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

[119] *Id.* at 347.

[120] *Id.* at 350–51.

[121] *Id.* at 351.

[122] Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

[123] *Id.* at 991.

[124] *Id.* at 1004.

> more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.[125]

C. Public Function Test

Many challengers seeking constitutional guarantees against private entities have suggested that the provision of a public function renders the entity a state actor. However, courts have held that in order to constitute state action, the function must be under the exclusive purview of the State.[126] In *Rendell-Baker v. Kohn,* the local government contracted with a private school to provide education services to its at-risk students and provided 90 percent of the school's operating budget.[127] Rendell-Baker, a teacher, was discharged after voicing her support of a proposal to which the school director objected.[128] Rendell-Baker claimed her termination violated her First Amendment right to free speech.[129] The Court stated that the performance of a function that serves the public does not render the action that of the State.[130] Rather "the question is whether the function performed has been 'traditionally the *exclusive* prerogative of the state.'"[131] The Court noted that legislative intention to provide education to at-risk students "in no way makes these services the exclusive province of the State."[132]

The courts have consistently reaffirmed *Rendell-Baker*'s holding that education is not an exclusive public function. In *Logiodice v. Trustees of Maine Central Institute*, the circuit court held that a private school contracted by the State to be the sole provider of public high school education in the district was not a state actor subject to the Due Process Clause of the Fourteenth Amendment.[133] The court found that the plaintiff could not satisfy the public function test because "education is not and never has been a function reserved to the state"[134] due to a rich history of private and religious education in this country. The court also rejected the

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[125] *Id.* at 1011.

[126] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

[127] *Id.* at 832.

[128] *Id.* at 834.

[129] *Id.*

[130] *Id.* at 842.

[131] *Id.* (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974) (emphasis added)).

[132] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

[133] Logiodice v. Trs. of Maine Cent. Inst., 296 F.3d 22, 31 (1st Cir. 2002).

[134] *Id.* at 26.

plaintiff's assertion that funding from the State should broaden the scope of the exclusivity analysis, noting that the mere fact of contracting for provision of a service that the State could also provide itself does not create liability on the part of the municipality for failure to ensure the same constitutional protections the government must provide when it acts on its own behalf.[135]

D. Entwinement

"Entwinement," articulated in *Brentwood Academy v. Tennessee Scholastic Athletic Association*,[136] is the most recent addition to the potential tests for state action, and thus may be the most ambiguous to apply. In finding that the governing body of a school sports association, which encompassed both private and public schools, was a state actor, the Court stated that "[t]he nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings."[137] The membership of the Association was composed of both private and public schools, but public schools constituted almost 85 percent of the affiliated institutions.[138] All members of the Association that voted on actions were principals, assistant principals, or superintendents, and all meetings were held during official school hours.[139] Brentwood Academy challenged an Association-mandated sanction on its athletic programs under the First and Fourteenth Amendments.[140] After the circuit court found no state action under *Rendell-Baker* or *Blum*, the Supreme Court reversed.[141]

The Court rejected the argument that failure to satisfy previous tests for state action was dispositive in this case.[142] Instead, the Court emphasized the degree of public employees' involvement in the workings of the Association, and in particular the fact that they were acting in their official capacity when serving as members of the Association's voting

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[135] *Id.* at 31 ("The locality does not thereby become liable under the Due Process Clause for failing to insist that the private entity offer exactly the same level of procedural protections to employees or beneficiaries of the services that the government must afford when it acts for itself.").

[136] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n., 531 U.S. 288 (2000).

[137] *Id.* at 298.

[138] *Id.* at 291.

[139] *Id.*

[140] *Id.* at 293.

[141] *Id.* at 294.

[142] *See id.* at 295–96.

body.[143] This "entwinement" led to a conclusion of state action despite the fact that that the Association was characterized as private by law.[144]

The court in *Logiodice* applied this new test but still declined to find state action.[145] Unlike in *Brentwood Academy*, Maine Central Institute, the private school contracted by the district to provide free public education to its high school students, was run by private and not public officials.[146] In addition, the court noted that the particular activity at issue in *Logiodice* was in no way entwined with the State.[147] The student in question challenged Maine Central Institute's disciplinary policies, but the contract expressly delegated this function to the private school.[148] This is distinguishable from *Brentwood*, where the challenged action was that of a body comprised largely of public employees fulfilling obligations associated with their official positions.

E. State Action and Charter Schools

To date, cases involving alleged infringement of constitutional rights by charter schools have been inconsistent, both in their outcomes and in their application of the state action doctrine. Most frequently, courts assume the conclusion of state action while failing to conduct the requisite analysis under any of the tests recognized by the Supreme Court.[149] Perhaps counsel for the charter schools fail to brief the issue, given that courts consistently highlight the fact that charter schools are legislatively designated as free public schools and subsequently find such language

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[143] *Id.* at 300.

[144] *Id.* at 302.

[145] *See* Logiodice v. Trs. of Maine Cent. Inst., 296 F.3d 22, 28 (1st Cir. 2002).

[146] *Id.*

[147] *Id.*

[148] *Id.* ("[T]he Trustees shall have the sole right to promulgate, administer and enforce all rules and regulations pertaining to student behavior, discipline, and use of the buildings and grounds.").

[149] *See, e.g.*, Villanueva v. Carere, 85 F.3d 481, 487 (10th Cir. 1996) (finding no discriminatory intent when a neighborhood school closed in order to open a charter school, but failing to conduct state action analysis before so concluding); Porta v. Klagholz, 19 F. Supp. 2d 290, 298 (D. N.J. 1998) (presuming without conducting analysis that the charter school was a state actor, but also finding that the operation of such a school in church space was not a per se violation of the Constitution); Jones v. SABIS Educ. Sys. Inc., 52 F. Supp. 2d 868, 878 (N.D. Ill. 1999) (stating that a § 1983 claim could proceed against individual employees of the private corporation that held the charter without conducting state action analysis); Daugherty v. Vanguard Charter Sch. Acad., 116 F. Supp. 2d 897, 917 (W.D. Mich. 2000) (granting summary judgment to the charter school on the grounds that there was no question of fact as to whether the school had violated the establishment clause, without conducting state action analysis to determine whether the First Amendment would be applicable to the charter school); *see also* Bradley T. French, *Charter Schools: Are For-Profit Companies Contracting for State Actor Status?*, 83 U. DET. MERCY L. REV. 251, 252 (2006) (noting that recent decisions have "made assumptions in place of the necessary, thorough analysis prescribed by the United States Supreme Court").

determinative of their state actor status without conducting thorough legal analysis.

In relying on the language of the authorizing statute, courts assume that the designation of charter schools as "public" schools mandates that the school is a state actor for purposes of constitutional claims.[150] In *Matwijko v. Board of Trustees of Global Concepts Charter School*, the school moved for judgment on the pleadings on the basis that it was not a state actor for the purposes of a Section 1983 claim.[151] The court denied its motion, conducting an analysis of the statute. Because the law conceived of the school as an "'independent and autonomous *public* school' performing 'essential public purposes and governmental purposes of th[e] state,'" the court reasoned that the school was therefore a state actor.[152] Even while acknowledging that the State expressly exempted charter schools from the burdens of various types of regulations in order to further their mission of educational reform, the court found that their designation as public mandated the conclusion that they were entities of the State.[153] The court also rejected analogies to *Rendell-Baker* and *Logiodice* as "inapposite" because the schools implicated in those cases were private schools and therefore, in the eyes of the court, readily distinguishable from the Global Concepts Charter school at issue in *Matwijko*.[154]

However, this reliance on statutory language is misplaced and in direct opposition to Supreme Court precedent, which has consistently found that legislative designation is not dispositive of state actor status.[155] In both *Brentwood* and *Lebron v. National Railroad Passenger Corp.*, the Court looked beyond the mere statutory characterization of the actors, instead applying a more searching analysis of the functions and purpose.[156] While in these circumstances the Court looked past designation as "private" to

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[150] *See* Jordan v. N. Kane Educ. Corp., No. 08C4477, 2009 WL 509744, at *3 (N.D. Ill. Mar. 2, 2009) (concluding that Cambridge Lakes Charter Schools, which is operated by North Kane Educational Corporation, is a state actor because charter schools are designated as "public schools" by the authorizing statute).

[151] Matwijko v. Bd. of Trs. of Global Concepts Charter Sch., No. 04-CV-663A, 2006 WL 2466868, at *1 (W.D.N.Y. Aug. 24, 2006).

[152] *Id.* at *5 (quoting N.Y. EDUC. §§ 2853(1)(c)–(d) (McKinney 2009)).

[153] *Id.*

[154] *Id.*

[155] *See, e.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298 (2001) (determining that the association was a state actor although the original charter was "nominally private"); Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 400 (1994) (finding that Amtrak was a state actor despite legislation that explicitly stated that it was not a governmental entity).

[156] *See Lebron*, 513 U.S. at 378–80 (ignoring the characterization of Amtrak as "private" and instead analyzing its actions and purposes to determine that Amtrak is a government entity for constitutional purposes); *Brentwood Acad.*, 531 U.S. at 296 ("[T]he character of a legal entity is determined neither by its expressly private characterization in statutory law, nor by the . . . government officials or agencies.").

find that the entities were actually "public" for legal purposes, it is appropriate to assume that this analysis should also cut in the other direction. This does not mean that a legislative designation as "public" is irrelevant. Rather, it is possible that this label alone is insufficient to make a legal determination of "state action." For example, the private school in *Rendell-Baker* was, for all intents and purposes, a "public" school because it was the only publicly-funded free school in the district. In spite of this, the Court still found that the school was not a state actor.[157] Charter schools are similarly situated in that they are providing public education (in the sense that it is free and available to all students within the district without respect to achievement), but are incorporated and operated by private entities. Thus, a statutory designation as "public" should not be determinative of legal status for purposes of the state action analysis. While the language may be facially persuasive, it does not implicate specific information about the manner in which the entity functions, which is of greater importance to the analysis.[158]

Other courts have been focused on the "function" analysis but have defined this more narrowly in order find state action under the "exclusive public function" test articulated in *Rendell-Baker*.[159] For example, in *Scaggs v. New York Department of Education,* the court held that the charter school was a state actor for the purposes of a claim regarding educational adequacy.[160] In comparing that case to *Rendell-Baker*, the court noted that "[here] the claims related to the alleged total inadequacy of a school to provide free public education to its students while receiving state funding, being bound to state educational standards and purporting to offer the same educational services and facilities as any other public school."[161] While *Rendell-Baker* focused on the concept of the general provision of education in analyzing whether the private actor performed an exclusively public function, the court in *Scaggs* noted that claims against charter schools related specifically to the "nature and quality of education" provided are properly brought under Section 1983.[162]

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[157] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

[158] *See, e.g.*, Jackson v. Metro. Edison Co., 419 U.S. 345, 358 (1974) (finding that despite legislative designation as a "public" utility, the electric company was not a state actor).

[159] Scaggs v. N.Y. Dep't. of Educ., No. 06-CV-0799, 2007 WL 1456221, at *13 (E.D.N.Y. May 16, 2007).

[160] *Id.*

[161] *Id.*

[162] *Id.* Section 1983 regulates civil actions for the deprivation of rights by state actors. 42 U.S.C. § 1983 (2006).

Similarly, in *Irene v. Philadelphia Academy Charter School*,[163] the court found that a charter school was a state actor because it performed the public function of educating individuals pursuant to the Individuals with Disabilities Education Act (IDEA).[164] In *Irene*, the claim alleged a complete failure to provide adequate education for students with disabilities, including non-compliance with students' individual education plans, and tampering with and withholding the records of the plaintiffs' children.[165] The court held that "where a state . . . receives federal funds under the IDEA . . . [and] authorizes charter schools to effectuate the State's duties under the IDEA, it is appropriate to treat such charter schools as a state actor at least in the context of resolving claims brought under the IDEA."[166] Without explicitly stating as much, the court was applying the "exclusive public function" test to the provision of services for disabled students. Its analysis suggests that in accepting funds for the purposes of providing IDEA-compliant education, the charter school was implicitly acknowledging a contract to perform the exclusive public function of adequately educating students with disabilities, and that it was therefore appropriate to hold this quasi-private entity to the same constitutional and legal standards as a public actor.

Both *Irene* and *Scaggs* articulate holdings that are not broadly in tension with the existing state action doctrine, as it seems appropriate to hold charter schools accountable as state actors in questions relating to the fundamental provision of a basic education. Based on their statutory authorization, this is the "function" for which charter schools were created by the State. Moreover, failure to adequately provide an education is the basis for revocation of a charter, and thus is clearly subject to state regulation.[167] This suggests that in the context of educational adequacy challenges, plaintiffs could also potentially argue for state actor status under entwinement or close nexus in addition to the more narrow construction of the exclusive public function analysis used in *Scaggs* and *Irene*.

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[163] Irene v. Phil. Acad. Charter Sch., No. Civ. A. 02-1716, 2003 WL 24052009, at *11 (E.D. Pa. Jan. 29, 2003).

[164] Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400(a) (2006).

[165] *Irene*, 2003 WL 24052009, at *2.

[166] *Id.* at *11.

[167] *See* Robert Martin, *Charting the Court Challenges to Charter Schools*, 109 PENN ST. L. REV. 43, 53 n.70 (2004) (enumerating reasons for which charters may be revoked). One point championed by charter school advocates is the perception that these schools carry a higher degree of accountability for performance, which presumably means that they should be exceeding the minimum standards of educational adequacy required by state constitutions. It is very much a point of contention as to whether this happens in reality. *See Multiple Choice*, *supra* note 23 and accompanying text; *see also* Hoxby, *supra* note 23 and accompanying text.

To date, the two cases in which courts have actually applied the requisite Supreme Court state action analysis to charter schools are split. In *Riester v. Riverside Community School*, the court denied Riverside's motion for dismissal of a claim in which a teacher alleged that she had been fired for exercising her First Amendment rights.[168] The school filed the motion on the basis that it was not a state actor. However, the court applied the public function and entwinement tests to find state action.[169] The court noted that "free, public education, whether provided by public or private actors, is an historical, exclusive, and traditional state function."[170] The court distinguished *Rendell-Baker* based on the fact that the school in *Rendell-Baker* had been started by solely private actors, whereas Riverside was started with the aid of the state authorizing statute.[171] Under entwinement, the court noted that the defendants were granted the authority to provide this free, public education in a non-discriminatory manner and that "no other entity . . . ha[d] been so mandated by the State of Ohio besides local school districts."[172] Therefore, the court found that the conduct was entwined such that the action of Riverside was indistinguishable from that of the State.[173] While the *Riester* court ostensibly applied the requisite analysis, at least one commentator has noted that "subsequent courts are again left with precedent relying on less than sufficient analysis of an otherwise complex state actor question."[174]

In *Caviness v. Horizon Community Learning Center*, the court held that a charter school was not a state actor for the purposes of a Fourteenth Amendment due process claim and granted the school's motion to dismiss.[175] In rejecting the plaintiff's assertion that the categorization of the school as a "public" school by the authorizing legislation was determinative, the court cited *Jackson*[176] and *Brentwood*[177] for the proposition that statutory designation is not determinative of state actor

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[168] Riester v. Riverside Cmty. Sch., 257 F. Supp. 2d 968, 969, 973 (S.D. Ohio 2002).

[169] *Id.* at 972.

[170] *Id.*

[171] *Id.* at 972–73.

[172] *Id.* at 973.

[173] *Id.*

[174] French, *supra* note 149, at 260.

[175] Caviness v. Horizon Cmty. Learning Ctr., No. CV-07-0635-PHX-FJM, 2007 WL 4468721, at *3 (D. Ariz. Dec. 14, 2007), *aff'd* 590 F.3d 806 (9th Cir. 2010).

[176] Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974) (noting that legislative designation as public utility was not determinative of state actor status).

[177] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2000) (finding that original authorization as private was not determinative of state actor status).

status.[178] The court rejected the public function argument on the basis that provision of education was not, nor had it ever been, the exclusive prerogative of the State.[179] The court also found that the nexus between the challenged action and the action of the State was not sufficiently close, and that the school was not compelled, coerced or "will[fully] engaged in joint action with the government" with respect to employment decisions, which were not regulated by the State in the context of charter schools.[180]

IV. STATE ACTION IN THE CONTEXT OF STUDENT SELECTION

The application of the formal state action tests and various scattered precedents to the context of student body diversity and racial balance suggests that in states where the authorizing statute does not mandate or suggest racial balance, charter schools are not state actors for the limited purpose of student assignment to schools and may therefore not be governed by *Parents Involved.*

A. Public Function

Under *Rendell-Baker*, and because the question at issue does not address educational adequacy or quality, the broad definition of "function" appears to be the appropriate analysis. With the long-standing tradition of the existence of private schools in this country, provision of education cannot be considered the exclusive prerogative of the State, and thus charter schools should not broadly be characterized as state actors solely because they provide free public education.[181] Given the strong analogy to the circumstances of *Rendell-Baker*, some commentators have argued that the public function test is the most apt in the charter school context, and further note that this seemingly on-point Supreme Court precedent provides a significant barrier to those who seek to find state action on the part of charter schools.[182]

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[178] *See Caviness*, 2007 WL 4468721, at *1.

[179] *See id.* at *2.

[180] *Id.*

[181] *See* Rendell-Baker v. Kohn, 457 U.S 830, 842 (1982); Logiodice v. Trs. of Me. Cent. Inst., 296 F.3d 22, 26–27 (1st Cir. 2002); Justin M. Goldstein, Note, *Exploring "Unchartered" Territory: An Analysis of Charter Schools and the Applicability of the U.S. Constitution*, 7 S. CAL. INTERDISC. L.J. 133, 170 (1998) (noting that because private schools have existed for a long time, charter schools are not likely to be found to perform an exclusive public function). *But see* Riester v. Riverside Cmty. Sch, 257 F. Supp. 2d 968, 972 (S.D. Ohio 2002) (finding that "free, public education, whether provided by public or private actors, is an historical, exclusive, and traditional state function").

[182] *See* French, *supra* note 149, at 263 (noting that because few, if any functions, are truly performed solely by the state, "[t]his exclusive reservation of the function to the states has proven to be a significant limitation for the courts in concluding that there is state action"); Jason Lance Wren, Note, *Charter Schools: Public or Private? An Application of the Fourteenth Amendment's State Action*

B. Close Nexus and Compulsion

Charter schools were created to give educators greater latitude and freedom from bureaucratic regulation and state oversight, which in the past have acted as impediments to innovative reforms. Given this context, it is difficult to satisfy the close nexus and compulsion tests, as the legislative history and authorizing statutes frequently grant charter schools explicit exemptions from many state regulations.[183] Additionally, the decision-makers in the charter school context are private individuals employed in a private capacity. In many cases, even charter school teachers are not considered state employees.[184] "Because the private individuals make all decisions regarding operation of the schools, no link can be established between the State and the challenged action, and no state compulsion or coercion is present."[185] Even in the case of a state that grants fewer freedoms to its charter schools and mandates compliance with many state guidelines, extensive regulation alone has repeatedly been insufficient to find state action in other contexts.[186] However, in the context of racial balancing, if the State mandates achievement of an explicit racial balance, or even requires the prospective charter school to put forth a plan for student recruitment that is likely to produce a student body that is racially reflective of the surrounding community, such a provision would clearly fulfill the close-nexus and compulsion tests, making the charter school a state actor for the purposes of student assignment. Such language in the statute would create an explicit link between the State and the charter

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Doctrine to These Innovative Schools, 19 REV. LITIG. 135, 155 (2000) (stating that of the explicitly articulated Supreme Court tests, *Rendell-Baker* most resembles the charter school context and thus is the most appropriate test to apply).

[183] *See, e.g.*, Goldstein, *supra* note 181, at 139 (noting that the primary purpose for many charter enabling statute was to "free the schools from the public school bureaucracy as well as other external controls, in order to facilitate the development of more innovative educational practices"). Goldstein uses California as a baseline example for typical, or "middle of the road" charter enabling legislation, and notes that California state senator Hart explained that the purpose of the charter school system was to "'provide parents and students with expanded educational opportunities within the public school system without the constraints of traditional, oftentimes cumbersome, public school bureaucratic rules and structure.'" *Id.* at 143 (internal citation omitted).

[184] *See, e.g.*, D.C. CODE ANN. § 38-1702.08(d) (LexisNexis 2007) (expressly stating that teachers at charter schools are not employees of D.C. Public Schools or the D.C. government); Angela Caputo, *CPS Claims Charter School Teachers "Are Not Public Employees"*, PROGRESS ILLINOIS (May 18, 2009, 4:07 PM), http://www.progressillinois.com/2009/5/18/cps-charter-public-employees (describing a fight in Chicago over the status of charter school teachers); *see also* Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J.L. & PUB. POL'Y 886 (2007) (discussing the designation of charter school employees and ongoing legal battles regarding their status for the purpose of collective bargaining).

[185] Wren, *supra* note 182, at 164.

[186] *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991 (1981) (highly regulated nursing home was not state actor); Jackson v. Metro. Edison Co., 419 U.S. 345 (1974) (extensively regulated public utility was not state actor).

school's action, and if achieving a racially diverse student body is a condition of a charter's approval, the State has clearly "compelled" this action.

C. Entwinement

Analysis under entwinement yields a similar result to the close-nexus inquiry. If a state has mandated that the charter school provide specific plans to achieve a racially diverse student body or requires the potential school to project an ability to create a state-mandated racial balance of students, and the State subsequently grants approval to the charter, the action does seem "entwined" with the State and "fairly attributable" to it.[187] Additionally, in such a case, the State "is *responsible* for the specific conduct" of which the particular plaintiff may complain in the sense that it required submission of and granted approval to the plan for student selection that was to yield the desired racial balance.[188] However, absent such provisions in the law, the authorization of a charter school is not "entwined" in the manner in which school officials were in *Brentwood*. Unlike in *Brentwood*, where the officers of the athletic association were principals or superintendents of public schools and were acting in their official capacity in serving on the board of the athletic association,[189] no public school officials sit on the board of trustees of charter operators, nor are teachers or administrators of the charter school public officials or employees of the State. Moreover, contrary to the holding in *Riester*, where the court found that the State's authorization of the right to provide a free public education, and to receive public funds in order to carry out this role rendered the school a state actor,[190] a legislative grant of authority alone is insufficient to create the level of entwinement present in *Brentwood*. In contrast to the charter school context, members of the association board in *Brentwood* served in their official capacity, and supplemental employees of the association were ministerial employees treated as state employees for the purposes of eligibility in the state retirement system.[191] Further, the Court in *Brentwood* recognized that "no one fact can function as a necessary condition" for finding state actor status, and it is possible that there can be a "countervailing reason" not to

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[187] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295–97 (2000) (setting forth the requirements of the entwinement test).

[188] *Id.* (emphasis in original) (quoting Blum v. Yaretsky, 457 U.S. at 1004).

[189] *Id.* at 288.

[190] Riester v. Riverside Cmty. Sch., 257 F. Supp. 2d 968, 969, 972–73 (S.D. Ohio 2002).

[191] *Brentwood*, 531 U.S. at 300.

attribute the action to the State.[192] In the case of charter schools, the legislative purpose in enacting enabling legislation militates against a finding of state action because charter schools were created explicitly to provide space for innovation and grant freedom from bureaucratic restrictions that limit the ability of traditional public schools to pursue reform initiatives.[193]

V. WHAT NEXT? POLICY POSSIBILITIES IF *PARENTS INVOLVED* DOES NOT APPLY

Despite the fact that *Parents Involved* casts serious doubt on the constitutionality of charter school racial balance provisions, there have not yet been any challenges to this aspect of charter authorizing statutes. However, some states have made policy changes to prospectively comply with this ruling. For example, Rhode Island previously used race to weight its charter school lotteries in order to increase minority representation.[194] They have not done so since the Court rendered its decision in *Parents Involved*, presuming it was unconstitutional to continue to use race in this fashion.[195] If other states follow suit, or districts shy away from adopting aggressive pro-integration policies for charter schools given concerns regarding constitutionality, it is highly likely that racial segregation in charter schools will only increase.[196] The potential for further re-segregation is particularly troublesome when one assumes a holistic view of the impact of racial isolation. In addition to depriving students of the social and emotional benefits of student body diversity, racially isolated schools tend to have lower per-pupil expenditures and a disproportionately inexperienced teaching staff.[197] One commentator has even gone so far as to suggest that adopting racial balance requirements is the single approach that would simultaneously address all concerns related to educational

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[192] *Id.* at 295–96.

[193] *See* Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 833 (2000) (arguing that "courts must look beyond the boundaries of applicable doctrine in order to give effect to state legislatures' purposes in enacting charter school legislation").

[194] *See* FRANKENBERG & SIEGEL-HAWLEY, *supra* note 7, at 16 (recounting interview with individual in Rhode Island's Department of Education who discussed this policy change).

[195] *See id.*

[196] *See, e.g.*, Brown-Nagin, *supra* note 193, at 873 ("[R]acially-integrated schools usually do not result from people's private choices."); Flagg, *supra* note 113, at 1310 ("As is illustrated in the case of race proportionality, the colorblind approach to equality too often leads directly to the maintenance of white privilege.").

[197] *See* Flagg, *supra* note 113, at 1300–02 (noting that from books to teachers, majority-minority schools are given fewer resources than those schools that are majority white).

inequities along racial lines.[198] In states that have not previously attempted to confront this challenge and did not enact explicit legislative goals regarding student body diversity in charter schools, charter operators may be constitutionally permitted to squarely address these concerns as private actors.[199]

In states where student assignment would not be considered state action, the ability to craft race-conscious policies for charter school admission appears to depend on whether the school needs or wants to continue to receive federal funds. Federal guidelines mandate the use of a lottery system if the charter school is oversubscribed and, as a contingency for receipt of monies, seemingly do not permit race-based weighting of the lottery.[200] However, the regulations do allow operators to weight the lotteries for students seeking a Title I transfer due to the failure of their home school to meet the No Child Left Behind Adequate Yearly Progress requirements.[201] In such cases, charter school officials could conduct explicit and targeted recruitment towards qualifying students who would improve the racial diversity of the charter school. This method goes one step farther than Kennedy's permissible race-conscious approach of "targeted student recruitment"[202] in that it seeks out individual students on the basis of their race alone—an overt classification in furtherance of racial balance, which Kennedy would likely see as "reduction" of the students to their racial categories and therefore impermissible if *Parents Involved* applies.[203]

Another potential approach available to those schools that are dependent on receipt of federal funds applies to a limited category of schools that are converted to charters from traditional public schools. Under these circumstances, all students who are enrolled at the previous public school do not need to enter a lottery to gain admission to the new

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[198] *See id.* at 1306 (stating that racial proportionality is "the one countermeasure that would address the factors generating resource allocation inequities").

[199] *See supra* Part III. It is important to mention that the specific language of the non-discrimination provisions might become relevant. In some cases, if the provision explicitly requires compliance with all Constitutional provisions, presumably compliance with *Parents Involved* would follow from such a mandate. I flag this here, but will proceed by considering the implications for the general provisions more broadly without discussing the language employed by specific states.

[200] *See* DEP'T OF EDUC., CHARTER SCHOOLS PROGRAM TITLE V, PART B: NON-REGULATORY GUIDANCE 12–13 (2004), http://www.ed.gov/policy/elsec/guid/cspguidance03.pdf.

[201] In addition, a charter school may weight its lottery in favor of students seeking to change schools under the public school choice provisions of ESEA Title I, for the limited purpose of providing greater choice to students covered by those provisions. For example, a charter school could provide each student seeking a transfer under Title I with two or more chances to win the lottery, while all other students would have only one chance to win. *Id.* at 12.

[202] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 551 U.S. 701, 789 (2007) (Kennedy, J. concurring) (listing presumably race-neutral while race-conscious means).

[203] *Id.* at 795 (objecting to reduction of students to bare racial classifications).

charter.[204] If such action were taken simultaneously in a district, so as to convert two or more schools at the same time, the new charter operator could theoretically redistribute the students in a more integrated fashion without having to conduct a lottery that might threaten pursuit of a racial balance.

If the school chose to eschew federal funds,[205] it would have the freedom to directly use race in determining student enrollment. Employing race avoids the ambiguity and inefficiency of utilizing proxies and helps yield the desired outcome of a student body reflective of the local school district or community. However, to overcome the barriers presented by unequal access to information and transportation, the plan would have to be carefully crafted. The school might attempt to employ a method similar to that used in Seattle or Louisville prior to the *Parents Involved* decision.[206] This would require that one charter operator run several different schools within one district. Pursuing such a plan with only one school is not likely to be successful because one school is unlikely to have a sufficiently strong reputation to draw students from outside the immediate neighborhood and overcome residential segregation. Rather, if the charter operator ran several schools, it could effectively function like a small school district in assigning students. Prospective students could rank the several schools run by the operator, and the operator could then use race in addition to student preference to create racially balanced student bodies. In such a plan, it would be critical for the charter operator or the district to provide transportation. Absent fully-funded transportation or a very efficient system of public transportation, schools will likely remain segregated because students will be unable to attend schools outside of their immediate neighborhood. Rhetorically, families are already generally resistant to the idea of "bussing," and low-income individuals are unlikely

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[204] *See* DEP'T OF EDUC., *supra* note 200, at 12 (enumerating the limited categories of students who may be exempted from the lottery).

[205] This is not as outrageous a possibility as it might appear. The recent clamoring for federal funds as a result of budgetary gaps notwithstanding, federal monies have typically accounted for less than 10 percent of overall education spending. DEP'T OF EDUC., 10 FACTS ABOUT K–12 EDUCATION FUNDING 1–2 (2002), http://www2.ed.gov/about/overview/fed/10facts/10facts.pdf. Charter schools are also notoriously resourceful in finding funds, frequently turning to private philanthropy or individual benefactors, typically to make up the difference between their per pupil allocation from the state and that which is given to traditional public schools. *See, e.g.*, Sharon Otterman, *Charter Schools Get Less Money Per Student, Study Says*, NYTIMES.COM CITY ROOM BLOG (Feb. 24, 2010 6:02PM), http://cityroom.blogs.nytimes.com/2010/02/24/charter-schools-get-less-money-per-student-study-says/ (noting that the state minimum per pupil allocation to charter schools is almost $3,500 less per pupil than public school counterparts, and though in reality the difference is much less, charter schools still receive less state money). For an example of philanthropy to charter schools, see *The Slate 60: Donor Bios- The Largest American Charitable Contributions of the Year*, SLATE (Feb. 5, 2010 4:49PM), http://www.slate.com/id/2243496/ (describing Eli and Edythe Broad's $2.5 million grant to Uncommon Schools and Success Charter Network, two charter operators in New York).

[206] *See supra* Part II.A.

to have the time or resources to provide transportation on their own to schools far from their residence.[207]

The ability to create a racially diverse student body relies not only on the methods for student assignment, but first and foremost on the interest of a racially diverse pool of potential students. The plan described above would only be successful if parents and students choose to opt in. As a result, these attempts are most likely to be successful in a community that has already demonstrated support for aggressive integration efforts, like Louisville. Despite initial objections to integration at the time the consent decree was instituted, most Louisville families were ultimately in favor of the plan when it was challenged in *Parents Involved*, and it is likely that they would welcome a choice plan that focused on maintaining school integration.[208]

Barriers to information pose additional challenges to these plans. Improving knowledge and awareness of school options has already proved difficult in low-income communities, so districts and operators would likely need to work together to improve access to applications.[209] Extensive and targeted recruitment would be necessary for this plan to successfully yield racially diverse student bodies.

CONCLUSION

More than fifty years following the hard-fought battle of *Brown v. Board of Education*, public schools remain intensely racially isolated, reflecting a high degree of residential segregation. Because charter schools are less constrained by residentially-based attendance zones, they present a promising means of breaking down this formidable barrier to school integration. To date, however, charter schools have not fulfilled their potential in this capacity. Racial-balancing provisions force potential operators to consider race in crafting policy, but the efficacy of merely suggestive statutory language appears limited.[210] Following the Court's decision in *Parents Involved*, states and charter operators have limited

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[207] *Cf.* FRANKENBERG & SIEGEL-HAWLEY, *supra* note 7, at 14, 19 (noting that magnet schools have largely been more successful than charters in maintaining diverse student populations because they are required to provide transportation).

[208] *See* Deidre Van Dyk, *When Public Schools Aren't Color-Blind,* TIME, Nov. 26, 2006, *available at* http://www.time.com/time/magazine/article/0,9171,1562980,00.html (describing residents' positive feelings towards Louisville's student assignment program).

[209] *See* FRANKENBERG & SIEGEL-HAWLEY, *supra* note 7, at 14 ("[F]amilies are left to comprehend and cope individually with the complicated landscape of school choice. This is challenging for families with limited resources, time, or knowledge of the variety of educational options even more so for families 'disadvantaged' by mainstream society, such as having limited English proficiency or who dropped out of school themselves.").

[210] *See generally* FRANKENBERG, ET AL., *supra* note 44 (citing statistics regarding the high degree of racial segregation and isolation in charter schools). *See also supra* Parts I & II.

options in pursuit of racially diverse student bodies. Barring a shift in private housing choices, meaningful school integration seems unlikely. Yet, for those charter schools operating in states that have minimal legislation with respect to student assignment to schools, the Court's state action jurisprudence suggests that they may not be state actors in performing this function.[211] Avoiding classification as a state actor would allow charter operators to disregard the limitations imposed by *Parents Involved* and directly pursue an integrated student body via race-based means. While these policies would still be constrained by private enrollment choices and the existing demographics of the community, charter operators would at least have the freedom to pursue an end that the Court legitimized in *Brown* but seemingly forgot in *Parents Involved*: an education on equal terms in a racially integrated classroom.

APPENDIX A

Citations from Table 1- Categorization of Racial Balancing Statutes

Alaska	ALASKA STAT. § 14.18.010 (2010)
California	CAL. EDUC. CODE § 47605.6(5)(h) (West 2006) (requiring the charter application to include "[t]he means by which the school will achieve a racial and ethnic balance among its pupils that is reflective of the general population residing within the territorial jurisdiction of the school district to which the charter petition is submitted")
Colorado	COLO. REV. STAT. § 22-30.5-510 (2010)
Connecticut	CONN. GEN. STAT. § 10-66bb(d) (2009)
Delaware	DEL. CODE ANN. 8A § 506(a)(4) (2007)
District of Columbia	D.C. CODE § 38-1802.06 (LexisNexis 2007)
Florida	FLA. STAT. ANN. § 1002.33(7)(a)(8) (West 2009) (charter shall state "ways by which the school will achieve a racial/ethnic balance reflective of the community it serves or within the racial/ethnic range of other public schools in the same school district")
Georgia	GA. CODE ANN. § 20-2-2066(c) (West 2007) ("A charter school shall not discriminate on any basis that would be illegal if used by a school system.")
Indiana	IND. CODE. ANN. § 20-24-2-2 (LexisNexis 2005) (prohibiting discrimination on the basis of race among other categories)
Iowa	IOWA CODE ANN. § 256F.4(2)(a) (West 2003) (requiring compliance with all federal, state and local laws prohibiting discrimination on the basis of race)
Kansas	KAN. STAT. ANN. § 72-1906(d)(2) (2002) ("[P]upils in attendance at the school must be reasonably reflective of the racial and socio-economic composition of the school district as a whole.")

[211] *See supra* Part III.

Louisiana	LA. REV. STAT. ANN. § 17:3991(B)(3) (2001) (admissions system may not exclude students on the basis of race)
Maryland	MD. CODE ANN., EDUC. § 9-102(8) (LexisNexis 2008) (Charter schools are "subject to federal and State laws prohibiting discrimination.")
Massachusetts	MASS. GEN. LAWS ANN. ch. 76, § 12A (West 2009) ("Any child residing in any city, town, or regional school district and attending therein a public school in which such racial imbalance exists may attend a public school or a publicly authorized non-sectarian school in a city, town, or regional school district in which he does not reside if the school committee of such city or town or the committee of such regional school district has adopted and the board has approved, as provided by this section, a plan for the attendance of such non-resident children therein.")
Michigan	MICH. COMP. LAWS SERV. § 380.504 (LexisNexis 2008) (prohibiting any practices that would be illegal if conducted by a school district)
Missouri	MO. ANN. STAT. § 160.410(3) (West 2010) (charter schools may not limit admission on the basis of race)
Nevada	NEV. REV. STAT. ANN. § 386.580(1) (LexisNexis 2008) (requiring the charter schools to "if practicable, ensure that the racial composition of pupils enrolled in the charter school does not differ by more than 10 percent from the racial composition of pupils who attend public schools in the zone in which the charter school is located")
New Hampshire	N.H. REV. STAT. ANN. § 194-B:17(VII) (LexisNexis 2006) (general non-discrimination)
New Jersey	N.J. STAT. ANN. § 18A:36A-8(e) (West 1999) ("The 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 racial and academic factors.")
New Mexico	N.M. STAT. ANN. § 22-8E-4(D)(5) (2006) (Charter schools are "subject to all state and federal laws and constitutional provisions prohibiting discrimination on the basis of . . . race.")
New York	N.Y. EDUC. LAW § 2854(2) (McKinney 2009) (no discrimination on the basis of race or ethnicity)
North Carolina	N.C. GEN. STAT. §115C-238.29F(g)(5) (2009) ("Within one year after the charter school begins operation, the population of the school shall reasonably reflect the racial and ethnic composition of the general population residing within the local school administrative unit in which the school is located or the racial and ethnic composition of the special population that the school seeks to serve residing within the local school administrative unit in which the school is located.")
Ohio	OHIO REV. CODE ANN. § 3314.03(A)(7) (LexisNexis 2009) (Each charter shall specify "[t]he ways by which the school will achieve racial and ethnic balance reflective of the community it serves.")
Oregon	OR. REV. STAT. § 338.125(3) (2009) (general non-discrimination)

Rhode Island	R.I. GEN. LAWS § 16-77-4(10) (2001) (Charter school must specify means by which it plans to enroll diverse population and "[t]he makeup of the charter public school must be reflective of the student population of the district, including but not limited to special education children, children at risk, children eligible for free or reduced cost lunch, and limited English proficient students.")
South Carolina	S.C. CODE ANN. § 59-40-50(B)(7) (2004) (requiring that school racial composition not deviate by more than twenty percent from the local school district in which the school is to be located)
Tennessee	TENN. CODE ANN. § 49-13-111(5)(b) (2009) (subjecting charters to federal and state laws prohibiting discrimination)
Texas	TEX. EDUC. CODE ANN. § 12.111(a)(6) (West 2006) (prohibiting discrimination on the basis of race)
Utah	UTAH CODE ANN. § 53A-1a-506(3) (LexisNexis 2009) (requiring that a charter school not discriminate in its admissions policies in same fashion required of other public schools)
Virginia	VA. CODE ANN. § 22.1-212.6(A) (2006) (subjecting charter school to all federal and state laws and constitutional provisions prohibiting discrimination)
Wisconsin	WIS. STAT. ANN. § 118.40(1m)(b)(9) (West 2004) (charter petition must include "[t]he means by which the school will achieve a racial and ethnic balance among its pupils that is reflective of the school district population")
Wyoming	WYO. STAT. ANN. § 21-3-304(c) (2009) (subjecting charter schools to all federal and state laws and constitutional provisions prohibiting discrimination on the basis of race)