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RACIAL BALANCING PROVISIONS AND CHARTER SCHOOLS: ARE CHARTER SCHOOLS OUT ON A CONSTITUTIONAL LIMB?

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Critics have claimed that our public educational system has failed to develop innovative ideas, attract exceptional teachers, or hold incompetent teachers and administrators accountable for their students' inability to learn.[1] Thirty-six states,[2] the District of Columbia,[3] and Puerto Rico[4] have attempted to ad-

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1. JOE NATHAN, CHARTER SCHOOLS: CREATING HOPE AND OPPORTUNITY FOR AMERICAN EDUCATION (1996).

(1) Alaska, ALASKA STAT. §§ 14.03.250–.290 (Michie 2000); (2) Arizona, ARIZ. REV. STAT. §§ 15-181–15-189.03 (2000); (3) Arkansas, ARK. CODE ANN. §§ 6-23-101– 507 (Michie 2000); (4) California, CAL. ED. CODE §§ 47600– 47664 (Deering, 2000); (5) Colorado, COLO. REV. STAT. §§ 22-30.5-101 – 209 (1999); (6) Connecticut, CONN. GEN. STAT. §§ 10-66aa—gg (1999); (7) Delaware, DEL. CODE ANN. tit.14, §§ 501—516 (1999); (8) Florida, FLA. STAT. chs. 228.056—.058 (1999); (9) Georgia, GA. CODE §§ 20-2-2060–2071 (2000); (10) Hawaii, HAW. REV. STAT. §§ 302A-1181—1188 (2000); (11) Idaho, IDAHO CODE §§ 33-5201—5212 (2000); (12) Illinois, 105 ILL. COMP. STAT. §§ 5/27A-1—5/32-2.13 (West 2000); (13) Kansas, KAN. STAT. ANN. §§ 72-1903—1910 (1999); (14) Louisiana, LA. REV. STAT. §§ 17:3971—4001 (2000); (15) Massachusetts, MASS. ANN. LAWS ch. 71 § 89 (Law. Co-op. 2000); (16) Michigan, MICH. COMP. LAWS §§ 380.501—518 (2000); (17) Minnesota, MINN. STAT. §§ 124D.10—.11 (1999); (18) Mississsippi, MISS. REV. STAT. §§ 37-28-1—21 (2000); (19) Missouri, MO. REV. STAT. §§ 160.400—.420 (1999); (20) Nevada, NEV. REV. STAT. ANN. §§ 386.500—.610 (Michie 2000); (21) New Hampshire, N.H. REV. STAT. ANN. §§ 194-B:1—22 (1999); (22) New Jersey, N.J. STAT. §§ 18A:36A-1—18 (West 1999); (23) New Mexico, N.M. STAT. ANN. §§ 22-8B-1—8C-7 (Michie 2000); (24) New York, N.Y. C.L.S EDUC. §§ 2850—2857 (McKinney 2000); (25) North Carolina, N.C. GEN. STAT. §§ 115C-238.29A—K (1999); (26) Ohio, OHIO REV. CODE ANN. §§ 3314.01– .020 (Anderson 2000); (27) Oklahoma, 70 OKLA. STAT. §§ 3-130—152 (1999); (28) Oregon, 1999 Or. Laws 200 (1999); (29) Pennsylvania, 24 PA. STAT. §§ 17-1701-A—1732-A (2000); (30) Rhode Island, R.I. GEN. LAWS §§ 16-77-2—77-1.5 (2000); (31) South Carolina, S.C. CODE ANN. §§ 59-40-10—190 (Law Co-op. 1998); (32) Texas, TEX. EDUC. CODE §§ 12.101—.118 (West 1999); (33) Utah, UTAH CODE ANN. §§ 53A-1a-501—514 (2000); (34) Virginia, VA. CODE ANN. §§ 22.1-212.5—.15 (Michie 2000); (35) Wisconsin, WIS. STAT. § 118.40 (1999); (36) Wyoming, WYO. STAT. ANN. §§ 21-3-201—207 (Michie 2000).

3. D.C. CODE ANN. §§ 31-2801—2853.25 (1999).

dress these problems through the creation of charter schools. Charter schools are autonomous, or semi-autonomous, public schools that are created by a contract, or charter, between the school's organizers and a sponsor, usually the state's department of education or a local school district.[5] The creators of charter schools are held accountable for achieving educational results. In return, the charter school receives waivers exempting it from many of the restrictions that apply to traditional public schools.[6]

Many observers fear that charter schools will provide school officials the means to help white parents escape from racially desegregated public schools.[7] Several states have responded to this concern by adopting statutes that require charter schools to reflect the racial and ethnic composition of the surrounding school districts.[8] Statistical evidence does not support the concern that charter schools will lead to white flight; few charter schools have a disproportionately high percentage of white students.[9] On the contrary, a high percentage of charter schools have a disproportionately high percentage of racial minorities.[10] In fact, rigid enforcement of charter school racial balancing provisions might prevent the development of charter schools that will benefit minority communities.

States should rescind their charter school racial balancing provisions. The two primary policy rationales for adopting these provisions are that desegregated schools: (1) have a positive correlation to academic achievement; and (2) increase the likelihood of minority students to achieve long-term success in society. The research on mandatory desegregation policies does not support these two policy assertions. Furthermore, the experiences of African-Americans in desegregated schools suggest that racial balancing provisions do not benefit minority communities.

Additionally, racial balancing provisions probably violate

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4. P.R. LAWS ANN. tit. 18, §§ 2501—2585 (1999).

5. NATHAN, *supra* note 1.

6. *Id.*

7. David J. Dent, *Diversity Rules Threaten North Carolina Charter Schools that Aid Blacks*, N.Y. TIMES, Dec. 23, 1998, at B8.

8. *See infra* notes 25-33 and accompanying text.

9. RPP INT'L, A NATIONAL STUDY OF CHARTER SCHOOLS: SECOND-YEAR REPORT (1998).

10. *Id.*

the Equal Protection Clause. All race-based governmental classifications must pass a two-prong test: (1) they must satisfy a compelling government interest; and (2) they must be narrowly tailored to that interest. [11] Charter school racial balancing provisions fail both parts of this test.

The first section of this paper provides an overview of the charter school movement, the second section explains the educational deficiencies of charter school racial balancing provisions, and the third discusses why charter school racial balancing provisions probably violate the Equal Protection Clause.

I. OVERVIEW OF THE CHARTER SCHOOL MOVEMENT

In 1983, the National Commission of Excellence warned in its influential report, *A Nation at Risk*, that the public schools were failing their mission to educate students by creating a "rising tide of mediocrity that threatens our very future as a Nation and a people."[12] Charter schools are part of a wave of educational reforms designed to remedy the perceived inadequacy of the public schools.[13] Supporters believe that charter schools would encourage competition, provide new models of schooling, and create incentives to improve the public schools.[14] The federal government has also provided statutory financial support to the charter school movement.[15]

Individual states determine the circumstances under which a charter school may be established. Despite this potential for variability, charter schools have several common characteristics. First, states relieve charter schools of certain state laws and regulations in exchange for the charter school's commit-

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11. Adarand Constructors v. Pena, 515 U.S. 200, 235 (1995).

12. DAVID P. GARDNER. ET AL., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM. AN OPEN LETTER TO THE AMERICAN PEOPLE. A REPORT TO THE NATION AND THE SECRETARY OF EDUCATION 5 (1983).

13. Jennifer T. Wall, *The Establishment of Charter Schools: A Guide to Legal Issues for Legislatures*, 1998 BYU EDUC. & L. J. 69 n.2 (1998).

14. NATHAN, *supra* note 1.

15. State educational agencies may use part of the money received under the Goals 2000: Educate America Act for the promotion of charter schools. 20 U.S.C.S. § 5888 (Law. Co-op. 1999). Title I of the Improving America's Schools Act of 1994 also seeks to encourage the development of charter schools through financial assistance, and evaluative studies. 20 U.S.C.S. §§ 8061—8067 (Law. Co-op. 1999). President William Clinton, in his State of the Union Address, called for the creation of 3,000 charter schools by the twenty-first century. President William Clinton, State of the Union Address (Feb. 4, 1997).

ment, by means of a contract, to achieve specific outcomes.[16] Charter schools may not charge tuition, but utilize per pupil state aid dollars to fund their efforts.[17] Schools must outline their mission and curricular focus and undergo a review process to qualify for charter school status.[18] Third, once those proposing a school have adequately justified their educational plan to the sponsor, they must enter into a contract to deliver those services to the children who will elect to attend.[19] If the charter school fails to meet its goals, it must develop an educational plan in which it explains how it will accomplish the goals of the charter.[20] If the charter school continues to fail, the sponsor may revoke the charter.[21]

II. CHARTER SCHOOLS AND RACIAL BALANCING PROVISIONS

Many observers fear that public officials will use charter schools to enable white parents and students to escape from desegregated public schools.[22] This concern has a historical basis: after the Supreme Court had outlawed separate-but-equal education in *Brown v. Board of Education*,[23] segregationists proposed school choice programs to circumvent school desegregation efforts.[24] Nine states have responded to the concerns raised by charter school critics by enacting statutes, which ensure that the population of a charter school reflects the racial and ethnic composition of the school district as a whole. California,[25] Florida,[26] Wisconsin,[27] and Wyoming[28] require each

16. Julie F. Mead & Preston C. Green. *Making Promises: Have Charter Schools Resurrected Educational Malpractice as a Cause of Action?* Paper presented at the annual meeting of the American Educational Research Association, Montreal, April 22, 1998 (1998) (paper on file with the author).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Dent, *supra* note 7.

23. 347 U.S. 483 (1954).

24. Stephen Eisdorfer, Colloquium, *Racial Ceilings and School Choice: Public School Choice and Racial Integration*, 24 SETON HALL L. REV. 937 (1993).

25. CAL. EDUC. CODE § 47605(b)(5)(G) (West 2000) ("The governing board of the school district shall not deny a petition for the establishment of a charter school unless . . . [t]he petition [fails to, *inter alia*] contain reasonably comprehensive descriptions [of] . . . [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.").

charter school to adopt policies that will ensure such racial and ethnic balance. The statutes of Kansas,[29] Minnesota,[30] and North Carolina[31] specifically require the charter school's racial and ethnic composition to reflect that of the surrounding school district. Nevada[32] and South Carolina[33] go further still by requiring the racial and ethnic population of a charter school to differ by not more than ten percent from the racial composition of the surrounding school district.

Statistical evidence does not support the concern that charter schools will lead to white flight from traditional public schools. On the contrary, evidence suggests that minority communities are leaving traditional public schools to attend charter schools. A study of 16 charter school states, funded by the United States Department of Education, found that only

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26. FLA. STAT. § 228.056(9)(a)(8) (1999) ("The . . . criteria for approval of the charter shall be based on [*inter alia*] . . . [t]he ways by which the school will achieve a racial/ethnic balance reflective of the community it serves or within the racial/ethnic range of other public schools in the same school district.").

27. WIS. STAT. § 118.40(b)(9) (1999) ("The [charter school] petition shall 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.").

28. WYO. STAT. ANN. § 21-3-203(b)(vii) (Michie 2000) ("The board may grant a charter for the operation of a school . . . if it determines the petition contains [*inter alia*] . . . [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.").

29. KAN. STAT. ANN. § 72-1906(d)(2) (1999) ("Pupils in attendance at the school must be reasonably reflective of the racial and socio-economic composition of the school district as a whole.").

30. MINN. STAT. § 124D.10 Subdiv. 9(3) (1999) ("A charter school may limit admission to . . . residents of a specific geographic area where the percentage of the population of non-Caucasian people of that area is greater than the percentage of the non-Caucasian population in the congressional district in which the geographic area is located, and as long as the school reflects the racial and ethnic diversity of the specific area.").

31. N.C. GEN. STAT. § 115C-238.29F(g)(5)(ii) (1999) ("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.").

32. NEV. REV. STAT. § 386.580(1) (Michie 2000) ("[T]he charter school shall, if practicable, ensure that the racial composition of pupils enrolled in the charter school does not differ by more than 10 percent from the racial composition of pupils who attend public schools in the zone in which the charter school is located.").

33. S.C. CODE ANN § 59-40-50(B)(6) (Law. Co-op 1998) ("[U]nder no circumstances may a charter school enrollment differ from the racial composition of the school district by more than ten percent.").

four percent of the charter schools in the sample were disproportionately white: that is, served 20 percent more white students than the districts in which they were located.[34] However, the study also found that: (1) one out of three charter schools had a disproportionately high percentage of minority students;[35] and (2) approximately 40 percent of charter schools that enrolled predominantly African-American students were located in districts where the average white enrollment was more than 50 percent.[36]

There are two possible reasons for this high percentage of predominantly minority charter schools. First, many charter schools are designed to address the needs of particular populations.[37] The Department of Education study found that the second most cited reason for starting a charter school was to meet the needs of a particular population of children.[38] Charter schools also provide many minority parents, who feel disenfranchised in traditional public schools, the opportunity to become more involved with the design of their children's educational program.[39] Moreover, charter school statutes create incentives to design educational programming that will benefit minority students. For example, the statutes of several states encourage proposals to focus on the needs of "at risk" students. Colorado,[40] Illinois,[41] New York,[42] and North Carolina[43] give

34. RPP INT'L, *supra* note 9, at 56.

35. *Id.* at 72.

36. *Id.* at 64.

37. *Id.* at 62.

38. *Id.*

39. Robin D. Barnes, *Group Conflict and the Constitution: Race, Sexuality, and Religion: Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375 (1997).

40. COLO. REV. STAT § 22-30.5-109(3) (1999) ("It is the intent of the general assembly that priority of consideration be given to charter school applications designed to increase the educational opportunities of at-risk pupils.").

41. ILL. COMP. STAT. § 5/27A-8(3)(West 2000) ("In evaluating any charter school proposal submitted to it, the local school board shall give preference to proposals that . . . are designed to enroll and serve a substantial proportion of at-risk children.").

42. N.Y. C.L.S EDUC. § 2852(2)(c) (McKinney 2000) ("In reviewing applications, the charter entity is encouraged to give preference to applications that demonstrate the capability to provide comprehensive learning experiences to students identified by the applicants as at risk of academic failure.").

43. N.C. GEN. STAT. § 115C-238.29C(b)(iii) (1999) ("In reviewing applications for the establishment of charter schools within a local school administrative unit, the chartering entity is encouraged to give preference to applications that demonstrate the capability to provide comprehensive learning experiences to students identified by the

preference to charter school proposals that serve at-risk children, while Oregon[44] provides grants and loans to charter schools that meet this need.

Second, many charter schools that are attractive to minorities have experienced a difficult time convincing white parents to enroll their children. There are several explanations for this inability to recruit whites. Some white parents may not be educationally interested in charter schools that have educational themes that are attractive to minority students.[45] Additionally, some white parents may fear the neighborhoods in which some minority-theme charter schools are located.[46] The Healthy Start Academy, a charter school located in Durham, North Carolina is a case in point. Located in a black neighborhood, the charter school was able to attract only two white students, even after engaging in an intense recruitment process.[47]

The enforcement of charter school racial balancing provisions might prevent the development of charter schools that address the educational concerns of minority communities. The experience of North Carolina's charter schools supports this assertion. In 1998, 22 of the North Carolina's 60 charter schools were not in compliance with the state's racial balancing provision;[48] all but one of these 22 schools were predominantly black.[49] The teachers' union and several state legislators called for the schools to comply with the state's racial balancing provision within a year or be closed.[50] The Healthy Start Academy filed suit in trial court to challenge the constitutionality of the statute's racial balancing provision.[51] A legal challenge was

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applicants as at risk of academic failure.").

44. OR. REV. STAT. § 338.152(2) (1999) ("Pursuant to rules adopted by the State Board of Education, the Department of Education shall award grants and loans on the basis of need. Priority for awarding grants and loans shall be to those public charter schools serving at-risk youth.").

45. For example, Harvest Preparatory School, a Minneapolis charter school, combines an Afrocentric curriculum with an emphasis on basic skills. John Ramsay, *A Direct Challenge; An Irresistible Question Presented Itself as an Educator Studied an Urban School's Highly Touted, But Controversial, Reading Program: Would It Work for His Preschooler?*, STAR TRIBUNE (Minneapolis), Jul. 9, 1998.

46. Stephan Thernstrom & Abigail Thernstrom, AMERICA IN BLACK AND WHITE 258 (1997) (discussing white fear of black neighborhoods).

47. Dent, *supra* note 7.

48. *Id.*

49. *Id.*

50. *Id.*

51. Christopher Kirkpatrick, *Lawsuit Tests Charter School Race Clause: Healthy*

avoided after the chairman of the state board of education promised not to take action against schools that are not in compliance with the state's racial balancing provision.[52]

States should rescind their racial balancing provisions so as not to prevent the development of charter schools that address minority concerns. The two primary policy rationales for adopting these provisions build upon the arguments used for adopting mandatory desegregation policies such as busing. The first claim is that desegregated schools have a positive correlation to academic achievement. For example, more than 40 years ago, less than 50 percent of young black adults had obtained high school diplomas or passed the General Educational Development (GED) Test; by 1993, this figure had increased to 83 percent, close to white completion rate.[53]

The second claim is that desegregated schools increase the likelihood of minority students to achieve long-term success in society. Predominantly minority schools tend to have high rates of poverty.[54] High poverty schools generally have low test scores, high dropout rates, and a low percentage of students who will eventually attend college.[55] According to a field of educational research known as "perpetuation theory," minorities who attend poor, segregated schools may become isolated from mainstream society, thus losing out on opportunity to enter into the middle class.[56] School desegregation helps minority students break out of this cycle of isolation.[57] In support of this thesis, proponents of perpetuation theory cite studies showing that students attending desegregated schools are more likely to

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Start Academy, N.C. Conservative Group Join Forces, HERALD-SUN (Durham, N.C.), Aug. 15, 1998, at A6.

52. The chairman stated that no action would be taken against any charter school that would attempt to be diverse. Christopher Kirkpatrick, *Charter School Bill Still Stalled on Racial Issues: Lawmakers Shelve Diversity Clause until Next Session*, HERALD-SUN (Durham, N.C.), Oct. 5, 1998, at B1. However, states should not follow the route suggested by the chairman by amending charter school statutes to require charter schools to attempt to be racially and ethnically diverse. Schools with educational themes that target special populations would still have a difficult time attracting students who are members of that group.

53. GARY ORFIELD ET. AL. DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 85 (1996).

54. *Id.* at 53.

55. *Id.*

56. *Id.* at 106.

57. *Id.*

succeed in college and have higher occupational aspirations.[58]

The research on mandatory desegregation policies does not support these two policy assertions. David Armor has conducted a comprehensive examination of mandatory desegregation policies. Although there may be a correlation between mandatory desegregation policies and African-American achievement, Armor has found that "the relationship is generally weak and inconsistent compared to the effect of educational and economic factors."[59] In fact, the improved socioeconomic state of the African-American family and federal compensatory programs such as Chapter 1 were significantly more important contributors than school desegregation.[60] Armor does find that "the research on long-term outcomes offers the strongest argument for desegregated schools";[61] however, he concludes that the studies in this area are inconsistent and the positive results may be confined to voluntary desegregation plans.[62]

Furthermore, Armor has found that mandatory school desegregation policies may actually lower black self-esteem.[63] One explanation for this finding is the discrimination that many African-Americans have experienced in desegregated schools.[64] A disproportionately high percentage of African-American students attending desegregated public schools are placed in low educational tracks.[65] African-Americans students are also more likely to be expelled or suspended from desegregated schools than white students are.[66] Moreover, many African-American parents believe that they have been unable to advocate for their children's interests in desegregated schools because white parents and school officials have prevented them from participating in the schools' decision making process.[67]

Predominantly minority charter schools may be more successful than desegregated schools in meeting the psychological

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58. *Id.*

59. DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 98 (1995).

60. *Id.*

61. *Id.* at 113.

62. *Id.*

63. *Id.* at 101.

64. *Id.*

65. Barnes, *supra* note 39.

66. *Id.*

67. *Id.*

and academic needs of their students. These schools may strengthen the commitment of minority parents by providing them with the opportunity to participate in their development and governance.[68] Charter schools' freedom from state regulations may enable minority parents to develop programs that address the emotional needs of their children.[69] These schools must also succeed academically, or run the risk of losing the charters.[70] Moreover, rescinding racial balancing provisions would be consistent with the shift of African-American attitudes toward mandatory desegregation policies. African-Americans have historically supported desegregation policies.[71] During the 1990s, however, African-Americans have become more supportive of all-minority neighborhood schools due to their frustration with persistent gaps in academic achievement between blacks and whites and the inconvenience of mandatory desegregation policies.[72] They have also begun to reject the notion that all-black schools are academically inferior and reduce the motivation of black students to learn.[73]

III. LEGAL ANALYSIS OF CHARTER SCHOOL RACIAL BALANCING PROVISIONS

The previous section noted that charter school racial balancing provisions might have the unexpected result of preventing the creation of charter schools that help minority communities. Charter school racial balancing provisions may also be vulnerable to Equal Protection Clause challenges. The Equal Protection Clause protects against, among other things, racial classifications by the government.[74] Because racial balancing provisions employ racial classifications, they should be subject to strict scrutiny. The purpose of strict scrutiny is "to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. Megan Twohey, *Desegregation Is Dead*, 31 NAT'L J., Sep. 18, 1999, at 2614.

73. *Id.*

74. The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1.

highly suspect tool."[75] To pass strict scrutiny, all race-based governmental classifications must satisfy a compelling governmental interest and be narrowly tailored to that interest.[76]

The South Carolina judiciary is presently grappling with the constitutionality of its racial balancing provision. In *Beaufort County Board of Education v. Lighthouse Charter School Committee*, the Beaufort (South Carolina) Board of Education denied the application for the Lighthouse Charter School, in part, because the school had failed to explain how it would comply with the state's requirement that the charter school's population be within 10 percent of the surrounding school district.[77] The Supreme Court of South Carolina upheld the denial of the charter school's application on this ground,[78] but remanded the case to trial court to determine whether the state's racial balancing provision violated the Equal Protection Clause.[79]

This section examines whether charter school racial balancing provisions would survive Equal Protection Clause challenges. The first subsection examines whether charter school racial balancing provisions would satisfy compelling governmental interests identified by the Supreme Court. The second subsection analyzes whether such provisions would satisfy other compelling interests recognized by legal commentators and lower federal courts. The third subsection looks at whether racial balancing provisions would be narrowly tailored.

A. Do Racial Balancing Provisions Satisfy Compelling Governmental Interests Identified by the Supreme Court?

The Supreme Court has recognized two compelling interests under strict scrutiny analysis: (1) to eliminate the present effects of past discrimination,[80] and (2) to achieve a diverse student body in the context of university admissions decisions.[81]

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75. City of Richmond v. Croson, 488 U.S. 469, 493 (1989).

76. *Adarand*, 515 U.S. at 235.

77. 516 S.E.2d 655 (S.C. 1999).

78. *Id.* at 659.

79. *Id.* at 661.

80. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality opinion); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 491-92 (1989); Adarand, 515 U.S. at 237.

81. Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 311-12 (opinion of Powell, J.).

Courts would probably rule that racial balancing provisions fail to satisfy the compelling interest of eliminating the present effects of past discrimination. In *City of Richmond v. J.A. Croson*, the Supreme Court invalidated Richmond, Virginia's set-aside program which required prime contractors to award 30% of the dollar amount of each contract to one or more minority business enterprises (MBE's). Minority groups consisted of "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."[82] The Court rejected the claim that the set-aside program was designed to eliminate the present effects of past discrimination because:

> There is *absolutely no evidence* of past discrimination against Spanishspeaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry. . . . It may well be that Richmond has never had an Aleut or Eskimo citizen. The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.[83]

Similarly, courts would rule that racial balancing provisions are not designed to eliminate the present effects of past discrimination. They not only apply to charter schools located in school districts that have discriminated against minority groups; but they also apply to charter schools located in school districts that have not committed such discrimination.

Racial balancing provisions also fail to satisfy the compelling interest of obtaining a diverse student body. In *Regents of the University of California v. Bakke*, the Supreme Court held that universities may use race as one of several factors in making their admissions decisions.[84] However, the *Bakke* Court for-

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82. *City of Richmond*, 488 U.S. at 478.

83. *Id.* at 506 (emphasis by the Court).

84. *Bakke*, 438 U.S. at 314 (opinion of Powell, J.). The constitutionality of *Bakke* is presently being debated in the courts. In Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), the Fifth Circuit held that a university's use of race to achieve a diverse student body is unconstitutional because such considerations stigmatized minority applicants, and contradicted the Equal Protection Clause's primary goal of eliminating all considerations of race. Other circuit courts, however, have to follow the First Circuit's lead. For example, in Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1999), a case dealing with the constitutionality of examination school's admissions policies, the First Circuit refused to declare *Bakke* unconstitutional in the absence of a clear signal from the Supreme Court. *Id.* at 796. Following the analysis of the First Circuit, this article assumes that *Bakke* is still good law.

bade universities from using race and ethnicity as the sole factors for obtaining a diverse student body because: "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[85] The Court also prohibited universities from taking steps to obtain a specific racial balance in their student composition:

> If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.[86]

In *Wessmann v. Gittens*, the First Circuit applied the logic of *Bakke* to pre-collegiate setting. In *Wessmann*, the First Circuit invalidated the Boston School Committee's admissions policy for its three examination schools. To be eligible for admission, an applicant had to be in the top 50 percent of the school's overall applicant pool.[87] Half of the available seats for an examination school's entering class were allocated according to test scores and grade point averages.[88] The second half were chosen according to the proportional representation of five different racial and ethnic groups – white, black, Latino, Asian, and Native American – from the remaining pool of qualified applicants.[89]

Because the admissions policy focused only on racial and ethnic diversity,[90] the First Circuit held that the proportional representation scheme failed to satisfy the compelling interest test.[91] Instead of achieving diversity, the court concluded that the School Committee's admissions plan was designed to achieve racial balancing, which is almost always constitutionally forbidden.[92] To justify the use of racial balancing, the court

85. *Bakke*, 438 U.S. at 315 (opinion of Powell, J.).
86. *Id.* at 307 (citations omitted).
87. *Wessman*, 160 F.3d at 790.
88. *Id.*
89. *Id.*
90. *Id.* at 798.
91. *Id.*
92. *Id.* at 799.

found that "a particularly strong showing of necessity would be required."[93] The School Committee failed to meet this burden. The court rejected the claim that racial balancing protected African-American and Hispanic students from the harmful effects of racial isolation because the racial isolation argument assumed that students could not function unless they were surrounded by a sufficient number of persons of like race or ethnicity.[94] Additionally, the court held that the that School Committee had failed to demonstrate why the proportional representation scheme promoted was better than constitutionally permissible alternatives to achieve diversity in promoting the vigorous exchange of ideas or improving the students' capacity and willingness to learn.[95]

Applying *Bakke* and *Wessmann*, courts would hold that charter school racial balancing provisions fail to satisfy the compelling interest of achieving a diverse student body. They would rule that charter school racial provisions are unconstitutional because race and ethnicity are the only criteria used to determine diversity. Also, as *Wessmann* demonstrates, courts would be highly skeptical of any rationale advanced for adopting a racial balancing provision to obtain a diverse student body.

B. May Charter School Racial Balancing Provisions Be Used to Prevent Other Possible Compelling Governmental Interests?

Legal commentators[96] and courts[97] have asserted that other

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93. *Id.*

94. *Id.*

95. *Id.* at 799-800.

96. Jason Walbourn, Comment, *Strict in Theory, but Not Fatal in Fact: Hunter v. Regents of the University of California and the Case for Educational Research as a New Compelling State Interest*, 83 MINN. L. REV. 183 (1998) (arguing that educational research can be a compelling governmental interest under the Equal Protection Clause); Note, *The Constitutionality of Race-Conscious Admissions Programs in Public Elementary and Secondary Schools*, 112 HARV. L. REV. 940 (1999) (arguing that other compelling interests under the Equal Protection Clause could include providing a quality education, and providing equal educational opportunity).

97. Eisenberg v. Montgomery Cty. Bd. of Educ., 19 F. Supp. 2d 449 (D.Md. 1998) (finding that prevention of possible segregative effects of voluntary enrollment policy constituted compelling governmental interest under Equal Protection Clause); Hunter v. Regents of the Univ. of Calif., 190 F.3d 1061 (9th Cir. 1999) (finding that educational research can be a compelling governmental interest under the Equal Protection Clause); Parent Ass'n of Andrew Jackson High Sch. v. Ambach, 598 F.2d 705 (2d. Cir. 1979) (finding that eliminating *de facto* segregation can serve a compelling governmental interest).

compelling governmental interests exist besides eliminating the present effects of past discrimination and achieving a diverse student body. For instance, in *Parent Association of Andrew Jackson High School v. Ambach*, the United States Court of Appeals for the Second Circuit held that reducing *de facto* segregation serves a compelling government interest. This case involved a desegregation plan focused primarily on the Andrew Jackson High School in Queens, New York. Queens had experienced a large influx of minority residents after World War II and a corresponding departure of white families to the adjacent suburbs.[98] Consequently, Andrew Jackson High School became a virtually all-minority school.[99] The school board adopted a "Controlled Rate of Change Plan," which permitted black and Hispanic students to transfer to schools in which white students exceeded 50 percent of the student population.[100] White students could transfer to schools where the white student population was lower than 50 percent.[101] The plan limited the number of students allowed to transfer in any given year to those who would not decrease the receiving schools' white/minority balance by four percent or more.[102]

Minority students who were not permitted to transfer to desired schools challenged the constitutionality of the choice program.[103] The Second Circuit held that it lacked the authority to compel the school board to achieve a racial balance in the high school because the segregation had not been caused by intentional discrimination.[104] Applying strict scrutiny analysis, the court did find that the school board had a compelling interest in ensuring that schools were relatively integrated.[105] To ensure such integration, the school board could take steps to avoid white flight. Although the purpose of the plan was constitutional, the Second Circuit remanded the case to work out specific details.[106]

The Supreme Court has also implied that school districts

98. Parent Ass'n of Andrew Jackson, 598 U.S. at 710.
99. *Id.*
100. *Id.* at 711.
101. *Id.*
102. *Id.* at 711-12.
103. Parent Ass'n of Andrew Jackson, 738 F.2d 574, 577 (2d. Cir. 1984).
104. Parent Ass'n of Andrew Jackson, 598 U.S. at 715.
105. *Id.* at 720.
106. *Id.* at 721.

may use racial balancing provisions to eliminate *de facto* segregation. In *Swann v. Charlotte-Mecklenberg Board of Education*, the first decision to approve mandatory busing to eliminate official discrimination, the Court observed:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.[107]

Although *Swann* involved official discrimination, this statement suggests that the Supreme Court would permit race-based assignments to remedy *de facto* segregation.[108] *North Carolina State Board of Education v. Swann*, a companion case decided at the same time as *Swann*, supports this assertion. In *North Carolina State Board of Education*, the Court invalidated a state statute forbidding student assignments for the purpose of achieving a specific racial balance. In reaching this conclusion, the Court explained that *Swann* held "as a matter of educational policy school authorities may well conclude that some kind of racial balance is desirable quite apart from any constitutional requirements."[109]

Washington v. Seattle School District No. 1 provides further support for the belief that the Supreme Court would uphold the constitutionality of racial balancing plans designed to eliminate *de facto* segregation. In *Washington*, the Court analyzed the constitutionality of a Washington statute that prohibited local school districts from using mandatory busing to upset neighborhood school enrollment patterns. The Court ruled that the statute was unconstitutional because it removed authority to eliminate *de facto* segregation in a manner that burdened minority interests.[110] If a state could not prohibit a district from using race-based assignments to eliminate *de facto* segregation

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107. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

108. William E. Thro, *The Constitutionality Of Eliminating De Facto Segregation In The Public Schools*, 120 WEST'S EDUC. L. REP. 895, 901 (1997).

109. North Carolina Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971).

110. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 474-75 (1982).

without violating the Equal Protection Clause, then it follows that local school districts have the right to engage in race-based assignments to remedy *de facto* segregation.[111]

Despite the implicit endorsement of the *Swann*, *North Carolina State Board of Education*, and *Washington* cases, courts would probably find that eliminating the effects of *de facto* segregation does not satisfy a compelling governmental interest. Proponents have advanced several reasons for approving plans that eliminate the effects of *de facto* segregation, including providing minority students with equal educational opportunity and preparing students for a culturally pluralistic society.[112] Supreme Court Justice Clarence Thomas has been especially critical of the argument that integration is necessary to provide minority students with equal educational opportunity. As he asserted in his concurrence in *Missouri v. Jenkins*: "[T]here is no reason to think black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment . . . black schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement."[113] Also, courts would find that using racial balancing provisions to achieve cultural diversity would not satisfy a compelling governmental interest. In *Bakke*, the Supreme Court stated that race could be one of several criteria used to achieve diversity.[114] Therefore, racial balancing provisions would be unconstitutional because they fail to take factors other than race into consideration to achieve cultural pluralism.

School districts could also argue that predominantly one-race charter schools raise an inference of discrimination on the part of charter school sponsors, and that the state has a compelling interest to prevent sponsors from using charter schools to facilitate racial segregation.[115] Courts would probably refuse to infer discrimination on the part of charter school sponsors merely because several charter schools have a disproportion-

111. Thro, *supra* note 108, at 901.

112. ORFIELD ET. AL., *supra* note 53.

113. Missouri v. Jenkins, 515 U.S. 70, 95 (Thomas, J., concurring).

114. *Bakke*, 438 U.S. at 315 (opinion of Powell, J.).

115. *See Eisenberg*, 19 F. Supp. 2d at 453 (finding that prevention of possible segregative effects of voluntary enrollment policy constituted compelling governmental interest under Equal Protection Clause).

ately high percentage of members from one racial group. In *City of Richmond*, the Supreme Court refused to infer that low participation of minority business enterprises in local contracting agencies was caused by the agencies' discriminatory actions.

> There are numerous explanations for this dearth of minority participation [in construction], including . . . both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction. . . .The mere fact that black membership in these trade organizations is low, standing alone, cannot establish a *prima facie* case of discrimination."[116]

Future court decisions may reason that the existence of disproportionately one-race charter schools may be caused by factors other than racially exclusionary practices on the part of charter school sponsors. Many charter schools have educational themes that are particular to one racial group. For example, the underlying premise of one of the schools participating in the U.S. Department of Education study on charter schools is "the belief that building a strong Afrocentric identity will give the youth the power and strength to succeed in life."[117] Although these schools are open to all students, their educational mission may attract a disproportionate number of minority students.[118]

C. *Are Charter School Racial Balancing Provisions Narrowly Tailored?*

Even if charter school racial balancing provisions served a compelling governmental interest, they must also be narrowly tailored to satisfy that interest. In *United States v. Paradise*, the Supreme Court identified several factors for determining whether governmental racial classifications were narrowly tailored: (1) the efficacy of alternative race-neutral remedies; (2) the flexibility of the relief; (3) the duration of the relief; (4) the relationship of the numerical goals to the relevant population; and (5) the impact of the policy on third parties.[119]

Courts would probably find that charter school racial bal-

116. *City of Richmond*, 488 U.S. at 503.

117. RPP INT'L, *supra* note 9, at 67.

118. *Id.*

119. U.S. v. Paradise, 480 U.S. 149, 171 (1987).

ancing provisions are not narrowly tailored. First, courts might conclude that states have failed to establish that less drastic policies such as voluntary recruitment, or lottery, may be just as effective for attaining the goals of eliminating the present effects of past discrimination, or achieving a diverse student body. [120] Second, courts would find fault with the duration of these provisions. The Supreme Court has ruled that racial classifications cannot continue in perpetuity, but must have a logical "stopping point."[121] Charter school racial balancing provisions have no such stopping point: each charter school must continually ensure that its student population reflects that of the school district as a whole.

Third, courts would probably find fault with the relationship between the numerical goal and the relevant population. Charter school racial balancing provisions seek to achieve compelling governmental interests by requiring the racial and ethnic composition of charter schools to reflect that of the surrounding school districts. Courts have expressed doubt that racial balancing provisions are necessary to achieve compelling governmental interests. For example, in *Tuttle v. Arlington County School Board*, the Fourth Circuit invalidated an alternative school's weighted admission policy, which was designed to achieve a racial and ethnic population similar to that of the school district as a whole. The court found that policy's goals of providing students with the educational benefits of diversity and helping the school board better meet the needs of a diverse group of students did not require racial balancing.[122]

Finally, courts would conclude that charter school racial balancing provisions are not sufficiently particularized to cure harms committed against a class of actual victims. For instance, in *Wessmann*, the First Circuit found that the Boston School Committee's proportional representation scheme was not narrowly tailored to remedy the present effects of past discrimination. Specifically, the court found that the policy was not focused on the African-American and Hispanic public school students who were the victims of racial discrimination. Many of the African-American and Hispanic students benefit-

120. *See e.g.*, Equal Open Enrollment Ass'n v. Board of Education of the Akron Cty. Sch. Dist., 937 F. Supp. 700, 708 (N.D.Ohio 1996); Tuttle v. Arlington Cty. Sch. Bd., 195 F.3d 698, 706 n11 (4th Cir. 1999).

121. *City of Richmond*, 488 U.S. at 498; *Wygant*, 476 U.S. at 275.

122. *Tuttle*, 195 F.3d. at 707.

ing from the policy attended private and parochial schools.[123] Similarly, courts would find that charter school racial balancing provisions fail the narrow tailoring requirement because they apply to charter schools in school districts that are not suffering from the effects of past discrimination. Courts might also support this conclusion by noting that states have adopted more particularized approaches that do apply to charter schools located in school districts that are still experiencing the vestiges of school segregation policies, such as requiring charter schools to comply with school desegregation decrees.[124]

IV. CONCLUSION

States should rescind their charter school racial balancing provisions. While one can argue that such provisions protect against the development of high-poverty, predominantly minority schools, and enable students to learn in a racially and culturally diverse student body, the experiences of African-Americans in desegregated schools indicate that enforcement of racial balancing provisions may not benefit minority communities. Also, racial balancing provisions should be rescinded because they violate the Equal Protection Clause. All race-based governmental classifications must satisfy a compelling government interest and be narrowly tailored to that interest. As has been shown above, charter school racial balancing provisions likely fail both parts of this test.

123. *Wessmann*, 190 F.3d at 808.

124. These states are as follows: (1) Arizona, ARIZ. REV. STAT. § 15-184(D) (2000) ; (2) Colorado, COLO. REV. STAT. § 22-30.5-104(3) (1999); (3) Delaware, DEL. CODE ANN. tit.14, § 506(5) (1999); (4) Illinois, 105 ILL. COMP. STAT. 5/27A-4(a) (West 2000); (5) Louisiana, LA. REV. STAT. § 17:3991(C)(3) (2000); (6) Nevada, NEV. REV. STAT. ANN. § 386.550(4) (Michie 2000); (7) North Carolina, N.C. GEN. STAT § 115C-238.29F(g)(5)(ii) (1999); (8) Ohio, OHIO REV. CODE ANN § 3314.06 (Anderson 2000); (9) Oklahoma, OKLA. STAT. § 3-140(B) (1999); (10) Pennsylvania, 24 PA. STAT. § 17-1730-A (2000); (11) Virginia, VA. CODE ANN. § 22.1-212.6 (A) (Michie 2000).