



# Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education

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# TOWARD A PRAGMATIC UNDERSTANDING OF STATUS-CONSCIOUSNESS: THE CASE OF DEREGULATED EDUCATION

TOMIKO BROWN-NAGIN<sup>†</sup>

## ABSTRACT

*This Article discusses the relationship between federal equal protection doctrine and the states' experiment with deregulated education—in particular, charter schools whose student bodies are identifiable on the basis of status. I argue that the states' experiment with deregulated education and the Supreme Court's understanding of the limitations imposed by the federal Equal Protection Clause on status-conscious state action are substantially in conflict, though not inevitably so. Reconciling state policy and federal constitutional law requires, first, that state legislatures draft laws that are consistent with the Court's skepticism of explicitly status-conscious state action, and its ambivalence toward state action that addresses social problems of status-identifiable groups in ways that do not raise the specter of historically or culturally meaningful notions of racial ordering or sex-based stereotypes. Thus, legislatures might give attention to the justificatory rhetoric of diversity or the idea of students "at-risk" of academic failure rather than incorporating concepts like racial balance or sex-segregation in enabling legislation. Second, the federal courts should adopt a more pragmatic mode of equal protection analysis in considering claims against deregulated schools, rather than presuming that status-identifiable charter schools should be subjected to heightened scrutiny, or that heightened scrutiny requires finding such*

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*schools unconstitutional. A more pragmatic mode of constitutional analysis is justified by the public and private features of deregulated schools, which, I propose, entitle some schools to be considered “quasi-public.” It is also justified by the Court’s precedent on federalism and education, which should be understood as consistent with state legislators’ purpose in deregulating schools—encouraging innovative approaches to learning through participatory democracy.*

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INTRODUCTION

The value of experimentation in education is one of the most widely accepted principles among philosophers of education and educational theorists. The American philosopher John Dewey expressed best the idea shared by intellectuals of disparate ideological perspectives that the central aims of education are fostered by the broad-

mindfulness and flexibility implicit in experimentation.<sup>1</sup> Scholars have considered experimentation in education valuable because they have concluded that changing social conditions often necessitate changes in perspective about appropriate educational methodologies, curricula content, and other aspects of educational policy.<sup>2</sup> Which is to say, the most revered philosophers have found it foolish to suppose that an intelligent theory of education and sound educational policies can be achieved by blindly following tradition.

The idea that received wisdom may work at cross-purposes with educational reform has been especially common in recent years, when the public educational system habitually has been perceived as being in a state of crisis.<sup>3</sup> In the 1990s this sense of crisis has given rise to an alternative schools movement, which includes advocates of deregulated educational institutions known as “charter” schools.<sup>4</sup> The charter schools movement is predicated upon the theory that schools freed of most of the regulatory constraints normally applicable to public schools can stimulate academic excellence in ways that traditional neighborhood schools cannot.<sup>5</sup>

Although some of the most prominent advocates of alternative schooling programs such as school choice are politically conservative,<sup>6</sup>

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1. For an overview of the evolution of philosophies of education and their relationship to changing social conditions, see ANDREW FEFFER, *THE CHICAGO PRAGMATISTS AND AMERICAN PROGRESSIVISM* 118-28 (1993) (discussing the experimentation characteristic of Dewey’s educational philosophy); HOWARD A. OZMON & SAMUEL M. CRAVER, *PHILOSOPHICAL FOUNDATIONS OF EDUCATION* xvi-xvii, 134-39 (5th ed. 1995) (same).

2. See OZMON & CRAVER, *supra* note 1, at xvi-xvii; see also Ralph Waldo Emerson, *An Oration Delivered Before the Literary Societies of Dartmouth (July 24, 1838)*, in EMERSON AT DARTMOUTH 19 (1956) (“[We] grind and grind in the mill of a truism, and nothing comes out but what was put in. But the moment [we] desert the tradition for a spontaneous thought, then poetry, wit, hope, virtue, learning, anecdote, all flock to [our] aid.”).

3. See E. D. HIRSCH, JR., *THE SCHOOLS WE NEED AND WHY WE DON’T HAVE THEM* 1-4 (1996) (stating that K-12 education in the United States “is among the least effective in the developed world”); NATIONAL COMM’N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 5-6 (1983) (arguing that American society has “lost sight of the basic purposes of schooling”).

4. Throughout this Article, I use the terminologies “charter schools” and “deregulated schools” interchangeably.

5. See Peter Applebome, *Some Educators See Experimental Hybrids as Country’s Best Hope for Public Schools*, N.Y. TIMES, Oct. 12, 1994, at B7; Rene Sanchez, *Embracing New Schools of Thought: States Charter Independent Institutions to Improve Education*, WASH. POST, Dec. 5, 1995, at A1.

6. See Richard Lee Colvin, *School Vouchers Passing Milwaukee Test*, L.A. TIMES, Oct. 26, 1996, at A1 (stating that most school choice supporters are conservative Republicans); see also JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA’S SCHOOLS* 11-12, 206 (1990) (describing the support for school choice by Ronald Reagan and George Bush, while

people across the ideological spectrum have voiced strong support for the charter schools movement.<sup>7</sup> With bipartisan support, the Minnesota legislature approved the first charter school enabling legislation in 1991,<sup>8</sup> since then, thirty-six other states located in all areas of the country, including California, Florida, Massachusetts, New York, and Wisconsin, as well as the District of Columbia, have enacted legislation authorizing the creation of charter schools;<sup>9</sup> all have done so with backing from both political parties.<sup>10</sup> Presently, more than two thousand charter schools are in operation across the nation.<sup>11</sup>

Because charter school legislation provides for the public financing of schools whose deregulated status imbues them with many features of private companies,<sup>12</sup> it implicates in complex ways many areas of federal and state law, including our civil rights laws.<sup>13</sup> This

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noting that Democratic constituencies, such as teachers' unions and education associations, generally are opposed to choice); PETER W. COOKSON, JR., *SCHOOL CHOICE* 7, 29-37 (1994) (discussing the support of Pat Robertson, Strom Thurmond, and many other prominent Republicans for school choice, including charter schools).

7. See JOE NATHAN, *CHARTER SCHOOLS: CREATING HOPE AND OPPORTUNITY FOR AMERICAN EDUCATION* 55-71 (1996); see also *Charter Schools: Hearings Before the Subcomm. on Early Childhood, Youth, and Families of the House Comm. on Educ. and the Workforce*, 105th Cong. 105 (1997) [hereinafter *Charter Schools Hearings*] (statement of Gerald N. Tirozzi, Assistant Secretary for Elementary & Secondary Education) (noting that President Clinton and the United States Secretary of Education both "strongly support" charter schools); BRYAN C. HASSELL, *THE CHARTER SCHOOL CHALLENGE* 2-3, 22, 25-27 (1999) (describing bipartisan support for charter schools); Peter Applebome, *With New Deal Fervor, Clinton Pushes Education Plan*, N.Y. TIMES, Feb. 6, 1997, at B8.

8. See MINN. STAT. § 120.064 (1991); Penny Roberts, *Charter School Plan Dangles the Carrot of Reform*, CHI. TRIB., Jan. 17, 1994, at 1.

9. See, e.g., CAL. EDUC. CODE § 47,601 (Deering 2000) (authorizing the establishment of charter schools); FLA. STAT. ch. 228.056 (2000) (same); MASS. ANN. LAWS ch. 71, § 89 (Law. Co-op. 2000) (same); NEV. REV. STAT. § 386.550 (2000) (same); WIS. STAT. § 118.40 (1999) (same); see also Center for Education Reform, *Charter School Highlights and Statistics*, at <http://www.edreform.com/pubs/chglance.htm> (last modified Aug. 18, 2000) (on file with the *Duke Law Journal*) [hereinafter Center for Education Reform] (listing the number of charter schools, as well as the total charter school enrollment by state, for fall 2000).

10. See HASSELL, *supra* note 7, at 2-3, 22, 25-27; NATHAN, *supra* note 7, at xiv-xv, 12; Claudia Willis, *A Class of Their Own*, TIME, Oct. 31, 1994, at 52.

11. See Center for Education Reform, *supra* note 9.

12. See *infra* Part I.

13. In the few years since charter school enabling legislation initially was passed, these laws have given rise to claims sounding in tort and contract, and predicated on federal and state constitutional law, Title VI of the Civil Rights Act, 42 U.S.C. § 2000d (1994), and the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1487 (1994). See, e.g., *Thompson v. Board of Special Sch. Dist. 1*, 144 F.3d 574, 578-81 (8th Cir. 1998) (rejecting the IDEA and race discrimination claims of a disabled student who had left a regular school for a charter school); *Villanueva v. Carere*, 85 F.3d 481, 486-87 (10th Cir. 1996) (rejecting the claim of race-based discrimination based on the establishment of a charter school); *Berry v. School Dist.*, 56 F. Supp. 2d 866,

Article considers the federal equal protection consequences of charter schools that are identifiable on the basis of status, or in terms of sex and/or race. A charter school may be identifiable as such for one of two reasons: because it is designed to appeal to certain students, or because certain groups of students are clustered geographically in close proximity to a school site.<sup>14</sup> Actual and prospective status-identifiable charter schools are being subjected to political and legal challenges in many areas of the country, thus making an analysis of their constitutionality timely and appropriate.<sup>15</sup>

Opposition to racially identifiable or single-sex charter schools is based on the claim that a profound tension exists between such schools and the constitutional mandate of equal protection of the laws. Opponents subscribe to the view that the movement of education reform efforts from the federal courts to state and local authorities is an unhealthy development<sup>16</sup> resulting from the Burger Court's

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872-85 (W.D. Mich. 1999) (refusing to authorize a charter school's funding absent sufficient information regarding racial composition of a student body and the effect on a desegregation decree, but authorizing a second charter school's funding on the condition that the school's racial balance approximate that of the school district as a whole and that the school report names of students to the district); *King v. United States*, 53 F. Supp. 2d 1056, 1066-67 (D. Colo. 1999) (finding a charter school to be a public entity for purposes of immunity against a tort claim); *Porta v. Klugholz*, 19 F. Supp. 2d 290, 302-04 (D.N.J. 1998) (finding that charter school enabling legislation that authorized class meetings in religious buildings did not impermissibly advance religion in violation of the First Amendment); *Board of Educ. v. Booth*, 984 P.2d 639, 645-56 (Colo. 1999) (holding that the allocation of authority between state and local educational authorities did not violate the state constitution); *Council of Orgs. v. Michigan*, 566 N.W.2d 208, 217-22 (Mich. 1997) (rejecting a claim that the Public School Academies Act, commonly known as the charter schools act, was unconstitutional either because the Act authorizes the use of public funds for nonpublic schools or because it divests the state board of education of its duty to supervise public education); *In re Grant of Charter Sch. Application*, 727 A.2d 15, 39-41, 48-49 (N.J. Super Ct. App. Div. 1999) (rejecting a claim that the charter school enabling law violated the state constitutional right to "thorough and efficient" education or equal protection); *Jersey City Educ. Ass'n v. City of Jersey City*, 720 A.2d 356, 359-60 (N.J. Super. Ct. App. Div. 1998) (finding that the city's use of proceeds from the sale of municipal bonds to construct a facility that would be leased in part to a charter school would not violate a state statute prohibiting the construction of charter school facilities with public funds); *Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 516 S.E.2d 655, 659 (S.C. 1999) (finding that a charter school application may be denied for failure to satisfy the civil rights component of the charter school enabling law).

14. The terms "status-conscious" and "status-identifiable" are used interchangeably in this Article and refer to sex or racial status.

15. See *Berry*, 56 F. Supp. 2d at 870-72; *Villanueva v. Carere*, 873 F. Supp. 434, 436-37 (D. Colo. 1994), *aff'd*, 85 F.3d 481 (10th Cir. 1996).

16. See Martha Minow, *Choice or Commonality: Welfare and Schooling After the End of Welfare as We Knew It*, 49 DUKE L.J. 493, 542-48 (1999) (arguing that education reform efforts that rely on local communities to take care of their own ignore problems in defining community and potential conflicts with judicial interpretation of equality norms); Joan C. Williams, *The*

narrow interpretation of the scope of federal courts' powers to remedy race- and socioeconomic class-based inequities in education.<sup>17</sup> Thus, deregulation is perceived as a refutation of the Warren Court's affirmative commitment to federal intervention in state and local educational matters for the purpose of ensuring equal educational opportunity.<sup>18</sup> In any event, in light of our recent national history of schools segregated on the basis of race or sex, and recalcitrance to integrated education,<sup>19</sup> opponents question whether charter schools might become taxpayer-supported havens for middle-class minority and white students, who will leave the most at-risk students behind in conventional, sub-par public schools.<sup>20</sup> That some of the most prominent proponents of charter school legislation are political conservatives who, fairly or not, are associated with hostility to civil rights leg-

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*Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 84-85, 105-11 (criticizing the rhetoric of localism in *Rodriguez*). See generally Richard T. Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843, 1860-85 (1994) (arguing that the Court's local government precedent perpetuates racial discrimination).

17. See *Milliken v. Bradley*, 418 U.S. 717, 745-47 (1974) (striking down an interdistrict busing remedy on the basis that suburban districts had not contributed directly to segregation in the city); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40-44 (1973) (upholding a state financing system for education against an equal protection challenge by minority students living in poorer districts based, in part, on the notion that federalism requires state and local control of education).

18. See Martha Minow, Lecture, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 258-61 (1999) (expressing sympathy for the latest wave of education reforms such as school choice and charter schools on the assumption that they are intended to aid the disadvantaged, but arguing that such efforts are predicated in part on the repudiation of methods and results of law-driven educational equality efforts like school desegregation litigation).

19. See SARA M. EVANS, *BORN FOR LIBERTY: A HISTORY OF WOMEN IN AMERICA* 28, 42, 58, 61, 65, 70-72 (1989) (discussing segregated and inferior education available to women from the colonial period through the nineteenth century); JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM* 136-37, 160-62, 230-31, 264-69, 405-15 (7th ed. 1994) (discussing de jure segregated and inferior education available to African Americans). State and local governments and school officials in the South devised a variety of tactics to impede or delay racial integration of public education. For example, they passed interposition and nullification decrees and laws against *Brown*, closed public schools and established private academies for white students, and instituted attendance plans that placed the burden of desegregating on black students and parents who were subjected to violence, intimidation, and harassment if they evinced a desire to attend white schools. See NEIL R. McMILLEN, *THE CITIZENS' COUNCIL: ORGANIZED RESISTANCE TO THE SECOND RECONSTRUCTION, 1954-64*, at 267-304 (1971); FRANCIS M. WILHOIT, *THE POLITICS OF MASSIVE RESISTANCE 21-70* (1973); RAYMOND WOLTERS, *THE BURDEN OF BROWN* 91-92, 112-15 (1984).

20. See, e.g., Tim Simmons, *Charter Schools Still Tilt Racially*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 3, 1999, at B1 ("The primary fear among lawmakers who approved the [charter school] program was that schools would become havens for middle-class and wealthy white families.").



isolation generally, and to school desegregation in particular,<sup>21</sup> only adds to opponents' misgivings about charter schools.

Equality-based concerns about the deregulation of education should not be taken lightly. In this Article, I argue that efforts must be made to ensure that charter schools do not disproportionately benefit elites. I offer judicial and legislative proposals that are designed to ensure that this goal is accomplished.

At the same time, however, this Article cautions against the assumptions that the devolution of education reform efforts is adverse to the cause of civil rights and that status-conscious charter schools are inconsistent with the concept of equal protection of the laws. I argue that state-level educational programs that enable local communities to influence the nature and content of schooling, such as the charter schools movement, may be understood to democratize, rather than constrain, the educational process. Such experiments may open previously unavailable avenues to equal citizenship for minorities and women—especially those from working-class and poor backgrounds—rather than restricting their rights in ways that reinscribe the kinds of status relationships characteristic of social relations during the pre-civil rights era. Indeed, such alternative schooling efforts should be understood as a central civil rights issue for those among the emerging generation of legal scholars and practitioners who are concerned about structural inequalities that historically marginalized groups continue to confront.<sup>22</sup>

In interrogating the assumption that status-conscious charter schools are constitutionally suspect, I aspire to bring a more nuanced intellectual perspective to the legal literature than is now apparent. Though this scholarship is only in the initial stages of development and no writer has systematically addressed the specific issue that I explore here, this literature already is manifesting the familiar fault lines that separate conservative and liberal thinking about “cultural war”-related topics like sex and race, especially as they relate to the concept of federalism. Analyses of charter school enabling statutes by those who have considered their federal constitutional or statutory

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21. See *supra* note 6.

22. See, e.g., Jodi Wilogren, *Young Blacks Turn to School Vouchers as Civil Rights Issue*, N.Y. TIMES, Oct. 9, 2000, at A1 (noting that while “established African-American organizations have been among the leaders of opposition to school vouchers,” younger leaders have embraced alternative schooling and polls show strong support for vouchers among African Americans in general).

implications tend to be characterized by suspicion of local level experimentation and by an assumption that this legislation will likely violate some individual's or group's constitutional or statutory equal protection rights.<sup>23</sup> By contrast, those who bring market-oriented perspectives to bear on the law rarely show interest in the equal protection implications of charter school legislation, or are convinced that such concerns are misplaced.<sup>24</sup>

These writers are approaching questions about charter schools as if they merely present another round in the affirmative action or school desegregation battles, rather than recognizing the complexity of these questions, owing to the unique public and private characteristics of deregulated schools. This approach obfuscates the most compelling question about legislation deregulating public education—namely, under what circumstances such legislation may work to advance the best educational interests of students, regardless of their sex or racial status. This question demands nuanced, fact-sensitive, case-by-case analysis, rather than a recapitulation of hackneyed cultural war salvos.

This Article is divided into four parts. Part I describes the nature and purposes of charter school enabling legislation. This part empha-

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23. See Raquel Aldana, *When the Free-Market Visits Public Schools: Answering the Roll Call for Disadvantaged Students*, 15 NAT'L BLACK L.J. 26, 36 (1997) (arguing that the deregulation of public education will have an adverse impact on minority and poor students and is in "direct competition with the idea of educational equity"); Jay P. Heubert, *Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation*, 32 HARV. C.R.-C.L. L. REV. 301, 303 (1997) (determining that federal disability law applies to charter school boards and that the duties of charter schools toward the disabled may exceed those of traditional public schools); Sharon Keller, *Something to Lose: The Black Community's Hard Choices About Educational Choice*, 24 J. LEGIS. 67, 95-98 (1998) (arguing that voucher programs and charter schools likely will undermine the rights of lower-income and minority students and parents). *But see* Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375, 2408-09 (1997) (arguing that certain charter schools may be viable options for the effective education of black children).

24. See Jonathan B. Cleveland, *School Choice: American Elementary and Secondary Education Enter "Adapt or Die" Environment of a Competitive Marketplace*, 29 J. MARSHALL L. REV. 75, 79-81 (1995) (asserting that charter schools are a "supply-side stimulus" that will produce reform or drive schools from the market and arguing that, liberals' arguments to the contrary notwithstanding, choice programs such as charter schools aid minority communities disproportionately); William Haft, *Charter Schools and the Nineteenth Century Corporation: A Match Made in the Public Interest*, 30 ARIZ. ST. L.J. 1023, 1028 (1998) (analyzing charter schools by way of the public/private model of the corporation, but failing to comment on equality issues); *cf.* James A. Peyser, *School Choice: When, Not If*, 35 B.C. L. REV. 619, 625-26 (1994) (disputing the "myth" that "government monopoly is the only way to ensure equity" by arguing that "choice enhances equity by weakening the links between wealth, geography, and educational opportunity").

sizes the similarities among various states' charter school enabling statutes, distinguishes charter schools from traditional public schools (including those that include school choice programs), and explains the role of deregulation in charter schools' distinctiveness.

Part II responds to equality-based criticisms of charter school legislation by critically examining state legislatures' efforts to ensure that all students benefit from the deregulation of education, regardless of race or sex. I examine, in particular, provisions of charter school enabling legislation that either permit or mandate status-consciousness in admissions. Ironically, I argue, these provisions may be counterproductive. Though well-intentioned, these provisions are substantially in conflict with federal equal protection precedent.

Part III is the analytical centerpiece of the Article. In this part, I suggest doctrinal concepts and conventions to aid courts in determining under what circumstances status-identifiable deregulated public schools may be deemed lawful. These conventions are based, in part, on the unique nature and purposes of deregulated education which, I believe, entitle *some* of these institutions to a unique, "quasi-public" legal status.<sup>25</sup> Supreme Court decisions on federalism and education, which dictate the presumptive constitutionality of state legislatures' decisions regarding public education except under narrowly circumscribed circumstances, also weigh in favor of according some of these schools a quasi-public status.<sup>26</sup> Finally, my suggestions are based on historical observations and social theory that support the concept of pragmatism in law.<sup>27</sup> A more pragmatic mode of equal protection analysis would accommodate the quasi-public status that I propose. In addition, it would be more responsive than the conventional jurisprudence to the sociological circumstances that result in the establishment of status-identifiable charter schools.

Finally, in Part IV, I conclude by offering suggestions to legislatures for correcting the most obvious technical deficiencies in status-conscious provisions of charter school enabling legislation. In the event that federal courts reviewing these provisions on equal protection grounds do not understand the states' experiment with deregulated education as deserving special considerations of the type outlined in Part III, my proposals may increase the likelihood that these statutory provisions will withstand constitutional scrutiny.

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25. See *infra* Part III.D.

26. See *infra* Part III.C.

27. See *infra* Part III.E.

## I. CHARACTERISTIC ELEMENTS OF DEREGULATED EDUCATION

The deregulation of public education has commanded considerable attention from politicians, journalists, scholars of public policy,<sup>28</sup> and the courts.<sup>29</sup> The legal implications of the charter schools movement are only beginning to be considered in the legal literature, however.<sup>30</sup> It is likely that the relative quietude among legal scholars over charter schools stems in part from the assumption that deregulation and school choice are essentially the same.<sup>31</sup> True enough, the idea of deregulated education is animated in part by the conviction that parents are entitled to exercise control over where their children attend school. Thus, it is correct to claim that both deregulated education and school choice programs function to bring autonomy to the process of selecting a school site.

That they function in a similar manner with respect to site selection does not make the two reform efforts the same for all purposes, however, certainly not as a matter of law. For this reason, the abundance of legal literature on school choice does not address the particular issues raised by deregulated education.<sup>32</sup>

The objective of this part is to explain the nature and purposes of charter school legislation, in contrast to conventional public schools, including those that permit participation in school choice programs. This part lays the groundwork for the arguments in the remainder of the Article concerning the importance that the deregulated status of charter schools, and state legislators' purposes in creating them, should play in federal courts' consideration of their constitutionality.

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28. See HASSEL, *supra* note 7, at 1-2, 7, 9; NATHAN, *supra* note 7, at 55-71; Applebome, *supra* note 5, at B7; Sanchez, *supra* note 5, at A1.

29. See *supra* note 13.

30. See *supra* notes 23-24.

31. See COOKSON, *supra* note 6, at 15, 40-41, 44, 46, 141, 145, 150 (1994) (describing various types of school choice plans and including charter schools as part thereof); Aldana, *supra* note 23, at 27-35 (discussing charter schools as part of school choice programs); Keller, *supra* note 23, at 95-98 (describing the similar trade-offs that must be made with both charter school systems and voucher programs).

32. See, e.g., Greg D. Andres, Comment, *Private School Voucher Remedies in Education Cases*, 62 U. CHI. L. REV. 795, 796-97 (1995) (arguing that private school vouchers may provide effective remedies for violations of students' rights under state constitutions); James B. Egle, Comment, *The Constitutionality of School Choice*, 1992 WIS. L. REV. 459, 509-10 (arguing that the Establishment Clause may not prohibit the adoption of voucher plans); James S. Liebman, *Voice, Not Choice*, 101 YALE L.J. 259 *passim* (1991) (reviewing CHUBB & MOE, *supra* note 6, and critiquing arguments in favor of choice).

### A. *The Legislative Purpose of Charter School Statutes*

School choice programs are intended to allow parents and students autonomy in the selection of school sites by providing vouchers to pay for tuition at private, parochial, or non-neighborhood public schools.<sup>33</sup> By contrast, proponents claim that the primary purpose of charter school legislation is to enhance the educational choices available to students and parents *within* public school systems.<sup>34</sup> Charter schools are intended to offer students expanded curricula opportunities and pedagogical approaches that are unavailable in existing public schools, as well as to increase opportunities for community involvement in the process of conceiving educational programming and in teaching.<sup>35</sup> Thus, charter school legislation is meant to foster educational excellence by encouraging unconventional approaches to learning, curricula, and instruction.<sup>36</sup> In this way, the legislation is designed to increase public confidence in the public schools and, thereby, to combat the presumption that a good education can only be attained in private or parochial schools, or in a select few suburban schools in the nation's wealthiest districts.

### B. *Essential Components of Charter School Legislation*

State legislators have sought to achieve the objectives described above through public-private partnerships. The private aspects of charter school enabling legislation include substantial deregulation of

33. See COOKSON, *supra* note 6, at 14-16; NATHAN, *supra* note 7, at 6. A caveat to this description is that some choice programs, known as "controlled choice" programs, place restrictions on which schools students can choose, usually to comply with antidiscrimination norms. See COOKSON, *supra* note 6, at 14-15.

34. See NATHAN, *supra* note 7, at 1-2.

35. See *Comparing Charter School Laws: Hearings Before the Subcomm. on Labor, Health, and Human Services, and Education, and Related Agencies of the Senate Comm. on Appropriations*, 104th Cong. 22-23 (Jan. 19, 1995) [hereinafter *Comparing Charter School Laws*] (statement of Louann A. Bierlein, Former Assistant Director, Morrison Institute for Public Policy, Arizona State University); HASSELL, *supra* note 7, at 5-7; NATHAN, *supra* note 7, at 1-5, 11-19.

36. See, e.g., FLA. STAT. ANN. § 228.056(2) (West 1996):

The purpose of charter schools shall be to: (a) Improve student learning. (b) Increase learning opportunities for all students, with special emphasis on expanded learning experiences for students identified as academically low achieving. (c) Encourage the use of different and innovative learning methods. (d) Increase choice of learning opportunities for students.

MASS. GEN. LAWS ANN. ch. 71, § 89 (West 2000) ("The purposes for establishing charter schools are: (1) to stimulate the development of innovative programs . . . (2) to provide opportunities for innovative learning and assessments; (3) to provide parents and students with greater options . . .").

schools, autonomy and creativity in educational programming, and admissions systems in which charter school trustees—private individuals or entities—are given wide discretion in selecting students. Charter schools retain a public nature because they are publicly financed; moreover, these institutions are required to demonstrate improved student performance to states and localities in order to retain their charters.<sup>37</sup>

1. *Deregulation.* Charter schools are considered independent from local educational bureaucracies,<sup>38</sup> although they complement the portfolio of educational opportunities that exist in local school districts, including magnet schools and other enrichment programs.<sup>39</sup> Charter schools differ from these other specialty programs in an exceptional way, however: the legislation enabling charter schools exempts them from nearly all of the regulatory constraints normally imposed upon public schools under state law.<sup>40</sup> Most significantly, charter schools may be freed from customary statutory mandates relating to budgets, teacher-pupil ratios, curriculum requirements, scheduling, teacher certification requirements, collective bargaining agreements, and other personnel matters.<sup>41</sup> Moreover, deregulation allows nontraditional persons or entities to found charter schools, including museums, universities, nonprofit or for-profit organizations, parents, and teachers; thus, local community members usually

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37. Although this part emphasizes the similarities among charter school enabling acts, there are important differences in the states' statutes. Most significant is the extent to which statutes grant schools autonomy in decisionmaking, an issue discussed further in Part III. For a general discussion of the differences among charter school laws, see Jennifer Hamilton, *A State by State Legislative Analysis of Charter School Laws* 7-8, 85 (1998) (surveying all states and the District of Columbia to discern the content of and variation among charter school laws), Social Science Research Network, at [http://papers.ssrn.com/paper.taf?abstract\\_id=152230](http://papers.ssrn.com/paper.taf?abstract_id=152230) (on file with the *Duke Law Journal*).

38. See Hamilton, *supra* note 37, at 4.

39. See FLA. STAT. ANN. § 228.056(b)(d) (West 1996); MASS. GEN. LAWS ANN. ch. 71, § 89(3) (West 2000); N.C. GEN. STAT. § 115C-238.29B (2000).

40. See Hamilton, *supra* note 37, at 4. Charter schools are not exempt from antidiscrimination laws and laws governing health, safety, and welfare. See, e.g., N.Y. EDUC. LAW § 2854 (Consol. 1999) (exempting charter schools from all laws and regulations except those pertaining to health, safety, student assessment, and civil rights); *infra* note 50.

41. See, e.g., 105 ILL. COMP. STAT. 5/27/A-5(g) (West 1997) (exempting charter schools from all state laws and regulations "governing public schools and local school board policies"); MINN. STAT. ANN. § 120.064(7) (West 1996) (exempting charter schools from "all statutes and rules applicable to a school, a school board, or a school district"). The number and nature of exemptions granted to charter schools may vary from state to state; some states' charter school laws are "weaker" than others. See Hamilton, *supra* note 37, *passim*.

uninvolved in the process of shaping educational programming have many opportunities to design curricula and set school policies.<sup>42</sup> In this way, charter schools democratize the educational process.

Deregulation also allows charter school administrators and teachers to operate more autonomously than their counterparts in traditional public schools.<sup>43</sup> Absent the massive bureaucracy usually associated with public schools, charter school administrators and teachers are free to design educational programming and institute policies as they see fit, including experimental approaches to teaching and learning.<sup>44</sup> Ideally, then, deregulation allows charter schools to serve as learning laboratories. Thus, charter schools deviate from the general principle that autonomy in schooling can only be achieved as a function of privately-held wealth.<sup>45</sup>

2. *Diversity in Educational Programming.* The autonomy allowed charter school administrators and teachers has helped them to create innovative curricula as well as creative pedagogical approaches to stimulating educational excellence.<sup>46</sup> This innovation is demonstrated by the remarkable array of theme schools that have emerged as a result of charter school legislation.<sup>47</sup> For example, schools have been organized around computer science and information technol-

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42. See 105 ILL. COMP. STAT. 5/27A-7(15)(b) (West 1997) (stating that founders may be teachers, school administrators, local school councils, colleges or universities or their faculty members, or corporations); N.Y. EDUC. LAW § 2851(1) (Consol. 1999) (same); Applebome, *supra* note 5, at B7; *Charter Schools*, THE ECONOMIST, July 2, 1994, at 26; Charles Greenwalt, *Because Parents Choose, Charter Schools Promising*, PATRIOT & EVENING NEWS (Harrisburg, Pa.), Sept. 25, 1996, at A15; Sanchez, *supra* note 5, at A1.

43. See Hamilton, *supra* note 37, at 4; Chester E. Finn & Dianne Ravitch, *Magna Charter?*, 74 HERITAGE FOUND. POL'Y REV. 41, 41 (1995).

44. See Willis, *supra* note 10, at 52. Once approved by the state, a charter school usually is considered an independent legal entity with the ability to hire and fire, sue and be sued, contract out services, and control its own finances. See Hamilton, *supra* note 37, at 4.

45. See Keller, *supra* note 23, at 72-74.

46. See MINN. STAT. ANN. § 124D.10 (West 2000) (stating that the purpose of a charter school is to "encourage the use of different and innovative teaching methods" and to "require the measurement of learning outcomes and create different and innovative forms of measuring outcomes").

47. See *Charter Schools Hearings*, *supra* note 7; Mary Gifford, *Each Student Can Focus on Specific Wants, Needs*, ARIZ. REPUB., Apr. 2, 1997, at 11 (noting that these themes "center on the arts, agriculture, computers and technology, Montessori-based curriculum, [and] a back-to-basics approach").

ogy,<sup>48</sup> a Montessori-based approach,<sup>49</sup> and a “back-to-basics” theme;<sup>50</sup> other schools are targeted to meet the educational needs of at-risk populations.<sup>51</sup>

3. *Increased Accountability for Academic Achievement.* In exchange for autonomous operation and the involvement of nontraditional actors in the process of establishing and managing charter schools, these schools are more accountable for their students’ academic performance than are traditional public schools.<sup>52</sup> State assessments of charter schools’ performance are based upon information contained in applications for charter status. An application must include specific achievement goals for the student body and a description of the methods that are to be used to achieve these objectives.<sup>53</sup> Schools must be able to demonstrate agreed-upon pupil outcomes through empirical data or outcome-based performance measures (which are considered more reliable than standardized measurements and preferred by many educators).<sup>54</sup> If schools do not demonstrate these outcomes, the states can revoke

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48. See, e.g., NATHAN, *supra* note 7, at 35-41 (describing a charter school in LeSueur, Minnesota, that is organized around computers and other technology).

49. See HASSEL, *supra* note 7, at 88 (showing that for the academic year 1995-96, 58 charter schools in Colorado, 40 schools in Massachusetts, and 22 schools in Michigan adopted an alternative approach to learning, including Montessori).

50. See *id.* (showing that for the academic year 1995-96, 21 charter schools in Colorado, 12 schools in Massachusetts, and 15 schools in Michigan adopted a basics approach).

51. See *id.* at 89 (showing that for the academic year 1995-96, 8 charter schools in Colorado, 20 schools in Massachusetts, and 15 schools in Michigan targeted at-risk students); see also NATHAN, *supra* note 7, at 26, 30 (discussing charter schools in St. Paul and San Francisco that attract overwhelmingly low-income and minority student populations).

52. See, e.g., *Charter Schools Hearings*, *supra* note 7 (“The first principle is high standards . . . . The final principle is accountability. These [charter] schools can truly set a model for holding public schools accountable.”).

53. Compare MASS. GEN. LAWS ANN. ch. 71, § 89(f) (West 1999) (requiring that applications include a description of, *inter alia*, “the mission, purpose, innovation and specialized focus of the proposed charter school” and “the educational program, instructional methodology and services to be offered”), with MASS. GEN. LAWS ANN. ch. 71, § 89(gg) (West 1999) (requiring an annual report detailing “progress made toward the achievement of the goals set forth in the charter”).

54. See ARIZ. REV. STAT. ANN. § 15-183(E)(4) (West 1999) (requiring that charter schools design a method for measuring their progress toward pupil outcomes adopted by the state, including norm-referenced standardized tests); see also *Charter Schools Hearings*, *supra* note 7 (discussing student performance standards as a common feature of charter schools).



their charters.<sup>55</sup> The threat of charter revocation functions as an incentive to meet or surpass state achievement goals.<sup>56</sup>

This feature, too, is said to distinguish charter schools from choice programs, which permit the use of public monies for education in purely private or parochial schools without requiring a demonstrated benefit to the public educational system. Modeled on the market imperative that businesses must “compete or die,” voucher programs do not require school administrators to demonstrate improved student performance. Rather, choice programs are predicated on the notion that schools that are considered superior will attract students (consumers) on the basis of their excellence.<sup>57</sup> That charter schools are accountable to states and localities for student achievement thus sharply contrasts with choice programs; the commitment to free market competition among advocates of choice means that the health of public schools is irrelevant, while the success of charter schools depends on the demonstrated improvement of the public school systems in which they are authorized.<sup>58</sup>

4. *Admissions.* Standards for admission to charter schools are almost entirely within the discretion of school administrators. Some schools elect open admissions policies.<sup>59</sup> Admission slots are filled to capacity by anyone who applies, or by lottery in the event that schools are oversubscribed,<sup>60</sup> as required by federal law.<sup>61</sup> Some charter

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55. In the nine years since charter schools were first established, 79 charter schools (4% overall) have been closed. See Edward Wyatt, *Charter School's Problems Yield Cautionary Tale*, N.Y. TIMES, Aug. 18, 2000, at A1.

56. See HASSEL, *supra* note 7, at 5-6; NATHAN, *supra* note 7, at 2-3.

57. See CHUBB & MOE, *supra* note 6, at 225 (“When it comes to performance, schools are held accountable from below, by parents and students who directly experience their services and are free to choose.”); COOKSON, *supra* note 6, at 106-07.

58. In fact, choice programs are designed to move the provision of education beyond public authority:

Our guiding principle in the design of a choice system is this: public authority must be put to use in creating a system that is almost entirely beyond the reach of public authority. . . . [W]e think the best way to achieve significant, enduring reform is for states to take the initiative in withdrawing authority from existing institutions and building a new system in which most authority is vested directly in the schools, parents, and students. . . . As long as authority remains “available” at higher levels within state government, it will eventually be used to control the schools.

CHUBB & MOE, *supra* note 6, at 218-19.

59. See N.H. REV. STAT. ANN. § 194-B:2(I) (1999).

60. See, e.g., FLA. STAT. ANN. § 228.056(6)(b) (West 1998) (mandating random selection when eligible students exceed spaces); MINN. STAT. ANN. § 124D.10(9)(3) (West 2000) (same).

61. See 20 U.S.C. § 8066(1)(H) (1994).

schools refuse to admit students who have been suspended or expelled from school, or involved in criminal activity, however.<sup>62</sup>

Moreover, some enabling laws impose minimum scholastic standards for admission, which are used together with a lottery system<sup>63</sup> to fill admissions slots in charter schools. Still, these minimal requirements are different in kind from the types of requirements that may be imposed by choice programs such as magnet schools, which eliminate many students from eligibility by requiring applicants to submit to admission tests. (Fifty-four percent of magnet schools at the secondary level and 24% at the elementary level require tests for admission.)<sup>64</sup> Due in part to the minimal restrictions on who may enroll in charter schools, these schools have not become havens for elites, as some had assumed they would be.<sup>65</sup>

In fact, the fear that charter schools will become bastions of the elite—and sites for the perpetuation of historic and contemporary discrimination—appears entirely unsupported by available empirical evidence. Most charter schools are quite diverse in terms of the racial composition, socioeconomic background, and sex of their student bodies.<sup>66</sup> While it is true that some charter schools are attended predominantly by students of color or by whites, a 1997 study by the United States Department of Education reported that 48% of students who attend charter schools are classified as racial minorities.<sup>67</sup> Thus, the Department found charter schools either to have racial compositions similar to statewide averages, or to have a “higher proportion of students of color” than noncharter public schools.<sup>68</sup> The data for 1998 show that in fifteen surveyed states and the District of

62. See N.C. GEN. STAT. ANN. § 115C-238.29F(g)(7) (West 2000).

63. See, e.g., ARIZ. REV. STAT. ANN. § 15-184(A) (West 1999) (authorizing the selection of students through an “equitable selection process such as a lottery” when eligible students exceed spaces); MASS. GEN. LAWS ANN. ch. 71, § 89(n) (West 1999) (mandating that spaces be assigned by lottery when eligible students exceed spaces); N.J. STAT. ANN. § 18A:36A-8 (West 1999) (same).

64. See NATHAN, *supra* note 7, at 7, 133.

65. See Finn & Ravitch, *supra* note 43, at 41; Ellen Nakashima & Spencer S. Hsu, *Harmonious Assembly Hears a Little Discord: NAACP's Charter School Challenge Threatens Va.'s Bipartisan Image*, WASH. POST, Jan. 21, 1997, at B1; Sanchez, *supra* note 5, at A1.

66. See generally *Charter Schools Hearings*, *supra* note 7; Sanchez, *supra* note 5.

67. See U.S. DEP'T OF EDUC., A STUDY OF CHARTER SCHOOLS: FIRST YEAR REPORT 16 (1997), available at <http://www.ed.gov/pubs/charter> (on file with the *Duke Law Journal*) [hereinafter 1997 STUDY]. According to the Department of Education, 51.6% of charter school enrollees are non-Hispanic white, 13.8% are non-Hispanic black, 24.8% are Hispanic, 6.3% are Asian or Pacific Islander, and 3.5% are American Indian or Alaskan Native. See *id.*

68. See *id.* at 24.

Columbia, minorities constitute 43.9% of charter school student bodies.<sup>69</sup> Since racial minorities make up roughly 44% of those states' school-age population,<sup>70</sup> these statistics belie the assumption that students of color are underserved by charter schools.

Charter schools are serving socioeconomically disadvantaged students at roughly the same rate as public schools. According to a 1998 Department of Education study, 36% of students attending charter schools in fifteen surveyed states and the District of Columbia were eligible for free or reduced-price lunch (an indicator of economic disadvantage), as compared to 40% of those attending regular public schools in those jurisdictions.<sup>71</sup>

Similarly, there is no indication that female students are less well served by charter schools than males,<sup>72</sup> even though one state's enabling legislation specifically permits the establishment of single-sex charter schools, and other states do not forbid it.<sup>73</sup> A recent Hudson Institute study reported that nearly equal numbers of females and males are represented among charter school enrollees.<sup>74</sup>

This demographic configuration is achieved in part through deliberate efforts. In addition to antidiscrimination provisions,<sup>75</sup> many states' charter school laws—thirteen, at last count—include provisions

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69. See U.S. DEP'T OF EDUC., A NATIONAL STUDY OF CHARTER SCHOOLS: SECOND-YEAR REPORT 48 (1998), available at <http://www.ed.gov/pubs/charter98> (on file with the *Duke Law Journal*) [hereinafter 1998 STUDY]. According to the study, 15.5% of those minority students are classified as African-American, 22.5% as Hispanic, 4.6% as Asian or Pacific Islander, and 4.9% as American Indian or Alaskan native. See *id.* The study included the following states: Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Louisiana, Massachusetts, Michigan, Minnesota, New Mexico, Texas, and Wisconsin, as well as the District of Columbia. See *id.* at 50.

70. See *id.* at 48.

71. See *id.* at 70.

72. See, e.g., Center for Educ. Reform, *What the Research Reveals About Charter Schools*, at [www.edreform.com/pubs/charters.htm](http://www.edreform.com/pubs/charters.htm) (Nov. 2, 2000) (describing a Western Michigan University study that found equal enrollment of boys and girls in Pennsylvania charter schools) (on file with the *Duke Law Journal*); see also *infra* note 74 (referring to the 1997 Hudson Institute report).

73. See N.Y. EDUC. LAW § 2854(2)(a) (McKinney 2000); *infra* notes 252-54.

74. See Hudson Institute, *Charter Schools in Action Project Final Report*, at <http://www.edexcellence.net/chart/chart1.htm> (1997) (noting that the nationwide charter school enrollment in 1996 was composed of 48% male and 52% female students) (on file with the *Duke Law Journal*).

75. See, e.g., MASS. GEN. LAWS ANN. ch. 71, § 89(f) (West 1999) (prohibiting discrimination in admissions on the basis of "race, color, national origin, creed, sex, ethnicity, sexual orientation, mental or physical disability, age, ancestry, athletic performance, special need, or proficiency in the English language, and academic achievement").

that require or encourage charter schools to enroll racially and/or socioeconomically diverse student bodies.<sup>76</sup> Statutes in seven states provide that charter schools may target students at risk of academic failure for outreach and recruitment, or give preference in the application process to schools that target educationally disadvantaged populations.<sup>77</sup> Many such schools have been established, and judging from reports that several have been quite successful in increasing students' academic achievement levels,<sup>78</sup> many other such schools probably will be established in the future.

### C. Conclusion

The aspect of deregulated schools that proponents find most unique is that they are designed to reform education not merely by permitting parental autonomy in the selection of school sites, but by allowing autonomy concerning the nature and content of the educational process itself. In this way, the deregulation of public education is said to encourage the development of innovative pedagogical approaches, unorthodox curricula, and other improvements in the learning process that enable teachers to cater to a wider range of learning styles and needs; thus, deregulation can function to provide an alternative to the one-size-fits-all approach to learning that is characteristic of public education. Moreover, the accountability provisions of charter school legislation appear to give school organizers an incentive to ensure educational improvement.

Proponents point to recent statistics showing that minorities are well represented among charter school attendees to rebut critics' contentions that privileged whites will benefit disproportionately from educational deregulation. While deregulation does not *now* appear to be diminishing educational opportunities for socioeconomically disadvantaged students, contemporary data do not address the concerns

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76. See MINN. STAT. ANN. § 124D.10(9)(3) (West 2000); N.J. STAT. ANN. § 18A:36A-8(e) (West 1999); N.C. GEN. STAT. ANN. § 115C-238.29F(g)(5) (West 2000).

77. See CONN. GEN. STAT. ANN. § 10-66bb(c) (West 2000); FLA. STAT. ANN. § 228.056(6)(c)(2) (West 1998); N.Y. EDUC. LAW § 2854(2)(a) (McKinney 2000).

78. See NATHAN, *supra* note 7, at 168-71; Center for Educ. Reform, *supra* note 72 (discussing studies of charter schools in Arizona, Colorado, Massachusetts, Minnesota, Texas, and Wisconsin for 1998-2000); LEGISLATIVE AUDIT BUREAU, AN EVALUATION: CHARTER SCHOOL PROGRAM 39-41 (1998), available at <http://www.legis.state.wi.us/lab/reports/98-15full.pdf> (on file with the *Duke Law Journal*); J.T., *In the Community; Chartering a New Course*, ESSENCE, Sept. 1994, at 114 (discussing the success of a Marcus Garvey charter school in Detroit and expressing optimism that the charter school movement will aid African-American students); *infra* note 111.

of some on the Left about the relationship between deregulation and equality. These concerns include a question about the consistency of the deregulated school paradigm with current equal protection doctrine. That is, are state statutes that provide for the deregulation of education consistent with the weight of federal antidiscrimination precedent? Emerging from this concern is a set of normative questions about what constraints federal courts should place on the states' experiments with deregulated education, notwithstanding whether these statutes technically are consistent with federal law. How should federal antidiscrimination law relate to state efforts to enact policies that appear to embrace freedom-of-choice principles characteristic of the era of resistance to *Brown v. Board of Education*<sup>79</sup> and to cases mandating equal rights for women? What norms or principles would enable federal courts to be cognizant of our national history of status-based discrimination in education, and therefore, the potential for its furtherance through the neutral guise of deregulation, while guarding against the placing of undue burdens on the states' prerogative to conceive and implement experimental approaches to education? What kinds of antidiscrimination norms should courts deem to burden unduly states' educational policymaking prerogatives with respect to deregulated schools? In the next part, I turn to a consideration of these questions about the relationship between the deregulation of public education and fundamental fairness.

## II. A CONSIDERATION OF THE EQUAL PROTECTION ISSUES RAISED BY THE DEREGULATION OF EDUCATION

Commentators who have expressed skepticism about, or opposition to, the deregulation of education usually have not been concerned with the internal workings of charter schools. Rather, they have focused on the impact of deregulation on the continued viability of the conventional public school system, and on the students and personnel who remain in those schools.<sup>80</sup>

Critics raise the possibility that charter schools will allow for intentional discrimination on the basis of race and sex, or that deregulation will have a disproportionately negative impact on minority com-

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79. 347 U.S. 483 (1954); *see also supra* note 17 and accompanying text (discussing the Burger Court's retreat from the Warren Court's commitment to federal intervention).

80. *See supra* note 23; *infra* notes 82-86, 148-50; *see also* Sanchez, *supra* note 5, at A1 (noting that charter schools can succeed academically without fostering the improvement of public schools).

munities.<sup>81</sup> In particular, they argue that deregulation will increase de facto school segregation<sup>82</sup> and that it will lead to the bankrupting of conventional public schools as monies are siphoned off to charter and other alternative schools.<sup>83</sup> In addition, they predict that to the extent that minority students do take advantage of alternative schooling opportunities like charter schools, only the best students, who are most likely to be members of the middle class, will participate in such programs.<sup>84</sup> The prediction that only the most privileged students will take advantage of charter schools is premised on the notion that students and parents from working-class and poor communities are less likely to have the information and resources required to make the best educational choices for their children.<sup>85</sup> These criticisms suggest the specter of deregulation exacerbating pre-existing educational inequalities, as well as engendering new forms of inequality on the basis of race and sex, as well as disability and socioeconomic status.<sup>86</sup>

Despite the differences between school choice and charter schools described in the previous part, commentators' criticisms of charter programs parallel those leveled against choice programs. Their criticisms are based on the premise that discrimination flows from decentralized decisionmaking, in this case, educational choices made on the state level by majoritarian legislators and on the local level by unelected charter school sponsors, trustees, parents, and students.<sup>87</sup> Stated differently, the criticisms are predicated on the notion that discrimination is less likely in the face of federal oversight of (and intervention in) state and local decisionmaking about public policies that affect historically marginalized populations. Some critics expressly recall the nation's history of de jure school segregation in

81. See Aldana, *supra* note 23, at 45-47; see also Keller, *supra* note 23, at 90-91, 94-95, 97 (describing the negative impact on communities that charter schools perpetuate, rather than address).

82. See, e.g., Aldana, *supra* note 23, at 50-51; Keller, *supra* note 23, at 95.

83. See Keller, *supra* note 23, at 95, 97; Neil MacFarquhar, *Public, but Independent, Schools Are Inspiring Hope and Hostility*, N.Y. TIMES, Dec. 27, 1996, at A1, B5; Joseph Pereira, *Storm over Cambridge Charter School: Parents Assail the Toll on the Public System*, WALL ST. J., Apr. 26, 1996, at B1.

84. See Aldana, *supra* note 23, at 45; Keller, *supra* note 23, at 95, 97.

85. See Aldana, *supra* note 23, at 42-48 & nn. 101-02; Amy Stuart Wells, *African American Students' View of School Choice*, in WHO CHOOSES? WHO LOSES?: CULTURE, INSTITUTIONS, AND THE UNUSUAL EFFECTS OF SCHOOL CHOICE 25, 25-26 (Bruce Fuller & Richard F. Elmore eds., 1996) (arguing that parents with more education are more likely to take advantage of school choice programs).

86. See *supra* notes 20, 23, 85 and accompanying text.

87. See *supra* notes 40-44 and accompanying text.

support of their concerns that deregulation will exacerbate inequality.<sup>88</sup> They draw parallels between charter schools and school choice programs that allow parents to opt out of conventional attendance zones and the segregation academies of the 1950s and 1960s, conceived by state legislators in the South as a means of resisting *Brown's* desegregation mandate by giving white students state-funded tuition grants to attend private schools,<sup>89</sup> or freedom-of-choice programs, which placed the entire burden of desegregation on black students.<sup>90</sup> These concerns are thus consistent with a prevalent theme in the constitutional literature: that the Burger Court's sanctioning of local decisionmaking over areas of public policy integral to the protection of minorities' civil rights—in this case, local control of educational policy<sup>91</sup>—privileges suburban over urban interests, at best, or sanctions private choices that perpetuate discrimination, at worst.<sup>92</sup>

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88. See, e.g., Aldana, *supra* note 23, at 51-52; Keller, *supra* note 23, at 90-93.

89. See WILLIAM H. CHAFE, CIVILITIES AND CIVIL RIGHTS 72 (1980) (describing the North Carolina legislature's Pearsall Plan); DAVID R. GOLDFIELD, BLACK, WHITE, AND SOUTHERN 260 (1988) (highlighting charter schools as an alternative outlet for those discontented with desegregation policies); DEWEY W. GRANTHAM, THE LIFE AND DEATH OF THE SOLID SOUTH 144-45 (1988) (analyzing massive resistance campaigns in Arkansas and Virginia).

90. See CHAFE, *supra* note 89, at 89-92; GOLDFIELD, *supra* note 89, at 257.

91. The Court made clear this theme in *Milliken v. Bradley*, 418 U.S. 717, 741-43 (1974):

[T]he notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to [the] quality of the educational process. . . . The Michigan educational structure involved in this case, in common with most States, provides for a large measure of local control, and a review of the scope and character of these local powers indicates the extent to which the interdistrict remedy approved by the two courts could disrupt and alter the structure of public education in Michigan.

(citations omitted); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40-56 (1973) (finding that the state's educational financing scheme did not violate the Equal Protection Clause). The *Rodriguez* Court further noted that "the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues." *Id.* at 41; cf. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472-74 (1982) (striking down a voter initiative removing from local school districts the power to implement voluntary school desegregation plans). This doctrinal trend has continued under the aegis of the Rehnquist Court. See *Missouri v. Jenkins*, 515 U.S. 70, 89-100 (1995) (emphasizing that restoring local control of a school system must be considered in determining constitutional compliance and finding that a remedial order including interdistrict components was beyond the scope of an interdistrict remedy); *Freeman v. Pitts*, 503 U.S. 467, 485-92 (1992) (holding that federal courts can return partial control to a district before the district has wholly satisfied a remedial order); *Board of Educ. v. Dowell*, 498 U.S. 237, 246-50 (1991) (noting that districts' internal decisions are not subject to stringent court review once a district has been deemed unitary, and emphasizing the temporary nature of court supervision).

92. See, e.g., Derrick Bell, Jr., *Brown v. Board of Education and the Interest-Convergence*

The objective of this part is to consider equality-based criticisms of the deregulation of public education by discussing legislative efforts to ensure equal educational opportunity in charter schools. Cognizant of our national history of race- and sex-based discrimination in education and political resistance to the deregulation of education that is premised on the fear that deregulation will perpetuate inequality,<sup>93</sup> legislators in many states have included provisions in charter school enabling legislation that address these issues. In response to concerns that charter schools are likely to become bastions for a white, middle-class elite, many states' charter school statutes not only forbid race-based discrimination, but also encourage or mandate racial balance or racial diversity in admissions.<sup>94</sup> Similarly, many states' enabling statutes forbid sex-based discrimination; at the same time, a few states' laws permit the establishment of single-sex programs in conventional and/or charter schools, and such schools have been established in states that do not expressly permit single-sex education.<sup>95</sup>

On the face of it, this type of legislation is a positive development. Race-conscious provisions help assuage concerns that charter schools will undermine the educational civil rights of racial minorities. The provisions permitting single-sex education affirm deregulated schools' essential purpose of encouraging pedagogical experimentation,<sup>96</sup> as increasing numbers of citizens support the inclusion of single-sex schools or classrooms among the portfolio of pedagogical opportunities available in public schools.<sup>97</sup>

Nevertheless, this part argues that in many instances the status-conscious provisions of charter school enabling legislation are more likely to decrease than to increase the educational options of the students whose civil rights they are intended to advance. The statutes are

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*Dilemma*, 93 HARV. L. REV. 518, 526-27 (1980) (criticizing the concept of local control of education); Keller, *supra* note 23, at 93-94 (questioning the Court's decision in *Rodriguez* declining to interpret the Equal Protection Clause to require "wealth-equalization of educational expenditures"); Williams, *supra* note 16, at 108-11 (criticizing the Court's decision in *Rodriguez* based on the Court's treatment of state sovereignty and local authority). For a discussion and critique of this constitutional commentary, see David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 546-54 (1999) (discussing the proposition that the U.S. Constitution protects local governments from state attempts to prevent localities from resolving federal constitutional problems).

93. See *supra* notes 14-18 and accompanying text.

94. See *infra* notes 104-07 and accompanying text.

95. See *infra* notes 251-54 and accompanying text.

96. See *supra* notes 35-36, 41-52 and accompanying text.

97. See *infra* notes 264-76, 281-91 and accompanying text.



likely to be counterproductive because they are not well conceived; their conceptual problems are structural in nature and, because they implicate federal law, are not easily resolved. Even though the statutes are designed to guard against intentional discrimination and discriminatory impact, or to promote expanded learning opportunities for historically marginalized groups, they are inconsistent with the Court's race- and sex-discrimination jurisprudence in significant ways. Their status-consciousness conflicts with the race discrimination jurisprudence both because de facto discrimination is not actionable under the Court's school desegregation jurisprudence, and because race- and sex-consciousness is frowned upon in the Court's affirmative action and single-sex education jurisprudence. While these statutes can be amended in ways that will make them more compatible with federal equal protection jurisprudence,<sup>98</sup> the essential problem is that the federal doctrine needs to be expanded to accommodate the new specie of school created by the deregulation of education.

A. *The General Equal Protection Problems Created by the Deregulation of Education*

Because deregulated schools are intended to offer educational programming that is different from or superior to that available in many public schools, charter school enabling legislation is open to legal challenges on equal protection grounds.<sup>99</sup> Claims of unequal access

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98. See *infra* Part III.

99. Constitutional challenges are only valid against state actors, of course. Some scholars have suggested that deregulated schools might be considered sufficiently private to raise a question regarding whether the state action doctrine applies to them. See, e.g., Justin M. Goldstein, *Exploring "Unchartered" Territory: An Analysis of Charter Schools and the Applicability of the U.S. Constitution*, 7 S. CAL. INTERDISC. L.J. 133, 149-77 (1998) (analyzing whether charter schools are state actors under the U.S. Constitution). The weight of authority suggests otherwise, however; charter schools are legislatively created by the states, funded by the states, and are providers of public education, making it unlikely that they would not be considered state actors. See *San Francisco Arts & Athletics, Inc. v. United States Olympics Comm.*, 483 U.S. 522, 543-45 (1987) (finding that whether a government-chartered entity is a state actor turns on whether the alleged governmental actor performs functions traditionally exclusively performed by the state); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (holding that conduct alleged to deprive an individual of a federal right may be the basis for a claim if the deprivation is caused by the exercise of a right or privilege created by the state and if the party alleged to have caused the deprivation can fairly be said to be a state actor); see also *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 397-400 (1995) (finding Amtrak to be part of the government for purposes of a First Amendment claim). *But cf.* *Rendell-Baker v. Kohn*, 457 U.S. 830, 839-43 (1982) (dismissing a section 1983 claim by teachers employed by a private school that received 90% of its funding from the state on the grounds that the school was not a state actor).

No court that has considered constitutional claims against charter schools has had diffi-

to the educational programming and resources offered in charter schools are an obvious basis for such constitutional challenges, especially if status-identifiable groups are over- or underrepresented among the schools' attendees.

An equal protection claim against either a particular charter school or enabling legislation would be based on the reality that in deregulating education, state legislatures have created two distinct categories of schools: the existing, or conventional, public schools, which generally are viewed as underperforming or failing, and charter schools, which are designed to offer an education that is different from and better than that available in the conventional public schools. The premise of the suit would be the notion that students attending charter schools are treated more favorably than students who remain in the conventional public schools. Such a proposition might be substantiated by differences in funding, curricula, credentials of personnel, and the characteristics of the students who are admitted to or enrolled in the two categories of schools.<sup>100</sup> Equal protection challenges that are based on any difference in admissions standards would be most viable in cases where charter school admissions are restricted.<sup>101</sup>

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culty finding the schools to be products of state action; in fact, most courts have not even addressed the question, thus implying that the answer to the state action question is axiomatic. *See, e.g.,* *Porta v. Klagholz*, 19 F. Supp. 2d 290, 301-04 (D.N.J. 1998) (finding that a charter school enabling law did not impermissibly advance or inhibit religion, while not addressing the state action question); *Villanueva v. Carere*, 873 F. Supp. 434, 438, 446-50 (D. Colo. 1994) (denying an equal protection claim against a school district that authorized a charter school, without considering the state action doctrine), *aff'd*, 85 F.3d 481 (10th Cir. 1996); *cf. King v. United States*, 53 F. Supp. 2d 1056, 1065 (D. Colo. 1999) (finding a charter school to be a public entity for purposes of immunity from a tort claim).

That charter schools are state actors should not mean that they are treated exactly the same as conventional public schools for purposes of equal protection analysis, however. This point is discussed *infra* Part III.

100. *See* Aldana, *supra* note 23, at 36-48 (discussing inequalities in funding, curriculum, and instruction raised by voucher programs and charter schools and suggesting legal remedies); Heubert, *supra* note 23, at 334-40 (discussing the admissions obligations of charter schools under federal antidiscrimination laws for disabled students); Jennifer T. Wall, *The Establishment of Charter Schools: A Guide to Legal Issues for Legislatures*, 1998 B.Y.U. EDUC. & L.J. 69, 82-83 (discussing equal protection issues raised by charter school enabling legislation).

101. *See, e.g.,* ARIZ. REV. STAT. ANN. § 15-184(C) (West Supp. 1999) (providing that enrollment may be limited to a particular age or grade level); MASS. ANN. LAWS ch. 71, § 89(1) (Law. Co-op. Supp. 1999) (authorizing charter schools to "limit enrollment to specific grade levels and . . . structure curriculum around particular areas of focus such as mathematics, science, or the arts"); N.J. STAT. ANN. § 18A:36A-7 (West 1999) (allowing charter schools to "limit admission to a particular grade level or to areas of concentration of the school, such as mathematics, science, or the arts" and to "establish reasonable criteria to evaluate prospective students").

### B. Racial Balance Mandates

The majority of litigation involving the admissions standards of deregulated schools has turned on the racial implications of charter school admissions practices, and they are the primary focus of this Article's analysis.<sup>102</sup> These cases involve challenges to charter school enabling laws or to particular schools established in states whose enabling legislation includes provisions that expressly address race in admissions. Extant school desegregation decrees, which are applicable to newly established charter schools, have also been the basis for litigation.<sup>103</sup>

More particularly, four types of common antidiscrimination provisions in charter school enabling legislation have given rise to these cases. All enabling laws contain antidiscrimination provisions.<sup>104</sup> Thirteen states' charter school laws include provisions that require or encourage charter schools to enroll racially balanced or racially diverse

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102. See, e.g., *Thompson v. Board of Special Sch. Dist. 1*, 144 F.3d 574, 580-81 (8th Cir. 1998) (rejecting a disabled student's claim of race discrimination under Title VI); *Villanueva*, 85 F.3d at 488-89 (rejecting a claim of race-based discrimination as a result of the establishment of a charter school); *Berry v. School Dist.*, 56 F. Supp. 2d 866, 885-86 (W.D. Mich. 1999) (denying authorization of a school's funding absent sufficient information regarding the racial composition of the student body to determine whether the enrollment would impair the state's and the school district's ability to meet desegregation decree obligations; authorizing another school's funding on condition that, among other requirements, the school's racial balance approximate that of the school district as a whole); *Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 516 S.E.2d 655, 659 (S.C. 1999) (finding that a charter school application may be denied for failure to satisfy the charter school enabling law's civil rights and racial composition components).

Although this Article focuses on the Fourteenth Amendment implications of status-identifiable charter schools, these schools also are subject to the constraints of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994), which prohibits discrimination by any "program or activity" that receives federal funds. Although courts generally have found that there is a private right of action under Title VI, see *Powell v. Ridge*, 189 F.3d 387, 397-99 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 579 (1999), the United States Department of Education enforces this Act and meets its obligations by, for example, aggressively monitoring the racial and ethnic composition of charter school enrollees. See 1998 STUDY, *supra* note 69, at 47-54; 1997 STUDY, *supra* note 67, at 16-20.

103. Nationwide, approximately 500 school districts are subject to desegregation decrees. See Telephone Interview with Peter McCabe, U.S. Department of Education, Office for Civil Rights (Nov. 8, 2000). At least one school district is under such supervision in 19 of the states that have passed charter school enabling legislation. See *Charter Hypocrisy*, WALL ST. J., Oct. 20, 1999, at A26.

104. See, e.g., MASS. ANN. LAWS ch. 71, § 89(f)(10) (Law. Co-op. Supp. 1999) (prohibiting discrimination in admissions on the basis of "race, color, national origin, creed, sex, ethnicity, sexual orientation, mental or physical disability, age, ancestry, athletic performance, special need, or proficiency in the English language, and academic achievement").

student bodies.<sup>105</sup> Moreover, seven states encourage and/or give preference to charter school sponsors whose proposals target at-risk students<sup>106</sup>—a population that often overlaps with racial minorities. Finally, eleven states' enabling legislation expressly requires charter schools to comply with school desegregation decrees.<sup>107</sup>

1. *Practical Effects of Racial Balance Provisions.* The types of statutory provisions at issue and the kind of equal protection litigation that they have inspired are illustrated by several pending cases, including one involving the Durham, North Carolina-based Healthy Start Academy.<sup>108</sup> Like many charter schools nationwide,<sup>109</sup> Healthy Start serves students nearly all of whom are minorities from working-class or impoverished backgrounds; thus, the school targets students who are at great risk of academic failure.<sup>110</sup> If, as proponents and the enabling legislation suggest, the best measure of deregulated schools' efficacy is the academic performance of their students, Healthy Start should be considered an unqualified success. In the first year of its operation, the school's students raised their standardized test scores tremendously, far surpassing students at other local

105. See, e.g., MINN. STAT. ANN. § 124D.10(9)(3) (West 2000); N.J. STAT. ANN. § 18A:36A.8(e) (West 1999); N.C. GEN. STAT. ANN. § 115C-238.29F(g)(5) (West 2000); S.C. CODE ANN. § 59-40-50(B)(6) (Law. Co-op. Supp. 1998).

106. See COLO. REV. STAT. ANN. § 22-30.5-109(2)(a) (West Supp. 2000); CONN. GEN. STAT. ANN. § 10-66bb(c) (West Supp. 1999); FLA. STAT. ANN. § 228.056(6)(c)(2) (West Supp. 2000); 105 ILL. COMP. STAT. ANN. 5/27A-8(A)(3) (West Supp. 2000); MO. ANN. STAT. § 160.405 (West 2000); N.Y. EDUC. LAW § 2852(2) (McKinney Supp. 2000); N.C. GEN. STAT. ANN. § 115C-238.29C(b)(iii) (West 2000).

107. See ARIZ. REV. STAT. ANN. § 15-184D (West Supp. 2000); COLO. REV. STAT. ANN. § 22-30.5-104(3) (West Supp. 2000); DEL. CODE ANN. tit. 14, § 506(a)(5) (West Supp. 1999); 105 ILL. COMP. STAT. ANN. 5/27A-4(a) (West Supp. 2000); LA. REV. STAT. ANN. § 17:3991(c)(3) (West Supp. 2000); NEV. REV. STAT. ANN. § 386.550(4) (Michie 2000); N.C. GEN. STAT. ANN. § 115C-238.29F(g)(5) (West 2000); OHIO REV. CODE ANN. § 3314.06 (West 1999); OKLA. STAT. ANN. tit. 70, § 3-140(b) (West Supp. 2000); PA. STAT. ANN. tit. 24, § 17-1730-A (West Supp. 2000); VA. CODE ANN. § 22.1-212.6(A) (Michie 2000).

108. See *Healthy Start Educ., Inc. v. Basnight*, No. 98-CV-09495 (N.C. Sup. Ct. filed Aug. 14, 1998).

109. See *supra* notes 67-71.

110. See Telephone Interview with Vernon Robinson, Executive Director, North Carolina Foundation for Individual Rights (Dec. 23, 1998); see also Editorial, *Closing Charters*, WALL ST. J., July 6, 1998, at A14 (documenting the racial makeup of the Healthy Start Academy) [hereinafter *Closing*]. On the relationship between poverty and the academic achievement of African Americans, see GARY ORFIELD ET AL., *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION*, 53-57, 217-18 (1996) [hereinafter *DISMANTLING DESEGREGATION*].

schools.<sup>111</sup> In light of this record, the academy would seem to have exceeded the legislature's hope that charter schools would improve students' academic performance.<sup>112</sup>

Nevertheless, Healthy Start's charter is subject to revocation by the North Carolina Department of Education. The school is subject to closure despite its students' success because its student body is 97% African-American.<sup>113</sup> The racial composition of the academy's student body presents a problem because North Carolina's charter school enabling legislation and implementing regulations include a racial balance provision. State law provides that within one year after it begins operating, a charter school must "reasonably reflect" the "racial and ethnic composition" of the school district's general population or the "special population" that the charter school seeks to serve within the district.<sup>114</sup> Because Durham's population is approximately 60% white and 40% minority, Healthy Start's student body is not proportionate to the county's populace.<sup>115</sup> Thus, Healthy Start may be operating in violation of the charter school law's racial balance provision—even though enrollment in the school is entirely voluntary, admission is open or by lottery,<sup>116</sup> and the school's sponsors

111. For instance, second graders raised their scores on the Iowa Test of Basic Skills from the thirty-fourth to the seventy-fifth percentile, while kindergarten students' scores went from the forty-second to the ninety-ninth percentile. See *Closing*, *supra* note 110, at A14.

112. See *supra* notes 52-56 and accompanying text.

113. See *Panel Lets Applicants for Charters Ignore Race*, NEWS & RECORD (Greensboro, N.C.), Oct. 25, 1998, at B5.

114. N.C. GEN. STAT. ANN. § 115C-238.29F(g)(5) (West 2000). The law also states that a charter school "shall be subject to any court-ordered desegregation plan in effect for the local school administrative unit." *Id.* Minnesota has a similar statute, which states:

[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.

MINN. STAT. ANN. § 124D.10(j)(3) (West 2000); 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."); *cf.* ARIZ. REV. STAT. ANN. § 15-184(D) (West Supp. 1995) (providing that charter schools may admit students from schools subject to a school desegregation decree unless that admission would violate a court order); CONN. GEN. STAT. ANN. § 10-66bb(c) (West Supp. 2000) ("In determining whether to grant a charter, the State Board of Education shall consider the effect of the proposed charter school on the reduction of racial, ethnic and economic isolation in the region in which it is located . . ."); *id.* § 10-66bb(d)(c) (requiring applications to include a statement about charter schools' efforts to "promote a diverse student body").

115. See *Closing*, *supra* note 110, at A14.

116. See N.C. GEN. STAT. ANN. § 115C-238.29F(g)(1) (West 2000) ("Any child who is qualified under the laws of this State for admission to a public school is qualified for admission to a

have made unavailing efforts to recruit white students.<sup>117</sup> Only two whites matriculated at Healthy Start, which is located in a predominantly black neighborhood, despite the sponsors' recruitment efforts.<sup>118</sup>

Other examples of racial imbalances spawning litigation arise from jurisdictions in Michigan and South Carolina with extant desegregation orders. In Benton Harbor, Michigan, a federal district court refused to authorize funding for a proposed charter school based on its understanding of the requirements of the desegregation decree to which the school district was subject.<sup>119</sup> All of the students who had expressed interest in the charter school (who indicated their race) were African-American.<sup>120</sup> Although the court realized that the proposed charter school's programming might be viewed as consistent with the decree's mandate of remedying past discrimination, it refused to authorize funding. The court's decision was based on its findings that the school in question had not made a sufficient representation concerning its student recruitment procedures and had not provided sufficiently specific information regarding its prospective student body.<sup>121</sup> In reaching these determinations, the court rejected arguments by the prospective school's sponsors that it faced a "Catch-22"—that it could make no specific representations regarding its recruitment practices or the make-up of its student body because it could not engage in recruitment efforts prior to receiving funding to do so.<sup>122</sup>

The same court authorized the funding of a second charter school set to open in Benton Harbor, however, on the basis that this school's sponsors had provided significantly more information about its recruitment efforts and its impact on local schools than had the first.<sup>123</sup> Nevertheless, the court's opinion approving the second school's funding included a caveat; the monies were authorized on the

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charter school."); *id.* § 115C-238.29F(g)(5) (forbidding discrimination on the basis of ethnicity, national origin, creed, race, sex, religion, ancestry, disability, intellectual ability, measures of achievement or aptitude, or athletic ability).

117. *See* N.C. GEN. STAT. ANN. §§ 115C-238.29F(g)(1)-(2), (5) (West 2000).

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

119. *See* *Berry v. School Dist.*, 56 F. Supp. 2d 866, 873-74 (W.D. Mich. 1999).

120. *See id.* at 873.

121. *See id.* at 872-73.

122. *See id.* at 872.

123. *See id.* at 874-75.

condition that the school's racial balance approximate that of the school district in which it was located.<sup>124</sup> Since all but three of the students who had applied to the school were African-American,<sup>125</sup> it would seem that the charter school may have a difficult time attracting white students. If so, then the second Benton Harbor charter school, like Healthy Start, will be in jeopardy of being closed.

The final example, involving South Carolina, the only Deep South state in which equal protection litigation involving charter schools has arisen,<sup>126</sup> is different from the Michigan and North Carolina examples in an important way: although South Carolina's enabling legislation contained a racial balance requirement similar to North Carolina's, the charter school at issue in South Carolina did not target or benefit disproportionately impoverished, minority students. To the contrary, according to projected enrollment figures, the Lighthouse Charter School was to be only 15% nonwhite,<sup>127</sup> although African Americans constitute 47.3% of the relevant school district's attendees, or roughly the same as the district's percentage of whites.<sup>128</sup> In June of 1999, the South Carolina Supreme Court affirmed the local school board's denial of Lighthouse's sponsors' application to establish a charter school on the grounds that they had failed to satisfy the enabling act's antidiscrimination provision,<sup>129</sup> which required compliance with extant school desegregation decrees. The decree, in turn, required approval from the Department of Justice prior to the establishment of new facilities.<sup>130</sup> In addition, the court affirmed a finding

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124. *See id.* at 883.

125. *See id.* at 875.

126. The moniker "Deep South" is used by historians to demarcate a geographic region, as well as to recall a sociopolitical reality and culture distinct from that of the Upper South and border states; including Alabama, Georgia, Louisiana, Mississippi, and South Carolina, the Deep South historically had the greatest concentrations of enslaved people, along with the most virulent forms of racial oppression. *See generally* V.O. KEY, JR., *Of the South, in* SOUTHERN POLITICS IN STATE AND NATION 3-18 (2d ed. 1977).

127. *See* Jennifer Holland, *Charter School Rejection Stands: Quota Issue Back in Lower Court*, POST & COURIER (Charleston, S.C.), June 2, 1999, at B1.

128. Whites make up 49.9% of public school enrollees, according to 1995 figures. In terms of total population, however, Beaufort County is 69.2% white and 28.5% black. Many of the district's students are impoverished; according to a leading federal indicator, approximately 40% of them are eligible for the free-lunch program. *See* SOUTH CAROLINA DEP'T OF EDUC., SOUTH CAROLINA EDUCATION PROFILES: 1998, available at <http://www.state.sc.us/sde/distschs/98profil> (last visited Nov. 10, 2000) (on file with the *Duke Law Journal*).

129. S.C. CODE ANN. § 59-40-50(B)(1) (Law Co-op. Supp. 1999) (requiring a charter school to "adhere to the same health, safety, civil rights, and disability rights requirements as are applied to public schools operating in the same school district").

130. *See* Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm., 516 S.E.2d 655,

by the local board that Lighthouse's sponsors had not complied with the statutory dictate that a charter school's enrollment not deviate by more than 10% from the school district's racial make-up.<sup>131</sup> The court reached this finding because Lighthouse had not identified its pool of prospective students and because it failed to attain prior approval of the charter school from the Department of Justice. The court found the sponsors' act of noncompliance with the desegregation order supportive of the opponents' claim that the charter school would have an adverse impact on racial balance in the district.<sup>132</sup> Moreover, the court noted that the local school board had found a lack of support for the charter school among African-American parents and students, which also mitigated against its establishment.<sup>133</sup>

Although the South Carolina Supreme Court found that Lighthouse's charter could be denied due to its failure to comply with the enabling act's racial balance requirement, the court did not rule on the constitutionality of the mandate. Rather, the court remanded this issue, which had been raised on intervention by the state's attorney general, to the trial court.<sup>134</sup> In May of 2000, the trial court found the racial balance requirement in the state's enabling legislation to be a "discriminatory quota."<sup>135</sup> The court did not stop there, however; because the enabling act did not contain a severability provision, it struck down South Carolina's charter school enabling statute in its entirety.<sup>136</sup>

The litigation over the Lighthouse Charter School appears to have exacerbated an already volatile racial atmosphere in South Carolina.<sup>137</sup> The charter law's racial balance requirement invariably is

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659 (S.C. 1999).

131. S.C. CODE ANN. § 59-40-50(B)(6) (West Supp. 1999) ("[U]nder no circumstances may a charter school enrollment differ from the racial composition of the school district by more than ten percent."). In so doing, the court reversed a decision by the state board of education, see *Beaufort*, 516 S.E.2d at 659, and ruled against the state's attorney general, who had intervened in the case. See *id.* at 660-61.

132. See *Beaufort*, 516 S.E.2d at 659-60.

133. See *id.* at 660 n.4.

134. See *id.* at 661. The state's attorney general had intervened precisely for the purpose of raising the equal protection issue, which had not been raised in the trial court. See *id.*

135. See *Judge Upends Charter Schools*, BEAUFORT GAZETTE (S.C.), May 12, 2000, at A1 [hereinafter *Judge Upends*].

136. See *id.*

137. The state continues to be embroiled in a battle with the NAACP, which last year launched a successful boycott of the state because of its continued homage to the Confederate flag. See Peter Smolowitz & Stella M. Hopkins, *Myrtle Beach, South Carolina Economy Falters as Tourism Numbers Decline*, CHARLOTTE OBSERVER, July 24, 2000, at A1; Zane Wilson,



described in local newspapers as a “quota”; the reporters’ usage of the pejorative term mimics the language of the court that issued the opinion striking down the antidiscrimination provision.<sup>138</sup> Many claim that the enabling law’s racial balance provision is foremost among the defects in the state’s charter school law, that it is impeding the development of charter schools in the state, and thus undermining the state’s chances of effective education reform.<sup>139</sup> On the other side of the fence are citizens, including some whites, who argue that a racial balance requirement is fundamental to preventing charter schools from becoming another facet of the state’s long history of segregated schools.<sup>140</sup> Similarly, some African Americans have voiced opposition to charter schools because of a belief that deregulation will breed inequality.<sup>141</sup> Unable to enact new charter school legislation during the 1999-2000 legislative term, the state legislature is again considering the question of how to ensure the racial diversity of charter schools, while not burdening prospective sponsors of charter schools with mandates that might unduly constrain their autonomy.<sup>142</sup>

2. *The Substantive Legal Problem with Racial Balance Provisions.* The South Carolina case demonstrates the validity of critics’ concerns about the potential for the deregulation of public education to perpetuate racial discrimination. At the same time, the case demonstrates the perils of racial balance requirements, which cannot, by themselves, create racially diverse schools, absent coercion (of white students). Similarly, the Michigan and North Carolina cases reveal the ironic reality that racial balance requirements can function to penalize students of color who wish to take advantage of the

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*South Carolina Lawmakers Seek Compromise on Confederate Flag Issue*, THE SUN NEWS (Myrtle Beach, S.C.), Mar. 24, 2000, at A1; see also Judson Drennan, *Summerlin Again Offers Charter Plan*, BEAUFORT GAZETTE (S.C.), Jan. 5, 2000, at B1 (describing the flaring of tempers during a meeting of parents, ministers, and school board members to discuss the conversion of an elementary school to a charter school).

138. See Gene Crider, *Race Issue Stalls Charter Schools*, BEAUFORT GAZETTE (S.C.), May 31, 2000, at B1; *Judge Upends*, *supra* note 135 (describing the racial balance provision as a “discriminatory quota”).

139. See, e.g., *Opinion, Charter Schools: It’s Time for State to Clear the Way*, BEAUFORT GAZETTE (S.C.), June 18, 2000, at A1 (noting that South Carolina has only 10 charter schools and arguing that their insubstantial number is caused by regulatory constraints in the state’s enabling law).

140. See Crider, *supra* note 138, at B1; Holland, *supra* note 127, at B1.

141. See, e.g., Drennan, *supra* note 137, at B1.

142. See Crider, *supra* note 138, at B1 (describing state house and senate efforts to redraft the state’s charter school enabling law).

educational opportunities afforded by charter schools: charter schools that serve racial minorities disproportionately are subject to a higher standard of equality than that to which conventional schools in the same jurisdictions are subject.<sup>143</sup> Healthy Start and similar schools are subject to closing or may be precluded from ever being opened, while other traditional area schools with similar rates of de facto segregation are not in jeopardy because the types of antidiscrimination provisions contained in North Carolina's and other states' charter school enabling legislation only apply to charter schools.<sup>144</sup> Furthermore, charter schools that are conceived to address the special needs of minority students are subject to a higher level of scrutiny by the state legislatures and the Departments of Education and Justice than public schools located in schools districts found to have committed de jure segregation usually ever are. This is true because, with the exception of the relatively few cases in which school districts have sought to be relieved of their duties to eliminate the vestiges of de jure segregation by being declared "unitary,"<sup>145</sup> school desegregation is a dead issue in the federal courts.<sup>146</sup> Affirmative

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143. Jay Heubert has observed that the same is true of charter schools that serve the disabled. See Heubert, *supra* note 23, at 334-40. However, at least one federal appellate court has rejected this extrapolation, finding that a charter school to which a disabled student had transferred was not required to provide an individualized educational plan, as required under the IDEA. See *Thompson v. Board of Special Sch. Dist. 1*, 144 F.3d 574, 579 (8th Cir. 1998).

144. See *supra* notes 105, 108-18. Notably, however, some schools that are similar to Healthy Start and the schools involved in *Beaufort County Board of Education v. Lighthouse Charter School Committee*, 516 S.E.2d 655 (S.C. 1999), and *Berry v. School District*, 56 F. Supp. 2d 866 (W.D. Mich. 1999), have not precipitated litigation. To cite two well-publicized examples, the Justice Department challenged the opening of the United Charter School in Baton Rouge, Louisiana, a 650-student charter school that would have been 80% black. See *Charter Hypocrisy*, *supra* note 103. In Pinellas County, Florida, the school board rejected the proposed Marcus Garvey School, which targeted 45 children from disadvantaged backgrounds, because the school's percentage of blacks would have been too high, which was interpreted as violating the desegregation decrees. See Howard Traxler, *Rejection of Uhuru Charter School is Full of Irony*, ST. PETERSBURG TIMES, Mar. 13, 2000, at 1B.

145. See *Missouri v. Jenkins*, 515 U.S. 70, 100-01 (1995) (finding that the obligations of a formerly de jure segregated school system that had instituted remedies to improve the educational achievement of black students should be limited in time and extent, and that school districts were not required to demonstrate actual improvement in students' achievement levels); *Freeman v. Pitts*, 503 U.S. 467, 498-500 (1992) (finding that formerly de jure segregated school districts could be released from a duty to desegregate, despite not having achieved equality in all areas); *Board of Educ. v. Dowell*, 498 U.S. 237, 244-46 (1991) (finding that a de jure segregated school district that had been found unitary could return to assigning students to neighborhood schools, even if such schools would be racially segregated).

146. Commentators have acknowledged this reality, and many have lamented it. See, e.g., Gary Orfield, *Turning Back to Segregation*, in *DISMANTLING DESEGREGATION*, *supra* note 110 (asserting that the Supreme Court "reversed" itself in the 1990s by "authorizing school districts

federal oversight of districts previously found guilty of intentional discrimination is minimal.<sup>147</sup>

Nevertheless, commentators who have advanced equality-based criticisms of the deregulation of education advocate regulations of the kind contained in North Carolina's and other states' enabling legislation. For example, in an article published in the 1997-98 Volume of the *National Black Law Journal*, Professor Raquel Aldana endorsed regulating the racial makeup of schools participating in choice programs (a category in which she included charter schools).<sup>148</sup> Professor Martha Minow is even more emphatic about the need for regulation; she has written that that "[w]ithout vigorous, creative regulatory efforts, vouchers and charter schools will increase the growing racial and ethnic segregation in American schools."<sup>149</sup> These arguments for regulation of admissions programs that provide for autonomy in site selection recall those made by constitutional scholars such as Paul Gewirtz fifteen years ago, when freedom-of-choice programs advocated by the Reagan administration were viewed as an effort to subvert court-mandated school integration.<sup>150</sup>

The impulse to regulate charter schools in this way cannot be correct, however—not in this historical moment, during the post-school desegregation era, when the federal courts have foreclosed

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to return to segregated and unequal public schools"); Raina Brubaker, *Missouri v. Jenkins: Widening the Mistakes of Milliken v. Bradley*, 46 CASE W. RES. L. REV. 579, 579-86 (1996) (stating that "the court has rapidly retreated from *Brown's* broad mission"); Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 479 (1999) (stating that Supreme Court precedent has prevented lower courts from undertaking "principled, well-grounded remedial processes" for curbing school segregation); Juan Williams, *The Court's Other Bombshell; Schools, Not Voting Rights, Was the Key Racial Ruling*, WASH. POST, July 2, 1995, at C1 (noting that in 1995, the Supreme Court "made it clear [that] it was out of the business of managing school systems to protect black and Hispanic students from any lingering damage of legal segregation").

147. See Orfield, *supra* note 146, at 16-22; Interview with Roger Mills, Attorney, United States Department of Education, Office for Civil Rights, Atlanta, Ga. (June 29, 2000).

148. Aldana apparently is less than sanguine about the possibility that racial balance statutes will fundamentally improve the probability that minorities will not be disadvantaged by market-oriented school reforms, however. See Aldana, *supra* note 23, at 52-54, 62-63; see also Wall, *supra* note 100, at 82 (advocating the inclusion of statutory provisions requiring charter schools to abide by antidiscrimination provisions of federal and state statutes as a way of addressing equal protection and due process issues raised by the establishment of charter schools).

149. Minow, *supra* note 18, at 283; see also *id.* at 285 (proposing that schools be permitted to seek race and sex balance using set-asides, in which seats are reserved for preferred students until shortly before the start of school).

150. See Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 730, 735-36, 749-71 (1986).

most remedies not only for de facto segregation, but also for remedying the vestiges of segregation in districts that previously practiced de jure segregation.<sup>151</sup> The provisions also are inconsistent with the doctrine on affirmative action, which counsels skepticism towards all racial classifications,<sup>152</sup> although the Court has not yet ruled directly on whether the goal of encouraging diversity may justify racial classifications in education.<sup>153</sup> Because of their inconsistency with relevant federal equal protection precedent, laws such as North Carolina's racial balance provision do not satisfactorily resolve the tension between the states' desires to protect minorities from educational discrimination and to increase the portfolio of educational opportunities available in public schools. Rather than guarding against the perpetuation of discrimination against minorities, these regulations may have perverse effects: the regulations and resulting litigation may diminish or altogether destroy opportunities for racial minorities to attend charter schools featuring personnel committed to, and programming specifically designed for, them. At a time when much of educational theory and philosophy and educators' practical energies focus on the issues of how policymakers can structure institutions to meet the instructional needs of the diversity of students who attend public schools<sup>154</sup> and how to close the academic performance gap between students of color and whites,<sup>155</sup> these regulations may deny minority students access to educational opportunities that would be superior to that which they typically receive in public schools. In this way, these provisions may diminish educational choices for students of color that deregulation promises to open up—choices that middle-class whites already enjoy.

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151. See *supra* note 145.

152. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237-38 (1995) (striking down set-asides in employment to which women and minority contractors presumptively were entitled, where the program was found to be insufficiently narrowly tailored to compensate the actual victims of discrimination).

153. See *infra* notes 248, 557-61.

154. See, e.g., JAMES P. COMER, *SCHOOL POWER: IMPLICATIONS OF AN INTERVENTION PROJECT* (1993); HIRSCH, *supra* note 3, at 5-11, 17-47; IRA KATZNELSON & MARGARET WEIR, *SCHOOLING FOR ALL: CLASS, RACE, AND THE DECLINE OF THE DEMOCRATIC IDEAL* (1985); JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991); JEANNIE OAKES, *KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY* (1985).

155. See, e.g., ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, AND UNEQUAL* 134-46 (1992); Jeannie Oakes, *Two Cities' Tracking and Within-School Segregation*, in *BROWN V. BOARD OF EDUCATION: THE CHALLENGE FOR TODAY'S SCHOOLS* 81 (Ellen Condliffe Lagemann & Lamar P. Miller eds., 1996) [hereinafter CHALLENGE].

a. *The conception of remedy dominant in the school desegregation precedent.* To explain this conundrum further, we must consider certain social realities that relate directly to past and ongoing discrimination, and the law's treatment of them. The first reality is that neighborhoods, schools, and school districts overwhelmingly are racially identifiable. This segregation is due, in many instances, to white flight from central cities as a result of the Supreme Court's desegregation mandate in *Brown*.<sup>156</sup> The Harvard Civil Rights Project reports that schools are more segregated than ever before, with 69% of African Americans and 75% of Hispanics attending predominantly minority schools.<sup>157</sup> Approximately 35% of black and Hispanic students attend schools that are "extremely segregated"—90% to 100% minority.<sup>158</sup> Moreover, most of these segregated African-American and Latino schools are attended primarily by poor children.<sup>159</sup> By contrast, 96% of segregated white schools have student bodies in which a majority are middle-class.<sup>160</sup> The second of these realities is the matter of residential segregation. Whereas 80% of minority students live in metropolitan areas, most whites reside in suburban school districts or in school districts that do not include minority neighborhoods.<sup>161</sup> Residential segregation can be understood as either causing or contributing to the segregation of neighborhoods,

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156. See JAMES S. COLEMAN ET AL., TRENDS IN SCHOOL SEGREGATION, 1968-73, at 77-80 (1975) (arguing that school desegregation was causing residential segregation in cities and increasing city/suburban residential segregation); see also DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 12-13, 68, 70-72, 174-80 (1995) (discussing the controversy over the existence and the extent of white flight). But see Thomas F. Pettigrew & Robert L. Green, *School Desegregation in Large Cities: A Critique of the Coleman 'White Flight' Thesis*, 46 HARV. EDUC. REV. 1, 46-52 (1976) (criticizing the notion that school desegregation causes white flight).

157. See Gary Orfield & John T. Yun, *Resegregation in American Schools*, at [www.law.harvard.edu/groups/civilrights/publications/resegregation99.html](http://www.law.harvard.edu/groups/civilrights/publications/resegregation99.html) (June 1999) (figures are noted in Table 9) (on file with the *Duke Law Journal*); see also GARY ORFIELD, THE GROWTH OF SEGREGATION IN AMERICAN SCHOOLS: CHANGING PATTERNS OF SEPARATION AND POVERTY SINCE 1968, at 7 (1993) (noting that in 1991-92, 66% of African-American students and 73% of Hispanic students attended predominantly minority schools).

158. See Orfield & Yun, *supra* note 157.

159. See Gary Orfield, *The Growth of Segregation: African-Americans, Latinos, and Unequal Education*, in DISMANTLING DESEGREGATION, *supra* note 110, at 53, 55-56. Schools with large numbers of poor students are characterized by a number of factors that mitigate against academic achievement, including less-qualified teachers, inferior facilities, limited curricula, high levels of teen pregnancy, and location in crime-infested neighborhoods. See *id.* at 53-54.

160. See *id.* at 55. The most segregated schools are in the Northeast, whereas schools in the South are the least segregated. See *id.* at 57-59.

161. See Gary Orfield, *Segregated Housing and School Resegregation*, in DISMANTLING DESEGREGATION, *supra* note 110, at 291-92.

schools, and school districts, but, in any event, it is correlated with school segregation.

Supreme Court precedent essentially sanctions the racial separatism in schools that is occasioned by these demographics. By virtue of the Court's conception of remedy in its school desegregation cases, minority students who live in metropolitan areas and white students who live in suburbs will not learn together. Beginning in the late 1960s, the Supreme Court made clear, in *Green v. New Kent County*<sup>162</sup> and subsequent cases,<sup>163</sup> that blacks who had been subjected to de jure segregation in education were entitled to have it eliminated "root and branch," and therefore, that ineffective choice-premised school desegregation programs were unconstitutional.<sup>164</sup> The Court soon changed its tune, however. Just a few years after it issued *Green* and its landmark decision in *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>165</sup> allowing the use of busing between noncontiguous school attendance zones, as well as the pairing and clustering of schools as a means of achieving desegregation,<sup>166</sup> the Court issued another landmark opinion, *Milliken v. Bradley*.<sup>167</sup> *Milliken* established that federal courts could not order multidistrict relief for de jure segregation in city schools absent findings that all districts to be included in the remedial order themselves had practiced de jure segregation, had committed acts that affected segregation in other districts, or had drawn district lines with the intent of fostering segregation.<sup>168</sup> As a re-

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162. 391 U.S. 430, 436-37 (1968) (requiring a school district to devise a school desegregation plan with racial balance goals that would eliminate the white school and the black school "root and branch" in six areas, including student assignments, faculty assignments, extra-curricular activities, transportation, and physical facilities).

163. See, e.g., *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 29-30 (1969) (requiring certain Mississippi school districts to discontinue operating "dual school" systems based upon race or color and to implement nondiscriminatory "unitary" school systems); see also *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 847 (5th Cir. 1966) ("The only school desegregation plan that meets constitutional standards is one that works.").

164. *Green*, 391 U.S. at 438-41. The Court did not find desegregation plans premised on choice unconstitutional per se. See *id.* at 439-40 ("We do not hold that a 'freedom-of-choice' plan might of itself be unconstitutional, although that argument has been urged upon us. Rather, all we decide today is that in desegregating a dual system a plan utilizing 'freedom of choice' is not an end in itself.").

165. 402 U.S. 1 (1971).

166. See *id.* at 18-31 (stating that busing, pairing, clustering of noncontiguous school zones, and other techniques may be used to effect desegregation).

167. 418 U.S. 717 (1974).

168. See *id.* at 748-52. *But cf.* *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 201-04 (1973) (holding that a finding of intentional segregation in a meaningful portion of the school system created a prima facie case of unlawful segregation and shifted the burden to school

sult of this ruling, the Detroit schools were not desegregated, but instead left 75% to 90% black.<sup>169</sup> Though it does not create a per se rule against interdistrict remedies for school desegregation,<sup>170</sup> *Milliken* raised the evidentiary bar for including suburban districts in plans to remedy segregation in inner cities to such an extent that commentators understand the case to perpetuate the effects of residential segregation on schools.<sup>171</sup> Thus, *Milliken* effectively ended the possibility that integrative remedies can be achieved through litigation in cities that follow the pattern of interrelated school district and residential segregation described above—that is, most American cities.<sup>172</sup> *Milliken* demonstrates best that the modern Court's conception of remedy in school desegregation cases is exceptionally narrow.<sup>173</sup>

In recent years, the Rehnquist Court has undermined *Swann* by applying *Milliken*'s limited theory of interdistrict remedy to cases involving intradistrict segregation in jurisdictions with extant desegregation orders. In a series of recent cases, the Court has found that school systems may be relieved from desegregation orders even if they have not fulfilled their obligations to desegregate their student

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authorities to show that segregation in the remainder of the school system did not result from intentional discrimination).

169. See *Milliken*, 418 U.S. at 726-36 & n.8. Subsequent to *Milliken*, the Court issued opinions that made plaintiffs' burden of establishing an intent to discriminate exceedingly difficult. See *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (holding that a discriminatory purpose finding must rest on a showing that action was taken "because of," and not merely "in spite of" its disparate impact); *Washington v. Davis*, 426 U.S. 229, 239-40 (1976) ("Our cases have not embraced the proposition that a law or other official act . . . is unconstitutional *solely* because it has a racially disproportionate impact.").

170. See *Gewirtz*, *supra* note 150, at 778-79 ("*Milliken I* is not a general per se bar to 'interdistrict remedies' for 'intradistrict violations.'").

171. See, e.g., ORFIELD, *supra* note 157, at 2 ("The *Milliken* decision is surely the basic reason why Illinois, New York, Boston, Michigan, and New Jersey, each of which has a much lower share of African-American students than many Southern states, have been the most segregated states for black students for more than a decade."). Generally, the Court has not considered residential segregation a proximate cause of school segregation. See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 494-95 (1992) (finding that the population changes within the county were not caused by the policies of the local school district, but rather the "mobility that is a distinct characteristic of our society"); *Austin v. Independent Sch. Dist.*, 429 U.S. 990, 994 (1976) (failing to consider evidence of discrimination in housing because such discrimination "[could not] be attributed to school authorities").

172. See *supra* note 161 and accompanying text.

173. The remedial approach in the school desegregation cases arguably is analogous or consistent with the nineteenth-century opinions in which the Court classified racially discriminatory practices by individual whites as "private" acts beyond the reach of law—notwithstanding the effects of such acts on the ability of the freed people to pursue their civil, political, and economic rights. See generally *The Civil Rights Cases*, 109 U.S. 3 (1883) (striking down the Civil Rights Act that made private discrimination unlawful).

bodies. The Court has held that school systems in Oklahoma City,<sup>174</sup> Atlanta,<sup>175</sup> and Kansas City<sup>176</sup> which have made some progress toward dismantling their dual school systems could be found to have met their constitutional mandate to desegregate (to have reached “unitary” status),<sup>177</sup> even though they have not completely eliminated the vestiges of segregation in all areas.<sup>178</sup> In *Oklahoma City v. Dowell*,<sup>179</sup> the Court established a “good faith” standard for determining whether a school district that adopted a student assignment plan under which previously desegregated schools would return to one-race schools<sup>180</sup> complied with a desegregation decree.<sup>181</sup> Moreover, the Court held that such districts must show only that they have eliminated the vestiges of past discrimination “to the extent practicable,” rather than make a more definite showing of compliance.<sup>182</sup>

Of particular relevance to this Article’s analysis of the constitutionality of racial balance provisions in charter school enabling legislation is the Court’s discussions of school districts’ responsibilities with regard to student assignment in *Freeman v. Pitts* and *Missouri v. Jenkins*. In *Pitts*, the Court upheld findings that the DeKalb County (metropolitan Atlanta) school district was unitary and that the withdrawal of federal supervision over some, but not all, areas of school policy was permissible.<sup>183</sup> The most remarkable facet of the Court’s decision endorsing incremental withdrawal of federal court supervision of districts bound by desegregation decrees was its reference to student assignments. The Court found that the racial identifiability of the northern (white) and southern (black) halves of DeKalb County

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174. See *Board of Educ. v. Dowell*, 498 U.S. 237, 250-51 (1991).

175. See *Freeman*, 503 U.S. at 490-91.

176. See *Missouri v. Jenkins*, 515 U.S. 70, 97-98 (1995).

177. The notion of “unitary” status has been used inconsistently by the federal courts. Some have used the term to refer to districts deemed to have completely eliminated the vestiges of discrimination, while other courts have used the term to refer to districts that employ student assignment plans that have resulted in some degree of school desegregation. Pursuant to the cases cited *supra* notes 174-76 and 178-85, however, unitary status should be understood as connoting districts which courts have found to have met their obligations under extant desegregation orders to the extent practicable.

178. These areas include the factors outlined in *Green v. New Kent County*, 391 U.S. 430, 436 (1968): student assignments, faculty assignments, extracurricular activities, transportation, and physical facilities.

179. 498 U.S. 237 (1991).

180. *Id.* at 241-43.

181. See *id.* at 248-49.

182. *Id.* at 249-50.

183. See *Freeman v. Pitts*, 503 U.S. 467, 492-94, 497-98 (1992).



resulted from “demographic shifts”<sup>184</sup> rather than invidious state action, despite the district’s failure to use the kinds of pairing, clustering, and transportation tools sanctioned in *Swann*.<sup>185</sup> Instead, the district relied on voluntary transfers of blacks living in the southern half of the district to predominantly white schools in the north to promote desegregation in schools—but did not cover the transportation costs for would-be transferees.<sup>186</sup> Unsurprisingly, this program did not result in substantial integration of the school system. Only about 6% of the system’s students participated in the majority-to-minority voluntary transfer program.<sup>187</sup> Nevertheless, as the Court explained:

That there was racial imbalance in student attendance zones was not tantamount to a showing that the school district was in noncompliance with the [extant school desegregation] decree or with its duties under the law. Racial balance is not to be achieved for its own sake. . . . Once the racial imbalance due to the de jure violation has been remedied, the school district is under no duty to remedy racial imbalance that is caused by demographic figures.<sup>188</sup>

As a result of the Court’s ruling, the DeKalb County schools were left overwhelmingly racially identifiable. Fifty percent of black students attend schools that are over 90% black, and 27% of white students attend schools that are over 90% white, although the ratio of blacks to whites in the system is roughly equal, with blacks constituting 47% of public school enrollees.<sup>189</sup>

In *Missouri v. Jenkins*,<sup>190</sup> the Court advanced the principle that it had expounded in *Dowell* and *Pitts* concerning the relative insignificance of racial balance in determining whether school systems under court order have met their constitutional obligations.<sup>191</sup> The *Jenkins* Court found that an interdistrict transfer program instituted by the Kansas City school system was beyond the scope of the remedial decree originally entered in 1985 because the district court had not found an interdistrict violation.<sup>192</sup> The school district was 69% black,<sup>193</sup>

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184. *Id.* at 475-76.

185. *See id.* at 476-79.

186. *See id.* at 481.

187. *See id.* at 518.

188. *Id.* at 494 (citing *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 31-32 (1971)).

189. *See id.* at 475.

190. 515 U.S. 70 (1995).

191. *See id.* at 76-77.

192. *See id.* at 92-93.

193. *See id.* at 76.

and authorities had instituted the program to attract white suburban students to the city school system.<sup>194</sup> In finding the interdistrict program beyond the scope of the original order, the Court affirmed that “racial imbalance in schools, without more” is not unconstitutional.<sup>195</sup>

These cases show that the weight of applicable federal precedent cuts against racial balance requirements in public schools. Therefore, this law also demonstrates the incompatibility of the kinds of race-conscious provisions contained in some states’ charter school enabling legislation with applicable federal law on pupil assignments. *Pitts*, *Jenkins*, and *Dowell* indicate that districts under desegregation decrees generally should not be subject to racial balance requirements that would frustrate the establishment of charter schools. Similarly, these cases suggest that charter schools can be established in districts never found guilty of intentional discrimination without strict regulation of racial balance within particular schools, absent evidence of purposeful discrimination in the recruitment of students.<sup>196</sup> Specific facts regarding the effect of charter schools on the overall quality of schools in these districts might limit the number or type of charter schools established in districts under court order, however, as discussed in Part IV.<sup>197</sup>

*b. Outliers.* While the weight of precedent is adverse to the types of racial balance provisions that have been discussed in this part, a few cases that rely on tort principles to determine liability in school desegregation cases<sup>198</sup> offer some support for state legislators’ efforts to mandate or encourage racial balance in deregulated schools. These cases involve *intradistrict* segregation and were resolved years prior to the Court’s decisions in *Pitts*, *Jenkins*, and *Dowell*. Though they provide support for those who wish to challenge racial imbalances in charter schools, the applicable burdens of proof for finding liability would nevertheless remain high, indeed probably insurmountable.

*Early racial balance cases.* In *Keyes v. School District No. 1, Denver, Colorado*,<sup>199</sup> the Court held that a finding of intentional segrega-

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194. *See id.* at 91-92.

195. *Id.* at 90-91 & n.5.

196. *See infra* notes 533-74 and accompanying text.

197. *See infra* notes 550-56 and accompanying text.

198. *See* DAN B. DOBBS ET AL., PROSSER AND KEATON ON TORTS 173-93 (5th ed. 1984) (explaining the evidentiary standard for proving negligence).

199. 413 U.S. 189 (1973).

tion in a meaningful portion of a school system created a *prima facie* case of unlawful segregation in the remainder of the district and shifted the burden to school authorities to show that segregation in the remaining portion did not result from intentional discrimination.<sup>200</sup> Moreover, in *Dayton v. Brinkman*,<sup>201</sup> the Court held that proof of foreseeable segregative consequences of state action is relevant to demonstrating a racially discriminatory purpose and authorities' failure to eradicate prior discrimination.<sup>202</sup> The *Brinkman* holding is consistent with the Court's decision in *Columbus Board of Education v. Penick*.<sup>203</sup> In *Penick* the Court found that a formerly intentionally segregated school district that subsequently took actions having a disparate racial impact and foreseeable discriminatory consequences could be found to have had a discriminatory purpose in doing so.<sup>204</sup> Together, these cases provide an evidentiary basis for establishing unlawful racial discrimination within a single school district that allows the establishment of racially identifiable schools, notwithstanding their thematic and temporal distance from the Court's rulings in *Pitts*, *Dowell*, and *Jenkins*.<sup>205</sup>

In light of *Pitts*, *Dowell*, and *Jenkins*, however, plaintiffs relying on *Keyes*, *Brinkman*, and *Penick* to challenge racially imbalanced schools would not be likely to prevail. In a case involving the Healthy Start Academy, for example, the defendant school district could argue that the racial imbalances in the Durham, North Carolina, school system are the result of individuals' private choices about where to live and other demographic changes. Thus, the district would argue, the federal courts need not, and ought not, order the closing of racially imbalanced charter schools. Applicable precedent is replete

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200. *See id.* at 201-04.

201. 443 U.S. 526 (1979).

202. *See id.* at 535-36.

203. 443 U.S. 449 (1979).

204. *See id.* at 456-58; *see also* NAACP v. Lansing Bd. of Educ., 559 F.2d 1042, 1047-48 (6th Cir. 1977) (noting its previous holding that "intent could be inferred from acts and policies of school authorities which had the natural and foreseeable effect of producing segregated schools" and that inferred intent is not inconsistent with other principles of de jure segregation).

205. Notwithstanding whether school districts operated de jure segregated schools in the past, *Keyes*, *Brinkman*, and *Penick* stand for the proposition that foreseeable actions by the state that cause racially disparate impacts are relevant to determining an intent to discriminate. *See Penick*, 443 U.S. at 455-57; *Brinkman*, 433 U.S. at 537; *Keyes v. School Dist.*, 413 U.S. 189, 203 (1973); *see also* Bell, *supra* note 92, at 527 (discussing the high standard of intent constructed in *Brinkman* and *Penick*).

with statements to this effect.<sup>206</sup> Relying on *Pitts* and other cases, a reviewing court might note that “[t]he effect of changing racial residential patterns on the racial composition of schools, though not always fortunate is somewhat predictable. . . . [R]esidential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies.”<sup>207</sup> These difficult issues may not be considered in a school case unless it is clear that there is a causal link between the segregated conditions in the schools and residential or demographic patterns,<sup>208</sup> as the Supreme Court explained most forcefully, perhaps, in the second *Milliken* case:

[F]ederal-court decrees must directly address and relate to the constitutional violation itself. Because of the inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the constitution or does not flow from such a violation.<sup>209</sup>

The defendant might also rely on the remoteness of time between the finding of liability and the development of charter schools to argue that racially imbalanced charter schools are beyond the scope of the federal courts’ remedial authority.<sup>210</sup> In any event, the defendant could argue, the Court has consistently ruled that school districts are not required to achieve any *particular* racial balance.<sup>211</sup>

The historically black college analogy. A final point needs to be made regarding outliers in the Supreme Court’s racial balance precedent. It concerns the recent case of *United States v. Fordice*.<sup>212</sup> In *Fordice*, the Court considered the constitutionality of Mississippi’s historically black colleges. The district court’s assessment of whether

206. See, e.g., *supra* notes 183-95 and accompanying text.

207. *Freeman v. Pitts*, 503 U.S. 467, 495 (1992). But see *Hills v. Gautreaux*, 425 U.S. 284, 292-96 (1976) (holding that *Milliken*’s limitation on the scope of remedy where residential segregation has occurred is inapplicable in a case of discrimination against a public housing authority).

208. See *Pitts*, 503 U.S. at 496.

209. *Milliken v. Bradley*, 433 U.S. 267, 282 (1977); accord *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

210. See *Pitts*, 503 U.S. at 496.

211. See, e.g., *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434 (1976); *Swann*, 402 U.S. at 26-32; see also *id.* at 31-32 (“Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.”).

212. 505 U.S. 717 (1992).

Mississippi had met its obligation to dismantle the dual college system turned on the facial neutrality of the schools' admissions and operational policies.<sup>213</sup> Because these were racially neutral, the court found that the schools were under no affirmative duty to desegregate under relevant precedent, and it rejected the plaintiffs' claims that Mississippi had not dismantled its dual college system.<sup>214</sup>

The Supreme Court reversed the Fifth Circuit's judgment affirming the district court's decision.<sup>215</sup> The Court found that the proper inquiry was not whether racial imbalances were caused by intentional discrimination, or whether those imbalances were irrelevant (since colleges are schools of choice).<sup>216</sup> Rather, the question was whether the effects of the state's dual college system persisted—whether, for instance, the admissions policies or other elements of the system fostered segregation notwithstanding their facial neutrality.<sup>217</sup> The Court focused on four policies or practices as suspect: different minimal test scores for admission of black and white students,<sup>218</sup> duplicative programs at predominantly black and white schools,<sup>219</sup> school missions that could be viewed as categorizing the black schools as less demanding than the white schools,<sup>220</sup> and the maintenance of more universities than were needed to educate the state's college-aged students.<sup>221</sup>

*Fordice* could provide a basis for majority- or minority-race students in conventional public schools to challenge predominantly white or predominantly minority charter schools. The very existence of the two categories of schools in a district that formerly was a dual system may be a basis for finding this model of school reform constitutionally suspect despite facially neutral admissions policies. More significantly, the special mission of charter schools, as compared to conventional schools, might be viewed as comparable to the two school missions found suspect in *Fordice*. Finally, to the extent that a

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213. See *Ayers v. Allain*, 674 F. Supp. 1523, 1529 (N.D. Miss. 1987), *aff'd en banc*, 914 F.2d 676 (5th Cir. 1990), *vacated sub nom.*, *United States v. Fordice*, 505 U.S. 717 (1992).

214. See *id.* at 1553.

215. See *Fordice*, 505 U.S. at 732.

216. See *id.* at 729 (“[That] college attendance is by choice . . . does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system.”).

217. See *id.* at 729-31.

218. See *id.* at 734.

219. See *id.* at 738.

220. See *id.* at 740.

221. See *id.* at 741.

district's charter schools and conventional public schools have the same core courses, they lend themselves to the charge of being unnecessarily duplicative, as the Court found certain courses at Mississippi's historically black and predominantly white universities to be.

*Remedial education cases.* Although federal law would not appear to support state statutes that compel racial balance in charter schools (except, perhaps, *Fordice*), one branch of federal school desegregation precedent more persuasively suggests how state legislators in jurisdictions previously found guilty of discrimination might justify these mandates. These are the cases that involve compensatory educational programs as a remedy for discrimination. The leading case is *Milliken II*.<sup>222</sup> In this case the Court affirmed an order requiring the state defendants in the first *Milliken* case to fund four "educational components" designed to improve the academic performance of black students who were victims of intentional school segregation.<sup>223</sup> These components were remedial reading programs, in-service training for teachers and administrators, aid with preparation for testing and revised testing procedures, and counseling and career guidance.<sup>224</sup> The Court upheld these programs on the theory that they were designed to alleviate the segregative condition to which black students had been subjected, and thus were within the scope of the federal courts' remedial authority.<sup>225</sup> The Court reasoned that these programs would help restore the victims to the condition in which they would have found themselves had the discrimination not occurred.<sup>226</sup>

The kinds of remedial programs sanctioned in *Milliken II* and subsequent cases seem consistent with state legislators' mission to use charter schools as a tool to enhance the academic performance of public school students. This is especially true insofar as the students who attend charter schools with distinctive educational programs are

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222. 433 U.S. 267 (1977).

223. *See id.* at 281-87.

224. *See id.* at 272-76.

225. *See id.*

226. *See id.* at 280; *see also* *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225, 231-32 (1969) (affirming the inclusion of faculty and staff desegregation as part of a remedial order); *Green v. New Kent County*, 391 U.S. 430, 436 (1968) (noting that *Brown I* authorized a district court to consider a school district's personnel in formulating a desegregation plan); *United States v. Missouri*, 523 F.2d 885, 887 (8th Cir. 1975) (authorizing teacher training for correcting deficiencies in reading and communication skills); *United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385, 394 (5th Cir. 1967) (affirming the inclusion of remedial education programs); *Miller v. School Dist. 2, Clarendon County*, 256 F. Supp. 370, 377 (D.S.C. 1966) (same).

disproportionately minority and thus members of groups previously subjected to intentional educational discrimination. In such instances, authorities could argue that charter schools are a way of remedying past discrimination. This tactic would be most viable, however, if the school district in question had been making efforts all along to address the educational needs of historically undereducated groups. Otherwise, the reliance on *Milliken II*-type cases might be viewed as a convenient justification for a district's contemporary policy prerogatives.

Moreover, although the principles espoused in *Milliken II* support school districts' efforts to meet their constitutional obligations to minorities by focusing not merely on racial balance in school assignments, but also on educational improvement,<sup>227</sup> a recent opinion by the Court may undercut the persuasive force and credibility of *Milliken II*-based arguments. In *Missouri v. Jenkins*,<sup>228</sup> the Court held that districts obligated to eliminate the vestiges of discrimination by, for instance, attempting to close racial gaps in performance on achievement tests, are not required to demonstrate actual progress in meeting such goals.<sup>229</sup> Rather, the Court held, "[t]he basic task of the District Court is to decide whether the reduction in achievement by minority students attributable to prior de jure segregation has been remedied to the extent practicable."<sup>230</sup> This decision cuts against the notion that deregulated schools are justifiable on the basis of districts' desires to remedy the harms of past discrimination because it implies that this goal is amorphous, not subject to judicial oversight, and therefore, not likely to be an issue to which federal courts will give great weight in the event of equal protection litigation.

*Conclusion.* A few cases among the Court's school desegregation precedents may support state legislators' efforts to ensure that charter schools do not become segregation academies. Most of the relevant precedents reveal a philosophical gap between states' efforts at racial balance and what the Court believes the Constitution requires of districts that previously intentionally discriminated against African Americans, however.

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227. See *Freeman v. Pitts*, 503 U.S. 467, 483-84, 492-93 (1992) (approving the district court's evaluation of individual *Green* factors); *Board of Educ. v. Dowell*, 498 U.S. 237, 250-51 (1991) (holding that courts should look at all aspects of schools to determine whether de jure segregation has been overcome).

228. 515 U.S. 70 (1995).

229. See *id.* at 101.

230. *Id.*

The doctrinal realities, first, that the Court has moved toward granting unitary status to districts found guilty of de jure segregation although they have not achieved racial balance in student assignments, and, second, that de facto segregation is not cognizable under federal law in most circumstances, are regrettable. I find this trend inconsistent with fundamental principles of fairness in education for students who historically have endured state-sanctioned discrimination. I would prefer that federal law required or encouraged all public schools—including deregulated ones—to reflect the racial diversity of the communities in which they are situated.

The law being as it is, however, the question that state legislators and those concerned that racial minorities are fairly treated in charter school admissions must address is how to promote equality without contravening the norms apparent in the Court's precedent defining the scope of rights and remedies in school desegregation cases. Part IV considers ways in which this task might be approached.

In the remainder of this part, I consider the ramifications of the Court's affirmative action jurisprudence for states' efforts to achieve racial balance in charter schools. I also analyze the relationship between the Court's sex discrimination precedents and charter school enabling laws that either permit, encourage, or simply do not forbid single-sex education.

*c. Affirmative action precedent.* The justificatory rhetoric for affirmative action programs appears consistent with that which school districts might offer to defend race-conscious admissions provisions. That is, a state might justify a racial balance provision (like that contained in North Carolina's charter school enabling legislation) by arguing that it is necessary to ensure that students from groups that historically have been the victims of educational discrimination are well represented among charter school attendees. The state might further argue that the provisions are necessary to ensure a diverse student body.

This strategy would echo the one used successfully to defend similar programs in higher education, most famously in *Regents of the University of California v. Bakke*.<sup>231</sup> The problem with this approach is that the decision in *Bakke*, a plurality opinion,<sup>232</sup> was controversial

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231. 438 U.S. 265, 319-20 (1978) (Powell, J., plurality opinion) (upholding the use of race as a factor in considering the admission of applicants to schools of higher education in California).

232. Justices Brennan, Marshall, White, and Blackmun justified the program at issue in



from the start, and has become even more so since. In the relatively short span of a decade, racial classifications designed by local,<sup>233</sup> state,<sup>234</sup> and even federal officials<sup>235</sup> to aid racial minorities have gone from being understood as permissible remedies for state-sanctioned segregation and enslavement to being constitutionally suspect—just as if these classifications were designed to perpetuate invidious discrimination. *Adarand Constructors, Inc. v. Pena*<sup>236</sup> is the Court's most recent and adamant statement that all racial classifications, even if justified by their proponents as compensatory or otherwise benign in nature, are subject to strict scrutiny when reviewed in the federal courts.<sup>237</sup> “[A]ll governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed,” the Court stated.<sup>238</sup>

Justice Stevens's dissenting opinion in *Adarand* cautioned that the idea of strictly scrutinizing remedial race-based classifications as if they were the same as laws imposing segregation revealed the majority's inability to distinguish a “No Trespassing” sign from a welcome mat.<sup>239</sup> Nevertheless, lower federal courts have relied on *Adarand* and *City of Richmond v. J.A. Croson Co.*<sup>240</sup> in striking down programs designed to remedy past discrimination in formerly de jure segregated states. Several courts have disregarded the *Adarand* majority's caution that even though all racial classifications must be subject to strict

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*Bakke* as a remedy for past discrimination, *see id.* at 326-79 (Brennan, J., concurring in part, dissenting in part), while Justice Powell, writing for the plurality, found that ensuring a diverse student body was a compelling interest that could justify consideration of race, *see id.* at 311-20 (Powell, J., plurality opinion).

233. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989) (O'Connor, J., plurality opinion) (striking down a set-aside program for minorities in the awarding of construction contracts).

234. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283-84 (1986) (Powell, J., plurality opinion) (striking down a school board's program allowing preferential treatment for blacks against lay-offs).

235. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 204, 235 (1995) (striking down a federal contracting program that gave contractors financial incentives to hire subcontractors characterized as “socially and economically disadvantaged individuals”).

236. 515 U.S. 200 (1995).

237. *Id.* at 226-27; *see also Croson*, 488 U.S. at 493-94 (O'Connor, J., plurality opinion) (requiring strict scrutiny when reviewing race-based classifications, regardless of the “race of those burdened or benefited by a particular classification”).

238. *Adarand*, 515 U.S. at 227.

239. *See id.* at 244 (Stevens, J., dissenting).

240. 488 U.S. 469 (1989).

scrutiny, all such classifications are not necessarily unconstitutional.<sup>241</sup> The Fifth Circuit since has struck down the use of race as a factor in admissions at the University of Texas;<sup>242</sup> the Fourth Circuit found the University of Maryland's policy of considering race in awarding scholarships unconstitutional;<sup>243</sup> the Ninth Circuit upheld an initiative by California voters barring the use of race and sex in college admissions or employment;<sup>244</sup> and most recently, race-based affirmative action in college admissions was struck down by a federal district court judge in Georgia<sup>245</sup> (although a procedurally unrelated claim against the same board of regents was later vacated for lack of standing).<sup>246</sup>

Thus, while the justificatory rhetoric of affirmative action precedent may provide a basis, theoretically, for rationalizing racial balance provisions in charter school enabling statutes, the Court's precedent is likely to provide ammunition for opponents of such provisions, if courts rigidly apply the strict scrutiny standard. The recent decision by the South Carolina Supreme Court concerning the Lighthouse Charter School confirms this prediction; that court struck down the state's racial balance requirement as a discriminatory quota in contravention of *Adarand* and *Croson*.<sup>247</sup>

Although a mechanistic application of the authority on affirmative action does not support race-consciousness in charter school admissions, there are several reasons to apply the strict scrutiny standard in a more nuanced manner to claims involving deregulated schools. Moreover, the concept of diversity may provide a workable basis for states to defend racial balance provisions. The Supreme

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241. See *Adarand*, 515 U.S. at 237 (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’ The unhappy persistence of both the practice and the lingering effects of racial discrimination . . . is an unfortunate reality, and government is not disqualified from acting in response to it.” (citation omitted)).

242. See *Hopwood v. Texas*, 78 F.3d 932, 962 (5th Cir. 1996) (striking down an affirmative action program for admissions to the University of Texas Law School), *aff’d in part, rev’d in part*, 2000 U.S. App. LEXIS 33523 (5th Cir. Dec. 21, 2000) (remanding for further findings of fact and conclusions of law).

243. See *Podberesky v. Kirwan*, 38 F.3d 147, 161 (4th Cir. 1994) (striking down a scholarship program designed to remedy past discrimination against minorities).

244. See *Coalition for Econ. Equity v. Wilson*, 110 F.3d 1431, 1439-46 (9th Cir. 1997) (holding that an initiative passed by California voters banning race or sex preferences in admissions to colleges and in employment is not unconstitutional).

245. See *Wooden v. Board of Regents*, 32 F. Supp. 2d 1370, 1378-84 (S.D. Ga. 1999) (finding race-consciousness in admissions policies of academic years 1990-95 unconstitutional).

246. See *Tracy v. Board of Regents*, 59 F. Supp. 2d 1314, 1318-20 (S.D. Ga. 1999), *rev’d per curiam*, 208 F.3d 1313, 1314 (11th Cir. 2000) (vacating for further considerations of standing).

247. See *Judge Upends*, *supra* note 135.

Court has not expressly considered diversity as a justification for such programs, though Justice O'Connor and others have endorsed this idea.<sup>248</sup> When coupled with the caveat in *Adarand* that even those racial classifications subject to strict scrutiny may nevertheless pass constitutional muster,<sup>249</sup> the educational mission of charter schools may, in some instances, mitigate the doctrinal assumption that status-conscious charter schools are constitutionally impermissible. These ideas are discussed in Part III.<sup>250</sup> Before addressing these matters, I discuss the constitutional implications of sex-consciousness in charter school admissions.

### C. *Single-Sex Education*

Together with provisions based on race, charter school enabling legislation typically contains language forbidding discrimination in admissions on the basis of sex.<sup>251</sup> Single-sex schools or classrooms may be established under several states' laws, however. While New York is the only state that expressly permits the establishment of single-sex charter schools,<sup>252</sup> no state forbids it. Virginia expressly allows for sin-

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248. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part, dissenting in part) (“[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently ‘compelling,’ at least in the context of higher education to support the use of racial considerations in furthering that interest.”); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-20 (1978) (justifying affirmative action in medical school admissions on the basis of diversity); see also *United States v. Virginia (VMI)*, 518 U.S. 515, 534 n.7 (1996) (“We do not question the Commonwealth’s prerogative evenhandedly to support diverse educational opportunities.”). But see *Wessmann v. Gittens*, 160 F.3d 790, 795-800 (1st Cir. 1998) (holding that diversity is not a compelling rationale for selecting admissions to an elite high school); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (same, in awarding broadcast licenses); *Hopwood v. Texas*, 78 F.3d 932, 948 (5th Cir. 1996) (same, in university admissions), *aff’d in part, rev’d in part*, 2000 U.S. App. LEXIS 33523 (5th Cir. Dec. 21, 2000) (remaining for further findings of fact and conclusions of law).

249. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995).

250. See *infra* notes 557-66 and accompanying text.

251. See, e.g., MASS. ANN. LAWS ch. 71, § 89(l) (Law. Co-op. Supp. 1999); N.Y. EDUC. LAW § 2854 (McKinney Supp. 2000); N.C. GEN. STAT. § 115C-238.29F(g)(5) (2000).

252. See N.Y. EDUC. LAW § 2854 (McKinney Supp. 2000) (“[N]othing in this Article shall be construed to prevent the establishment of a single-sex charter school or a charter school designed to provide expanded learning opportunities for students at-risk of academic failure.”). A single-sex school designed to serve both boys and girls (separate instruction in one building with one faculty and administration) recently was approved by the New York State Board of Regents. No details are yet available about this school. See Jeanne Allen, *Charter School Laws: State by State Ranking and Profiles*, Center for Education Reform, at [http://www.edreform.com/charter\\_schools/laws/ranking.htm](http://www.edreform.com/charter_schools/laws/ranking.htm) (Apr. 2000) (on file with the *Duke Law Journal*); 3 CENTER FOR EDUCATION REFORM NEWSWIRE 1 (Jan. 3, 2001), at <http://www.edreform.com/update.index.html> (on file with the *Duke Law Journal*).

gle-sex programs in conventional schools,<sup>253</sup> and others, including Illinois, Maryland, Pennsylvania, and Wisconsin, have approved single-sex schools, including same-sex charter schools, although their codes of law do not expressly so permit.<sup>254</sup>

The antidiscrimination provisions notwithstanding, some commentators are troubled by the possibility that the deregulation of education will result in sex-based discrimination, especially insofar as it allows for single-sex schooling. Aware of the historical linkage between women's limited educational opportunities and the notion of women's "place" in the home, some find the notion of single-sex education per se suspect.<sup>255</sup> The National Organization for Women (NOW) and the American Civil Liberties Union (ACLU) argue that rather than creating sex-conscious schools or classrooms, existing programs and laws promoting sex equity should be enforced.<sup>256</sup> Similarly, Professor Martha Minow has argued that no publicly financed school should be allowed to exclude persons on the basis of sex.<sup>257</sup> She advocates the use of sex (and racial) balance requirements to ensure equality in deregulated and other alternative schools.<sup>258</sup>

1. *The Theory and Practice of Single-Sex Education.* Nevertheless, state legislatures' affirmative provision for single-sex education, or their failure to expressly forbid it, likely is viewed as consistent with their overall purpose in creating charter schools of expanding the kinds of learning environments available to students and meeting students' special educational needs. Research shows that by early childhood, girls and boys have acquired different skills and thus already have different educational needs.<sup>259</sup> This finding has led

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253. See VA. CODE ANN. § 22.1-212.1:1 (Michie 2000) ("Consistent with constitutional principles, a school board may establish single-sex classes in the public schools of the school division.").

254. See generally JANICE L. STREITMATTER, FOR GIRLS ONLY 16-23 (1999); Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 451-53 & nn.3-4 (1999) (noting that single-sex schools are experiencing a "resurgence in popularity" across the country).

255. See STREITMATTER, *supra* note 254, at 36-43; Levit, *supra* note 254, at 476-505 & nn.224-25; see also Peggy Orenstein, *All-Girl Schools Duck the Issue*, N.Y. TIMES, July 20, 1996, at A19 (arguing that focusing on single-sex education makes the more significant problem of inequality in coeducational classrooms melt into the background).

256. See STREITMATTER, *supra* note 254, at 119 (noting NOW's official stance and opposition to girls-only classrooms as a form of "segregation" rather than desirable "inclusion").

257. See Minow, *supra* note 18, at 285.

258. See *id.*

259. See AMERICAN ASS'N OF UNIV. WOMEN, HOW SCHOOLS SHORTCHANGE GIRLS 18

the American Association of University Women (AAUW) to conclude that “[t]he uniform application of a single preschool curriculum may not be the most effective way of improving outcomes for children.”<sup>260</sup> Moreover, research shows that girls experience a marked decline in academic performance and self-esteem during adolescence,<sup>261</sup> and that this confidence level is correlated with girls scoring less well than boys on high school math and science tests.<sup>262</sup> As with the differences in the educational needs of boys and girls in early childhood, the gender gap in performance in math and sciences courses is said to relate to different experiences that males and females have in the school environment. The AAUW reports, for instance, that girls are less likely to be exposed to biology-related activities such as using microscopes. By third grade, only 37% of girls report having used microscopes at school, as compared to 51% of boys; similarly, girls are less likely to have engaged in activities involving mechanics or electronics.<sup>263</sup>

While these data and anecdotes do not, alone, support an inference of sex bias, studies show that girls experience discrimination in the classroom which may or may not be inadvertent.<sup>264</sup> Teachers tend

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(1995) [hereinafter HOW SCHOOLS SHORTCHANGE].

260. *Id.* at 21. The AAUW has not endorsed single-sex education, however.

261. See STREITMATTER, *supra* note 254, at 6 (“As girls’ holistic views of themselves in relation to particular subject matter taught in schools.”); see also MARY PIPHER, REVIVING OPHELIA: SAVING THE SELVES OF ADOLESCENT GIRLS 19-23 (1994) (arguing that girls’ self-esteem plummets during their teenage years due to the sexism and violence pervading American culture); Mary Jane Ritheram-Borus et al., *Personal and Ethnic Identity, Values, and Self-Esteem Among Black and Latino Girls*, in URBAN GIRLS 35, 45 (Bonnie J. Ross Leadbeater & Niobe Way eds., 1996) (noting that research indicates that girls have significantly lower self-esteem than boys, particularly in the younger grades).

262. See PIPHER, *supra* note 261, at 62-64; see also HOW SCHOOLS SHORTCHANGE, *supra* note 259, at 25-26 (citing report showings that, at higher cognitive levels, 8.2% of males, but only 4.5% of females, were at the highest math levels; that while 54% of all males and 48% of females could do “moderately complex procedures and reasoning,” that in 1988, men scored an average of 37 points higher than females on “level 1” math and 38 points higher than females on “level 2” math problems; that men perform much better than females in physics, chemistry, earth science, and space science; that men scored 29 points higher than females on the 1988 biology advance placement test, and 56 points higher than women on the 1988 physics advance placement test); Jane Gross, *To Help Girls Keep up: Math Class Without Boys*, N.Y. TIMES, Nov. 24, 1993, at A1 (reporting girls’ assertion that they are learning more in experimental all-female mathematics classes in California); Kate Stone Lombardi, *Schools Show Uneven Attack on Sex Bias*, N.Y. TIMES, Mar. 9, 1997, at 1 (discussing teachers’ efforts to close the gap between boys’ and girls’ achievements in science and technology classes).

263. See HOW SCHOOLS SHORTCHANGE, *supra* note 259, at 45.

264. See *id.* at 118-19, 121-24.

to call on boys more often, ask boys more challenging questions, and, in laboratory work, tend actually to do the work for girls while admonishing boys to do it for themselves.<sup>265</sup> Finally, girls and women of all ages confront sexual harassment and sexual assault in coeducational settings.<sup>266</sup>

To some, single-sex education seems an appropriate remedy to many of the sex-linked difficulties that girls and women experience in school. Although there is no consensus on the extent to which single-sex schooling is a beneficial educational policy,<sup>267</sup> a substantial number of studies demonstrate its efficacy in educating some students.<sup>268</sup> Girls and women seem to perform better in all-female classrooms.<sup>269</sup> Moreover, studies show that girls and women who attend single-sex schools hold higher career aspirations than their coeducational counterparts.<sup>270</sup> Butressing this claim is a study that shows that graduates of women's colleges are more likely than female graduates of coeducational colleges to attend graduate school and to be noted in Who's

265. See MYRA SADKER & DAVID SADKER, *FAILING AT FAIRNESS: HOW AMERICA'S SCHOOLS CHEAT GIRLS 1-14* (1994). The same kinds of interactions (or lack thereof) experienced by girls and women in secondary schools plague women who pursue undergraduate and professional study. For one account of such disadvantaging, see LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 1-77* (1997).

266. See Mary Jordan, *Sex Harassment Complaints Starting in Grade School; Taunts, Intolerance on the Rise, Survey Finds*, WASH. POST, June 2, 1993, at A1 (discussing graphic, sexually harassing behavior that girls and young women endure and its negative impact on their grades and self-esteem); see also NANCY WOLOCH, *WOMEN AND THE AMERICAN EXPERIENCE 125-28, 276-83* (1984) (discussing the development of elementary, secondary, and higher education opportunities for eighteenth-century women in the United States).

267. The AAUW reports that:

Research has shown that there are differences in how successful students are in school based on gender and ethnicity . . . . Differences exist in the extent to which boys and girls take courses in science, math, English, history, and other subjects, and in the levels of difficulty . . . at which they take them . . . . Among the most important effects on girls in school are differential patterns of achievement associated with different classroom experiences.

HOW SCHOOLS SHORTCHANGE, *supra* note 259, at 169, 172-73. However, it also notes:

Despite an abundance of data-collection activities in the United States, there are not enough comparable and useful data on gender differences to adequately monitor the quality and equality of education for boys and girls in the states and nation. The ways that data are collected and maintained at the school, district and state levels can severely limit the utility of the data.

*Id.* at 176.

268. See STREITMATTER, *supra* note 254, at 36-41; Kirsten Kaplice, *The Case for Public Single-Sex Education*, 18 HARV. J.L. & PUB. POL'Y 227, 243 (1994).

269. See STREITMATTER, *supra* note 254, at 36-41 (citing recent research on single-sex schools); see also Kaplice, *supra* note 268, at 243, 247-49 (citing research on single-sex education generally, and single-sex education of minority children specifically).

270. See STREITMATTER, *supra* note 254, at 38; Kaplice, *supra* note 268, at 244.

Who of American Women.<sup>271</sup> These generalizations hold for some men and boys. Studies show that certain boys and men perform better at single-sex institutions and have higher career aspirations than those who attend coeducational institutions.<sup>272</sup>

Single-sex schools “enroll a higher percentage of minority students than coeducational schools,”<sup>273</sup> and some studies show that racial minorities in particular may benefit from attending such schools.<sup>274</sup> In fact, in a 1998 study commissioned by the AAUW, Professor Cornelius Riorda stated that black and Hispanic girls from low-income backgrounds show the greatest gains from attending single-sex schools.<sup>275</sup> Perhaps not coincidentally, Spelman College and Morehouse College, both single-sex, historically black colleges, are the only ones of their kind habitually ranked among the nation’s best undergraduate institutions.<sup>276</sup>

There is no pending case concerning a single-sex charter school comparable to those involving racially identifiable charter schools like the Healthy Start Academy,<sup>277</sup> the Lighthouse Charter School,<sup>278</sup> the proposed schools in the Benton Harbor school district,<sup>279</sup> or the many other cases involving racially identifiable charter schools discussed above.<sup>280</sup> Single-sex, racially identifiable charter schools recently have been established, however. These schools are subject to legal challenges, just the same as racially identifiable charter schools and conventional single-sex schools.

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271. See Kaplice, *supra* note 268, at 244; see also Susan Estrich, *For Girls' Schools and Women's Colleges: Separate Is Better*, N.Y. TIMES, May 22, 1994, at 39 (discussing her radically different experiences at Wellesley College and Harvard Law School, and arguing for single-sex educational opportunities).

272. See STREITMATTER, *supra* note 254, at 36-38, 40, 43; Kaplice, *supra* note 268, at 245, 249-50; Cornelius Riorda, *Single-Sex Schools: Outcomes for African and Hispanic Americans*, 10 RES. SOC. EDUC. & SOCIALIZATION 177, 192-202 (1994).

273. Kaplice, *supra* note 268, at 247.

274. See Riorda, *supra* note 272, at 192-202.

275. See generally AAUW, SEPARATED BY SEX: A CRITICAL LOOK AT SINGLE-SEX EDUCATION FOR GIRLS (1998).

276. See David Bowermaster & Betsy Wagner, *Close to Home*, U.S. NEWS & WORLD REP., Sept. 28, 1992, at 124 (noting that Spelman College ranked first in the magazine’s survey of regional liberal arts colleges, that Spelman is the only historically black college ever to rank first in any category in the magazine’s “Best Colleges” survey, and that Morehouse College ranked tenth among regional liberal arts colleges in the survey).

277. See *supra* notes 108-18 and accompanying text.

278. See *supra* notes 126-36 and accompanying text.

279. See *supra* notes 119-25 and accompanying text.

280. See cases cited *supra* note 13.

One example of such a single-sex and racially identifiable charter school is the Young Women's Leadership School in Chicago, a college preparatory academy that is located on the campus of the Illinois Institute of Technology and was founded in the academic year 2000.<sup>281</sup> The school focuses primarily on math, science, and technology for 150 girls in grades six and nine;<sup>282</sup> thus, it aims to improve girls' academic performance in precisely those areas in which there is the greatest sex gap.<sup>283</sup> The curriculum includes seven years of math, science, and computer courses, along with courses specifically designed to help the girls succeed on the job market.<sup>284</sup> Other distinctive features of Chicago's Young Women's Leadership School are the commitment from local businesses to provide internships to its students when they are of age, and the students' commitment to community service, which they are required to perform weekly at nursing homes.<sup>285</sup> Like Healthy Start and other charter schools discussed above, Chicago's Young Women's Leadership School is comprised overwhelmingly of students who are minority and poor.<sup>286</sup> Though admission is by lottery, 88% of the students are racial and ethnic minorities, and over 75% qualify for the federal free-lunch program.<sup>287</sup>

The Young Women's Leadership School in Chicago is a sister school of the Young Women's Leadership Academy in Harlem, a conventional public school established prior to the New York legislature's passage of charter school enabling legislation. The school was founded in 1996 by prominent philanthropists.<sup>288</sup> The size of the school's student body is modest—it services only fifty students—but all of these girls are minority and from low-income households.<sup>289</sup>

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281. See *In Chicago, Girls Get a Public School of Their Own*, N.Y. TIMES, Aug. 27, 2000, at A16 [hereinafter *In Chicago*].

282. See *id.*

283. See *supra* notes 261-63 and accompanying text.

284. See *In Chicago*, *supra* note 281, at A16.

285. See *id.*

286. See *id.*

287. More particularly, 63% of the students are African-American, 21% are Latina, 3% are Native-American, 1% are multiracial, and 12% are white. See Young Women's Leadership Charter School of Chicago Student Profile for 2000-01 (unpublished manuscript, on file with the *Duke Law Journal*); see also *In Chicago*, *supra* note 281, at A16 (describing the Young Women's Leadership Charter School of Chicago and its primary objectives of educating poor, minority girls).

288. See Jacques Steinberg, *All-Girls School Opens to Muffins and Media*, N.Y. TIMES, Sept. 5, 1996, at B6.

289. See *id.*



The trend of single-sex schools for minorities is not limited to girls. Perhaps the most well-known example in recent history of such a school arose from Detroit. In 1991, the Detroit Board of Education established three all-male academies for 250 students in kindergarten through fifth grade.<sup>290</sup> Based on Afrocentric curricula, the academies were designed to combat poor academic performance among young African-American boys.<sup>291</sup>

Not long after the idea of the Detroit boys' academies was conceived and the Young Women's Leadership Academy in Harlem was established, they become embroiled in legal controversies. The attacks came from liberals: the National Organization for Women, along with the American Civil Liberties Union, challenged the legality of the schools.<sup>292</sup> In the case of the Detroit academies, NOW filed a lawsuit, *Garrett v. Board of Education*,<sup>293</sup> in a Michigan federal court; *Garrett* ultimately resulted in an injunction barring the establishment of all-male academies for African-American boys.<sup>294</sup> The organization alleged that in establishing all-male academies, the Detroit school board had "deliberately chosen to disregard the rights of girls in the public school system."<sup>295</sup> NOW argued that girls confronted an "equally urgent and unique crisis" as that faced by black boys.<sup>296</sup>

With respect to the all-girls school in Harlem, NOW filed an administrative complaint with the Department of Education, Office for Civil Rights.<sup>297</sup> Unable to dispute research showing that some girls perform worse and participate less in coeducational schools, a NOW spokesperson responded that the solution to these academic problems

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290. See *Garrett v. Board of Educ.*, 775 F. Supp. 1004, 1006 (E.D. Mich. 1991).

291. See *id.* at 1006-08.

292. See Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 HARV. L. REV. 1741, 1741 & n.3 (1992) (noting that organizations including NOW argue that the creation of single-sex schools for inner-city boys can alleviate the problems of racism and classism, but that such schools aggravate the problem of sexism); Jacques Steinberg, *Just Girls, and That's Fine with Them: At a New School, No Boys, Less Fussing, and a Freer Spirit*, N.Y. TIMES, Feb. 1, 1997, at A21 (quoting an official from the New York chapter of NOW stating that Harlem's girls' school would "set the girls back in preparing for a coeducational environment").

293. 775 F. Supp. 1004 (E.D. Mich. 1991).

294. See *id.* at 1014.

295. *Id.* at 1006.

296. *Id.* at 1007.

297. In New York, NOW filed its complaint along with the New York Civil Liberties Union. See Jacques Steinberg, *Rights Groups Seek to Bar Girls-Only School*, N.Y. TIMES, Aug. 23, 1996, at B2.

was not to “sequester 50 girls in an environment that did not mirror the real world.”<sup>298</sup> The department has yet to rule on the complaint.<sup>299</sup>

Of course, separate schooling has existed for women, especially white, upper-class women, for centuries.<sup>300</sup> It is ironic, or maybe just a coincidence, that concern about single-sex education appears to be reaching a crescendo just as minority girls from working-class and poor backgrounds are being offered the possibility of single-sex education in public schools.

In any event, although the experiment with the Detroit academies for boys was quashed and the Young Women’s Leadership Academy in Harlem is imperiled, the interest in single-sex education continues to be high, especially within working-class, poor, and minority communities.<sup>301</sup> Enrollment at all-girls schools has increased

298. *Id.*

299. See Telephone Interview with Linda Cologne, United States Department of Education, Office for Civil Rights, New York Regional Office (Jan. 11, 2000); see also Tamar Lewin, *Girls’ Schools Gain, Saying Coed Isn’t Coequal*, N.Y. TIMES, Apr. 11, 1999, at A1 (relating the experiences of teachers, parents, and female students in single-sex public schools in New York City).

300. See STREITMATTER, *supra* note 254, at 25-31.

301. Many people within the communities of color in Detroit and New York City had been excited about the possibility of single-sex education and have voiced disappointment with and opposition to what they view as NOW’s arrogance in opposing these educational experiments. See David Gonzalez, *Girls’ School: Neighbor’s for, NOW Against*, N.Y. TIMES, Mar. 5, 1997, at B1; Roberto Santiago, Editorial, *Harlem Girls School Deserves NOW’s Blessing*, N.Y. TIMES, Mar. 8, 1997, at A22; Steinberg, *supra* note 292, at A21. Maria Irizarry-Lopez, the Vice President of 100 Hispanic Women and a member of NOW in its early years, severed her ties with NOW because, as typified by NOW’s response to the Young Women’s Leadership Academy, she felt that “the feminist movement never understood minority and working-class women” and she didn’t think that NOW had “a right to oppose this school [because] [t]hey never addressed our needs, so why should they come down here and tell us we can’t have this?” *Id.* (quoting Maria Irizarry-Lopez).

Given the concern that NOW voiced in *Garrett* about the plight of urban females and the reality that it reputedly is an organization for women and girls, its efforts to prevent the opening of the Young Women’s Leadership Academy in Harlem seem ironic. From a historical perspective, however, NOW’s actions are not unusual. Both first-wave advocates of women’s rights, and second-wave liberal feminist organizations (NOW being the paradigm), have had uneasy relations with women of color and working-class or poor women. Tensions stemmed from the perception that NOW, composed of predominantly white, middle-class women, and committed to a legalistic approach to women’s liberation, had not conceived of equality in terms of the problems faced by nonwhite, non-middle-class women. More simply said, NOW’s leadership was believed to suffer from race/class myopia. See NANCIE CARAWAY, *SEGREGATED SISTERHOOD: RACISM AND THE POLITICS OF AMERICAN FEMINISM* 117-67 (1991) (discussing the challenges faced by African-American women in the feminist movement at the end of the nineteenth century and the beginning of the twentieth century); NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 31-32, 68-72 (1987) (discussing racism in the women’s suffrage movement); PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 124-28, 341-48 (1984) (discussing the racially exclu-

24% since 1991, and thirty-one such new schools have opened nationwide since 1996.<sup>302</sup> The development of the Young Women's Leadership School in Chicago is a concrete indicator that the movement for racially identifiable, single-sex schools will continue and probably accelerate under the aegis of charter school enabling laws.<sup>303</sup>

But will charter schools like the Young Women's Leadership School in Chicago fare any better in the event of challenges in the federal courts than conventional schools like the Harlem girls' school or the Detroit boys' schools that were targeted to attract status-identifiable student bodies? Is the applicable federal equal protection precedent as incongruous with race- and sex-identifiable schools as I have argued that it is with respect to racial balance provisions in charter school legislation? I analyze this precedent in the next section.

2. *The Conception of Equality Dominant in Precedent on Single-Sex Education and Racially Identifiable Single-Sex Schools.* In this section, I argue that the formalism and narrow conception of remedy that plague the school desegregation and affirmative action precedent also limit the possibility that sex-conscious charter school admissions will be considered constitutional. The central defect in the relevant constitutional law is that the prevailing analysis of sex-based and sex-plus-race-based educational classifications is hamstrung by reliance on too rigid an understanding of the equal treatment principle. Reliance on the equal treatment principle is problematic because it is unlikely to accommodate conceptions of equality and inequality that do not parallel those recognized in liberal feminist theory, circa the 1960s,<sup>304</sup> and the NAACP's conception of civil rights, circa the 1950s.<sup>305</sup> Stated differently, the conceptions of equality and inequality that the jurisprudence recognizes are backward-looking and focused mainly on de jure discrimination. Because the charter school provisions that mandate or encourage sex- and race-conscious admissions focus only on de facto types of discrimination (for example, at-risk status and

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sionary "expediency strategy" of white suffragists and ERA proponents); *see also id.* at 341 ("[NOW], a predominantly White, middle-class feminist movement was insensitive to the needs of working-class women and Black women. Instead of forming an effective coalition with these groups, NOW turned inward, among its own . . .").

302. *See* Liz Vivanco, *New Charter School Is for Girls Only*, CHI. SUN-TIMES, Aug. 22, 2000, at A6.

303. Statistics show that minority and low-income students are enrolling in charter schools at a disproportionate rate. *See supra* notes 66-72 and accompanying text.

304. *See infra* notes 307, 309-13.

305. *See infra* note 308.

race- or sex-based educational disadvantage that results from societal discrimination), traditional equal protection jurisprudence is ill-suited to address the types of social problems that the deregulation of education is designed to remedy. In other words, I argue, the relevant law is incompatible with the new face of inequality<sup>306</sup> that some state legislators hope to address by deregulating education. In fact, because sex-plus classifications (sex classifications combined with racial classifications) are at issue in the single-sex education cases, they demonstrate the deficiencies of federal equal protection jurisprudence better than the race discrimination precedent alone.

The Supreme Court's equal protection doctrine on sex discrimination requires the sexes to be presumed alike by nature, unless there is an important reason for treating them differently, such as physiological differences related to the benefit at issue.<sup>307</sup> This conception of equality also undergirds the Court's race discrimination precedent.<sup>308</sup> Sex-based classifications that are stereotypical are deemed illegitimate products of the historical view that women should be confined to the private sphere of home, while men were capable of entering the public sphere of work and politics<sup>309</sup> or other arbitrary distinctions

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306. The "new face of inequality" and its relevance to public education has been discussed extensively. See, e.g., Robert L. Carter, *The Unending Struggle for Equal Educational Opportunity*, in CHALLENGE, *supra* note 155, at 19, 23 (arguing that conditions that are not necessarily unlawful, such as de facto racial segregation in housing and neighborhood school assignment policies, result in African-Americans' educational failure); Ellen Condliffe Lagemann, *An American Dilemma Still*, in CHALLENGE, *supra* note 155, at 1-4 (arguing that poverty is just as implicated as race in the failure of public education to entirely address America's social challenges); see also WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE* 1-23 (2d ed. 1980) (arguing that "economic class subordination," which generally is not unlawful, largely explains subordination of contemporary groups of blacks).

307. See *Dothard v. Rawlinson*, 433 U.S. 321, 336-37 (1977) (finding that a regulation banning women from contact prison guard positions did not violate the Civil Rights Act prohibition against discrimination because sex related to an individual's ability to perform the job, and thus fell into the bona-fide-occupational-qualification exception to the Civil Rights Act); *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.").

308. See generally MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-50*, at 27-28 (1987) (explaining that the NAACP's litigation plan was designed to eliminate the doctrine of separate but equal on the grounds that even if resources were equal, a violation of the Equal Protection Clause would occur wherever segregation is accompanied irremediably by discrimination).

309. For the definitive work on separate spheres ideology, see Barbara Welter, *The Cult of True Womanhood, 1820-1860*, 18 AM. Q. 151-74 (1966); see also NANCY F. COTT, *THE BONDS OF WOMANHOOD* 1-18, 197-206 (2d ed. 1997) (applying the separate spheres analysis to the experiences of women in New England between 1780 and 1835).

between men and women.<sup>310</sup> Relying upon the norm embodied in the equal treatment principle, the Court of the 1970s and early 1980s struck down several classifications that were deemed to have been predicated upon the historic cultural presumption that women and men belonged in “separate spheres.” Most notably, the Court struck down laws mandating lower remuneration levels for female recipients of workers’ compensation,<sup>311</sup> welfare,<sup>312</sup> and Social Security benefits.<sup>313</sup>

The Supreme Court’s opinions on single-sex education are predicated unerringly on the narrative that emphasizes the historical connections between women’s confinement to the private sphere, and their subjection to limited educational and employment opportunities.<sup>314</sup> Moreover, the court’s sex discrimination precedent commonly analogizes to race discrimination.<sup>315</sup> State-sanctioned sex discrimination in education against women is discussed as if it parallels de jure race discrimination in education against African slaves and their de-

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310. See, e.g., *Craig*, 429 U.S. at 208-09 (striking down an Oklahoma statute that allowed women access to alcoholic beverages three years earlier than men because, even though statistics showed that men were more likely to drive drunk, the “principles embedded in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups”); CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 4-5 (1979) (describing the Supreme Court’s adherence to the view that discrimination occurs only where the distinctions made are “arbitrary” in that they are preconceived or inaccurate).

311. See *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 147 (1980) (striking down a law that automatically granted death benefits to widows, but granted the same benefits to widowers only if the widower was mentally or physically incapacitated, or dependent on his wife for support).

312. See *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (invalidating a provision of the Social Security Act that provided benefits to families whose dependent children were deprived of support because of the unemployment of the father, but did not provide such benefits upon the unemployment of the mother).

313. See *Califano v. Goldfarb*, 430 U.S. 199, 216-17 (1977) (holding unconstitutional a provision of the Social Security Act that made survivor’s benefits payable to widows regardless of dependency, but made such benefits payable to widowers only where they received at least half of their income from their wives); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975) (holding that widowers with dependent children should receive the same Social Security survivor’s benefits as widows with dependent children); *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (holding that women in the military are entitled to the same level of family benefits as men).

314. See *infra* notes 322-36 and accompanying text.

315. See, e.g., *Frontiero*, 411 U.S. at 685 (1973) (“[Throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names . . . .”); *id.* at 686 (“[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex [is unconstitutional].”).

scendants, notwithstanding profound dissimilarities in the two historical experiences.<sup>316</sup>

Because the Court's jurisprudence is so well informed by the historical connection between societal subjugation of women and their disparate treatment in educational systems, the Court views single-sex schooling as highly suspect. In light of this historical narrative, sex-segregated schooling presumptively represents an unlawful difference—irrational presumptions or stereotypes about women's educational abilities and preferences.<sup>317</sup> While same-sex schooling has not been found per se unconstitutional, the Court's rulings suggest that it will be difficult indeed for such educational policies to pass muster under the Equal Protection Clause.<sup>318</sup>

In my judgment, the Court's jurisprudence relies too heavily on this historical narrative, and in so doing, diminishes or excludes counter-narratives. For instance, the story of women's success in single-sex colleges is not heard.<sup>319</sup> Contemporary policy concerns that animate the establishment of status-identifiable charter schools likewise are silenced.<sup>320</sup> The inflexibility of the Court's approach and the extent to which it is informed by the de jure historical narrative is clear from a discussion of the Court's most recent statement on status-conscious schooling, *United States v. Virginia (VMI)*.<sup>321</sup>

a. *United States v. Virginia*. The majority opinion in *United States v. Virginia* begins by emphasizing two facts that fit well into the equal treatment principle and de jure historical paradigms: VMI is an "incomparable military college"<sup>322</sup> which has "notably succeeded in its

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316. To cite the most profound difference, whereas literacy for slaves was criminalized in southern law codes, white women never faced such educational limitations. See MARY FRANCIS BERRY & JOHN W. BLASSINGAME, *LONG MEMORY: THE BLACK EXPERIENCE IN AMERICA* 261-67 (1982) (describing the almost-nonexistent educational opportunities available to African Americans during the Civil War and Reconstruction, and their achievements in light of those obstacles).

317. See *infra* notes 334-36, 347 and accompanying text.

318. See *id.*

319. On the history of women's colleges, see Jennifer R. Cowan, *Distinguishing Private Women's Colleges From the VMI Decision*, 30 COLUM. J.L. & SOC. PROBS. 137, 139-42 (1997) (discussing the legal history of single-sex education and citing studies that demonstrate how successful women have been at single-sex institutions).

320. See *supra* notes 66-78 and accompanying text.

321. 518 U.S. 515 (1996).

322. *Id.* at 519.

mission to produce leaders”;<sup>323</sup> and women wrongly are excluded from the benefits of VMI despite the majority’s observation that the school’s unique adversative method is not “inherently unsuitable to women.”<sup>324</sup> The majority opinion thus frames the case as revolving around the question of whether women are denied VMI’s benefits—its record of producing leaders, its alumni support, its huge endowment<sup>325</sup>—despite the presumption that women are not physiologically unable to compete with male cadets.<sup>326</sup> For purposes of VMI, the majority assumes that women are the same as men.

The first premise in this construction, VMI’s reputation, is uncontroversial. It is the second proposition that is in need of factual as well as legal support. The majority’s elaboration upon the second proposition reveals that its premise, that men and women are the same for purposes of VMI, is predicated upon a historical narrative in which women are burdened by sex-based classifications—and presumably never aided by them.<sup>327</sup>

“Today’s skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history,” the majority writes, in discussing the legal standard applicable to VMI’s sin-

323. *Id.* at 520. The Court also noted:

[A]mong its alumni are military generals, Members of Congress, and business executives. The school’s alumni overwhelmingly perceive that their VMI training helped them to realize their personal goals. VMI’s endowment reflects the loyalty of its graduates; VMI has the largest per-student endowment of all public undergraduate institutions in the Nation.

*Id.*

324. *Id.*

325. *See id.*

326. *See id.* The Court comments, however, that “[i]t may be assumed, for the purposes of this decision, that most women would not choose VMI’s adversative method.” *Id.* at 542.

327. Justice Ginsburg was the author of the majority opinion in *VMI*. It is not surprising that Justice Ginsburg, the quintessential liberal feminist, reasons so unerringly in terms of the sameness/difference and de jure historical paradigms. Ginsburg, of course, led the legal effort to achieve formal equality for women in terms of the equal treatment principle. This way of thinking is consistent with her life experiences as a pioneering woman. *See* Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 829-30 (1990) (defining liberal feminism and Ginsburg’s landmark efforts in the movement for formal equality).

Justice Ginsburg has expressed her liberal feminist perspective in the following manner:

Generalizations . . . seem to me unhelpful in making decisions about particular individuals. In working as a lawyer, law teacher, and now judge, I have discerned no distinctively male or female styles of thinking or writing. And I agree with Minnesota Supreme Court Justice Jeanne Coyne, who said, when asked whether women judges decide cases differently because they are women: “A wise old man and a wise old woman reach the same conclusion.”

Ruth Bader Ginsburg, *Foreword*, 84 GEO. L.J. 1651, 1654 (1996).

gle-sex admissions policy.<sup>328</sup> It substantiates this claim first by citing women's disfranchisement for "a century plus three decades."<sup>329</sup> It also finds the historical fact that sex-based classifications were accorded mere rational relation review until 1971<sup>330</sup> relevant to the scenario presented in *VMI*.<sup>331</sup> Finally, the majority recounts sex discrimination by institutions of higher education in Virginia in support of the position that the historical record justifies a finding that the single-sex admission policy of VMI is unconstitutional.<sup>332</sup> It notes, for instance, that the University of Virginia only began admitting women in 1972.<sup>333</sup>

The structure of the majority's historically-informed argument leads inexorably to the conclusion that VMI's admissions policy represents yet another benefit from which women have been denied due to irrational stereotypes about women's abilities.<sup>334</sup> Thus, the majority finds that VMI has not provided an "exceedingly persuasive justification"<sup>335</sup> for its male-only admissions policy and concludes that VMI must cease arbitrarily excluding women.<sup>336</sup>

In considering the appropriate remedy for VMI's unconstitutional admissions policy,<sup>337</sup> the majority again looks to history, but this time explicitly to the country's history of racial discrimination against African Americans. The Court makes a historical connection between race- and sex-segregated schools and the remedy of integration by way of *Sweatt v. Painter*.<sup>338</sup> Analogizing the Virginia Women's Insti-

328. *VMI*, 518 U.S. at 531.

329. *Id.*

330. See *Reed v. Reed*, 404 U.S. 71, 77 (1971) (striking down a statute favoring male administrators of estates). Although the Court purported to apply the "mere rationality" standard in *Reed*, the Court clearly applied a standard tougher than rational relation review in this case. The Court explicitly broke with the mere rationality standard in *Frontiero v. Richardson*, 411 U.S. 677 (1973), and finally settled on the intermediate scrutiny standard in *Craig v. Boren*, 429 U.S. 190 (1976).

331. See *VMI*, 518 U.S. at 532.

332. See *id.* at 537-38.

333. See *id.* at 538.

334. For another expression of the same argument, see Lucille M. Ponte, *United States v. Virginia: Reinforcing Archaic Stereotypes About Women in the Military Under the Flawed Guise of Educational Diversity*, 7 HASTINGS WOMEN'S L.J. 1, 32-57 (1996). For a contrary view, see Jon A. Soderberg, *The "Constitutional" Assault on the Virginia Military Institute*, 53 WASH. & LEE L. REV. 429, 456-61 (1996).

335. *VMI*, 518 U.S. at 534.

336. See *id.* at 555-56.

337. The Court of Appeals had given VMI three remedial options: abandon state funding; cease the exclusionary policy; or operate a parallel institution for women. The state chose the third option, creating the Virginia Women's Institute for Leadership. See *id.* at 525-26.

338. 339 U.S. 629, 642 (1950) (finding that separate law schools for African Americans and



tute for Leadership to the inadequate law school established by the University of Texas for Herman Sweatt (and the Court's decision in 1950 ordering Texas to admit Sweatt to the law school),<sup>339</sup> the majority orders VMI to admit qualified women.<sup>340</sup>

*VMI* was rightly decided, in my view. I am satisfied that VMI's single-sex admissions policy was unconstitutional because it restricted to males a unique type of educational programming unavailable elsewhere in the state.<sup>341</sup> In my judgment, if even one woman desires and is qualified to undertake VMI's adversative method of training, the Constitution requires the institution's programming to be available to women as a class.

Nevertheless, the historically-informed mode of reasoning upon which the majority relied in reaching the finding of unconstitutionality is much less convincing than the Court supposed. The majority reasons from history in a manner far too linear and uncomplicated. In so doing, it leaves too little room for the establishment of legitimate, nondiscriminatory single-sex educational programs in the future. The unsatisfactory nature of the Court's historical reasoning is demonstrated at many turns.

First, the historical record that the majority cites in support of the outcome seems too general as a matter of law to support the proposed remedy. To support its result, the majority relies on the history of women's disenfranchisement, the subjection of sex-based classifications to rational relation review, discrimination against women in higher education in Virginia, generally, and discrimination against women at the University of Virginia, specifically.<sup>342</sup> When compared to relevant precedent in the analogous area of race discrimination, however, little of the historical evidence that the majority cites seems adequate to support its argument. The Court's doctrine on racial discrimination establishes that the fit between historical discrimination and the resulting remedy must be exceedingly snug to be considered legally relevant to the resolution of an equal protection claim. Consider, for instance, that in *City of Richmond v. J.A. Croson Co.*,<sup>343</sup> the Supreme Court struck down a race-based set-aside program as un-

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whites at the University of Texas Law School were unconstitutional).

339. See *VMI*, 518 U.S. at 554.

340. See *id.* at 555-56.

341. Cf. *id.* at 520 (describing VMI's unique "adversative method" of instruction and noting that the method is not available anywhere else in Virginia).

342. See *VMI*, 518 U.S. at 531.

343. 488 U.S. 469 (1989).

constitutional on the grounds that the relevant municipality had not demonstrated that the putative beneficiaries of the program had experienced discrimination in the *local industry* sufficient to warrant the remedial action.<sup>344</sup> Thus, for the *Croson* Court, neither acts by others, nor discrimination against relevant groups not pertaining to the specific industry in question, were considered relevant.<sup>345</sup> *Croson* is just one in a line of recent cases in which the Court has greatly restricted the terms under which history can be used to support remedial action by states or institutions that have practiced de jure segregation.<sup>346</sup>

Given the high degree of correlation between past discrimination and remedial action that the Supreme Court requires in the race cases for remedial action, and the *VMI* Court's penchant for reasoning by analogy to those same cases, logic dictated that the Court limit its discussion of history to *VMI*'s past practices and policies. Certainly *VMI*'s history of discrimination alone was sufficient to support a finding that its single-sex admissions policy was unconstitutional. By failing to limit the scope of its discussion, the majority opinion needlessly heightened the burden that sex-conscious schools must carry. Future claims against single-sex institutions that are predicated on modern conditions, rather than archaic stereotypes, likewise can be justified on inappropriately broad historical evidence.<sup>347</sup>

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344. *See id.* at 510.

345. *See id.*

346. *See, e.g.,* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-75 (1986) (Powell, J., plurality opinion) (finding preferential treatment in a layoff process unconstitutional where the state's rationale was found to be insufficiently related to present effects of past discrimination). In the circuit courts, the application of *Adarand* and these other cases in which the Court has held that the fit between the history and remedial plan must be exceedingly snug has resulted in the striking down of many remedial programs designed in recognition of the historic discrimination faced by blacks in the Deep South. *See, e.g.,* *Hopwood v. Texas*, 78 F.3d 932, 935 (5th Cir. 1996) (striking down an affirmative action program at University of Texas Law School, the defendant institution in *Sweatt v. Painter*), *aff'd in part, rev'd in part*, 2000 U.S. App. LEXIS 33523 (5th Cir. Dec. 21, 2000) (remanding for further findings of fact and conclusions of law); *Podberesky v. Kirwan*, 956 F.2d 52, 57 (4th Cir. 1992) (remanding a challenge to a scholarship program available only to African-American students, and instructing the district court to determine if present effects of past discrimination existed and whether the remedy was narrowly tailored). In other contexts I have criticized the *Hopwood* court's reading of history and understanding of what type of historical record supports remedial action. *See, e.g.,* Tomiko Brown-Nagin, *A Critique of Instrumental Rationality: Judicial Reasoning About the "Cold Numbers" in Hopwood v. Texas*, 16 J.L. & INEQUALITY 359, 382-87 (1998).

347. My concern about the usage of history in *VMI* is heightened by the fact that in a prior opinion, precisely the same pattern of using overly broad historical evidence to strike down single-sex admissions policies is clear. In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), the Court, in an opinion by Justice O'Connor, ruled that a state-supported nursing school that limited its enrollment to women violated the Equal Protection Clause. *See id.* at 731.

Moreover, some of the language in the *VMI* opinion suggests that all sex-based classifications, like all race-based ones, should be considered suspect classifications, and therefore, presumed unconstitutional.<sup>348</sup> The Court implies as much not only by presuming that our national history of racial discrimination and sex discrimination are sufficiently similar to allow reasoning by analogy, but also by using language that appears to have changed the nature of the burden that defenders of sex-based classifications must meet.<sup>349</sup> The traditional test for whether a sex-based classification passes constitutional muster, as established in *Craig v. Boren*, requires that sex-based classifications “serve important governmental objectives” that are “substantially related to the achievement” of those objectives.<sup>350</sup> In *United States v. Virginia*, however, the majority uses language that is more robust than the formulaic language typically associated with intermediate scrutiny. The majority writes that sex classifications must be supported by an “exceedingly persuasive” justification.<sup>351</sup> While this language had been used in previous cases,<sup>352</sup> the phrase was invoked so often in *VMI* that it can be interpreted as having eclipsed the tradi-

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The school justified its admissions policy on the grounds that it compensated for past discrimination against women and because the record showed that the male plaintiff could enroll in a suitable nursing program at another state-supported institution. *See id.* at 727. The Court rejected the school’s rationale for its single-sex admissions policy because it found nursing to be a job traditionally held by women. *See id.* at 729. Thus, Justice O’Connor reasoned, MUW’s single-sex admissions policy tended to harm women by perpetuating a stereotype. *See id.* at 729-30. Like the majority in *United States v. Virginia*, the *Hogan* majority made an unconvincing history-based argument in support of its decision. The *Hogan* Court invoked nineteenth-century history relating to the banning of women from law practice and bartending, as well as the enactment of “protective” labor laws, to support the argument that MUW’s single-sex admissions policy was unconstitutional. *See id.* at 725 n.10. As I argued was the case with respect to the *VMI* majority’s historical reasoning under current equal protection doctrine the examples cited by the *Hogan* Court are much too broad to be relevant to the discrete matter of single-sex nursing schools. Thus, like the majority opinion in *Virginia*, *Hogan* demonstrates an inflexibility in the Court’s single-sex jurisprudence: it is wedded to a conception of the equal treatment principle that is predicated upon a historical narrative in which women *always* are burdened by sex-based classifications. These decisions imply that sex-conscious admissions in education always are highly suspect. In this way, they are harmful to contemporary efforts to create single-sex schools and classrooms that are predicated on modern conditions, rather than on the historical narrative of women’s oppression based on de jure discrimination, which is largely inapt to modern education.

348. *See United States v. Virginia (VMI)*, 518 U.S. 515, 532-33 (1996).

349. *See infra* notes 351-54 and accompanying text.

350. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

351. *VMI*, 518 U.S. at 533.

352. *See, e.g., Hogan*, 458 U.S. at 724; *Personnel Adm’r v. Feeney*, 442 U.S. 256, 273 (1979).

tional formulation of the intermediate scrutiny test.<sup>353</sup> As Professor Cass Sunstein has written,

Before *Virginia*, it had seemed well settled that gender discrimination would face “intermediate scrutiny” . . . . *Virginia* heightens the level of scrutiny and brings it closer to the “strict scrutiny” that is applied to discrimination on the basis of race. The Court . . . placed a great emphasis on the need for an “exceedingly persuasive justification,” which seems to have become the basic test for sex discrimination.<sup>354</sup>

Thus, although the majority opinion does not expressly claim that sex is a suspect classification, its word choice in describing the applicable test suggests this result nonetheless.

This outcome was foreshadowed in Justice Ginsburg’s prior opinion in *Harris v. Forklift Systems*, the sexual harassment case, and she had fought for it throughout her career with the ACLU Women’s Rights Project.<sup>355</sup> As counsel to the ACLU, Justice Ginsburg argued in a series of cases from *Reed v. Reed*,<sup>356</sup> to *Frontiero v. Richardson*,<sup>357</sup> to *Craig v. Boren*,<sup>358</sup> that sex-based classifications, like race-based ones, should be considered suspect classifications.<sup>359</sup>

I appreciate the sociopolitical impulse that suggests that moving the sex discrimination doctrine closer to the race discrimination doctrine on the issue of suspect classification would be in the interests of

353. See Linda C. McClain, *Toward a Formative Project of Securing Freedom and Equality*, 85 CORNELL L. REV. 1221, 1226 (2000) (noting that language in *VMI* suggests that the standard for sex discrimination is moving toward strict scrutiny); Collin O’Connor Udell, *Signaling a New Direction in Sex Classification Scrutiny: United States v. Virginia*, 29 CONN. L. REV. 521, 558 (1996) (arguing that Justice Ginsburg’s language in *VMI* opened the door to strict scrutiny for sex classifications).

354. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 72-73 (1996) (footnotes omitted).

355. See *Harris v. Forklift Sys.*, 510 U.S. 17, 26 n.\* (1993) (Ginsburg, J., concurring) (stating that the appropriate level of scrutiny for gender-based classifications “remains an open question”).

356. 404 U.S. 71, 75-76 (1971) (holding that a mandatory Idaho probate code provision that gave preference to men over women who seek appointment as estate administrators violated the Equal Protection Clause).

357. 411 U.S. 677, 678 (1973) (striking down as discriminatory statutes that, solely for administrative convenience, used different definitions of “dependency” for male and female applicants to government benefits programs).

358. 429 U.S. 190, 191 n.\* (1976) (holding that a state statute barring the sale of beer to males under 21 and females under 18 unconstitutionally discriminated on the basis of gender).

359. See Martha Craig Daughtrey, *Women and the Constitution: Where We Are at the End of the Century*, 75 N.Y.U. L. REV. 1, 8-12 (2000).

women's liberation. In criticizing the traditional understanding of the intermediate level of scrutiny and judicial review of sex-based status relationships, feminist scholars have supposed for some time now that treating sex and race as parallel in the equal protection doctrine would advance the cause of women's rights.<sup>360</sup>

There are countervailing arguments against this trend, however, of which the *VMI* opinion does not take account. If we believe that equality should mean acceptance rather than accommodation,<sup>361</sup> if we are to take seriously the project of conceiving equality in a way that is flexible enough to accept difference feminism as a legitimate version of the feminist demand for acceptance,<sup>362</sup> and if we are persuaded by those scholars who proffer a fundamental critique of antidiscrimination discourse,<sup>363</sup> then we must consider that this doctrinal move toward analyzing sex-based discrimination under strict scrutiny may be another means by which power relations may be situated in, and perpetuated by, legal doctrine. It only takes reviewing recent rulings in the race discrimination area to understand that subjecting sex-based classifications to the strictest scrutiny will not necessarily effect

360. See *id.*; see also Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1015, 1023-28 (1986) (discussing criticisms leveled against the Supreme Court's traditional formulation of the intermediate scrutiny standard); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 34 (1989) (arguing that black women's constitutional claims under the Fourteenth Amendment should be accorded a level of scrutiny higher than strict scrutiny).

361. See Christine A. Littleton, *Reconstructing Sexual Equality*, in FEMINIST LEGAL THEORY 33, 44-45 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) [hereinafter FEMINIST LEGAL THEORY].

362. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 1-4 (1982).

363. Professor Catharine MacKinnon argues:

Abstract rights authorize the male experience of the world. Substantive rights for women would not. Their authority would be the currently unthinkable: nondominant authority, the authority of excluded truth, the voice of silence. It would stand against both the liberal and left views of law. The liberal view that law is society's text, its rational mind, expresses the male view in the normative mode; the traditional left view that the state, and with it the law, is superstructural or ephiphenomenal, expresses it in the empirical mode. . . . Equality will require change, not reflection—a new jurisprudence, a new relation between life and law.

CATHARINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE 248-49 (1989); see also Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 *passim* (1988) (arguing that antidiscrimination law has allowed the perpetuation of material subordination of blacks); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (arguing that feminist legal theorists' tendency to describe a unitary, "essential" women's experience independently of race, class, sexual orientation, and other basic differences actually silences the same female voices silenced by the mainstream legal voice of "We the People").

greater freedom for women. The legal history of the racial discrimination cases—in particular, the recent affirmative action rulings, some of which also apply to programs for women—demonstrates that the analytical power of the suspect classification doctrine is contingent upon political and cultural currents.<sup>364</sup> In fact, in *Adarand*, Justice O'Connor, writing for the majority, endorsed the view that strict scrutiny does not guarantee a finding of unconstitutionality.<sup>365</sup> Thus, there is express doctrinal support for the view that the strict scrutiny formulation is not a reliable way of guaranteeing that noxious sex classifications, rather than neutral or helpful ones, are struck down in every instance. For this reason, treating all sex-based classifications as suspect might not be an improvement over subjecting each such classification to the more flexible intermediate scrutiny standard.

A case in point is the problem that we consider here. The kind of doctrinal inflexibility implied by strict scrutiny does not bode well for the future establishment of legitimate status-conscious charter schools. The move toward making sex a suspect classification raises the bar for those whose motives in wanting to establish status-conscious schools, such as the sponsors of Chicago's Young Women's Leadership School, are not invidious, but rather designed to increase opportunities for those who have faced historical, or confront contemporary, discrimination in education. Therefore, the analytical convention employed in *VMI* may further undermine the possibility for nuance in equal protection jurisprudence, making it unlikely that those who wish to expand the educational opportunities available to students or address social inequalities by establishing single-sex charter schools will be able to do so without fear of contravening the law. Because it made equal protection doctrine less capable of recognizing that de facto socioeconomic and political subordination may be remedied through status-conscious means,<sup>366</sup> *VMI* is, to that extent, a flawed opinion.<sup>367</sup>

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364. See *supra* notes 231-46.

365. See *Adarand Contractors, Inc. v. Peña*, 515 U.S. 200, 237 (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring))).

366. See *MACKINNON*, *supra* note 363, at 215-24.

367. One explanation for Justice Ginsburg's vigorous condemnation of single-sex admissions in the *VMI* case lies in the nature of the classification involved in that case. The *VMI* majority might have deemed the quintessential sex symbolism attached to military training and *VMI*'s adversative method to require an especially bold statement of unlawfulness from the Court. Sex-based classifications that are quintessentially identified with masculinity or femininity demonstrate best the conundrum created by law's reliance on the equal treatment principle as the

That said, all may not be lost in the *VMI* opinion. Although the majority reasons about sex-conscious schools in a manner that I find limiting, some argue that the opinion's strong language was directed at a putatively narrow class of programs that perpetuate sex-based stereotypes.<sup>368</sup> They argue that sex-conscious programs that are shown to be remedial in nature and to advance women's equality interests may not be viewed so dimly by the Court.<sup>369</sup>

This prediction seems most valid, however, when familiar sex-conscious educational programs, such as partly federally financed women's colleges attended predominantly by whites that some commentators believe are jeopardized by *VMI*, are at issue.<sup>370</sup> This Article

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principle for mediating claims of sex discrimination. See MACKINNON, *supra* note 310, at 220-22; Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, in FEMINIST LEGAL THEORY, *supra* note 361, at 5, 22, 24. Sex-based classifications relating to the military or military service have caused enormous controversy in the courts, among politicians, and in public opinion. See *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981) (upholding the male-only draft registration law); see also *Philips v. Perry*, 106 F.3d 1420, 1421 (9th Cir. 1997) (upholding the "don't ask, don't tell" policy against gays serving openly in the armed services); *Steffan v. Perry*, 41 F.3d 677, 682 (D.C. Cir. 1994) (same).

Cases involving pregnancy-based classifications also have been difficult for the Court and feminists alike. See *General Elec. Co. v. Gilbert*, 429 U.S. 125, 128 (1976) (holding that the exclusion of pregnancy-related disabilities from an otherwise comprehensive state disability insurance program was lawful under Title VII); *Geduldig v. Aiello*, 417 U.S. 484, 496-97 n.20 (1974) (upholding the exclusion of pregnancy-related disabilities from an otherwise comprehensive state disability insurance program on the theory that pregnancy is a sex-neutral "physical condition"). In response to *Gilbert*, Congress amended Title VII; the Pregnancy Discrimination Act (PDA) provides that discrimination on the basis of pregnancy constitutes sex discrimination.

368. See, e.g., Elizabeth M. Schneider, *A Postscript on VMI*, 6 AM. U. J. GENDER & L. 59, 63 (1997).

369. See *id.* at 63 & n.29. Perhaps the most adamant proponent of this view comes from a former attendee and self-proclaimed skeptic of a single-sex school, who writes that, notwithstanding what she calls the "excitement" that the *VMI* opinion generated among advocates and opponents of single-sex education, the policy is no more threatened today than it was prior to *VMI*. See Denise C. Morgan, *Anti-Subordination Analysis After United States v. Virginia: Evaluating the Constitutionality of K-12 Single-Sex Public Schools*, 1999 U. CHI. LEGAL F. 381, 382-83 [hereinafter Morgan, *Anti-Subordination Analysis*]; Denise C. Morgan, *Finding a Constitutionally Permissible Path to Sex Equality: The Young Women's Leadership School of East Harlem*, 14 N.Y.L. SCH. J. HUM. RTS. 95, 101-12 (1997) [hereinafter Morgan, *Permissible Path*]. Given the lower federal courts' interpretation of the Court's affirmative action decisions in *Adarand* and *Croson* (which generated an equal amount of excitement among commentators), see *supra* notes 236-46 and accompanying text, none of us can be sanguine and sure of our prognostications in the face of the Court decisions about volatile sociopolitical issues like race and sex.

370. Title IX of the Education Amendments of 1972 exempts traditionally single-sex public undergraduate institutions from its prohibition against sex-based discrimination in education. See 20 U.S.C. § 1681(a)(5) (1994). Since many such colleges receive federal funding, however, some have argued that the *VMI* decision and the general erosion of the distinction between pri-

is not concerned with the constitutionality of garden variety sex-conscious educational programs, of course. Rather, my focus is publicly financed sex-conscious programs servicing predominantly minority and poor students that are housed in deregulated schools, which are presumptively viewed as suspect by some on the Left. Under these circumstances, the probability decreases that the Court will appreciate the remedial justifications of sex-conscious programs as lawful. Certainly, the race-blind analysis in cases involving single-sex schools for minorities,<sup>371</sup> the narrow understanding of remedy in cases such as *Missouri v. Jenkins*<sup>372</sup> in which remedial education for African Americans was at issue, and the Court's dim view of race-conscious remedial programs in the affirmative action cases, give pause to the generous reading of *VMI* offered by some. To deny this reality is to fail to take seriously the scholarship by critical race theorists and critical race feminists, who have argued persuasively the difference that race and sex make in judicial review.<sup>373</sup>

More promising is a footnote in the *VMI* opinion suggesting that some single-sex institutions can survive the Court's equal protection analysis on diversity grounds. In footnote seven, the Court acknowledged arguments by several amici that "diversity in educational opportunities is an altogether appropriate governmental pursuit and that single-sex schools can contribute importantly to such diversity."<sup>374</sup> The Court responded by implying that single-sex institutions whose missions are "to dissipate, rather than perpetuate, traditional gender

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vate and public in our antidiscrimination law implies that these institutions are subject to challenges under the Equal Protection Clause. See, e.g., Karla Cooper-Boggs, *The Link Between Private and Public Single-Sex Colleges: Will Wellesley Stand or Fall with the Citadel?*, 29 IND. L. REV. 131 (1995); Cowan, *supra* note 319, at 138; Jeffrey Rosen, *Single-Sex Schools and Double Standards*, N.Y. TIMES, July 3, 1996, at A23. For an argument that the private/public distinction in schools should not preclude equal protection claims under the federal Constitution, see generally Mark Tushnet, *Public and Private in Education: Is There a Constitutional Difference?*, 1991 U. CHI. LEGAL F. 43 (discussing racial discrimination). But see Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENTARY 329, 342-59 (1993) (arguing that the public/private distinction, despite its conceptual difficulties, has some usefulness in the area of constitutional law).

371. See *infra* notes 386-403 and accompanying text.

372. See *supra* notes 190-95, 228-30 and accompanying text.

373. See, e.g., Crenshaw, *supra* note 363, at 1335 (arguing that race consciousness must be taken into account in efforts to understand hegemony and the politics of racial reform); Harris, *supra* note 363, at 581 (arguing that feminist legal theory needs to be more sensitive to the racial and gender differences among women); Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2136-42 (1989) (critiquing the contextuality and formal reasoning of the Supreme Court's analysis in *Croson*).

374. *United States v. Virginia (VMI)*, 518 U.S. 515, 534 n.7 (1996).



classifications,” may not be unconstitutional.<sup>375</sup> Thus, it is possible that a deregulated school like Chicago’s Young Women’s Leadership School might be found constitutionally permissible on the ground that it expands educational diversity.<sup>376</sup> The possibility for finding consistency between the states’ experiment with status-conscious deregulated schools and federal equal protection jurisprudence using this theory is explored in the next part.<sup>377</sup>

*b. Reasoning about sex and race-conscious education in the lower federal courts.* Two other cases, concerning elementary and secondary education, both adjudicated in the lower federal courts, are important to our consideration of status-conscious deregulated education. These cases are important because of the extent to which they deviate from the historically informed application of the equal treatment paradigm relied on in *VMI* and *Hogan*, the other leading Supreme Court case on single-sex education.<sup>378</sup> Because the adjudicating courts focus on actual conditions that motivate the establishment of single-sex schools, these cases offer a more intellectually coherent approach to settling legal challenges to status-conscious schools than the approaches favored in *VMI* and *Hogan*. Thus, in contradistinction to the Supreme Court’s single-sex jurisprudence, the lower courts’ reasoning points the way to understandings of equality that are capable of encompassing the de facto types of discrimination and disadvantage that some believe may be remedied in status-conscious charter schools.

This is not to say that these cases are flawless. As I will discuss below, one case was wrongly decided, in my view, while the other demonstrates the doctrinal difficulty in reasoning about multifaceted inequalities, such as sex-based disadvantage complicated by de facto racial discrimination.

*Vorchheimer v. School District of Philadelphia*. In the first of these cases, *Vorchheimer v. School District of Philadelphia*,<sup>379</sup> the United States Court of Appeals for the Third Circuit held that a female plaintiff who had been denied admission to an elite academic

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375. *Id.* This statement, of course, was dicta.

376. See Morgan, *Permissible Path*, *supra* note 369, at 98.

377. See *infra* Part III.E.3.

378. See *supra* note 347.

379. 532 F.2d 880 (3d Cir. 1976), *aff’d by an equally divided court*, 430 U.S. 703 (1977) (per curiam).

high school with an all-male admissions policy had not experienced sex discrimination in violation of the Constitution.<sup>380</sup> The court based its decision on two principles: substantial equality of educational resources and individual choice. The trial court had made the crucial finding that the plaintiff-appellant in *Vorchheimer* could receive an education at an all-girls school that was substantially the same as or equal to that available at the all-male school.<sup>381</sup> The appellate court took this finding to mean that the young woman's desire to enroll at the all-male school was voluntary, a matter of choice,<sup>382</sup> thus, she had experienced no actual deprivation as a result of the denial of admission.<sup>383</sup> In light of the choice factor presented in *Vorchheimer*, the Third Circuit recognized the value of single-sex education within the portfolio of educational opportunities provided in the Philadelphia school district.<sup>384</sup>

Because I am unconvinced that an equivalent school was in fact available to the female plaintiff in *Vorchheimer*, the final disposition of the case is unpersuasive. Variations in curricula and faculty quality suggest that the offerings available at the boys' and girls' schools were materially different.<sup>385</sup> Therefore, the schools perpetuated sex-based discrimination—for instance, the sex-based stereotype that women are disinterested in or are not good at science, and thus have no need of the superior science curriculum only available at the boys' school. The finding that the denial of admission was not unconstitutional was inappropriate.

Despite my disagreement with the district court's findings and the outcome of the case on appeal, I find some aspects of the Third Circuit's reasoning in *Vorchheimer* more coherent than that of the Supreme Court in *VMI*. The *Vorchheimer* opinion carries with it a kind of credibility that *Hogan* and *VMI* do not because the Third Circuit's reasoning rests upon compelling principles: the finding that the programs in the two schools were substantially equal and the principle of individual choice, or voluntariness. The *Vorchheimer* court's

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380. *See id.* at 888.

381. *See id.* at 882-83. The finding of equality is arguable, however, because the scientific course of study at the all-male high school was superior to that offered elsewhere in the district. *See id.* at 882.

382. *See id.* at 882, 886-87.

383. *See id.* at 886.

384. *See id.* at 887-88.

385. *See id.* at 882 (noting that the science curriculum at the boys' school was superior to that at the girls' school).

mode of reasoning produces the sense that the principal issue was equality of educational opportunities per se, rather than the controverted issue of single-sex education per se. The question of equality of educational opportunity is precisely where the focus of judicial attention should be in any constitutional case concerning public education.

This kind of reasoning leaves open the possibility of the establishment of single-sex schools under circumstances where the facts indicate a legitimate, nondiscriminatory purpose. This is true because the *Vorchheimer* opinion recognizes nuance. *Vorchheimer* allows for case-sensitive judicial review of status-conscious schools, thus avoiding the *VMI* majority's movement of the jurisprudence closer to the idea, based on overly broad historical evidence, that all sex-based classifications are unconstitutional. In this way, *Vorchheimer* leaves space in the law for considerations such as those arising from the advent of status-conscious deregulated schools.

Garrett v. Board of Education. Neither the Supreme Court nor a United States Court of Appeals has considered a case involving racially identifiable single-sex schools or racially identifiable single-sex schools that target at-risk populations. *Garrett v. Board of Education*,<sup>386</sup> an opinion by a federal district court in Michigan, is the only case that addresses the constitutionality of such a school.

*Garrett*, like *Vorchheimer*, is predicated upon reasoning that is principled and flexible in a way that the Court's opinions in *Hogan* and *VMI* are not. *Garrett* involved a lawsuit seeking to enjoin the opening of three special academies for 250 African-American boys in kindergarten through fifth grade in the Detroit public school system.<sup>387</sup> The local board of education sought to open these academies in order to address the special educational needs of African-American boys, including unusually high dropout rates and subsequent unemployment.<sup>388</sup>

The court granted the motion for an injunction, ruling that there was a substantial likelihood of success on the merits by the female students who challenged the proposed all-male academies on equal

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386. 775 F. Supp. 1004 (E.D. Mich. 1991).

387. See *id.* at 1004-05.

388. See *id.* at 1007; Michael John Weber, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099, 1099-1101 (1993); see also Kevin Brown, *Do African-Americans Need Immersion Schools?: Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813, 846-56 (1993) (making the case for immersion schools).

protection grounds.<sup>389</sup> The ruling was based on the court's finding that while the governmental purpose at issue was important, an all-male educational environment was not substantially related to that goal.<sup>390</sup> In fact, proffered evidence showed that African-American girls attending Detroit public schools also faced academic performance problems of crisis proportions.<sup>391</sup>

Thus, as in *Vorchheimer*, the *Garrett* court was not preoccupied with the policy of sex-segregated education itself. The *Garrett* court's evaluation was a fact-intensive review in which the poor quality of educational programming and life available to Detroit's boys and girls was the predominant consideration. The result was a persuasive argument suggesting why an injunction against the all-male academies was in order.<sup>392</sup>

Because *Garrett* involved issues of race as well as sex, however, it brings into focus the inadequacy of both the Supreme Court's application of the equal treatment principle to single-sex education and its heavy reliance on the de jure historical narrative. This is true because in analyzing the question of the constitutionality of single-sex schools for African-American boys—a race *plus* sex issue—the *Garrett* court ignored the significance of race.

As a matter of doctrine, the court's action was proper. The plaintiffs did not challenge the de facto racial segregation of the Detroit schools. In any event, de facto segregation in schools is of no legal significance in the federal courts pursuant to longstanding Supreme Court precedent.<sup>393</sup> Moreover, the issue was precluded as to the De-

389. See *Garrett*, 775 F. Supp. at 1008.

390. See *id.* at 1007-08.

391. See *id.* at 1007; see also Note, *supra* note 292, at 1741 (arguing that the education of inner-city black girls deserves the same level of attention and remedial effort currently given to the education of inner-city black boys).

392. Since losing in *Garrett*, the Detroit Board of Education has begun operating immersion academies that are open to young boys as well as girls. See *American Notes; Education: Back to Square One*, TIME, Aug. 26, 1991, at 23; Barbara Kantrowitz et al., *A is for Ashanti, B is for Black*, NEWSWEEK, Sept. 23, 1991, at 45.

393. See *Milliken v. Bradley*, 418 U.S. 717, 736-47, 761 (1974). De facto racial segregation in schools still may be challenged in the state courts, *Milliken* notwithstanding. See, e.g., *Sheff v. O'Neill*, 678 A.2d 1267, 1283 (Conn. 1996) (finding that de facto race discrimination in schools is a violation of the state constitution). Thus, theoretically, the *Garrett* plaintiffs were not estopped from challenging de facto racial segregation and its relevance to the single-sex academies in the Michigan courts on state constitutional grounds. See *Michigan v. Long*, 463 U.S. 1032, 1041-43 (1983) (holding that the Court will review a state decision referencing federal law if that decision is based on separate, adequate, and independent state grounds); see also Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307,

troit schools, despite a past finding of purposeful discrimination by state actors against black students in the Detroit schools, due to the Supreme Court's decision in *Milliken v. Bradley*.<sup>394</sup>

That the plaintiffs chose not to challenge the de facto racial segregation of Detroit's schools in the state courts and were constrained from doing so in the federal courts nevertheless is significant. De facto racial segregation in Detroit's schools clearly is implicated in the poor quality of resources available to African-American boys and girls in Detroit. The court's ignoring of race thus speaks to a blind spot in the relevant single-sex (and racial) jurisprudence: namely, the inability of the law to address multifaceted inequalities that are not predicated on the traditional understanding of discrimination in education—de jure segregation—but on de facto segregation and societal inequalities. In other words, the relevant law does not address the modern condition—the new, neutral face of inequality.<sup>395</sup>

This point can be explained by considering the following contradictory facts upon which the *Garrett* court's decision was based. The *Garrett* court found a substantial likelihood that the boys' academies would be found unconstitutional, even though the presiding judge recognized African-American boys as an "endangered species" who confront numerous social problems that implicate their educational opportunities and achievement.<sup>396</sup> The court also recognized that the Detroit school system is plagued by a lack of resources, and that this condition affects all of Detroit's predominantly minority population, boys and girls.<sup>397</sup> Finally, evidence suggests that de facto racial segregation is correlated with the quality of schools<sup>398</sup> and, some would ar-

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339 (1991) (demonstrating that nearly every state constitution has an education clause that has been utilized to achieve substantive reforms in educational policy).

394. See *supra* notes 167-69 and accompanying text.

395. See sources cited in *supra* note 306.

396. *Garrett*, 775 F. Supp. at 1014.

397. See *id.* at 1007.

398. See *Sheff*, 678 A.2d at 1292 (Berdon, J., concurring); *Abbott v. Burke*, 643 A.2d 575, 580-81 (N.J. 1994); see also RONALD H. BAYOR, RACE AND THE SHAPING OF TWENTIETH-CENTURY ATLANTA 235-42 (1996) (examining a failed effort to limit white flight by maintaining the quality of schools); DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW 594-98 (3d ed. 1992) ("Perhaps the most substantial impediment to school desegregation is the court's short-sighted acquiescence to patterns of residual segregation."); AMY STUART WELLS & ROBERT L. CRAIN, STEPPING OVER THE COLOR LINE: AFRICAN-AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS 1-105 (1997) (offering a broad historical overview of white flight in St. Louis and the city's school desegregation plan); Howard A. Glickstein, *Inequalities in Educational Financing*, in CHALLENGE, *supra* note 155, at 122, 122 (arguing that fiscal inequalities in education are correlated with racial segregation).

gue, with the endangered status of the targeted population of young men<sup>399</sup> and their female counterparts. That the court realized the propriety of the special academies for boys and girls, but nonetheless found these schools unconstitutional, means that the court concluded that the Supreme Court's single-sex and desegregation precedent required it to ignore the multidimensionality of the targeted population's status.

Although the concept of "sex-plus" currently applies to statutory claims only, it is not inconceivable that a court considering a constitutional action might analogize to it in discussing equal protection claims brought by minority girls.<sup>400</sup> Thus, the question raised by the result in *Garrett* is, why did the ways of reasoning about sex trump the obvious significance of race?<sup>401</sup> The normative answer to this question is that the Court's single-sex jurisprudence is thus far unconcerned with inequalities that are not predicated upon narratives of state-sanctioned race *or* sex segregation, or upon overt race *or* sex dis-

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399. See 3 JAWANZA KUNJUFU, COUNTERING THE CONSPIRACY TO DESTROY BLACK BOYS ii, 21, 45, 67-71 (1990) (relating rates of involvement with criminal justice system to the lack of academic preparation and opportunity for African-American males from adolescence to adulthood).

400. See *Scales-Trent*, *supra* note 360, at 12 (1989) (arguing that black women should be granted the highest level of protection, strict scrutiny, under the Constitution); see also Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989) (advocating "intersectionality" as a concept for recognizing distinctive life experiences of and forms of discrimination that may be encountered by women of color).

401. This question is especially apt in light of the "sex-plus" theory of discrimination against minority women recognized in several circuits. Under this doctrine, African-American women may bring Title VII claims as both women and African Americans, or as persons subject to dual legal statuses. See, e.g., *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416-17 (10th Cir. 1987) ("[I]n determining the pervasiveness of the harassment against a plaintiff, a trial court may aggregate evidence of racial hostility with evidence of sexual hostility."); *Jeffries v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1032-34 (5th Cir. 1980) (determining that black women are a distinct subgroup, protected by Title VII); *Judge v. Marsh*, 649 F. Supp. 770, 780 (D.D.C. 1986) ("[E]mployment actions directed against black women as a group may violate Title VII."); *Chambers v. Omaha Girls' Club*, 629 F. Supp. 925, 951-52 (D. Neb. 1986) (ruling that the Girls' Club rule is not a violation of Title VII but only due to the club's unique mission and past methods for addressing the problem of teenage pregnancies), *aff'd*, 834 F.2d 697 (8th Cir. 1987). But see *DeGraffenreid v. General Motors Assembly Div.*, 413 F. Supp. 142, 143 (E.D. Mo. 1976) (finding that black women are not a special class under Title VII), *aff'd in part, rev'd in part*, 558 F.2d 480, 484 (8th Cir. 1977).

crimination.<sup>402</sup> The same result can be seen in the Court's failed school desegregation precedent.<sup>403</sup>

Stated differently, the law on single-sex education is unable to imagine, and does not address, the diversity of the legal subject. By the "diversity of the legal subject," I mean to suggest diversity within status groups, including those boys and girls within various racial groups who prefer or might benefit from single-sex education. This is another indication of how inapt the jurisprudence is to the kinds of social and economic realities that communities, teachers, and school administrators have been confronting for some time now.

*c. Conclusion.* The reasoning contained in the Court's leading case on single-sex education, *United States v. Virginia*, is inapposite to some of the most complex issues involved in contemporary public education—where meeting the educational needs of status-identifiable students is of greatest concern. While the political movement for, and legal realization of, formal sexual equality undoubtedly has aided women as a class,<sup>404</sup> the prevailing understanding of discrimination in the jurisprudence lags behind the changing face of the very sex-based discrimination that the Court presumes to reach. Because it conceives of equality as the same treatment for men and women and reasons from a *de jure* historical narrative, this conception of equality is limited. It does not adequately protect those who prefer or can benefit from single-sex education, including those who experience *de facto* forms of racial segregation that limit their educational opportunities, such as the students in *Garrett* and those on whose behalf the Chicago Young Women's Leadership Charter School has been established.<sup>405</sup> For these subsets of the student popu-

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402. See Crenshaw, *supra* note 363, at 1334-35 (1988) (arguing that while antidiscrimination law eliminated symbolic manifestation of racial discrimination, it left untouched the material subordination of African Americans); Reva Siegal, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129-31 (1997) (arguing that the Court's interpretation of the Equal Protection Clause accommodates and rationalizes certain forms of discrimination (*de facto*), even while appearing to have abolished status-based discrimination generally); Williams, *supra* note 373, at 2136-42 (critiquing the *Croson* decision).

403. See BELL, *supra* note 398, at 586-98; Carter, *supra* note 306, at 19-20.

404. See WILLIAM H. CHAFE, *WOMEN AND EQUALITY* 145-68 (1977).

405. A rich legal, theoretical literature addresses in a general manner the concerns that I raise here about the diversity of the legal subject in sex discrimination law. While this literature does not reach the discrete issue of single-sex education, it contains insights that are applicable to my subject matter. See generally Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539; Crenshaw, *supra* note 400; Harris, *supra* note 363; Mari J. Matsuda, *When the First Qual Calls*:

lation and others, status-conscious schools may constitute a positive component of the portfolio of educational opportunities offered by a school district. The Court's equal protection jurisprudence should be more receptive to these students' educational needs, rather than moving closer to the inflexible standards contained in the race discrimination precedent.

Given the relative lack of conceptual space within the doctrine for state- and local-level experimentation with single-sex education, it is constitutionally problematic for states to endorse these practices in charter school enabling legislation. Since charter school sponsors and personnel are free to formulate their own curricular focus with little regulatory constraint, the failure of enabling legislation to forbid these practices may be just as problematic as express legislative endorsement of single-sex education. The recent establishment of the Chicago Young Women's Leadership Charter School in Illinois, a state whose laws are silent on the propriety of sex-conscious education, confirms that, in many instances, sponsors may interpret legislative silence implicitly to condone single-sex education.

In the next part, I consider doctrinal conventions that would enable federal equal protection jurisprudence to accommodate the diversity of legal subjects and educational needs serviced in deregulated schools, while ensuring that charter schools serve students on an equal basis, regardless of status.

### III. RECONCILING FEDERAL PRECEDENT AND STATE AUTHORITY TO DEREGULATE SCHOOLS

The previous part demonstrated that while gender-conscious education is increasingly popular in practice, the Court views single-sex education with skepticism. The discussion also explained that, by contrast, racial segregation in schools will not support a cause of action in the federal courts unless the plaintiffs can prove intentional discrimination, notwithstanding the reality that students' racial status continues to correlate highly with the quality of education that they are afforded in the public school system. Moreover, since the Court's precedent on affirmative action makes no distinction between status-consciousness that is motivated by a desire to remedy discrimination and that which is motivated by status-based animus, it is difficult to

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*Multiple Consciousness as Jurisprudential*, 11 WOMEN'S RTS. L. REP. 7 (1989); Scales-Trent, *supra* note 360.



justify educational programs that target students based on their status in an effort to improve their academic performance. Thus, I identified a legal and policy conundrum: federal equal protection jurisprudence is in tension with the states' effort to deregulate schools in important ways. Most significantly, for purposes of this Article, federal law conflicts with states' efforts to ensure that access to charter schools is equally available to all students, by, for instance, including provisions requiring these schools to be racially balanced. In light of federal law on sex discrimination, it is also problematic for states to allow charter school sponsors to establish single-sex charter schools or to otherwise include gender-conscious programming among curricular offerings.

This part discusses mechanisms for resolving this conflict between federal equal protection jurisprudence and states' educational policies regarding deregulated schools. Here I suggest doctrinal conventions and modalities of reasoning upon which courts can rely to determine when status-identifiable charter schools are consistent with federal antidiscrimination norms and when they are not.

My approach to resolving this conflict is based on two separate but related concepts. The first concept pertains to the nature and purposes of charter school legislation. I argue that at least *some* of the charter schools established by states to encourage experimentation and excellence in education should be given deference by federal courts that review equal protection claims against them. This deference is appropriate, first, because the Supreme Court's cases on federalism and education discourage intervention by the federal courts in state educational affairs; and, second, because *some* deregulated schools may be entitled to a distinct, quasi-public status.

I propose, in particular, that constitutional review of charter schools whose status-identifiability is due to sponsors' efforts to remedy discrimination or to ensure educational diversity should be substantially different from a federal court's analysis of status-consciousness in traditional public schools *if* the schools in question are deemed quasi-public in nature. Rather than presuming that such status-identifiable charter schools should be subjected to heightened scrutiny, courts would subject such schools to rational relation review in many instances. In my judgment, rational relation review should be the presumptive standard unless there is proof that affirmative acts of exclusion by state actors have resulted in *historically disfavored* status-identifiable groups being disproportionately underserved by charter schools. *Thus, under my approach, neither racial balance provisions, nor status-identifiable schools attended overwhelmingly by ra-*

*cial minorities because of demographic configurations beyond the schools' control, or by women, due to targeted appeals, would be subject to heightened scrutiny.* However, charter schools whose student bodies are overwhelmingly white or that exclude women from admission would be subjected to heightened scrutiny.

This approach should apply equally to status-identifiable schools in districts subject to school desegregation or school finance orders, and to those established in districts not subject to such orders. There should be exceptions to this approach when it is applied to charter schools that are located in districts subject to such court orders, however. Heightened scrutiny would be appropriate where evidence shows that court orders would be undermined by the establishment of charter schools. Even so, heightened scrutiny should not necessarily dictate that the charter schools (or enabling legislation) will be found unconstitutional or precluded from opening. Rather, it should imply that courts must undertake a fact-sensitive review of the impact of particular charter schools on particular aspects of relevant court orders.

My proposed asymmetrical and fact-intensive analysis of status-identifiable charter schools is contrary to the courts' usual application of the Equal Protection Clause to state action that is alleged to be discriminatory. Whereas I endorse a multifaceted analysis of whether an action advances equality, the usual approach is mechanical, with rational relation review implying a perfunctory analysis and a finding of constitutionality, and strict scrutiny implying the presumptive unconstitutionality of a challenged action.

I justify my deviation from these doctrinal norms, and advocate that others follow suit, by reference to the concept of pragmatism. That is, the second prong of my approach is the suggestion that federal courts' review of status-conscious charter schools should be guided by pragmatism. Given the rigid understanding of status-consciousness contained in leading cases such as *VMI* and *Croson*, and the incomplete understanding of discrimination exemplified by *Garrett*, courts must look beyond the boundaries of applicable doctrine in order to give effect to state legislatures' purposes in enacting charter school legislation. Pragmatic analysis would allow federal courts to modify the three-tier-type of analysis typical in the equal protection jurisprudence on a case-by-case basis. Such an analysis would turn on a consideration of the merits of particular charter schools' admissions policies and educational practices, rather than on a mechanical application of relevant, but distinguishable, precedent

(that is, cases on school desegregation, single-sex education, and affirmative action) to status-identifiable charter schools. In this way, courts could recognize deregulated schools as a unique, new specie of school, while not abrogating their duties to strike down admissions policies and educational practices that offend the antidiscrimination principles that are valued in our constitutional law.

A. *A Second Look at Federalism*

A first consideration for any court that reviews charter school enabling legislation on equal protection grounds should be the relationship between the federal and state governments in the area of education. I make this claim despite my awareness that the mention of federalism usually conjures up an image of conservative jurists fundamentally opposed to federal intervention in state and local affairs. After all, as I discuss below, federalism figured prominently in cases decided by the Burger Court that generally are viewed as putting an end to the civil rights revolution in the area of education.<sup>406</sup> The Rehnquist Court also has relied upon the concept in striking down laws that were designed to protect groups that many believed were in dire need of federal help. Most notably, the Court has found unconstitutional the Gun-Free School Zones Act, intended to protect students from drug-trafficking and school violence,<sup>407</sup> and the Violence Against Women Act, which enhanced remedies for victims of crimes motivated by gender animus.<sup>408</sup> Thus, there is a clear and convincing factual predicate for the view that federalism, as typically understood by the Court, is contrary to the interests of socially marginalized populations.

Though I generally agree with scholars' criticisms of the Court's movement away from a liberal understanding of the scope of the federal government's authority to regulate activities that threaten citizens' well-being and individual rights,<sup>409</sup> in this section I advocate a second look at the relationship between the concept of federalism and civil rights. My proposal that we reexamine the relationship between

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406. See *infra* notes 431-43 and accompanying text.

407. See *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (striking down the statute on the grounds that the regulated activity did not substantially affect interstate commerce).

408. See *United States v. Morrison*, 120 S. Ct. 1740, 1749 (2000) (striking down the civil remedy provision of a statute on the grounds that the regulated activity did not substantially affect interstate commerce and that the Fourteenth Amendment's Enforcement Clause also did not provide a basis for regulation).

409. See sources cited *supra* note 13.

federalism and education is premised, first of all, on the reality that, as a matter of doctrine, these cases are relevant to federal courts' consideration of the constitutionality of status-identifiable charter schools. However, I also advocate this reexamination because I believe that intellectual ownership of the concept of federalism should not be ceded to those who support outcomes in civil rights cases that I believe are incorrect, or who oppose social policies that I support. Precisely because the current Court seems intent on relying on the principle of federalism in resolving a wide variety of social and economic dilemmas, it is important that we seek sophisticated understandings of the relationship between federalism and equality rights, and craft arguments that reason about the concept in nonreactionary ways.

The particular argument that I advance in this section is that the very federalism-related cases that, when decided, were inimical to the educational interests of racial minorities, have much to offer to those concerned about problems of structural inequality, now that battles over education reform are being fought primarily in state and local fora. Justice Brandeis's famous proposition, that the states may serve as "laboratories" for conducting "novel social and economic experiments,"<sup>410</sup> may, today, accurately describe the capacity for the concepts of federalism and separation of powers to help the most needy students—the working class, minorities, and young women and girls—take advantage of the educational opportunities offered in charter schools. This is true because federalism is conceptually consistent with the idea of educational experimentation through deregulation. This is especially so insofar as individuals are involved in designing and managing "learning laboratories" that are tailored to meet the educational needs of students within local communities, and that advance shared community values, such as increasing educational diversity or remedying historical or contemporary discrimination in education.

While recognizing the potentially useful aspects of the Court's federalism cases, we must not dismiss either the probability of further state and local discrimination against minorities and women *or* the need for plaintiffs to bring claims in federal court against such dis-

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410. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("[I]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country . . .").

crimination in the event that it occurs. The idea here is not that there should be no federal oversight of the states' experiment with deregulated education; rather, I posit that there must be a distinction drawn between federal oversight that is consistent with advancing equality and that which is not.

*B. Limits Imposed by Federalism on the Ability of Federal Courts to Intervene in the States' Experiment with Deregulated Education*

Federalism does not require that courts take any particular stance in resolving equal protection claims related to status-conscious charter schools. Nevertheless, the Court's reasoning in cases relating to federalism and education offers guidance to courts that consider such claims. Two competing conceptions of the federal government's role in education are clear from this precedent; these poles are represented by the Warren Court's decision in *Brown v. Board of Education*,<sup>411</sup> on the one hand, and the Burger Court's decisions in *San Antonio Independent School District v. Rodriguez*<sup>412</sup> and *Milliken v. Bradley*,<sup>413</sup> on the other.

*Brown v. Board of Education*. The concepts of federalism and the separation of powers traditionally have empowered state experimentation in many areas of public policy,<sup>414</sup> including the public education policymaking prerogatives of the state legislatures.<sup>415</sup> Educational policymaking was viewed as among the foremost prerogatives

411. 347 U.S. 483 (1954).

412. 411 U.S. 1 (1973).

413. 418 U.S. 717 (1974).

414. See, e.g., U.S. CONST. art. I, § 8 (enumerating the powers of Congress); see also THE FEDERALIST NOS. 10, 16, 17, 21, 23 (Alexander Hamilton), NOS. 37, 39 (James Madison) (explaining that the federal system was created to achieve the competing objectives of giving the federal government the power to tax and to regulate commerce, while ensuring that states could achieve their own political and economic prerogatives, some of which were not necessarily compatible with federal interests); GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 88-89, 354-55 (13th ed. 1997) (presenting an overview of the concepts of federalism, and of the separation of powers).

415. See GUNTHER & SULLIVAN, *supra* note 414, at 89 (citing a report articulating "diversity, pluralism, experimentation, protection from arbitrary majoritarianism and over-centralization, and a greater degree of citizen participation" as values "inherent in American federalism"); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6-17, 39-42 (1973) (describing Texas's approach to school financing and concluding that the Court would not "intrude in an area in which it has traditionally deferred to state legislatures" because of state authorities' expertise in dealing with "local conditions" and educational policy matters); *Brown*, 347 U.S. at 492-93 (stating that education is "perhaps the most important function of state and local governments," while relying on the powers of the federal government and courts to find the state and local practice of school segregation unlawful).

of state governments for the lion's share of this country's history; in fact, it was a domain into which federal intrusion was not imagined.<sup>416</sup> It was the issue of status-based discrimination that changed the relationship between the federal government and the states in the area of education: in 1954, the Supreme Court's decision in *Brown v. Board of Education* radically and permanently altered federal-state relations.<sup>417</sup>

In fact, *Brown* and the social history connected to it singularly illustrate the relationship between reactionary conceptions of federalism and the federal courts' enforcement of civil rights. The defendant states in *Brown* had argued that "the right of a state to classify its public-school pupils by race was 'not impaired or affected' by the Fourteenth Amendment,"<sup>418</sup> and that the federal government had no constitutionally-based authority to interfere with the practice of segregating public schools. The Supreme Court's decision in *Brown* undermined the notion that state governments could invoke the Tenth Amendment to protect from the jurisdiction of the federal courts a public welfare function, such as the distribution of education, that the Court found indispensable to good citizenship.<sup>419</sup> In holding that states could no longer segregate public school pupils by race, the *Brown* Court made clear that the states must manage local institutions in a manner consistent with the equal protection standards of the Constitution and national, rather than local, racial norms.<sup>420</sup>

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416. See *Rodriguez*, 411 U.S. at 1, 40-44; DIANNE RAVITCH, *THE TROUBLED CRUSADE: AMERICAN EDUCATION, 1945-80*, at 5, 7, 27-28 (1983) (explaining that Congress's failure to enact laws providing for federal aid to education prior to the 1960s was motivated, in part, by local leaders' desire not to have federal control over education). The federal government did, however, provide money to the states in the early decades of the twentieth century to support the development of systems of higher education. See 3 GEORGE BROWN TINDALL & DAVID E. SHI, *AMERICA: A NARRATIVE HISTORY* 830 (3d ed. 1992) (discussing the federal government's practice, via the Morrill Acts, of providing grants to states to support the establishment of colleges and universities).

417. See *Brown*, 347 U.S. at 483; 2 ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 581-89 (7th ed. 1991).

418. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 572 (1976) (quoting John W. Davis, attorney for the state of Virginia).

419. In its most memorable statement about the national interest in education, the *Brown* Court asserted that education was "perhaps the most significant function of state and local governments" and the "very foundation of good citizenship"—the cornerstone of success in American society. *Brown*, 347 U.S. at 493.

420. See 2 KELLY ET AL., *supra* note 417, at 584-91; DONALD LIVELY, *THE CONSTITUTION AND RACE* 113-14 (1992) (noting that the *Brown* Court "announced a uniform constitutional demand that cut deeply into established state law"); see also KLUGER, *supra* note 418, at 598-

The NAACP had won several other significant civil rights cases before 1954; however, none had the impact of *Brown*.<sup>421</sup> Based on *Brown*, the Court made monumental changes in equal protection jurisprudence generally, outlawing segregation in a wide range of public areas.<sup>422</sup> Thus, *Brown* had the effect of reviving the view of the federal government's role in civil rights that had predominated during the era of Reconstruction,<sup>423</sup> but which had been undermined by the Court's rulings in the *Slaughterhouse Cases*,<sup>424</sup> the *Civil Rights Cases*,<sup>425</sup> and *Plessy v. Ferguson*.<sup>426</sup>

Moreover, in light of *Brown*, Congress enacted several statutes that protect students from the infringement of their federal rights to equal protection of the laws and due process by state actors.<sup>427</sup> These statutes and their implementing regulations, together with cases interpreting *Brown*, have transformed the relationship between the states and the federal government in the area of public education.<sup>428</sup> While it is still conventional to view educational policymaking as a

610, 615-16, 625-56, 667-78, 680-99 (discussing the Justices' weighing of public policy, the legal history of the Fourteenth Amendment with respect to federal-state relations, and the framing of issues in its unanimous opinion).

421. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948) (finding the state enforcement of restrictive covenants unconstitutional); *Smith v. Allwright*, 321 U.S. 649, 664-66 (1944) (outlawing a whites-only primary).

422. See, e.g., *Johnson v. Virginia*, 373 U.S. 61, 62 (1963) (per curiam) (seating in courtrooms); *Gayle v. Browder*, 352 U.S. 903, 903 (1956) (per curiam) (buses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877, 877 (1955) (per curiam) (public beaches); *Holmes v. City of Atlanta*, 350 U.S. 879, 879 (1955) (per curiam) (municipal golf courses); *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971, 971 (1954) (per curiam) (parks).

423. *Brown* reaffirmed the role for the federal government implied in the Reconstruction amendments by nationalizing civil rights. See LIVELY, *supra* note 420, at 39-59 (giving an overview of the Reconstruction era); 1 KELLY, *supra* note 417, at 352-57 (discussing post-Civil War interpretations of the Reconstruction amendments).

424. 83 U.S. (16 Wall.) 36, 74-78 (1872) (finding that no fundamental rights of state citizenship are protected by the Privileges and Immunities Clause).

425. 109 U.S. 3, 10-11 (1883) (finding that a private individual's actions did not constitute a violation of another's constitutional rights under the Fourteenth Amendment).

426. 163 U.S. 537, 548-52 (1896) (finding that a law mandating segregation on railroad cars did not violate the Fourteenth Amendment).

427. Most notably, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994), which makes unlawful race-based discrimination by educational institutions that receive federal funding, Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1994), which protects against sex-based discrimination in federally-funded educational institutions, and the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401-1491 (1994), which protects the rights of children with disabilities, were passed.

428. For a discussion of the impact of these federal statutes and post-*Brown* Supreme Court rulings on the administration of the public educational system, see MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 673-77 (3d ed. 1992).

function of state governments, the federal government's authority to intervene in states' administration of their educational systems is clear.<sup>429</sup> Because of federal mandates associated with *Brown* and the new federal antidiscrimination statutes, state education codes and regulations are more comprehensive than ever before.<sup>430</sup> And, as a general matter, it is difficult to overstate the public benefits resulting from the emergence of regimes of federal and state law that protect the educational civil rights of students.

San Antonio v. Rodriguez. Nevertheless, the Warren Court's decision to disrupt state and local decisionmaking when it conflicts with minorities' equal protection rights has proven aberrational, except within certain narrowly circumscribed circumstances. After a relatively short period of ordering recalcitrant school districts to desegregate,<sup>431</sup> the Court retreated from interference in most state decisionmaking relating to education. The case that best supports this understanding of constitutional history is *San Antonio Independent School District v. Rodriguez*.<sup>432</sup> Whereas the claims of the *Brown* plaintiffs were vindicated upon the Court's conclusion that the Constitution overrode the states' prerogative to segregate schools, the *Rodriguez* plaintiffs lost their equal protection challenge to educational funding disparities largely because of the Court's decision to abstain from interfering in affairs that it considered the province of the states and localities.<sup>433</sup>

The *Rodriguez* Court acknowledged that Texas's system of public school financing created considerable financial disparities among the state's school districts,<sup>434</sup> and therefore placed the Mexican-American plaintiffs at a relative educational disadvantage to students

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429. *See id.*

430. *See id.*

431. *See supra* note 398.

432. 411 U.S. 1 (1973).

433. The *Rodriguez* plaintiffs challenged the use of local property taxation as the method of financing the public school system in the state of Texas. The suit was brought on behalf of Mexican-American students in San Antonio, Texas, who were impoverished and resided in school districts with low property bases. The class alleged that the state's financing method violated the Equal Protection Clause because of the existence of differences in the values of assessable property in districts where poorer and wealthier students resided. Such variations resulted in substantial interdistrict disparities in per-pupil expenditures, and thereby, wealth-based distinctions in educational quality. *See id.* at 11 & n.21.

434. The Court's ruling also was based on its determinations that education is not a fundamental right protected by the Constitution and that the putative class of students living in low-property districts did not constitute a suspect class. *See id.* at 28, 33-35. Therefore, the Court analyzed the plaintiffs' claims under a rational relation standard of review. *See id.* at 55.



living in richer districts. Invoking the principle of federalism, however, the Court deferred to the state legislature's determinations concerning taxation and educational policy.<sup>435</sup> The Court perceived that a ruling in favor of the plaintiffs would have colossal consequences for the relationship between state and federal power. "[I]t would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State," the Court wrote.<sup>436</sup>

The *Rodriguez* majority thus framed the issues presented in the case as a kind of contest between the principle of federalism and the right of equal protection. These two competing values were represented as irreconcilable, and the majority's judgment that honoring federalism required exclusive local control of education won. The *Rodriguez* Court's hands-off approach to equal protection analysis of inequalities in public school systems was a landmark ruling, one that implies the presumptive constitutionality of state and local educational policy decisions, with few exceptions.<sup>437</sup>

Milliken v. Bradley. The retreat from questioning state and local decisionmaking about education signaled in *Rodriguez* has been affirmed in many other cases, including the ruling in *Milliken*<sup>438</sup> that figured prominently in the previous part's discussion. As explained in Part II, the issue in *Milliken* was the proper scope of a remedial decree where a core city was guilty of de jure segregation, but the surrounding suburban districts were not.<sup>439</sup> The Court's conclusion that suburban districts could not be ordered to participate in a desegregation decree under these circumstances was based on the principle of federalism.

The *Milliken* Court's language suggesting that the federal courts should not be involved in local educational policymaking was strikingly similar to that used in *Rodriguez*. The *Milliken* majority argued that neighborhood attendance policies should be preserved because "no single tradition in public education was so deeply rooted."<sup>440</sup> Although the majority admitted that locally determined district lines

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435. *See id.* at 41-43.

436. *See id.* at 44.

437. *See infra* Part III.C.1.

438. 418 U.S. 717 (1974).

439. *See supra* notes 167-73 and accompanying text.

440. *Milliken*, 418 U.S. at 741.

were not “sacrosanct,” the Court maintained that requiring districts to change them to affect an interdistrict remedy would “disrupt and alter the structure of public education in Michigan.”<sup>441</sup> In a classic parade of horrors, the Court warned that innumerable administrative, logistical, financial, transportation, and other problems of an unspecified nature would result if interdistrict relief were ordered. A “vast super school district” would result, and the district court would become a virtual “legislative authority” and “school superintendent.”<sup>442</sup> Not wishing to cause such disruption in state and local educational affairs where the suburban districts to be included in an interdistrict remedy were not liable for intentional discrimination, the Court refused to order a remedy for the wrong committed by the core city. *Milliken* was a landmark case—the first post-*Brown* decision in which the Supreme Court found a constitutional violation but ordered no integrative remedy for the wrong.<sup>443</sup>

### C. *The Substantive Meaning of Federalism in Education-Related Cases*

*Milliken* and *Rodriguez* reveal the contingency of the Court’s interpretation of the Equal Protection Clause in ways that aid minorities over the past two decades. In both cases the Court sided with majority interests, or the status quo, where holdings consistent with the minority plaintiffs’ positions would have required states to provide integrated public schools, financed equally well, without regard to students’ status. Nevertheless, here I argue that in the present historical moment, neither the doctrinal significance of these cases nor their past tendency to advance majority interests necessarily implies that this precedent is adverse to minorities who are now participating disproportionately in the charter schools movement.

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441. *Id.* at 742-44. Interdistrict relief could only be ordered for an intradistrict violation, the Court concluded, if the surrounding districts were themselves guilty of purposeful segregation or if segregation in one area was the “substantial cause” of segregation in another district. *See id.* at 744-45. This standard of proof has proven exceedingly difficult for plaintiffs to meet in light of *Washington v. Davis*, 426 U.S. 229, 239-40 (1976) (holding that plaintiffs must prove intent to discriminate notwithstanding the racially disparate impact of a policy). *See* David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 988 (1989) (arguing that courts should consider how damaging private discrimination is because “the discriminatory intent standard requires a court to decide whether the state would have sacrificed certain interests . . . to combat something that affects whites in the way that private discrimination affects blacks.”).

442. *Milliken*, 418 U.S. at 743-44.

443. *See* BELL, *supra* note 398, at 565.

1. *Doctrinal Significance.* The doctrinal convention established in *Milliken* and *Rodriguez* is unambiguous. These cases express the Court's understanding that unless a limited class of rights is at issue, the federal courts may not intrude upon the states' traditional control over educational policymaking pursuant to the authority granted by the Equal Protection Clause. This class of rights includes only those practices and policies that are substantially similar to the de jure segregation outlawed in *Brown*: the Court will only overturn state policy if it condones the explicit segregation or disfavoring of a group on the basis of status—whether race, sex, or alienage. Thus, the Court struck down state laws mandating sex segregation<sup>444</sup> and the withholding of funds from local school districts for the education of aliens,<sup>445</sup> but has upheld de facto racial segregation in *Milliken* and funding disparities in *Rodriguez* that had a disparate impact on racial or ethnic minorities.

When applied to cases involving deregulated education, the Court's rule of non-interference in state educational affairs mitigates against federal court involvement in states' experiments with charter schools. Federal courts hearing claims related to deregulated education should be clear that the class of rights which qualify for federal intervention into state educational prerogatives is narrow. As a general matter, state laws that are not facially discriminatory are presumptively constitutional—notwithstanding the existence of inequalities that disparately impact identifiable groups, even those classified as constitutionally suspect or quasi-suspect classes.<sup>446</sup> Therefore, it should be clear that not only the school desegregation precedent,<sup>447</sup>

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444. See, e.g., *United States v. Virginia (VMI)*, 518 U.S. 519, 555-56 (1996) (holding that equal protection prevented Virginia from excluding women from "unique educational opportunities" at its military college).

445. See *Plyler v. Doe*, 457 U.S. 202, 228-30 (1982) (finding that the exclusion of aliens from public schools violated the Equal Protection Clause).

446. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 584-85 (1983) (holding that the IRS was empowered to deny tax-exempt status to private schools that discriminate on the basis of race); *Runyon v. McCrary*, 427 U.S. 160, 172 (1976) (finding that a private school that discriminated on the basis of race violated 42 U.S.C. § 1981). Compare *VMI*, 518 U.S. at 519 (holding that a unique public higher education institution violated the Equal Protection Clause when it discriminated in admission on the basis of sex) and *Plyler*, 457 U.S. at 228-30 (holding that public schools which denied admission to aliens on the basis of their immigrant status violated the Equal Protection Clause), with *Davis*, 426 U.S. 229, 246-48 (1976) (declining to prohibit a test with a racially discriminatory impact) and *Personnel Adm'r v. Feeney*, 442 U.S. 256, 281 (1979) (refusing to strike down a veterans' preference that had a disparate impact on women).

447. See *supra* Part II.B.

but also the federalism cases, counsel nonintervention where charter schools are racially identifiable due to demographic configurations beyond the control of charter school sponsors.

Furthermore, these cases suggest deference where states have chosen to include racial balance provisions in charter school enabling legislation or where the states have endorsed or allowed single-sex education. This is not to suggest, of course, that federalism requires that federal courts ignore the dictates of cases such as *VMI*, *Adarand*, or *Crosby* when considering claims involving deregulated schools. When coupled with the suggestion that federal courts should apply these precedents in a manner consistent with pragmatism—the second prong of my proposal for reconciling federal equal protection jurisprudence and state charter school laws—the rules established in these cases might be applied less rigidly, however, as I explain below.

2. *Participatory Democracy: A Historical Rationale for a Second Look at Federalism.* *Milliken* and *Rodriguez*, decisions which, when rendered, were adverse to the interests of dispossessed persons who looked to the federal government to affirm their rights, may now, in the post-rights revolution era, also serve to advance participatory democracy. When the passages in these cases concerning the advisability of “local control” of education are taken seriously, and applied to individuals living in minority communities who are disproportionately affected by educational inequalities in public school systems, the federalism and education cases are consistent with the advent of schools in which community members exercise autonomy over the nature and content of educational policies and programs. In other words, these cases endorse state legislators and local charter school sponsors’ belief in participatory democracy, or community control and autonomy, in education.

My confidence in the project of participatory democracy is based on the history of the rights revolution, which was initiated by the politically and economically disenfranchised rather than by federal courts or politicians.<sup>448</sup> As I have discussed in a prior article regarding educational reform on the state level,<sup>449</sup> many historians who have analyzed the civil rights movement argue that its origins did not lie in

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448. See *infra* notes 450-62 and accompanying text.

449. See Tomiko Brown-Nagin, “Broad Ownership” of the Public Schools: An Analysis of the “T-Formation” Process Model for Achieving Educational Adequacy and Its Implications for Contemporary School Reform Efforts, 27 J.L. & EDUC. 343, 364-76 (1998).

law. Rather, they locate its inception in the actions of ordinary citizens who, under the guidance of leaders like Dr. Martin Luther King, Jr., began to effect change through acts of resistance to unfair treatment in local communities across the South. These grassroots activists were later aided by counsel.<sup>450</sup> By developing a “direct action” strategy for achieving civil rights in which local citizens organized in a certain locale to achieve a specific goal (for example, voter registration), King conceived a model of reform that supplemented the litigation campaign favored by the NAACP Legal Defense Fund (LDF).<sup>451</sup>

Thus, many historians maintain that the type of social change represented by the civil rights movement is generated from the “bottom up,” rather than initiated by the government, or by arms of the state such as law.<sup>452</sup> Activism on the local level and lawyering within the confines of normative institutions of the state proceeded in a symbiotic fashion. The former activity preceded the latter, however, and it seems that the viability of the symbiosis was predicated upon such an order.<sup>453</sup> By staging nonviolent mass protests in the South that revealed the ugliness of segregation to national and international

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450. In fact, one of the most significant, but least quoted, statements by Dr. Martin Luther King, Jr. was his assertion that, “Anyone who starts out with the conviction that the road to racial justice is only one lane wide will inevitably create a traffic jam and make the journey infinitely longer.” MARTIN LUTHER KING, JR., *THE WORDS OF MARTIN LUTHER KING, JR.* 40 (Coretta Scott King ed., 1987).

451. See ADAM FAIRCLOUGH, *TO REDEEM THE SOUL OF AMERICA: THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE AND MARTIN LUTHER KING, JR.* 6-7, 57-83 (1987).

452. See, e.g., CHAFE, *supra* note 404, at 91-113 (comparing and contrasting the individualized civil rights movement with respect to African Americans and to women). See also sources cited *infra* note 453 (describing such “bottom up” African-American activism throughout the United States in the mid-twentieth century).

453. See generally CHAFE, *supra* note 89 (tracing the history of the black civil rights movement in Greensboro, North Carolina, from the 1940s to the 1960s); JOHN DITTMER, *LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI* (1994) (presenting a social history of the civil rights movement in a single state); ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* (1984) (explaining how the civil rights movement began and developed from 1953-63 to be a major force in American society); ROBERT J. NORRELL, *REAPING THE WHIRLWIND: THE CIVIL RIGHTS MOVEMENT IN TUSKEGEE* (1998) (following the efforts of blacks to gain the right to vote in Tuskegee, Alabama, from 1941 through the 1960s); *WOMEN IN THE CIVIL RIGHTS MOVEMENT: TRAILBLAZERS & TORCHBEARERS, 1941-1965* (Vicki Crawford et al. eds., 1993) (presenting conference papers concerning the role of African-American women in social movements); Tomiko Brown-Nagin, *The Transformation of a Social Movement into Law?: The SCLC's and NAACP's Campaigns for Civil Rights Reconsidered in Light of the Educational Activism of Septima Clark*, 8 *WOMEN'S HIST. REV.* 81 (1999) (arguing that the efficacy of NAACP and SCLC efforts was undermined by the groups' failure to include the perspective of an educational activist who believed that knowledge empowered marginalized groups in ways that formal legal equality did not).

audiences during the period from 1955 to 1965, the Southern Christian Leadership Conference (SCLC), along with a host of other organizations including the NAACP, the Congress of Racial Equality (CORE), and the Student Non-Violent Coordinating Committee (SNCC), ushered in passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.<sup>454</sup> It was then left to the lawyers to bring suits enforcing the rights guaranteed by this legislation. Thus, although litigation in the federal courts has been important to civil rights gains, social historians assert that the activism of ordinary people on the local level has been at least as important as litigation.

Local community-based organizing also played an important role in civil rights activism around the particular issue examined here—educational inequalities. During the summer of 1964, the so-called “Freedom Summer,” SNCC became preoccupied with the concept of “parallel institutions”: establishments that would replace existing institutions which were deemed inadequate to meet the needs of poor communities.<sup>455</sup> The paradigmatic parallel institution was the “freedom school.”<sup>456</sup> These were experimental educational academies designed “to fill an intellectual and creative vacuum” in the lives of African-American youth left by inadequate public schooling.<sup>457</sup>

Freedom schools featured a distinctive “citizenship” curricula designed to inculcate critical thinking skills in students and raise their political consciousness.<sup>458</sup> Espousing the Gandhian philosophy of non-violence championed by Dr. Martin Luther King, Jr.,<sup>459</sup> freedom school teachers urged their students not only to refrain from doing physical harm to others, but also to practice nonviolence of speech

454. See FAIRCLOUGH, *supra* note 451, at 134-35, 249-51.

455. See CHARLES PAYNE, I’VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE 302 (1995).

456. See *id.*

457. *Id.* (quoting Charlie Cobb, creator of the freedom school program).

458. Historian Charles Payne paints a picture of the ethos and relatively unstructured pedagogical approach used in freedom schools:

The curriculum reflects how far discussion within SNCC had progressed beyond a narrow concern with civil rights. A full analysis of society was embedded in the thinking behind the schools, an analysis that went beyond racial problems and public policy about them. What was actually taught and how it got taught varied from situation to situation. Teachers were encouraged to use a Socratic style of teaching, asking questions that drew on the experiences of students and trying to help them develop a larger perspective. *Volunteers who were professional teachers often had more trouble adjusting to the teaching style than did the inexperienced. . . . At their best the schools were an electric experience for teachers and students alike.*

*Id.* at 303 (emphasis added).

459. See FAIRCLOUGH, *supra* note 451, at 24-26.

and thought.<sup>460</sup> Approximately three thousand students attended the SNCC-run schools during the summer of 1964.<sup>461</sup> Available evidence suggests the effectiveness of the freedom school project.<sup>462</sup>

This example is important because the freedom schools are quite similar to the kinds of schools that are developing under the auspices of charter school enabling legislation. Like charter schools,<sup>463</sup> the freedom schools were premised on the assumption that unconventional curricular approaches, teachers, and pedagogies were important to stimulating academic achievement among at-risk students. Thus, there is a kinship between the approaches to equality that emerged from successful community-based organizing efforts of the sixties and contemporary education reform efforts that are predicated on the deregulation of schools.

The lessons implied by the history of the kind of the community organizing led by Dr. King that compelled changes in federal law and the SNCC-led freedom schools community-organizing effort are the same. This history teaches that effective advocacy requires using the law where law is useful, but also empowering individuals to conceive solutions to their own problems outside of the court system.<sup>464</sup> This history also demonstrates that the notion that local control is necessarily adverse to the rights of racial minorities is a valid description only when history is viewed statically and from the perspective of white resistance.

A relative lack of historical consciousness by some on the Left—an absence of awareness of the role that the dispossessed have played in saving themselves—underlies the resistance to the idea that change can occur on the state and local levels. Decades after the rights revolution, progressives in the legal academy continue to view federal law and federal courts as *the* central remedy for status-based inequality, although a belief in meaningful federal oversight of civil rights is, in reality, a dubious proposition under current equal protection jurisprudence. This perspective lacks faith in the ability of individuals to effect change; moreover, it is unduly hostile to the very notion of

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460. See PAYNE, *supra* note 455, at 303.

461. See *id.* at 302.

462. See *id.* at 304.

463. See *supra* notes 42-51.

464. I would argue that it is only when the individuals who are affected by particular social problems are able to participate in problem-solving that socially marginalized communities will secure the most effective policy and programmatic changes. See Brown-Nagin, *supra* note 449, at 374.

devolution and deregulation of areas like education, and blind to the untapped value of cases like *Rodriguez* and *Milliken*.<sup>465</sup>

3. *Anticipated Criticisms of the Democracy Argument.* This is not to say that the idea that deregulation may democratize educational institutions in ways previously unknown is without problems. Some may argue that I have idealized the extent to which citizens can be expected to participate in, and take advantage of, the opportunities afforded by deregulated schools.

The first response to this criticism is that it is counter-factual. There is every indication, based on federal data, that minorities are enrolled in charter schools at a disproportionately high rate.<sup>466</sup> This data undercuts claims that deregulation will further disadvantage minority communities because they typically are not “information-rich.”<sup>467</sup> There is no reason to doubt the correctness of the “information-rich” claim generally; however, it is ill-advised to oppose experimentation through charter schools in the absence of actual data demonstrating that minorities’ general disadvantage in this regard is proving a barrier to their enrollment in charter schools. To the extent that a lack of information might contribute to a lack of participation by students in socially marginalized communities, it can be corrected; as I argue in Part IV, states should require charter schools to broadly disseminate information about new charter schools and recruit in diverse communities.<sup>468</sup>

Perhaps the best response is that the concept of participatory democracy overcomes the objection to state- and local-level educational experimentation on the various speculative grounds offered by opponents. Minorities deserve as much freedom as others to choose the educational destinies of their children, or at least, to have the opportunity to make such choices. It is a kind of poetic justice that federalism-related cases that twenty years ago functioned to constrain

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465. Recent scholarship on constitutional theory is redressing this tendency to diminish the possibility of efforts by lay citizens to substantially reform social policy on the state and local levels. See generally Barron, *supra* note 92 (arguing for the potential vitality of local-level decisionmaking about social problems usually viewed as best handled by state and federal authorities); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (arguing for decentralization in governance and problem-solving by “subnational units” appropriate to local conditions).

466. See *supra* notes 66-74 and accompanying text.

467. See Wells, *supra* note 85, at 25.

468. See *infra* Part IV.C.3.



the choices of minorities in deference to majoritarian power today can be read to ensure that minorities are not unduly burdened in their efforts to gain the kinds of educational options that long have been available to socially privileged and politically powerful whites.

*D. The Significance of the Quasi-Public Status of Charter Schools*

In addition to being cognizant of the Court's federalism-related cases, courts reviewing challenges to status-identifiable charter schools should consider the constitutional significance of the schools' deregulated status. As I explained in Part II, this status imbues charter schools with characteristics of both public and private entities: most significantly, although they are taxpayer-supported, charter schools are privately managed. While some have questioned whether charter schools might be considered sufficiently private in nature to raise questions as to whether they are state actors for equal protection purposes, the weight of the authority suggests that deregulated schools—created by state legislators and publicly financed<sup>469</sup>—are sufficiently public in nature to trigger application of the Equal Protection Clause.<sup>470</sup> This analysis is affirmed by the many courts that have adjudicated claims involving charter school thus far; generally, they have not even considered the state action question.<sup>471</sup>

In this section, I argue that charter schools' status as state actors should not mean that they are treated precisely the same as conventional public schools for purposes of equal protection analysis. I note that federal law has a way of interpreting state action so as to give proper deference to states legislators' intent that charter schools be considered public-private partnerships. Reasoning by analogy, I propose that some deregulated schools may be deemed to occupy a distinct "quasi-public" status. In the event of equal protection litigation relating to such schools, courts should generally give deference to schools that are considered quasi-public by subjecting their practices

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469. See cases cited *supra* note 99.

470. See *San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522, 543-46 (1987).

471. See, e.g., *Villanueva v. Carere*, 873 F. Supp. 434, 445-52 (D. Colo. 1994) (denying an equal protection claim against a school district that authorized a charter school, without considering the state action doctrine), *aff'd*, 85 F.3d 481 (10th Cir. 1996); *Porta v. Klagholz*, 19 F. Supp. 2d 290, 301-04 (D.N.J. 1998) (finding that a charter school enabling law did not impermissibly advance or inhibit religion, but not addressing the state action question); *cf. King v. United States*, 53 F. Supp. 2d 1056, 1065 (D. Colo. 1999) (finding a charter school to be a public entity for purposes of immunity from a tort claim).

to rational relation review. The exception to this rule would be cases in which affirmative acts by the state or school authorities result in the exclusion of status-identifiable groups from enrollment in charter schools, or where evidence shows that particular charter schools would undermine existing court orders.

1. *The Quasi-Public Analogy.* The suggestion that deregulated schools may be characterized as “quasi-public” is a functional one. This characterization provides a means of allowing courts, as a general matter, to view deregulated schools in the same manner as conventional public schools for purposes of determining whether the Equal Protection Clause is implicated by a particular school law or policy. Thus, the quasi-public analogy guards against the imprudence of those advocates of deregulated schools who would prefer that charter schools be almost totally free of state and court oversight.<sup>472</sup> At the same time, it calls for courts to recognize that charter schools represent state legislatures’ commitment to experimentation in public education. As a consequence, although the quasi-public analogy allows courts to view the initial state action question in the same manner for charter schools and conventional schools, courts would have a flexible and context-specific approach in identifying the relevant standard of review where the Equal Protection Clause and charter schools intersect. Thus, the principle underlying my proposal is to allow for asymmetry in constitutional interpretation involving equal protection claims against charter schools. Currently, the precedent allows for no such asymmetry where status-conscious charter schools are concerned, due to the Court’s continued endorsement of a three-tiered system of review (rational, intermediate, and strict scrutiny)<sup>473</sup> and its corresponding inflexibility.<sup>474</sup>

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472. See, e.g., Allen, *supra* note 252 (advocating strong charter legislation and ranking state laws as “strong/effective” or “weak/ineffective,” with indicia of effectiveness relating to the extent to which schools are “genuinely independent” from district, state, and federal oversight).

473. The relevant considerations would be (1) whether classifications not involving a suspect class or a fundamental right have a rational relationship to a legitimate governmental interest, see *United States v. Kras*, 409 U.S. 434, 440 (1973), (2) whether a sex-based classification serves an important government objective and the means are substantially related to that objective, see *Craig v. Boren*, 429 U.S. 190, 197 (1996), and (3) whether a race-based classification serves a compelling government objective and the means are narrowly tailored to achieve that objective, see *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494-500 (1989).

474. The three-tiered scrutiny formula has not been without its critics, most famously, Justice Thurgood Marshall. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 109-10 (1973) (Marshall, J., dissenting); *Dandridge v. Williams*, 397 U.S. 471, 519-23 (1970) (Marshall, J., dissenting); see also *Craig v. Boren*, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring) (argu-

The term “quasi-public” is an apt way of allowing for interpretive flexibility with respect to some deregulated schools because of the hybrid public/private character of the basic provisions common in enabling legislation authorizing charter schools.<sup>475</sup> The hybrid nature of these schools is reflected in certain provisions of charter school legislation that define the nature of the schools,<sup>476</sup> relate to organization or sponsorship,<sup>477</sup> determine funding,<sup>478</sup> govern personnel management,<sup>479</sup> and the legal rights and responsibilities of charter schools’

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ing that courts should employ a uniform equal protection standard); cf. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 107-08 (1976) (criticizing the mechanical jurisprudence occasioned by the means-ends fit antidiscrimination analysis).

475. Other commentators refer to deregulated schools using terminology that acknowledges their hybrid nature. See Applebome, *supra* note 5 (“hybrid”); Maria Koklanaris, *An Alternative Way to Educate: Charter Schools Challenge Public and Private Systems*, WASH. TIMES, Dec. 1, 1994, at C4 (“quasi-private”); Hal Mattern, “*It’s Humble, but That Will Change*”: *Phoenix Site Will Give Rise to One of State’s First Charter Schools*, ARIZ. REPUB., Oct. 4, 1994, at A1 (“public school that resembles a private school”); Penny Roberts, *Charter Schools Plan Dangles the Carrot of Reform*, CHI. TRIB., Jan. 17, 1994, at 1 (“non-profit corporation with its own board of directors”); William A. Testa & Richard H. Mattoon, *Midwest Approaches to School Reform*, ECON. PERSP., Jan. 1995, at 2 (“public-private hybrid”).

476. See COLO. REV. STAT. § 22-30.5-203(1) (2000) (“‘Charter school district’ means a school district operating under a charter that has been approved by the state board . . . .”); FLA. STAT. ANN. § 228.056(7) (West 1998) (“A charter school shall organize as . . . a nonprofit organization.”); 105 ILL. COMP. STAT. 5/27A-5(a) (West 1998) (“A charter school shall be a public, nonsectarian, nonreligious, non-home based, and non-profit school. A charter school shall be organized and operated as a nonprofit corporation or other discrete, legal, nonprofit entity authorized under the laws of the State of Illinois.”); MINN. STAT. § 124D.10(7) (2000) (“A charter school is a public school and is part of the state’s system of public education.”); N.J. STAT. ANN. § 18A:36A-6 (West 1999) (“A charter school . . . shall be a body corporate and politic with all powers necessary . . . for carrying out its charter . . . .”).

477. See ARIZ. REV. STAT. ANN. § 15-183(B) (West Supp. 1999) (“The sponsor of a charter school may contract with a public body, private person or private organization for the purpose of establishing a charter school pursuant to this article.”); MINN. STAT. § 124D.10(3) (2000) (“A school board, . . . community college, state university, technical college, or the University of Minnesota may sponsor one or more charter schools.”).

478. See FLA. STAT. ANN. § 228.056(9)(a)(9) (West 1998) (providing that “financial and administrative management” of charter schools shall be negotiated by the governing body of the school and its sponsor, “following a public hearing to ensure community input”); MASS. GEN. LAWS ch. 71, § 89 (1991) (providing for the direct payment of appropriate funding to individual charter schools).

479. The New York statute illustrates this hybrid nature:

The board of trustees of a charter school shall employ and contract with necessary teachers, administrators and other school personnel. Such teachers shall be certified in accordance with the requirements applicable to other public schools; provided, however, that a charter school may employ as teachers (i) uncertified teachers with at least three years of . . . teaching experience; (ii) tenured or tenure track college faculty; (iii) individuals with two years of satisfactory experience through the Teach for America program; and (iv) individuals who possess exceptional business, professional, artistic, athletic, or military experience . . . .

sponsors.<sup>480</sup> These provisions may be appropriately termed hybrid and quasi-public because they enable both public and private entities to sponsor, provide funding for, manage, or otherwise contribute to the operation of deregulated schools. Indeed, such privatization of traditional governmental functions is the very essence of deregulation in public education.

Federal and state courts have used the terminology “quasi-public” to describe entities that contain elements characteristic of both public and private enterprises in a wide variety of cases.<sup>481</sup> The term is used in Establishment Clause doctrine,<sup>482</sup> with respect to hospitals,<sup>483</sup> railroads,<sup>484</sup> zoning laws,<sup>485</sup> and laws on libel and slander,<sup>486</sup> as

N.Y. EDUC. LAW § 2854.3.a-1 (McKinney Supp. 2000).

480. See ARIZ. REV. STAT. ANN. § 15-183(h) (West Supp. 1999) (“Charter schools may contract, sue and be sued.”); FLA. STAT. ANN. § 228.056(7) (West 1998) (“A charter school shall organize as . . . a nonprofit organization. . . . As such, the charter school may be either a private or public employer.”); N.J. STAT. ANN. § 18A:36A-6(b) (West 1999) (granting charter schools the right to sue and be sued, “but only to the same extent and upon the same conditions that a public entity can be sued”); N.C. GEN. STAT. ANN. § 115C-238.29F (c)(1) (West 2000) (“The board of directors of a charter school may sue and be sued.”).

481. The terminology is usually applied to libraries, common carriers, museums, playgrounds, hospitals, and historic, scientific, or other professional organizations. See National Ass’n of Regulatory Util. Comm’rs v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976) (defining “quasi-public” carriers for purposes of allocating the frequency spectrum under the Federal Communications Act); Valley Hosp. Ass’n v. Mat-Su Coalition for Choice, 948 P.2d 963, 972 (Alaska 1997) (holding that a quasi-public hospital may not have a policy that restricts the availability of legal abortions without violating the state constitutional protection for privacy rights).

482. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 881 n.7 (1995) (Souter, J., dissenting) (noting the significance of a quasi-public character as one factor significant in the Court’s analysis of whether state actors’ aid to religious groups violates the Establishment Clause); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 12 (1989) (using the term “quasi-public corporation” in striking down a tax exemption for a religious organization); *Walz v. Tax Comm’n*, 397 U.S. 664, 680 (1970) (upholding a law that provided a property tax exemption to certain religious institutions, nonprofits, and quasi-public corporations); see also *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 833 (1985) (Stevens, J., dissenting) (invoking the term “quasi-public” in relation to a ruling concerning solicitation by charities from federal employees).

483. See *Valley Hosp. Ass’n*, 948 P.2d at 969 (stating that a hospital may be a quasi-public institution); *Adler v. Montefiore Hosp. Ass’n*, 311 A.2d 634, 639 (Pa. 1974) (noting that the first usage of the term “quasi-public” was with respect to hospitals that essentially were private but were also marked by several public characteristics, including receipt of public funds and tax benefits because of their nonprofit and non-private character).

484. See *Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co.*, 417 U.S. 703, 714 (1974) (defining railroads as “quasi-public”).

485. See *Fox v. Shriver-Allison Co.*, 275 N.E.2d 637, 639 (Ohio Ct. App. 1971) (holding that a funeral home is not a quasi-public building).

486. See *Edmonds v. Delta Democrat Publ’g Co.*, 93 So. 2d 171, 173 (Miss. 1957) (using the quasi-public status of the object of an editorial to determine how libel and slander laws should

well as in education-related cases.<sup>487</sup> The “quasi-public” description indicates that a state actor is sufficiently involved with an entity bearing characteristics of a private body to warrant application of the federal Equal Protection Clause.<sup>488</sup> Yet the Court has held that depending on the particular purposes for which the legislature established quasi-public entities or their characteristics, not all entities that serve the public must comply with federal statutes or the Constitution in exactly the same manner as entities that are wholly public.<sup>489</sup>

In *Walz v. Tax Commission of the City of New York*,<sup>490</sup> for example, the Court sustained a property tax exemption granted by New York City and the state of New York to religious properties owned by quasi-public corporations, including some religious groups. In so doing, the Court rejected the argument that the exemption violated the First Amendment’s Establishment Clause. The Court’s reasoning turned on the breadth of the exemption; it covered a broad class of quasi-public institutions, including nonprofit organizations, libraries, and hospitals. It also turned on the exemption’s purpose. Given New York’s goal not of “establishing, sponsoring, or supporting religion,”<sup>491</sup> but of advancing the “legitimate secular purpose and effect of contributing to the communities moral and intellectual diversity,” the Court let the exemption stand.<sup>492</sup>

Perhaps the best analogy in the Court’s jurisprudence for this Article’s purposes involves cases in which the Justices have considered First Amendment limitations upon federal school aid programs that benefit private and/or parochial schools. In *Mitchell v. Helms*,<sup>493</sup> a case decided during the 1999-2000 term, the logic of *Walz* was extended to

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be applied).

487. See *Board of Educ. v. Grumet*, 512 U.S. 687, 704-05 (1994) (noting that local governments may give tax credits to quasi-public corporations, including religious schools, but not to a single religious school alone); *State ex rel. Manchin v. West Va. Secondary Sch. Activities Comm’n*, 364 S.E.2d 25, 27 (W. Va. 1987) (designating the funds of a public school-affiliated commission as “quasi-public”).

488. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724 (1961) (finding that a privately owned restaurant located in a public parking garage sufficiently involved state participation and authority to subject its racially discriminatory practices to the Fourteenth Amendment); *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948) (holding that because state judges enforce racially discriminatory restrictive covenants, the practice of selling homes with such covenants falls within the purview of the Fourteenth Amendment).

489. See *infra* notes 490-511 and accompanying text.

490. 397 U.S. 664, 672-73 (1970).

491. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 12 (1989) (quoting *Walz*, 397 U.S. at 674).

492. *Id.*

493. 120 S. Ct. 2530 (2000).

parochial schools that borrow computers and other educational materials from public schools pursuant to provisions of the Education Consolidation and Improvement Act of 1981.<sup>494</sup> This program was challenged as unconstitutional on the grounds that it functioned to subsidize religion in a direct, nonincidental way.<sup>495</sup> A plurality of the Court relied on three factors in determining that the program did not violate the Establishment Clause.<sup>496</sup> The plurality found it significant, first, that the in-kind aid in question was allocated on the basis of neutral, secular criteria, rather than in a way that favored or disfavored a certain religion;<sup>497</sup> second, that the aid was allocated on the basis of parents' and students' private choices about where to attend school, rather than on the "unmediated" will of government;<sup>498</sup> and third, that the aid did not have an impermissible, or religion-endorsing, content.<sup>499</sup>

*Mitchell* modified the Court's prior precedent on state action within the context of education, *Agostini v. Felton*,<sup>500</sup> as well as the precedent that had been modified by *Agostini*. In *Agostini*, the Court approved a program established pursuant to Title I of the Elementary and Secondary School Act of 1965<sup>501</sup> providing that public employees could teach remedial classes in religious and other private schools.<sup>502</sup> Rather than considering whether the aid in question created an "excessive entanglement between government and religion," as had been required under the third prong of the state action test established in

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494. This Act, 20 U.S.C. §§ 3801-3808 (1994), is a part of the Elementary and Secondary Education Act of 1965, and codified therein.

495. See *Mitchell*, 120 S. Ct. at 2538 (Thomas, J., plurality opinion).

496. See *id.* at 2555-56 (Thomas, J., plurality opinion).

497. See *id.* at 2252-53 (Thomas, J., plurality opinion).

498. The Court noted:

As a way of assuring neutrality, we have repeatedly considered whether any governmental aid that goes to a religious institution does so only as a result of the genuinely independent and private choices of individuals. . . . [I]f numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment. Private choice also helps guarantee neutrality by mitigating the preference for pre-existing recipients that is arguably inherent in any governmental aid program, and that could lead to a program inadvertently favoring one religion or favoring religious private schools in general over nonreligious private schools.

*Id.* at 2541-42 (Thomas, J., plurality opinion) (citations omitted).

499. See *id.* at 2553-55 (Thomas, J., plurality opinion).

500. 521 U.S. 203 (1997).

501. 20 U.S.C. §§ 6301-7100 (1994).

502. See *Agostini*, 521 U.S. at 222-31.

*Lemon v. Kurtzman*,<sup>503</sup> the *Agostini* Court considered whether any religious indoctrination that resulted from the program in question reasonably could be attributed to the government. Thus, whereas the *Agostini* Court primarily had considered the effects of the program in question, the *Mitchell* decision emphasized, in addition, the relevance of private choices and content. The *Mitchell* Court also overruled two prior cases, *Meek v. Pittenger*<sup>504</sup> and *Wolman v. Walter*,<sup>505</sup> in which the Court had found programs providing many of the same materials authorized under the statute at issue in *Mitchell* unconstitutional, using a more formalistic analysis.<sup>506</sup>

The *Mitchell* decision represents the Court's effort to move toward functional determinations about whether state action that benefits private or parochial schools violates the First Amendment. This jurisprudential shift was predicated upon the Court's recognition that prior conventions within Establishment Clause jurisprudence represented fundamentally precarious determinations about whether governmental activity said to disfavor or favor private or parochial schools was constitutionally impermissible.<sup>507</sup> "[C]andor compels the acknowledgment that we can only dimly perceive the boundaries of permissible governmental activity in this sensitive area,"<sup>508</sup> the Court stated in *Mitchell*. The *Mitchell* Court even acknowledged the difficulty of applying the new interpretation of the *Lemon* and *Agostini* tests that it had endorsed. "[A]ttribution of indoctrination is a relative question," the Court admitted.<sup>509</sup>

Certainly *Mitchell* does not unambiguously reconcile the Court's precedent regarding governmental school-aid programs that benefit private or parochial schools. After all, *Mitchell* was a plurality opinion. Nevertheless, the reasoning in *Mitchell* and *Walz* suggests how

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503. 403 U.S. 602, 612-13 (1971) (delineating a three-prong test, including the evaluation of whether a statute has a secular purpose, has the primary effect of establishing or inhibiting religion, or creates an excessive entanglement between government and religion).

504. 421 U.S. 349, 362, 366 (1975) (finding a state law allowing governmental funding of textbooks for parochial schools constitutional, while finding the provision of equipment of instructional materials and equipment for the same schools unconstitutional).

505. 433 U.S. 229, 255 (1977) (finding a state law providing for governmental funding for textbooks and standardized tests for parochial schools constitutional, but finding the provision of instructional equipment and materials for the same schools unconstitutional).

506. See *Mitchell*, 120 S. Ct. at 2555-56 (Thomas, J., plurality opinion).

507. See *id.* at 2539 (Thomas, J., plurality opinion).

508. *Id.* at 2540 (Thomas, J., plurality opinion) (quoting *Tilton v. Richardson*, 403 U.S. 672, 678 (1971)).

509. *Id.* at 2541.

the federal courts might apply the Equal Protection Clause to public schools that bear characteristics of private entities. These cases illuminate how courts can at once exercise the obligation of applying federal antidiscrimination norms to a new specie of state actor among public schools, while also recognizing the uniqueness of, and the special purpose behind, this type of school. They suggest the propriety of a functional, rather than a formalist, analysis of the question of when action that benefits private or parochial entities (or in the case of deregulated schools, quasi-public entities) should be considered legitimate, nondiscriminatory exercises of governmental power.<sup>510</sup>

Like any other state actor, quasi-public organizations may not deprive individuals of their fundamental rights or discriminate on the basis of status.<sup>511</sup> In recognition of the quasi-public nature of charter schools, *Walz's* treatment of quasi-public organizations, and *Mitchell's* analysis of permissible government action in the case of parochial schools, however, courts adjudicating claims involving quasi-public deregulated schools may, and should, modify the equal protection standard traditionally applied to public schools. The courts should fashion a standard of review more nuanced and flexible than the traditional three-tiered scrutiny convention in equal protection doctrine—better than the standards relied on in *VMI*, *Adarand*, or *Garrett*, for instance. Complexity of analysis, rather than the mechanical formulas implied by heightened scrutiny, would be expected, and required, of courts reviewing this quasi-public class of deregulated

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510. Other scholars have suggested parallels between the constitutional jurisprudence on race and religious accommodation in recent years. See Jesse H. Choper, *Religion and Race Under the Constitution: Similarities and Differences*, 79 CORNELL L. REV. 491 *passim* (1994); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 64-68 (1991); Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119 *passim* (1997).

511. See, e.g., *Leo Sheep Co. v. United States*, 440 U.S. 668, 683 (1979) (noting, in dicta, for a claim under federal Quiet Title Act, that statutes enabling grants to induce works of "quasi public character" should be constructed in a liberal manner or in a manner that does not defeat the purposes of legislation); *Walz v. Tax Comm'n*, 397 U.S. 664, 696-97 (1970) (sustaining, in a First Amendment case, a property tax exemption for religious properties because the state had not singled out a particular religious group, but a broad class of property owned by nonprofit, quasi-public corporations); *Bangor & Aroostook R.R. Co. v. Bangor Punta Operations, Inc.*, 482 F.2d 865, 868-71 (1st Cir. 1973) (allowing a cause of action by a quasi-public corporation for alleged securities and antitrust violations of a party, in part because recovery by the quasi-public entity would inure to the public), *rev'd on other grounds*, 417 U.S. 703, 710-14 (1974); *Valley Hosp. Ass'n Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 973 (Alaska 1997) (holding that a quasi-public hospital could not restrict the availability of legal abortions).



lated schools. Particular applications of this idea to the concept of quasi-public status-identifiable schools are discussed below.

2. *Determining Whether the Quasi-Public Designation Is Appropriate.* Before discussing these applications, I must allow that a mediating principle for the quasi-public construct is necessary, even assuming that it is appropriate to consider the private characteristics of deregulated schools constitutionally significant. There must be a standard for determining whether, or the extent to which, a state's deregulated schools are to be considered quasi-public. Such a determination is important because, while there are many similarities among states' charter school laws,<sup>512</sup> there also are important differences. For purposes of this Article, the most important differences among the states' charter school enabling legislation pertain to the extent to which the laws promote participatory democracy in education and grant autonomy to private persons who become involved in the sponsorship and management of charter schools.

Thus, a standard for determining which schools are quasi-public can be gleaned from the degree to which a particular state's enabling legislation makes charter schools more or less like traditional public schools in terms of the decisionmaking authority given to charter school sponsors. The more the relevant enabling legislation allows for involvement of private entities in the process of organizing or managing charter schools, and the more autonomy given those schools, the greater the rationale is for considering schools quasi-public.

Charter laws may be classified as strong, weak, or moderate in terms of the extent of involvement of, and autonomy granted to, private parties. The following types of criteria would be helpful in making such determinations:

- whether the enabling legislation allows private entities or non-profit agencies to sponsor charter schools and/or sit on schools' boards of trustees;<sup>513</sup>

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512. See *supra* notes 37-78 and accompanying text.

513. See, e.g., ARIZ. REV. STAT. § 15-183(b) (2000) ("The sponsor of a charter school may contract with a public body, private person or private organization for the purpose of establishing a charter school pursuant to this article.") (strong); MINN. STAT. § 124D.10(3) (1999) ("A school board, . . . community college, state university, technical college, or the University of Minnesota may sponsor one or more charter schools.") (moderately weak).

- whether schools may accept funding from private entities or non-profit agencies;<sup>514</sup>
- whether schools receive funding directly from the state, or whether it is meted out by public school officials;<sup>515</sup>
- the degree to which various tasks relating to management of schools or other functions of boards of trustees suggest that the schools constructively are private;<sup>516</sup>
- whether the enabling legislation designates the schools as separate legal entities.<sup>517</sup>

Thus, strong enabling provisions would contain the following elements: a variety of private organizations or individuals are allowed to sponsor and operate a charter school; charter schools are considered discrete legal entities that do not remain a part of a school district or significantly under the control of the district board; and teachers and

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514. See, e.g., FLA. STAT. ch. 228.056(9)(a)(9) (2000) (providing that the “financial and administrative management” of charter schools shall be negotiated by the governing body of the school and its sponsor, “following a public hearing to ensure community input”) (moderate); MASS. GEN. LAWS ANN. ch. 71, § 89 (2000) (providing for direct payment of appropriate funding to individual charter schools) (strong); N.C. GEN. STAT. § 115C-238.29F(e)(4) (1999) (“In the event a charter school . . . elects total independence from the local board of education, its employees shall not be deemed to be employees for the local school administration unit.”) (strong).

515. See MASS. GEN. LAWS ANN. ch. 71, § 89 (2000) (providing for the direct payment of appropriate funding to individual charter schools) (strong).

516. See, e.g., COLO. REV. STAT. ANN. § 22-30.5-203(1) (2000) (“‘Charter school district’ means a school district operating under a charter that has been approved by the state board . . .”) (ambiguous); FLA. STAT. ch. 228.056(7) (2000) (“A charter school shall organize as a nonprofit organization.”) (strong); 105 ILL. COMP. STAT. 5/27A-5(a) (2000) (“A charter school shall be a public, nonsectarian, nonreligious, non-home based, and non-profit school. A charter school shall be organized and operated as a nonprofit corporation or other discrete, legal, nonprofit entity authorized under the laws of the State of Illinois.”) (strong); MINN. STAT. § 124D.10(7) (“A charter school is a public school and is part of the state’s system of public education.”) (weak); N.J. STAT. ANN. § 18A:36A-6 (2000) (“A charter school . . . shall be a body corporate and politic with all powers necessary . . . for carrying out its charter . . .”) (strong).

517. See, e.g., ARIZ. REV. STAT. § 15-183(h) (2000) (“Charter schools may contract, sue and be sued.”) (strong); FLA. STAT. ch. 228.056(7) (2000) (“A charter school shall organize as a nonprofit organization.” As such, the charter school “may be either a private or public employer.”) (strong); N.J. STAT. ANN. § 18A:36A-6 (2000) (granting a charter school the right to sue and be sued, “but only to the same extent and upon the same conditions that a public entity can be sued”) (ambiguous); N.C. GEN. STAT. § 115C-238.29F(c)(1) (1999) (“The board of directors of a charter school may sue and be sued.”) (strong). This list is suggestive rather than exhaustive; other criteria suggested by enabling legislation may also be considered by reviewing courts.

other personnel employed by the schools have the option of working as employees or as subcontractors.<sup>518</sup>

By contrast, charter laws classified as weaker or moderate would allow for more control by local school authorities, and thus less autonomous operation by individual school sponsors. For example, weaker laws would allow schools less legal and fiscal autonomy, and waive only discrete aspects of the regulations that apply to traditional public schools, rather than granting a blanket waiver.<sup>519</sup>

If enabling legislation consists mainly of strong provisions, schools created by it would presumptively be deemed quasi-public in nature. Thus, these charter schools would deserve a greater level of deference from a federal court reviewing its policies than conventional public schools. Strong or relatively strong versions of states' charter school legislation, together with enabling legislation that contains a mixture of relatively strong and moderately weak provisions, also might be deemed to entitle deregulated schools to a constitutional category distinct from traditional public schools. By contrast, consistent with state legislators' drafting decisions, federal courts would allow less deference to charter laws containing weaker provisions.

*E. Delimiting the Scope of the States' Experiment with Quasi-Public Schools Through the Pragmatic Interpretation of Standards*

Having discussed how the dictates of federalism and deregulated status should affect constitutional review of some charter schools, I now turn to a consideration of how, specifically, pragmatism may inform the review of equal protection-based challenges to deregulated schools that qualify as quasi-public. In suggesting that courts rely upon pragmatism in analyzing issues that may arise in cases concerning status-conscious deregulated education, I do not mean to imply the kind of *ad hoc* and intuitive jurisprudence captured by judicial reliance on "interest-balancing." Characterized by a supposed weighing of certain interests against others (for instance, ridding a local school

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518. See *Comparing Charter School Laws*, *supra* note 35, at 24.

519. See *id.* Weak versions of charter school legislation usually result from a compromise in state legislatures where there is a lack of consensus among lawmakers over passage of these laws; some of these laws were fashioned and supported by legislators who actually oppose charter laws on principle. These compromise laws contain weak provisions for the purposes of ensuring detractors substantial legislative control over the operation of these putatively independent schools. See Finn & Ravitch, *supra* note 43, at 42-43 (discussing weak charter school legislation). Weak versions of charter laws should not be deemed quasi-public in nature.

district of segregated schools versus the concerns of parents in the district about busing to achieve integrated schools<sup>520</sup>), the notion of interest balancing is too vague and subjective to be a useful interpretative paradigm.<sup>521</sup>

Informed by pragmatism in philosophy and politics,<sup>522</sup> but transcending both, legal pragmatism<sup>523</sup> in my meaning implies judicial engagement with sociological understandings of the experiences of legal subjects,<sup>524</sup> respect for participatory democratic experiments on the

520. See *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 242-45 (1973) (Powell, J., concurring in part, dissenting in part).

521. The “interest balancing” method was often used by Justice Powell in school desegregation cases and has been criticized best, in my judgment, by Paul Kahn. Kahn concludes that Powell’s interest balancing method is an “unacceptable foundation for the constitutional function of judicial review” because it rests on “mere intuition” rather than “articulate argument” and tends to preserve the existing distribution of power in the national community. Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 3-9 (1987); see also Brown-Nagin, *supra* note 346, at 409 (criticizing interest balancing in constitutional cases involving affirmative action in education). See generally Charles Fried, *Some Reflections on the Supreme Court’s Interest Balancing Test*, 76 HARV. L. REV. 755 (1963) (discussing the Court’s allocation of duties of the parties as a means of balancing competing interests); Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972) (discussing a balancing approach as employed by Justice Powell).

522. For a discussion of pragmatism in philosophy, see WILLIAM JAMES, PRAGMATISM 25-39 (1981) (acknowledging that all interpretation is value-laden and reality-contingent). Richard Rorty provides a useful discussion of pragmatism in politics:

[T]he citizens of my liberal utopia would be people who had a sense of the contingency of their language of moral deliberation, and thus of their consciences, and thus of their community. They would be liberal ironists . . . people who combined commitment with a sense of the contingency of their own commitment.

RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 61 (1989). What both of these positions have in common is a dislike for grand theory; both are anti-foundationalists. See CORNEL WEST, *Theory, Pragmatism and Politics*, in KEEPING FAITH 89 (1993).

523. On classical legal pragmatism and its revival, see Thomas Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989) (interpreting the relationship of Holmes’s jurisprudence to philosophical pragmatism and situating it within “neo-pragmatism”); Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163; Catharine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes*, 82 NW. U. L. REV. 541 (1988).

524. See FEFER, *supra* note 1, at 2-3; cf. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 229-310 (1999) (arguing for pragmatism as a “disposition to ground political judgments on facts and consequences rather than on conceptualisms and generalities”); J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 107 (1993) (aspiring to a jurisprudence that recognizes the ideological, sociological, and psychological features of our legal system). It should be noted that my understanding of pragmatism in law would be contested by others. See, e.g., RONALD DWORKIN, LAW’S EMPIRE 161 (1986) (claiming that legal pragmatists are unprincipled and unconcerned about consistency with authority, including legislative authority).

local level,<sup>525</sup> and a willingness to rely upon these two in reconciling judgments about policy with doctrine. Unlike formalistic opinions whose legitimacy is predicated upon backward-looking original understandings or narrow doctrinal arguments,<sup>526</sup> decisions informed by pragmatism would reflect relevant knowledge encompassed by applicable legal norms, as well as nonlegal knowledge that is derived from both observable social or behavioral situations<sup>527</sup> and the recent history of citizen-initiated social change.<sup>528</sup> Under this model, the effects of social and economic hierarchy on educational opportunity would not be considered irrelevant to, or inconsistent with, the application of the appropriate level of scrutiny.

The pragmatism I propose can be described more concretely by clarifying what it is not. Let us consider, for instance, the precedent on single-sex education discussed in Part II. The Court's application of the equal treatment principle to single-sex education in *VMI* was rigid and acontextual,<sup>529</sup> its claims bold, its propositions general, careful not to recognize exceptions to its understanding of sex discrimination. Inflexible and detached from the kinds of issues explored in educational literature, the Court's perspective on sex segregation in public schools is one-dimensional; it presumes the practice constitutionally suspect, notwithstanding academic literature and practical experiments in Chicago, Detroit, and New York that favor same-sex education. As such, the Court's jurisprudence on single-sex education is fundamentally anti-pragmatic.

Decisions concerning the propriety of status-conscious deregulated education that are informed by pragmatic criteria would result in a jurisprudence better suited than current law to modern conditions of inequality—notably, *de facto* inequalities and societal disadvantage. In the context of status-conscious deregulated schools, judicial decisionmaking influenced by pragmatic criteria would not involve grand claims about the propriety of status consciousness *per se*, or absolutisms, but rather particularized, fact-intensive inquiries concerning the educational needs of students.<sup>530</sup> Under this adjudicatory model, the central focus of a judge's scrutiny would be upon

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525. See *supra* notes 448-65 and accompanying text.

526. See generally PHILLIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991) (describing characteristic modalities of constitutional argument).

527. See FEFFER, *supra* note 1, at 3-4.

528. See *supra* notes 448-65 and accompanying text.

529. See *supra* notes 322-67 and accompanying text.

530. See *infra* notes 533-74 and accompanying text.

*factors*, such as whether or not a deregulated school is considered quasi-public, and *consequences*, such as the benefit or detriment of proposed educational programming on present and future students as determined in relevant nonlegal literature, case law, and outstanding court orders—rather than on rules or ideology.<sup>531</sup>

1. *Level of Scrutiny.* These factors and consequences would then influence the level of scrutiny applied to status-conscious schools: that is, affect whether a court applies rational relation or heightened scrutiny to such schools. Thus, unlike in sex discrimination cases like *VMI*<sup>532</sup> and race discrimination cases like *Croson*,<sup>533</sup> the pragmatic court would not apply a heightened level of scrutiny merely because race and/or sex discrimination is alleged. Rather, relevant facts about a particular school or provision of charter school enabling legislation would influence the court's consideration of whether the fit between the governmental interest and the means used to achieve the objective are close enough to withstand an equal protection challenge.

In order to illustrate the strengths of a pragmatic approach to constitutional review of deregulated education, let us assume that a federal court is hearing an equal protection challenge to two charter schools. One school's student body consists overwhelmingly of African-American and Latino students, due primarily to its location in an area populated mainly by racial minorities. Thus, this school is analogous to the Healthy Start example discussed in Part II. The other school's student body consists overwhelmingly of African-American and Latino girls because it is targeted to appeal to this subgroup of students. The second school is, therefore, comparable to the Young Women's Leadership Academy discussed in Part II.

A court whose understanding of the challenge is informed by pragmatic considerations would proceed as follows. First, the court would take note of the doctrinal reality that, pursuant to *Rodriguez*

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531. For a discussion of the important differences between rules and standards, see CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 27-30 (1996).

532. As explained in *supra* notes 348-59 and accompanying text, the *VMI* Court subjected the sex-based classification to a heightened intermediate level of scrutiny, a level more exacting than in past sex discrimination cases; in fact, the Court implied that sex classifications should be subjected to a level of scrutiny akin to the strict scrutiny to which race is subject.

533. In *Croson*, the Court made it clear that any race-based classification should be subjected to strict scrutiny. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494-500 (1989).

and *Milliken*, the schools should be presumed constitutional.<sup>534</sup> Second, the court would determine whether the enabling legislation that formed the basis for the schools' establishment consists of provisions that favor a finding that the schools are quasi-public in nature. This determination would be made by reference to the kind of criteria described in the preceding section.<sup>535</sup> If either of the hypothetical schools' characteristics were determined to allow the school to be classified as quasi-public, the court would understand this status as a second basis for showing deference to state legislatures in analyzing the constitutionality of the school.<sup>536</sup>

Next, the court would turn to an equal protection analysis of the status-identifiability of the schools in question. Keeping in mind the independent indications that the schools presumptively are constitutional, that is, the status of primary and secondary education in the federal system, as well as the need to accommodate the school's quasi-public status, the court would determine the appropriate level of scrutiny of the schools and/or the legislation that enabled their creation. Because suspect (race) and quasi-suspect (sex) classifications would be at issue, the court would need to determine *whether* a heightened level of scrutiny was indicated. Again, the court would not apply a heightened level of scrutiny merely because race and sex were at issue and discrimination was alleged.<sup>537</sup>

The court's determination of whether the status-identifiability of the schools should be subjected to a heightened level of scrutiny would turn on a number of factors. First of all, the court must consider whether the alleged discrimination was deliberate (i.e., facial or as administered) or a result of a confluence of unintentional acts (e.g., disparate impact). For instance, if charter schools seemed only or mainly to be established in areas of the state that are overwhelmingly white or overwhelmingly minority, there might be a basis for finding the law unconstitutional as applied. This might not be true if these policies were justified as compensatory or remedial in nature, however (that is, as a type of affirmative action).<sup>538</sup>

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534. See *supra* notes 432-43 and accompanying text.

535. See *supra* notes 513-19 and accompanying text.

536. See *supra* notes 488-89 and accompanying text.

537. See *Villanueva v. Carere*, 873 F. Supp. 434, 441, 447 (D. Colo. 1994), *aff'd*, 85 F.3d 481, 484-86 (10th Cir. 1996).

538. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 234-37 (1995); *Croson*, 488 U.S. at 495-504.

Second, the court should consider the facts and policy considerations that motivated the state to enable the establishment of the hypothetical schools. The court would need to consider whether the state policy of encouraging status-consciousness is supported by legislative findings<sup>539</sup> that incorporate pertinent educational research.<sup>540</sup> For instance, it would be proper for the court to ascertain whether the hypothetical single-sex school for minority girls was supported by research indicating that the relevant students would benefit as a consequence of the school's single-sex policy,<sup>541</sup> and whether community sentiment supported establishment of these schools for sound educational reasons.<sup>542</sup> Most importantly, under my approach, the fact that both hypothetical schools aid historically disfavored groups should be very significant to the court's analysis.

If education were considered a fundamental right under the relevant state's constitution,<sup>543</sup> and if the state's policy of permitting status-conscious schools for girls of color was supported by credible educational research, these factors might militate in favor of applying a rational relation level of scrutiny, rather than a heightened scrutiny to the second hypothetical school.<sup>544</sup> In such a case, the state educational policy and constitutional authority might indicate so strongly

539. Even in equal protection cases involving a suspect classification, there is a strong presumption that courts should defer to sound legislative or administrative findings. Whether such findings are sufficient may be highly contested in litigation, however. *See, e.g.,* *Metro Broad. Inc. v. FCC*, 497 U.S. 547, 570-71 & n.16 (1990) (accepting the findings of the Federal Administration Agency); *Croson*, 488 U.S. at 500-02 (rejecting the findings of the city council); *cf. Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971) (entitling to "great deference" interpretative decisions of an administrative agency charged with enforcing federal civil rights laws).

540. *See supra* notes 259-72 and accompanying text.

541. For instance, some (although by no means all) research supports the view that academic improvement is correlated with single-sex education. *See Kaplice, supra* note 268, at 245, 247-50 (citing research suggesting academic performance improvements for males and females who attend same-sex schools); Riorda, *supra* note 272, at 192-202 (discussing research supporting the view that minority students from low-income households benefit academically from same-sex schools).

542. *See Calhoun v. Cook*, 362 F. Supp. 1249 (N.D. Ga. 1973), *aff'd*, 522 F.2d 717 (5th Cir. 1975) (considering the opinions of community members who opposed a busing remedy in deciding not to impose metropolitan-wide relief); *see also Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 242-45 (1973) (Powell, J., concurring) (advocating the consideration of community aspirations and personal rights).

543. Forty-eight state constitutions explicitly recognize a right to education and many contain requirements that education be delivered on an equal basis. *See Julius Chambers, Adequate Education for All: A Right, an Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55, 65 (1987).

544. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973) (declining to employ a heightened level of review where state concerns were deemed greater than the federal authority over the subject matter).



that the federal court should not interfere in educational affairs that it would determine that heightened scrutiny was inappropriate, unlike in *VMI*.<sup>545</sup>

If the court decided to apply a heightened standard, however, it would be incumbent upon it to devise a standard that considers the multidimensionality of the factual situation: *both* the race and sex of the relevant students. This standard would have to be much more nuanced than the reasoning in *Garrett*.<sup>546</sup> A pragmatic effort at nuanced analysis might be a test that encompassed the reasoning characteristic of *Vorchheimer*,<sup>547</sup> while considering the reasoning of *Pitts*, *Adarand*, and *Croson*. *Pitts* would dictate that the court not find a race-conscious charter school within an otherwise racially diverse school district unconstitutional if the racial identifiability resulted from residential choices.<sup>548</sup> At the same time, *Adarand* and *Croson* might dictate skepticism of the same school if the kind of programming available therein was not available to white students outside of the geographic area.<sup>549</sup>

2. *Schools Under Court Order*. This calculus might change, however, if an extant desegregation order were at issue. For instance, in Kansas City, Missouri, the locality from which the Supreme Court's most recent ruling on desegregation arose,<sup>550</sup> the desegregation order at issue relied on a magnet school program to promote a "quality of education" remedy.<sup>551</sup> The result of this program is that the Kansas City school district is equipped with facilities and opportunities unavailable in any other school district in Missouri.<sup>552</sup>

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545. *Cf. id.* at 16, 23 (deferring to state tax and educational policies on a rational relation level of review on the grounds that the state's prerogatives could not be legitimately overridden by the federal government, which has no constitutional authority to intervene where no suspect classification or federal fundamental right is deemed at issue).

546. *See supra* notes 386-403 and accompanying text (discussing the advantages and disadvantages of the *Garrett* standard).

547. *Vorchheimer v. School Dist.*, 532 F.2d 880, 881-83, 886-87 (3d Cir. 1976), *aff'd by an equally divided court*, 430 U.S. 703 (1977) (per curiam); *see also supra* notes 379-85 and accompanying text (discussing *Vorchheimer*).

548. *Freeman v. Pitts*, 503 U.S. 467, 493 (1992); *Milliken v. Bradley*, 418 U.S. 717, 734 (1974).

549. *See supra* notes 236-38 and accompanying text.

550. *See Missouri v. Jenkins*, 515 U.S. 70 (1995).

551. *See id.* at 75-78 & n.1.

552. *See id.* at 102. It is not clear that this is still the case, given the recent problems of this school district, including its loss of full accreditation. *See Rick Pierce, City Schools Win Provisional Accreditation from State Board*, ST. LOUIS POST-DISPATCH, Oct. 20, 2000, at C8.

Suppose that single-sex deregulated schools were established in localities in close proximity to Kansas City, that the programming in the deregulated schools was considered equal or superior to that available in Kansas City's magnet schools, and that these schools attracted a student body of predominantly African-American and Latino girls. Then consider that an equal protection challenge to the charter schools was brought on grounds that minority and white males were being denied access to the superior programs available at the charter schools, and moreover, that the charter schools were undermining the outstanding court order.

Under such circumstances, a pragmatist court's consideration of the challenge would have to turn on the specific goals of the outstanding desegregation order, as compared to the predicate facts that gave rise to the establishment of the single-sex charter schools. For instance, the court would consider whether the Kansas City desegregation order contains any generally applicable racial balance goals for student assignment, and whether the racial identifiability of the hypothetical girls' school resulted from residential choice, as opposed to a deliberate state policy to establish a school for minority girls. If the order contained no racial balance goals and the racial identifiability of the girls' schools resulted from residential choice, the court might conclude that there was no basis for subjecting the school to heightened scrutiny, notwithstanding its status-identifiable student body. Even if the order contained racial balance goals, a pragmatic court might still reach the same conclusion if there were no ongoing enforcement proceedings or efforts to achieve balance prior to the establishment of charter schools. That court could conclude that the existence of a desegregation order should not be used as a means of quashing experimental education programs when no concern about racial imbalances previously was apparent.

The pragmatic court also would need to consider the relationship between the outstanding court-ordered requirements relating to educational programming and the programming available at the charter schools. A court might make this determination on the basis of whether the programming available at the two school sites was substantially equal. If, as in *Vorchheimer*, the court reviewing the hypothetical challenge to the charter school for girls determined that there was not a substantial difference between the curriculum of the challenged school and others, the court might choose not to subject the charter school to a heightened level of scrutiny. On the other hand, if the court determined that programming at the girls' school was supe-

rior to or different from (in a stereotypical fashion) that in other Kansas City schools, it might apply a heightened level of scrutiny to the state's decision to permit the establishment of a single-sex charter school.

Similarly, if a state's schools were subject to a (state) court order relating to school finance—as might well be the case in many states<sup>553</sup>—the court would need to consider the specific nature of the relevant school finance decree. The court would need to know what is required financially of the relevant local school districts under the order, and to determine whether status-conscious deregulated schools undermine compliance with the order.<sup>554</sup>

The situation in New Jersey is instructive. The state's public schools currently are subject to a court order that requires all schools to be funded at levels that will provide all students with a “thorough and efficient” education.<sup>555</sup> At the same time, New Jersey has passed charter school enabling legislation that permits deregulated schools to accept funding from private sources.<sup>556</sup> In light of the existing school finance order, a court considering an equal protection challenge to the enabling legislation based on differential availability of resources to particular communities might find that a heightened level of scrutiny was appropriate.

3. *The Diversity Rationale.* A matter to which courts should give particular attention in fashioning a more nuanced equal protection analysis for quasi-public deregulated schools is the extent to which

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553. Successful challenges to state systems of financing schools on equal protection grounds include *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983), *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976), *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989), *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989), and *Abbott v. Burke*, 643 A.2d 575 (N.J. 1994). For a discussion of the numerous state-level challenges to school financing systems, see Alexandra Natapoff, 1993: *The Year of Living Dangerously: State Courts Expand the Right to Education*, 92 W. EDUC. L. REP. 775, 762-64 & n.36 (describing types of school finance litigation brought in state courts over past three decades); see also Merri Rosenberg, *Suit Due on School Financing*, N.Y. TIMES, Sept. 4, 1998, at 14C (discussing two suits that challenge the inadequacy of the present school funding formula for providing adequate education for New York's public school students).

554. See OZMON & CRAVER, *supra* note 1, at 25 (discussing the likelihood that vouchers will take funding away from traditional schools); Note, *supra* note 391, at 2004-06 (same).

555. See, e.g., *Abbott*, 643 A.2d at 575 (finding that the state had violated equal protection standards by failing to ensure that students living in certain districts were funded at levels high enough to result in a thorough and efficient education).

556. See N.J. STAT. ANN. § 18A:36A-6(c), (g) (West 1999) (empowering charter schools to receive and disburse funds and accept real property).

the educational diversity that they create is a justification for those schools, their status identifiability notwithstanding. Dicta from the Court's equal protection precedent implies that diversity may provide a rationale for status-identifiable charter schools.

In three major cases Supreme Court Justices have voiced support for the idea that diversity may be a legitimate basis for status-conscious governmental programs. In *Wygant v. Board of Education*,<sup>557</sup> Justice O'Connor stated her judgment that "a state interest in the promotion of racial diversity has been found to be sufficiently 'compelling,' at least in the context of higher education."<sup>558</sup> Justice O'Connor presumably was referring to the Court's opinion in *Regents of University of California v. Bakke*,<sup>559</sup> in which Justice Powell, writing for a plurality, reasoned that a university's right to academic freedom—in particular, its decision to seek a diverse student body—was a justification for race-conscious affirmative action in medical school admissions.<sup>560</sup> Moreover, in the most recent case, *United States v. Virginia*, Justice Ginsburg, writing for the majority, suggested that single-sex education might be justified if the state's provision of it is "even-handed" and designed to promote "diverse educational opportunities," as opposed to perpetuating discrimination or sex-based stereotypes.<sup>561</sup>

Although two Ninth Circuit panels, as well as a federal district court in Michigan, have declared it a compelling governmental interest,<sup>562</sup> the diversity rationale for status-conscious state action in education has been rejected by three circuit courts.<sup>563</sup> The notion of diver-

557. 476 U.S. 275 (1986).

558. *Id.* at 286.

559. 438 U.S. 265 (1978).

560. *Id.* at 313-15 (Powell, J., plurality opinion). For an analysis of *Bakke's* language on diversity, see Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1750 (1996).

561. *United States v. Virginia (VMI)*, 518 U.S. 515, 534 n.7 (1996).

562. See *Smith v. University of Wash.*, Nos. 99-35209, 99-35347, 99-35348, 2000 U.S. App. LEXIS 31160, at \*24 (9th Cir. Dec. 4, 2000) (finding the use of race in admissions to attain a diverse student body in higher education institutions lawful); *Hunter v. Regents of the Univ. of Calif.*, 190 F.3d 1061, 1064 (9th Cir. 1999) (finding that the use of race and ethnicity in an admissions process was justified where the elementary school was research-oriented and dedicated to improving educational quality in urban schools); *Gratz v. Bollinger*, No. 97-CV-75231-DT, 2000 U.S. Dist. LEXIS 18099, at \*40 (E.D. Mich. Dec. 13, 2000) (finding diversity to be a compelling interest that justifies the addition of points to the admissions indices of certain minorities by the University of Michigan).

563. See *Wessmann v. Gittens*, 160 F.3d 790, 795-800 (1st Cir. 1998) (rejecting the diversity rationale in admissions to an elite high school); *Lutheran Church-Missouri Synod v. FCC*, 141

sity rejected in those cases is distinct from that which is proposed here and that which was sanctioned in *Bakke* and the dicta in *VMI* in my judgment. Rather than referring to a raw correlation between status and diversity, diversity as imagined here refers to variety among educational programs, such as the curricula available in charter schools versus that available in conventional schools, together with the value of racial diversity per se.<sup>564</sup> The former type of diversity directly implicates the state's traditional educational policymaking prerogatives, as understood in cases from *Rodriguez* to *Milliken* to *Pitts*.<sup>565</sup> The latter is consistent with the Court's recognition that heightened scrutiny of status-conscious programs need not mean a finding of unconstitutionality.<sup>566</sup>

Educational diversity may provide the best overall justification for status-identifiable deregulated schools. This conception of a state's interest in establishing charter schools is consistent with my understanding that federalism is an independent basis for the presumptive constitutionality of deregulated schools. It also complements the idea that judicial deference to state legislatures' passage of charter school enabling legislation may be warranted by the quasi-public character of some charter schools.

Still, the diversity rationale will not support a status-identifiable charter school that is not narrowly tailored to achieve its purpose. The need for narrow tailoring counsels against states' explicit references to race- or sex-consciousness in charter school legislation. In-

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F.3d 344, 354 (D.C. Cir. 1998) (holding that diversity is not a compelling rationale for employing preferences when awarding broadcast licenses); *Hopwood v. Texas*, 78 F.3d 932, 948 (5th Cir. 1996) (rejecting the diversity rationale in university admissions), *aff'd in part, rev'd in part*, 2000 U.S. App. LEXIS 33523 (5th Cir. Dec. 21, 2000) (remanding for further findings of fact and conclusions of law).

564. An insightful legal analysis of diversity is found in John Charles Boger, *Willful Color-Blindness: The New Racial Piety and the Resegregation of Public Schools*, 78 N.C. L. REV. 1719, 1740-80 (2000) (discussing recent decisions on school assignment in light of the Supreme Court's equal protection jurisprudence); Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2382-88 (2000) (suggesting constitutional difficulties of race-neutral affirmative action). For discussions of recent social science literature on the issue of whether racial diversity positively impacts the school environment, see Patricia Gurin, *The Compelling Need for Diversity in Higher Education*, Expert Report (1999) (expert witness testimony in *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998)), available at <http://www.umich.edu/urel/admissions/legal/expert/-index.html> (on file with the *Duke Law Journal*); see also Michael Kurlaender & John T. Yun, *Is Diversity a Compelling Education Interest? Evidence from Metropolitan Louisville*, at <http://www.law.harvard.edu/groups/civilrights/publications/-louisville.html> (Aug. 2000) (on file with the *Duke Law Journal*).

565. See *supra* notes 431-43 and accompanying text.

566. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995).

stead, states that wish to expand educational opportunity by establishing charter schools, while ensuring equality, should amend statutes in the following manner: avoid references to race or sex, make the means by which charter schools may comply with the antidiscrimination goals that it wishes to advance more explicit, and mandate close administrative oversight of the charter school recruitment process. These suggestions are explicated further in the final part of this Article.<sup>567</sup>

4. *The Significance of Predominantly White and All-Male Charter Schools.* While this Article has counseled against the blanket application of mechanical equal protection formulas to charter schools, courts should be clear that the cultural and legal significance of predominantly white or all-male charter schools is distinct from that of status-identifiable schools attended primarily by racial minorities and women. Under my approach, courts should employ an asymmetrical analysis when considering claims concerning these two categories of schools. Thus, although status-identifiable charter schools that serve historically disfavored groups or promote diversity may, under certain circumstances, be subjected to rational relation review, predominantly white and all-male charter schools should be subject to heightened scrutiny.

The rationale for the different approach to the latter category of schools lies, of course, in the history of white and male domination and resistance to integrated and/or coeducational schools.<sup>568</sup> Whereas many whites commonly shun, and historically have resisted, attending schools where whites are a minority of the student body,<sup>569</sup> this generalization does not apply to minority students. For the same reasons, sponsors of charter schools that are predominantly white should not be able to cloak such schools in the rhetoric of diversity to avoid or defeat challenges to racially imbalanced schools.<sup>570</sup> Since similar history-based arguments can be made with regard to single-sex educa-

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567. See *infra* Part IV.

568. See *supra* notes 19, 156-61, 263-66, 329-31, 398-99 and accompanying text; *infra* note 569.

569. See, e.g., ARMOR, *supra* note 156, at 176, 177, 180, 208; BELL, *supra* note 398, at 624; JENNIFER L. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION 180 & tbl. 2 (1984); Jeffrey R. Henig, *Race and Choice in Montgomery County, Maryland, Magnet Schools*, in CHALLENGE, *supra* note 155, at 129, 131-32; Gary Orfield, *Public Opinion and School Desegregation*, in CHALLENGE, *supra* note 155, at 54, 59.

570. Accord *United States v. Virginia (VMI)*, 518 U.S. 515, 536 n.8 (1996).

tion,<sup>571</sup> courts should be similarly skeptical of gender-conscious education in many cases.

What of the case of all-male academies for at-risk students who are racial minorities? As I have argued throughout this section<sup>572</sup>—as well as in the section above concerning *Garrett v. Board of Education*,<sup>573</sup> and as I will argue below, in the section pertaining to at-risk students,<sup>574</sup> special considerations should apply to such programs. Courts should consider the remedial purposes of these schools an important factor in determining whether heightened or rational relation review should apply; if the court determines that heightened scrutiny applies, because, for instance, the school for minority boys conflicts with a specific provision of a school desegregation order, it might nevertheless find the minority boys' school constitutional, given the ultimate compatibility between the remedial purposes of both the court order and the school. Allegations of intraracial sex discrimination within the context of charter schools would be a more difficult question; however, once again, a reviewing court should consider factors and consequences that weigh for or against heightened scrutiny and a finding of constitutionality, as described above.

#### F. Conclusion

In this part, I have endorsed an equal protection analysis that recognizes the relevance of three considerations to determinations about the constitutionality of deregulated schools, particularly those schools whose student bodies are identifiable on the basis of status. First, rather than assuming that cases from the Burger Court era relating to federalism, education, and status are adverse to efforts to achieve equality—the standard liberal understanding of these cases—*Rodriguez* and *Milliken* should be understood in the post-civil rights era to enhance the ability of democratically empowered citizens to take advantage of state- and local-level educational experimentation. Second, the legislation enabling some deregulated schools may allow them to be understood as quasi-public in status; this designation should be understood, in turn, to suggest deference from courts who review claims against them.

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571. See *supra* notes 19, 329-31 and accompanying text.

572. See *supra* notes 525-41 and accompanying text.

573. See *supra* notes 386-403 and accompanying text.

574. See *infra* notes 620-32 and accompanying text.

Finally, I have argued that cognizance of the relevance of federalism and quasi-public status implies a more functional, rather than formalist, analysis of claims against deregulated schools. A more functional analysis has been explicated here in terms of pragmatism; courts that analyze the constitutionality of status-identifiable charter schools in a manner infused with pragmatism are better suited to address the complex legal and policy issues raised by the states' experiment with deregulated schools. Pragmatic analysis is the antithesis of the mechanical analysis usually dictated by the heightened scrutiny of sex- or race-based classifications. Whereas the traditional suspect-classification doctrine is oriented toward striking down status-conscious schools, when pragmatism plays a role in judicial decision-making, those status-conscious charter schools that are narrowly tailored to meet the needs of their student bodies may pass constitutional muster. Others, not narrowly tailored, will not. This is as it should be; a case-specific analysis of the constitutionality of deregulated schools is consistent with the demands of the Fourteenth Amendment's Equal Protection Clause.

#### IV. LEGISLATIVE SOLUTIONS

In the previous part, I discussed analytical conventions that might aid federal courts in considering claims brought against deregulated schools, especially those schools whose student bodies are identifiable on the basis of status. That discussion was predicated on Part II's critical examination of the Court's equal protection jurisprudence, which is inconsistent in many ways with the goals of state- and local-level educational experimentation that are advanced by the advent of charter schools.

In this part of my discussion, I consider how state legislatures, anticipating the possibility of federal court review of the constitutionality of deregulated schools, may increase the likelihood that their experiment with deregulated schools can withstand scrutiny. The particular goal here is to aid states in reaching their objective of preventing status-based discrimination. At the same time, these suggestions are consistent with states' objectives of expanding educational opportunities for those status groups—racial minorities and women—who historically have suffered state-sanctioned educational disadvantaging and who may continue to have special educational needs.

My suggestions for how state legislatures can diminish the legal jeopardy to which their charter school enabling legislation or par-



ticular charter schools might be subject revolve around the concepts of constructive vagueness and specificity in drafting. In addition, I suggest strong administrative oversight of the charter school recruitment process.

A. *Drafting and Substantive Problems in Status-Conscious Admissions Provisions*

As a predicate to my discussion of how state legislators can improve the drafting of charter school enabling legislation, here I offer a brief discussion of the problems of language and structure found in some statutes which permit or mandate status-consciousness in admissions. For this discussion, I discuss parts of two statutes referenced in Part II, a provision in North Carolina's charter school enabling legislation that requires charter schools to "reasonably reflect" the racial composition of the relevant district,<sup>575</sup> and a provision in New York's law that permits the establishment of single-sex schools.<sup>576</sup> These statutes are similar to, or representative of, the kinds of charter school statutes that have been, and will continue to be, the subjects of equal protection claims in the federal and state courts.<sup>577</sup>

1. *North Carolina's Racial Balance Mandate.* In July of 1998, the North Carolina Department of Education clarified the nature of the racial-balance mandate in the state's charter school legislation. The regulation adopted by the state department of education states that charter schools "shall provide racial balance in their enrollments" and "must have a student body that reflects the racial/ethnic composition of the school system in which it is located."<sup>578</sup> The regulation further states that a given charter school's "percentages" must "fall within the range exhibited by the regular, non-magnet, non-special schools in the district."<sup>579</sup> This regulation thus makes clear the state's commitment to racial balance in charter schools that is akin to the racial ratios common in school desegregation orders.

Nevertheless, neither the state's charter school enabling law or departmental regulations give potential charter school sponsors guid-

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575. N.C. GEN. STAT. § 115C-238.29F(g)(5)(2) (2000).

576. N.Y. EDUC. LAW § 2854(2) (McKinney Supp. 2000).

577. See *supra* notes 101-07 and accompanying text.

578. Complaint at 5, *Healthy Start Educ., Inc. v. Basnight*, (N.C. Sup. Ct. Aug. 14, 1998) (No. 98-CV-09495).

579. *Id.*

ance as to how they are to ensure compliance with the mandate. In fact, the statute appears to make an obvious way of complying with the mandate unlawful. The enabling legislation forbids *all* discrimination on the basis of race or ethnicity, thus implying that even “benign” or “remedial” discrimination<sup>580</sup> cannot be used to meet the mandate’s requirement, while the regulation demands that certain racial percentages be achieved in the student bodies of *every* charter school.

The statute’s apparent forbidding of even benign racial and ethnic discrimination, while mandating racial and ethnic diversity, is made all the more confounding by other aspects of the charter school enabling legislation. In particular, provisions that make enrollment in charter schools a function of students’ and parents’ voluntary choices conflict with the goal of the racial balance mandate.<sup>581</sup> It is clear from both our nation’s historical experience with court-ordered school desegregation,<sup>582</sup> and the failure of charter schools located in predominantly minority neighborhoods to recruit a diverse student bodies<sup>583</sup> (Healthy Start among them<sup>584</sup>), that racially integrated schools usually do not result from people’s private choices. Thus, the voluntariness aspect of the enabling legislation is deeply in conflict with the statute’s racial balance mandate.<sup>585</sup>

The regulation’s contemplation of racial balance also may conflict with provisions in North Carolina’s enabling statute that allow for preferential treatment in admissions for certain students (which are common in many states’ charter school laws).<sup>586</sup> The North Carolina enabling legislation grants preferential treatment in admissions for the children of a member of a charter school’s board of trustees,<sup>587</sup>

580. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235-37 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-500 (1989).

581. See N.C. GEN. STAT. § 115C-238.29F(g)(1)-(2) (2000).

582. See BELL, *supra* note 398, at 550-51, 566-67, 579-81 (discussing whites’ refusal to desegregate in the 1950s and “white flight” from racially diverse cities during the 1960s).

583. See *supra* note 20 and accompanying text.

584. See *supra* notes 108-18 and accompanying text.

585. See *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 29-30 (1969); *Green v. County Bd.*, 391 U.S. 430, 440 (1968); *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 847 (5th Cir. 1966).

586. See Hamilton, *supra* note 37, at 7-8, 85.

587. See N.C. GEN. STAT. § 115C-238.29F(g)(5) (2000). The statute limits the number to 10% of the student body or 20 students, whichever is less, and to the first year of operation. Since admitted students are not required to reapply, the one-year provision is virtually meaningless, because the children of the trustees probably would tend to be among a school’s first

for the siblings of students who are admitted to charter schools,<sup>588</sup> and for the children of a charter school's principal, teachers, and teacher assistants.<sup>589</sup> Since the legislation makes no provision for racial balance among the members of a charter school's board of trustees, its teachers, or teacher assistants, the considerable number of set-asides allowed for their children and the siblings of admitted students may have a significant impact on the racial composition of the student body. Thus, these set-aside provisions may militate against a school's compliance with the racial balance provision.<sup>590</sup>

In addition, the enabling legislation may undercut compliance with the racial balance provision because providing transportation for enrollees is not mandatory. Although the statute specifies that a charter school *may* provide transportation for enrolled students,<sup>591</sup> it does not require schools to provide transportation for students within "the local administrative unit," a term left undefined, which may or may not denote an area greater than neighborhood school district lines.<sup>592</sup> Since school district lines are often either arbitrarily drawn or drawn in such a way as to differentiate between socioeconomic classes and

enrollees. *See id.* § 115C-238.29F(g)(6).

588. *See id.* § 115C-238.29F(g)(5); *see also* MASS. GEN. LAWS ch. 71, § 89(m)-(n) (1996) (granting preferential treatment in admissions for the siblings of students who are admitted to charter schools); N.J. STAT. ANN. § 18A:36A-8(c) (West 1999) (same).

589. *See* N.C. GEN. STAT. § 115C-238.29F(g)(5).

590. The conflict between these set-asides and the diversity mandate would create a novel and important constitutional issue for reviewing courts: namely, the legal significance of set-asides. Thus far, such programs or policies have only been the subject of litigation when designed for women and minorities, not when whites are the beneficiaries. *See, e.g.,* Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (considering set-aside programs benefiting women and minorities); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (same).

591. *See* N.C. GEN. STAT. § 115C-238.29F(h).

592. The statute reads:

The charter school *may* provide transportation for students enrolled at the school. The charter school *shall* develop a transportation plan so that transportation is not a barrier to any student who resides in the local school administrative unit in which the school is located . . . [the school is] not required to provide transportation to any student who lives within one and one-half miles of the school.

*Id.* (emphasis added); *see also* MASS. GEN. LAWS ANN. ch. 71, § 89(ff) (West 2000) (mandating that transportation be provided to charter school students "who reside in the school district in which the charter school is located" but forbidding the provision of transportation beyond the limitations established by the local school committee). *But see* MINN. STAT. ANN. § 124D.10(16)(c) (West 2000) (requiring school districts to provide transportation to charter schools, where students reside in the same district in which the charter school is located, but also permitting the provision of transportation to students who reside in districts other than the one in which the charter school is located).

rac<sup>593</sup> school desegregation orders typically have included mandatory transportation provisions.<sup>594</sup> The legislature's failure to include provisions in charter school enabling legislation mandating the provision of transportation to applicants outside of the neighborhood school district, and perhaps even across district lines, may well undermine compliance with its racial balance mandate.

2. *New York's Single-Sex Provision.* Next, let us consider the provision in New York's charter school enabling legislation which provides that "nothing in this article shall be construed to prevent the establishment of a single-sex charter school or a charter school designed to provide expanded learning opportunities for students at-risk of academic failure."<sup>595</sup> While the term "at-risk" does not necessarily indicate students of a specific race or sex, the single-sex provision explicitly gives the imprimatur of the state to status-based segregation in education.

As discussed in Part III, equality is the touchstone of the Court's assessment of whether separate schools for women and men may be considered lawful.<sup>596</sup> In recent cases, the Court has raised the bar regarding when sex-based discrimination of any variety will be tolerated.<sup>597</sup> Considered in light of the prevailing doctrinal norm, New York's single-sex statute is not as clearly written as is advisable. The problem arises in part from the sparseness of the provision's language and the absence of regulations to fill in the holes in the statutory lan-

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593. See BELL, *supra* note 398, at 560-70 (discussing boundaries drawn for segregative purposes).

594. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 29-31 (1971) (upholding a district court's mandate requiring a school district to bus children to desegregate schools).

595. N.Y. EDUC. LAW § 2854 (McKinney Supp. 2000); cf. VA. CODE ANN. § 22.1-212.1:1 (Michie 2000) ("Consistent with constitutional principles, a school board may establish single-sex classes in the public schools of the school division."); see also *supra* notes 77, 106 and accompanying text (providing a discussion of states with similar provisions).

596. See *United States v. Virginia (VMI)*, 518 U.S. 515, 532 (1996) (describing equal protection in the sex discrimination context); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982) (subjecting the university's admissions policy to equal protection scrutiny because it expressly discriminated between applicants based on sex); *Vorchheimer v. School Dist.*, 532 F.2d 880, 885-87 (3d Cir. 1976) (reasoning that "the special emotional problems of the adolescent years are matters of human experience and have led some educational experts to opt for one-sex high schools . . . [and] [w]hile this policy has limited acceptance on its merits, it does have its basis in a theory of equal benefit and not discriminatory denial," and overturning a district court injunction mandating admission of a female student to an all-male public high school), *aff'd by an equally divided court*, 430 U.S. 703 (1977) (per curiam).

597. See *supra* notes 321-67 and accompanying text.

guage. The legislature's decision merely to state that sex-segregated charter schools are not prohibited leaves important substantive matters regarding implementation of the provision unaddressed.

The most conspicuous problem with the section is that it makes no provision whatsoever for the equality of sex-segregated charter schools in the event that they are established. The area of most concern relates to equality of resources. Ideally, the legislature would have included a provision in its enabling legislation stating something to the effect that any single-sex charter school established pursuant to section 2854 "shall" receive funding and resources at least equal to that received by coeducational alternative and/or traditional public schools and vice versa.<sup>598</sup> That the legislature fails to include such a provision is especially remarkable given the detailed provisions relating to funding otherwise contained in the enabling legislation<sup>599</sup> and the obvious equal protection implications of different levels of funding for charter versus noncharter schools.<sup>600</sup> There is a vast literature about equal protection claims brought in state courts in the years since *Rodriguez*; in some of these cases, state courts have determined that inequities in funding deny students residing in districts with fewer resources equal protection of the laws.<sup>601</sup>

Instead of mandating equality with respect to the funding of single-sex charter schools, the New York charter law seems not only to condone, but also to encourage inequality in the resources meted out to charter schools. The enabling legislation has this effect because,

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598. Education codes contain complex formulas for establishing equity among school districts. However, the presence of gift clauses and the fact that special laws govern single-sex institutions might require more specific rules.

599. See N.Y. EDUC. LAW § 2856(1) (McKinney Supp. 2000) (providing that the school of residence shall directly pay the charter school 100% of the funding to which the school is entitled pursuant to a formula specified elsewhere in the statute (including federal and state money for special needs students) for each student enrolled in the charter school who resides in the school district); N.Y. STATE FIN. LAW § 97-sss (McKinney Supp. 2000) (providing for a charter school stimulus fund).

600. Much of the legal literature that is beginning to develop on charter schools, like the literature on school choice, relates to the legal significance of funding provided to charter schools as opposed to noncharter public schools. See, e.g., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, SCHOOL CHOICE 25-27 (1992) (concluding that statewide interdistrict choice programs tend to increase the "gap between rich and poor districts"); Note, *The Limits of School Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality*, 109 HARV. L. REV. 2002, 2004-06 (1996) (discussing the possibility that vouchers will cause traditional public schools to deteriorate by causing funding levels to decline).

601. See, e.g., *Abbott v. Burke*, 643 A.2d 575, 576-77 (N.J. 1994) (striking down a law that failed to guarantee equal funding between school districts).

like many other states' enabling legislation,<sup>602</sup> it includes a gift clause that anticipates and authorizes contributions to charter schools from private sources.<sup>603</sup> This gift clause makes the likelihood of uneven funding of charter schools, including coeducational charter schools vis-à-vis single-sex ones, a distinct possibility.<sup>604</sup>

Regardless of whether a single-sex school receives fewer or greater resources than coeducational charter schools or traditional public schools, the probability of equal protection litigation is high. Both conditions may give rise to arguments of disparate treatment of similarly situated students by particular schools or school districts within the New York state system.<sup>605</sup> Since New York's school funding policies and practices are the subject of an ongoing lawsuit,<sup>606</sup> the legislature's decision not to mandate equality among charter schools, but to include a gift clause that seems to encourage inequality, is particularly confounding.

A more difficult area not addressed by the single-sex provision concerns curricula and academic requirements. This area is more conceptually and practically difficult than the funding issue because of the autonomy that deregulated schools are supposed to enjoy. One of the most important aspects of a charter school board's power and the thing that most distinguishes charter schools from traditional ones is autonomy with regard to educational programming. Thus, legislative

602. See Hamilton, *supra* note 37, at 7-8, 85.

603. See N.Y. EDUC. LAW § 2856(3) (McKinney Supp. 2000):

Nothing in this Article shall be construed to prohibit any person or organization from providing funding or other assistance to the establishment or operation of a charter school. The board of trustees of a charter school is authorized to accept gifts, donations or grants of any kind made to the charter school and to expend or use such gifts, donations or grants in accordance with the conditions prescribed by the donor; provided, however, that no gift, donation or grant may be accepted if subject to a condition that is contrary to any provision of law or term of the charter.

604. Like charter schools generally, single-sex schools usually are established because of the interest of a particular individual or group, thus increasing the likelihood of gift-giving by special interests. See, e.g., Levit, *supra* note 254, at 451-53 & nn.1-6, 464-69 (discussing various factors, including perceived disadvantages to girls in schools, that animate parents, experts, and others to become interested in and establish single-sex schools or classrooms).

605. In a typical equal protection claim, a court must determine whether legislation that imposes special burdens or benefits on certain classes is justified, for example, discriminating between charter schools versus noncharter schools. See GUNTHER, *supra* note 414, at 601-08.

606. See Merri Rosenberg, *Suit Due on School Financing*, N.Y. TIMES, Sept. 6, 1998, at 14C (discussing a suit that challenges the inadequacy of the present school funding formula for providing sufficient education for New York's public school students). A trial court recently sided with the plaintiffs in the suit, finding the state's school formula unconstitutional. See Abby Goodnough, *New York City Is Shortchanged in School Aid, State Judge Rules*, N.Y. TIMES, Jan. 11, 2001, at A1.

mandates in this area may frustrate the central purpose of deregulated education.<sup>607</sup>

Nevertheless, where the state permits sex-segregated charter schools, *VMI* and prior cases are clear that it must take steps to ensure that this policy does not contravene the principle of equal protection.<sup>608</sup> Thus, the legislature might have included a provision mandating that no single-sex charter school established pursuant to the enabling legislation is organized around any sex-stereotyping theme or curriculum.<sup>609</sup> Such a simple directive would have left a charter school's management wide discretion in educational programming intact, while prescribing equality in curricula for coeducational as well as single-sex schools, consistent with constitutional principles.

A final glaring example of the legislature's failure to address problems of implementation raised by its sanctioning of single-sex charter schools relates to recruitment. The legislature did not address the question of how one establishes a single-sex charter school without discriminating in terms of recruitment and admission of students. The answer to this question, of course, is that one does not. Yet, New York's charter school law and regulations are silent on what kinds of outreach programs or special appeals to applicants are permissible and do not violate of the enabling legislation's antidiscrimination provisions.<sup>610</sup> The lack of guidance about recruitment and admissions offered to those desirous of establishing single-sex charter schools invites the development of ad hoc and non-uniform processes. Such variable processes place individual single-sex charter schools (and such schools as a class) in jeopardy, since, as a general matter, subjective and non-uniform processes are more vulnerable to equal protection challenges than are objective and uniform processes.<sup>611</sup>

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607. See *supra* notes 40-46 and accompanying text.

608. See *supra* notes 321-54 and accompanying text.

609. See *United States v. Virginia (VMI)*, 518 U.S. 515, 533 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723, 730 (1982).

610. See N.Y. EDUC. LAW § 2854(2)(a) (McKinney Supp. 2000) (providing that charter schools "shall not discriminate against any student, employee or other person on the basis of ethnicity, national origin, gender, or disability or any other ground that would be unlawful if done by a school" and that "[a]dmission of students shall not be limited on the basis intellectual ability, measures of achievement or aptitude, athletic ability, disability, race, creed, gender, national origin, religion, or ancestry"); *Id.* § 2854(2)(b) (providing that "[a]ny child who is qualified under the laws of this state for admission to a public school is qualified for admission to a charter school [to capacity]" and that, in the event that seats are filled, admission is by lottery).

611. See generally *Brown-Nagin*, *supra* note 346, at 365-66, 374-80 (1998) (discussing the use and misuse of statistical evidence in an equal protection case involving affirmative action in education).

In sum, New York's single-sex enabling provision, like North Carolina's racial balance mandate, though well intentioned, is not well conceived or well drafted. This statutory vagueness creates problems of constitutional significance.

*B. The Significance of Statutory Vagueness*

Although vagueness in legislative drafting sometimes is considered positive,<sup>612</sup> vagueness in charter school enabling legislation may be detrimental to the fulfillment of states' purposes. Like criminal laws found unconstitutional on void-for-vagueness grounds,<sup>613</sup> provisions of charter school enabling legislation that are so vague that the means of complying with them are unclear may make the provisions futile as a practical matter. They may be meaningless both to those upon whom they impose legal duties and unclear to courts that review their constitutionality.<sup>614</sup>

In the case of the racial balance provision contained in North Carolina's charter school law, the legislature has failed to provide guidance to schools about what means may be used to comply with the mandate that schools "reasonably reflect" the racial and ethnic composition of the school districts in which they are situated.<sup>615</sup> This vagueness may mean, practically, that schools make little effort to attain a racially balanced student body. Boards of trustees may be too confused about their obligations even to attempt to comply with this putative mandate; or, charter schools may never be founded due to

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612. See WILLIAM N. ESKRIDGE & PHILLIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION* 108-09 (1995).

613. In the context of criminal law, the void-for-vagueness doctrine requires fair or definite warning of proscribed conduct prior to punishment. See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."); *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (holding that law "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law").

Vagueness issues also arise in the administrative law area; an agency's failure to ensure that a predeprivation hearing rests on sufficiently specific standards for taking away benefits may result in the agency being prohibited from exercising such unbridled discretion, especially when fundamental constitutional rights are at issue. See *Arnett v. Kennedy*, 416 U.S. 134, 158-63 (1974) (observing the problematic aspects of vague statutory language); see also Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 418-22 (1989) (discussing interpretative problems that vagueness causes for social and economic regulation).

614. See *Grayned*, 408 U.S. at 108-09.

615. See *supra* notes 99-118 and accompanying text.



prospective sponsors' wariness of the provision's requirements. Such eventualities would be most unfortunate in states such as North Carolina that not only have a history of racial discrimination in the public schools, but also a history of academic underachievement across racial groups.<sup>616</sup> Similarly, the New York state legislature's effort to experiment with single-sex charter schools should not be stymied due to its failure to provide guidance to schools concerning what must be done so that sex-conscious schools will comply with the mandates of equal protection.<sup>617</sup> In turn, these failures may lead to litigation that might have been avoided (as in North Carolina), to the striking down of enabling legislation in its entirety (as in South Carolina),<sup>618</sup> or to the prevention of school openings (as in Benton Harbor, Michigan).<sup>619</sup> All of these results, of course, are adverse to state legislatures' purpose in enacting charter school legislation in the first place—experimentation in education.

### C. *Improving the Drafting and Conception of Enabling Legislation*

Fortunately, many of these technical deficiencies can be corrected. Some substantive conflicts between federal antidiscrimination norms and charter school enabling legislation can also be ameliorated by state legislatures through amendments and/or by drafting regulations that clarify the meaning of the legislation.

1. *The Merits of Greater Specificity.* One approach that state legislatures can take to resolving some of these problems is to provide greater guidance to charter school sponsors regarding compliance with racial balance mandates or permissive single-sex provisions in a manner that is consistent with federal equal protection doctrine. The following suggestions relate to the most obvious drafting defects in these statutes.

Where states' enabling legislation includes antidiscrimination provisions similar to that contained in North Carolina's law, drafters should be clear about whether the provision is a mandate or merely encourages racial balance. In either case, but especially if the provi-

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616. See generally CHAFE, *supra* note 89 (discussing efforts to desegregate schools in North Carolina and the state's racial history).

617. See *supra* notes 595-611 and accompanying text.

618. See *supra* notes 108-18 and accompanying text for North Carolina; *supra* notes 126-33 for South Carolina.

619. See *supra* notes 119-25 and accompanying text.

sion is to be considered a mandate, legislators should be specific about the provision's nature. Specificity about the nature of the provision requires, at a minimum, clarity about the meaning of racial imbalances under various circumstances. For example, drafters should differentiate between requirements for charter schools in school districts that are subject to court-ordered decrees concerning racial balance or finance and those that are not.

Moreover, it is important for legislators to anticipate the extent to which compliance with racial balance or racial diversity provisions is probable and respond accordingly. Factors that should be considered include the demographic make-up of a state; the density of the population, including various racial groups in a state's regions; the location of charter schools; the number of charter schools that may be established in a state or region; as well as other relevant provisions of the enabling legislation, particularly those that grant admissions preferences to certain classes of students. Mandates or permissive provisions concerning racial balance or diversity should accommodate the probable effect of these factors on the goal of racial balance to the extent feasible. For instance, legislatures might determine that deregulated schools may only be located at sites equidistant between the cities and the suburbs if it is likely that allowing schools to be located in either the central cities or the suburbs would adversely affect the racial composition of schools. Alternatively, legislatures might choose to ensure that any child who wishes to attend a charter school that is not convenient to his or her home is provided transportation to the school.

With respect to provisions of enabling legislation that permit the establishment of single-sex schools, including those that also are racially identifiable, legislators must ensure that such schools are substantially equal to other schools. In particular, these charter schools must be comparable to other schools with respect to funding. Equality and/or adequacy in funding is especially important where states are subject to decrees concerning their methods of financing public schools and/or decrees relating to school desegregation. Additionally, it is important that no sex-stereotyping is apparent with respect to curricula used in deregulated schools that cater to same-sex, racially identifiable students.

Where enabling legislation permits or mandates the establishment of status-conscious schools, drafters should suggest kinds of initiatives that are permissible means of status-conscious recruitment and programming. Guidelines concerning appropriate methods of re-

cruiting students should be clear. Perhaps regulations should require that opportunities for admission to charter schools are made known through diverse media, including those that are more likely to gain the attention of various subsets of the student population. Moreover, drafters should state whether admission slots may be filled, at least in part, through status-conscious admissions preferences (that is, beyond those granted to the children of members of charter schools' boards of trustees and the like). If so, regulators must suggest ways in which such programs may be narrowly tailored so as to avoid offending doctrinal norms established in the Court's affirmative action precedent.

2. *Constructive Vagueness Through "At-Risk" Statuses.*

Legislators also might consider the propriety of statutory endorsements of schools that target at-risk students, rather than mandates relating to race or provisions permitting single-sex education. I strongly endorse this approach as practically effective and the most constitutionally defensible of the alternatives for status-identifiable schools discussed in this Article.

Unlike schools established pursuant to a deliberate policy of permitting single-sex schools, or schools overwhelming minority as a result of targeted appeals, charter schools for at-risk students would not be predicated upon suspect classifications.<sup>620</sup> Thus, these schools would not seem to warrant heightened scrutiny if challenged on equal protection grounds under existing doctrinal conventions, or might escape a finding of unlawfulness even if subjected to heightened scrutiny.<sup>621</sup> As such, targeting at-risk populations may be a constructive

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620. See, e.g., FLA. STAT. ANN. § 228.056 (6)(c)(2) (West 1998) (allowing charter schools to limit enrollment to target academically at-risk students); 105 ILL. COMP. STAT. ANN. 5/27A-3 (West 1998) (defining an at-risk pupil as one who, "because of physical, emotional, socioeconomic, or cultural factors, is less likely to succeed in a conventional . . . environment"); N.Y. EDUC. LAW § 2854(2)(a) (McKinney Supp. 2000) (stating "nothing in this Article shall be construed to prevent the establishment of . . . a charter school designed to provide expanded learning opportunities for students at-risk of academic failure"); VA. CODE ANN. § 22.1-212.5(b) (Michie 2000) (defining at-risk populations as having a "physical, emotional, intellectual, socioeconomic, or cultural risk factor . . . which . . . negatively influence[s] educational success").

621. See, e.g., *United States v. Paradise*, 480 U.S. 149, 171 (1987) (Brennan, J., plurality opinion) (requiring consideration of whether race-neutral means, rather than race-conscious ones, could accomplish a result); *Podberek v. Kirwan*, 38 F.3d 147, 161 (4th Cir. 1994) (allowing that racial disparities may be remedied where socioeconomic disparities are implicated); see also *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999) (applying strict scrutiny only where "race was the 'predominant factor' motivating the legislature's districting decision"); *Bush v. Vera*, 517 U.S. 952, 958 (1996) (O'Connor, J., plurality opinion) (applying strict scrutiny where plaintiffs prove that "other legitimate principles were 'subordinated' to race") (quoting *Miller v. Johnston*, 515 U.S. 900, 916 (1995)); *Shaw v. Reno*, 509 U.S. 630, 642 (1993) ("This Court has

way of providing unique educational opportunities to needy populations in a manner that does not offend either the law or shared community values.

One federal court that has considered an equal protection challenge to such a charter school found that it did not violate the Equal Protection Clause, in part because it found no reason to apply strict scrutiny. In *Villanueva v. Carere*,<sup>622</sup> a federal district court considered an equal protection claim by a group of Hispanic parents that was based on the claim that the establishment of certain charter schools had led to a decline in educational opportunities in their school district by leading to the closing of two neighborhood schools.<sup>623</sup> The district court found for the defendant school district,<sup>624</sup> and the Tenth Circuit affirmed.<sup>625</sup>

The court of appeals began its review of the plaintiffs-appellants' claims on the assumption that acts of state legislatures are constitutional,<sup>626</sup> and stressed the importance of allowing the school district to experiment with innovative approaches to educational reform.<sup>627</sup> Acknowledging its lack of expertise in educational policy and that no fundamental right or suspect class was implicated in the case,<sup>628</sup> the court deferred to the state legislature's decisionmaking regarding the propriety of charter schools targeted for at-risk students.<sup>629</sup> Under these particular circumstances, the Tenth Circuit did not find that the decision to close neighborhood schools was motivated by intentional discrimination.<sup>630</sup> Thus, it affirmed the decision below. The *Villanueva* court's approach is similar to the kind of pragmatic analysis that I have endorsed in this Article.<sup>631</sup>

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never held that race-conscious state decision-making is impermissible in *all* circumstances.”).

622. 873 F. Supp. 434, 448 (D. Colo. 1994), *aff'd*, 85 F.3d 481 (10th Cir. 1996).

623. In addition to their Fourteenth Amendment claim, the parents claimed that these actions violated their rights under Title VI because the closing had a disparate impact on Hispanics. The court rejected this claim as well. *See id.* at 450-51.

624. *See id.* at 448 (“Encouraging the development of Charter Schools to address the needs of at-risk students does not warrant heightened scrutiny and does not violate the Equal Protection Clause of the United States Constitution.”).

625. *See Villanueva v. Carere*, 85 F.3d 481, 484 (10th Cir. 1996).

626. *See id.* at 487.

627. *See id.* at 487-88.

628. *See id.* at 488.

629. *See id.*

630. *See id.* at 486.

631. Some are less optimistic about the possibility that even a race-neutral action that promotes racial diversity is defensible under the Court's affirmative action precedent. *See* Chapin Cimino, Comment, *Class-Based Preferences in Affirmative Action Programs After Miller v.*

To advise legislatures to consider the viability of charter schools for at-risk students is not to suggest that all courts will view such provisions as the *Villanueva* courts did. Under certain circumstances, courts may find that deregulated schools that target at-risk students are subject to heightened scrutiny. Moreover, targeting at-risk populations would not seem a likely substitute for legislatures' efforts to permit the establishment of single-sex charter schools.

Nevertheless, in those cases where the notion of at-risk students may serve as a proxy for the populations that may be drawn to certain deregulated schools, this designation may be useful. Durham's Healthy Start Academy<sup>632</sup> is a case in point. If North Carolina's enabling legislation contained a provision that permitted the establishment of charter schools targeted to at-risk populations, perhaps the school would not be in jeopardy of closure because of the enabling legislation's racial balance provision. Even if the school were challenged on equal protection grounds, there would seem to be no basis for subjecting the legislation enabling the establishment of the school to heightened scrutiny, thus, the legislature's actions likely would be found lawful under the rational relation standard of review.

Of course, the situation may be more complicated in jurisdictions with extant desegregation or finance orders. In those cases, courts may be aided in their analyses by the pragmatism-based arguments advanced in Part III.

3. *Administrative Accountability.* My final recommendation to state legislatures is that they provide for the establishment of a strong administrative structure to monitor matters that might be of interest as a matter of law, and therefore, as a matter of policy. It would be useful, for example, to establish a procedure for monitoring the racial composition (actual or projected) of charter schools' student bodies, both during the process of proposing and establishing charter schools,

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Johnson: *A Race-Neutral Option, or Subterfuge?*, 64 U. CHI. L. REV. 1289, 1297 (1997); Forde-Mazrui, *supra* note 564, at 2333-34, 2338-48. *But see id.* at 2364-81 (arguing that a race-neutral action designed to remedy past discrimination should be considered lawful). For all of the reasons discussed in this part, however, I find the case of deregulated education distinct; thus, I have argued, the precedent applicable in the school desegregation, single-sex education, or affirmative action contexts should not be understood as generally applicable to status-identifiable charter schools. Even assuming that some find my arguments concerning the special character of deregulated schools unpersuasive, however, it still is not clear that courts should apply the precedent on affirmative action in higher education to elementary and secondary schools designed to reach at-risk students uniformly.

632. *See supra* notes 108-18 and accompanying text.

as well as after their opening. Keeping track of the number of applications received by different subsets of students in various areas of a state would be a means of determining how to fashion successful efforts to recruit diverse student bodies. In addition, these statistics could be used to determine whether charter schools are complying with the antidiscrimination provisions that typically are contained in charter school enabling legislation. Information on the racial composition of faculty and staff of charter schools should be collected for the same reasons.<sup>633</sup>

### CONCLUSION

To many, the current experiment with deregulated education offers a possibility for an educational renaissance. This experiment is threatened, however, by state legislators' failures in drafting charter school legislation and by challenges to deregulated education on equal protection grounds in the federal (and state) courts.

Because the Supreme Court's equal protection jurisprudence is based on inflexible and inadequate conceptions of racial and sex equality—concepts predicated on the country's history of state-sanctioned discrimination—states' experiment with charter school legislation is likely to be viewed skeptically by federal courts. This is especially true if the charter school provisions at issue mandate or encourage the establishment of status-conscious institutions—even if those institutions are designed to remedy observable conditions of social disadvantage.

Resolving the conflict between federal law construing the federal Equal Protection Clause and the state's constitutionally protected authority to manage the nation's public educational systems requires pragmatism. Realizing the limitations of the Court's current equal protection jurisprudence, federal courts that review status-conscious charter schools or enabling legislation would be wise to consider all factors and consequences implicated in each particular case, rather

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633. The federal government's administrative structure for supervising compliance with federal civil rights laws provides a useful example that states might follow in this regard. The Office for Civil Rights of the United States Department of Education has been collecting data concerning the racial composition and socioeconomic status of students who attend charter schools, as compared to those who attend conventional public schools. This project is related to school districts subject to school desegregation orders, orders pertaining to students with limited English proficiency, or compliance with antidiscrimination norms contained in the federal disability laws, Title VI of the 1964 Civil Rights Act, or Title IX of the 1972 Education Amendments. The data collected by the Department of Education is presented in *supra* notes 67-69.

than presuming that status-conscious schools are subject to heightened scrutiny, and therefore, are unconstitutional.

The state legislatures may also help to ameliorate the conflicts between federal law and the policy of deregulation that many are advancing. Legislatures must decrease the extent to which important provisions of charter school laws give inadequate guidance to sponsors regarding how to comply with antidiscrimination norms, or contain status-based provisions that might be more compatible with federal law if rewritten to focus on at-risk statuses.

The resolution of these issues of law and policy is only as important as the country's future. It is a future whose promise was imagined in the Constitution from its inception, as Justice Brandeis understood. Thus, resolving these matters does not require a radical solution. Most of all, what is required is a sustained judicial effort to interpret the Fourteenth Amendment's Equal Protection Clause in a functional manner. A functional interpretation should cohere with state legislators' prerogative of experimenting with an innovative method of achieving educational excellence and remedying status-related academic disadvantage.