

# **Charters, Choice, and the Constitution**

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## **INTRODUCTION**

By the early 1990s, a strong market-based ideology had taken over education reform circles in the United States.<sup>1</sup> Just as it was argued that banks and derivative markets needed freedom from regulation to innovate, so apparently did America's schools.<sup>2</sup> In this heady time of a political third way—the notion that the best public policy was neither liberal nor conservative—choice and competition were touted as the path to improve American education, particularly for the least fortunate. The argument was that the K–12 educational system, the largest part of state and local budgets, constituted a non-competitive monopoly supported by taxes that were so high that they stunted growth and innovation.<sup>3</sup> Hence, competitive

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<sup>1</sup> See generally John E. Chubb and Terry M. Moe, *Politics, Markets, and America's Schools* (Brookings 1990); Jeffrey R. Henig, *Rethinking School Choice: The Limits of the Market Metaphor* (Princeton 1994); Diane Ravitch, *Reign of Error: The Hoax of the Privatization Movement and the Danger to America's Public Schools* (Knopf 2013); Herbert Gintis, et al, Book Review, *Politics, Markets, and America's Schools*, 12 British J L & Eq 381 (1991).

<sup>2</sup> See generally Chubb and Moe, *Politics, Markets, and America's Schools* (cited in note 1); Henig, *Rethinking School Choice* (cited in note 1); Ted Kolderie, *Chartering Diversity*, 9 Eq & Choice 28 (1992).

<sup>3</sup> See generally Kolderie, *Chartering Diversity*, 9 Eq & Choice 28 (cited in note 2); Ted Kolderie, *Beyond Choice to New Public Schools: Withdrawing the Exclusive Franchise in Public Education* (Progressive Policy Institute Nov 1990), online at <http://files.eric.ed.gov/fulltext/ED327914.pdf> (visited Oct 18, 2014); Ted Kolderie, *What Do We Mean by "Privatization"?*, Society 50–51 (Sept/Oct 1987), online at [http://download.springer.com/static/pdf/778/art%253A10.1007%252FBF02695576.pdf?au\\_th66=1413666270\\_304a2c70a52023b49005418f31942d23&ext=.pdf](http://download.springer.com/static/pdf/778/art%253A10.1007%252FBF02695576.pdf?au_th66=1413666270_304a2c70a52023b49005418f31942d23&ext=.pdf) (visited Oct 18, 2014).

market-based education reforms promised more efficient schools, lower taxes, and a stronger economy all in one go.<sup>4</sup> When this logic was combined with the argument that traditional educational practices were responsible for the dismal outcomes in the nation's economically and racially segregated urban school systems, the momentum for change was overwhelming. The lack of any concrete evidence that such ideas might work did nothing to slow the speed with which they took hold.

Between 1954 and 1990, "choice-based" traditional education strategies were struck down one by one by the United States Supreme Court.<sup>5</sup> Since 1990, a new wave of reformers—charter school and open enrollment advocates—have adopted much of the same market-based rhetoric. Unfortunately, when implemented without restraints, the new choice strategies also share many of the same outcomes with the earlier "reforms"—especially economic and racial segregation. Ironically, both charter schools and open enrollment "reforms" were implemented first and with few restraints in Minnesota, a state that had been a civil rights leader in earlier years. This Article discusses the evolution of these school choice strategies and their consequences.

## I. THE BIRTH OF CHARTER SCHOOLS IN MINNESOTA

### A. An Early Civil Rights Leader

Minnesota was a national leader in the civil rights movement and was perennially one of the states with the highest achieving public schools. In early statehood, Minnesota's abolitionist congressional leaders, along with those from New England, urged President-elect Lincoln to brook no compromise with the South on slavery in order to prevent secession.<sup>6</sup> In 1869, its legislature was the second after the Civil War to outlaw racial segregation in its public schools.<sup>7</sup>

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<sup>4</sup> See generally Kolderie, *Beyond Choice to New Public Schools* (cited in note 3).

<sup>5</sup> See Part II.

<sup>6</sup> See generally Roman J. Zorn, *Minnesota Public Opinion and the Secession Controversy, December, 1860–April, 1861*, 36 Miss V Hist Rev 435 (1949).

<sup>7</sup> See Davison M. Douglas, *Jim Crow Moves North: The Battle over Northern School Segregation, 1865–1954* 85 (Cambridge 2005). See generally William D. Green, *A Peculiar Imbalance: The Fall and Rise of Racial Equity in Early Minnesota* (Minn Hist Soc 2007).

Clarence Mitchell, Roy Wilkins, and Whitney Young—and several other national African American civil rights leaders—were educated at the University of Minnesota and began their civil rights careers pushing Minnesota to early national leadership.<sup>8</sup> Minneapolis Mayor Hubert Humphrey signed the nation's first fair housing and fair employment practices ordinances and led the effort to include a strong civil rights plank in the 1948 Democratic platform—a moment many see as the beginning of the Democratic Party's post-war commitment to civil rights legislation.<sup>9</sup> Humphrey was a central actor in the passage of the 1957, the 1960, and, most importantly, the 1964 Civil Rights Acts<sup>10</sup> as a senator and in the Voting Rights Act<sup>11</sup> and Fair Housing Act<sup>12</sup> as Vice President. Walter Mondale was the chief Senate author of the 1968 Fair Housing Act and one of the Senate's great "civil rights lions."<sup>13</sup>

Minnesota Republicans from the Civil War through the 1980s were also civil rights champions. Governor Elmer L. Anderson championed and signed the nation's first state human rights law.<sup>14</sup> All of Minnesota's Republican congressional representatives supported each of the civil rights bills passed between 1950 and 1980. President Nixon's Supreme Court appointees from Minnesota—Warren Burger and Harry Blackman—angered him when they authored decisions that created tools to dramatically increase school integration throughout the United States.<sup>15</sup> While Burger would move to the

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<sup>8</sup> See generally Denton L. Watson, *Lion in the Lobby: Clarence Mitchell, Jr.'s Struggle for the Passage of Civil Rights Laws* (Morrow 1990); Nancy J. Weiss, *Whitney M. Young, Jr., and the Struggles for Civil Rights* (Princeton 1989); Roy Wilkins and Tom Mathews, *Standing Fast: The Autobiography of Roy Wilkins* (Viking 1982).

<sup>9</sup> See generally Carl Solberg, *Hubert Humphrey: A Biography* (Norton 1984); Robert A. Caro, *The Years of Lyndon Johnson: Master of the Senate* (Random House 2002).

<sup>10</sup> Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 241, codified at 42 USC § 2000 et seq.

<sup>11</sup> Voting Rights Act of 1965, Pub L No 89-110, 79 Stat 437, codified as amended at 42 USC § 1971 et seq.

<sup>12</sup> Title VIII of the Civil Rights Act of 1968, Pub L No 90-284, 82 Stat 81, codified as amended at 42 USC § 36 et seq.

<sup>13</sup> See generally Walter F. Mondale and David Hage, *The Good Fight: A Life in Liberal Politics* (Scribner 2010).

<sup>14</sup> See generally Elmer L. Anderson, *A Man's Reach* (Minnesota 2000) (L. Sturdevant, ed.).

<sup>15</sup> See generally Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (Simon and Schuster 1979). See also David S. Tatel, *Judicial Methodology, Southern School Desegregation and the Rule of Law*, 79 NYU L Rev 1071,

right, Harry Blackmun became one of the Court's dependable proponents of school integration.<sup>16</sup> As recently as 1995, a Republican Governor, Arne L. Carlson, signed a region-wide fair housing measure for the Twin Cities.<sup>17</sup>

In 1971, after a federal court declared the Minneapolis schools *de jure* segregated, the legislature responded with alacrity by authorizing a state administrative integration rule that outlawed *de facto* segregation and tied state school aid to integrated schools.<sup>18</sup> The court strategically dissolved its jurisdiction in reliance on this rule, but never declared the district unitary,<sup>19</sup> securing a clear legal basis to maintain integration in perpetuity.<sup>20</sup>

The state government on a bi-partisan basis created a metropolitan level government and, without a court order, implemented the nation's most effective pro-integrative fair housing program, Metropolitan Council Policy 13/39 from 1971–1986.<sup>21</sup> In 1991, there were virtually no non-white segregated schools in the Twin Cities and Minnesota's public school system, which, by virtue of its students' achievement levels, was among the best in the nation.

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1097 (2004).

<sup>16</sup> See Paul Dimond, *Beyond Busing: Inside the Challenge to Urban Segregation* 58 (Michigan 1985). See generally Paul Dimond, *Symposium Brown v. Board of Education and Its Legacy: A Tribute to Thurgood Marshall: Panel II: Civil Rights and Education After Brown: Concluding Remarks*, 61 Fordham L Rev 63 (1992).

<sup>17</sup> See Myron Orfield, *Metropolitics: A Regional Agenda for Community and Stability* 149–52 (Brookings 1997); Minn Stat § 473.25 et seq.

<sup>18</sup> See Minnesota Department of Education, *Integration of Racially Isolated School Districts*, Minn Admin Rule 3535.0170 (Sep 26, 2007), online at <https://www.revisor.mn.gov/rules/?id=3535.0170> (visited Oct 18, 2014); Myron Orfield, *Choice, Equal Protection, and Metropolitan Integration: The Hope of the Minneapolis Desegregation Settlement*, 24 L & Ineq J 269, 318–19 (2006).

<sup>19</sup> In *Board of Education of Oklahoma City Public Schools, Independent School District No 89, Oklahoma County, Okla v Dowell*, 498 US 237, 244–46 (1991), the Supreme Court declared that a specific and clear finding of unitary status must be made before the parties can assume that the court's injunction is terminated.

<sup>20</sup> See Cheryl Heilman, *Booker v Special School District No. 1: A History of School Desegregation in Minneapolis, Minnesota*, 12 L & Ineq J 127, 171–72 (1993).

<sup>21</sup> See Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 Fordham Urban L J 877, 919 (2006), citing Carrie Daniel, Note, *Land Use Planning—The Twin Cities Metropolitan Council: Novel Initiative, Futile Effort*, 27 Wm Mitchell L Rev 1941, 1950–58 (2001).

### B. Education “Reform”

Yet, not all were happy in Lake Wobegon. Some affluent families in Minneapolis did not like having their previous all-white, affluent schools suddenly racially and socially integrated. Some suburban leaders did not like affordable housing requirements for their communities. Even more troubling were Minnesota’s very high income and commercial real estate taxes compared to its neighbors in the Dakotas and Iowa. As local businesses like Honeywell, Dayton-Hudson, Control Data, Pillsbury, and General Mills grew, they made it clear they wanted these taxes to decrease. The largest share of taxes was going to support Minnesota’s high-performing K-12 school system. Without cutting school costs, it would be impossible to cut taxes. Yet it was hard to fight the education monolith. When successful businesses and high net-worth individuals complained about educational waste, they did not gain much traction with an education loving electorate.

However, at about this time, a new philosophy of reforms championed by the business community and an important Twin Cities policy organization—the Citizen’s League—took hold. The Citizen’s League, a think-tank funded by the progressive Twin Cities business establishment, began to campaign for market-oriented, choice-based approaches to public policy in the late 1960s when Ted Kolderie, a former newspaper reporter took over as its Director.<sup>22</sup>

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<sup>22</sup> Thomas Toch, *Reflections on the Charter School Movement*, 91 Washington View 70, 70 (2010) (“[I] learned about charter schools while strolling through a Minneapolis suburb with Ted Kolderie, a civic gadfly.”). See generally Ted Kolderie, *Beyond Business-Education Partnerships*, in Melissa A. Berman, *Restructuring Education: Highlights from a Conference* (Conference Board 1987); David Osborne, *Born on the Bayou: A New Model for American Education* (Third Way Next 2012), online at [http://content.thirdway.org/publications/579/Third\\_Way\\_Report\\_-\\_Born\\_on\\_the\\_Bayou-A\\_New\\_Model\\_for\\_American\\_Education.pdf](http://content.thirdway.org/publications/579/Third_Way_Report_-_Born_on_the_Bayou-A_New_Model_for_American_Education.pdf) (visited Oct 18, 2014). See, for example, Ted Kolderie, *Beyond System Reform: The Need for Greater Innovation in School and Schooling* (Education Week Mar 11, 2008), online at <http://www.edweek.org/ew/articles/2008/03/12/27kolderie.h27.html> (visited Oct 18, 2014). See also Ted Kolderie, *Who We Are* (Education Evolving 2014), online at <http://www.educationevolving.org/bios/ted-kolderie> (visited Oct 18, 2014) (indicating that Kolderie works on system questions and establishing Kolderie’s previous work history as Executive Director of the Twin Cities Citizens League, reporter and editorial writer for the Minneapolis Star and Tribune, and as senior fellow at the University of Minnesota’s Hubert H. Humphrey Institute of Public Affairs. There is no indication that he has had an education-centric background.).

To these reformers it did not matter that Minnesota's schools were among the nation's best. Minnesota schools should not rest on their laurels because its competitors were not. Competition would make Minnesota's schools be even better and more efficient with public dollars. It was obvious that the state's schools would benefit from the types of experiences that had forged Minnesota's local business leaders into the smartest people in the state. Moreover, the same competition would not only improve education by fostering a race to the top, but it would also accomplish racial and social integration of students better than the public schools.

As the first fruits of the labors of the Citizen's League, in 1988, Minnesota passed an open enrollment law that allowed students to attend any other public school they wanted, if it had capacity.<sup>23</sup> In 1991, Minnesota passed the nation's first charter school law. Minnesota recognized that education is a fundamental right guaranteed under the Minnesota Constitution.<sup>24</sup> Pursuant to this and other constitutional rights, minority citizens sued the State of Minnesota in 1995 asserting that newly emerging segregated schools in the Twin Cities metropolitan area violated the Minnesota and federal constitutions. In 2000, the state settled with these plaintiffs and in so doing created a state-supported voluntary integration program between Minneapolis and ten western suburban school districts.<sup>25</sup> In this voluntary program, called the "Choice is Yours," the state supported the transportation of predominantly minority students from Minneapolis who chose to "open enroll" from low-income, racially segregated neighborhoods into higher opportunity, predominantly white schools in the suburbs.<sup>26</sup> Around this time, the state desegregation rule was gutted by changes sought by educational reform proponents in 1999 that exempted charters and open enrollment and in other ways weakened its oversight.

<sup>23</sup> See *Open Enrollment and Racial Segregation in the Twin Cities: 2000–2010* \*4 (Institute on Metropolitan Opportunity Jan 2013), online at <http://www.law.umn.edu/uploads/30/c7/30c7d1fd89a6b132c81b36b37a79e9e1/Open-Enrollment-and-Racial-Segregation-Final.pdf> (visited Oct 18, 2014).

<sup>24</sup> See *Skeen v State*, 505 NW2d 299, 313 (Minn 1993).

<sup>25</sup> See Office of the Legislative Auditor, State of Minnesota, *Evaluation Report: School District Integration Revenue* 5 (2005), online at <http://www.auditor.leg.state.mn.us/ped/pedrep/integrevf.pdf> (visited Oct 18, 2014).

<sup>26</sup> Orfield, 24 L & Ineq J at 314–18 (cited in note 18).

## II. CHOICE-BASED SEGREGATION TACTICS AND THE CONSTITUTION

Choice and competition are central to a strong market economy. However, even the most conservative of economists acknowledge that unfettered markets are not always the best way to provide goods or services, and that education is a prime example where non-market, equity-based goals reduce the effectiveness of market-based solutions. As an example, in the not-too-distant past, educational “choice” programs were a means by which whites avoided the integrated schools required by *Brown v Board of Education*.<sup>27</sup> Cases decided by the Supreme Court during the post-Brown era reflect the various attempts from states to avoid the new obligations regarding school integration and help to shed light onto Minnesota’s own educational reform measures.

In the 1950s and 1960s—the time known as “massive resistance”—Virginia went so far as to stop funding for traditional public schools, creating school vouchers for use in “segregation academies.”<sup>28</sup> Later, “freedom of choice” desegregation plans in other states unconstitutionally placed the burden of desegregation on the victims of discrimination and their families, rather than on the discriminatory public actors. Another strategy employed by white school boards to reduce the political pressure for racial integration was to create all-black specialty schools, staffed with all-black faculties, under the control of the powerful black political leaders. Similarly, optional transfer programs allowed whites to avoid integrated schools. When choice programs allowed whites to leave integrated districts for whiter suburban districts, this was an interdistrict violation which would give rise to a city suburban busing order.<sup>29</sup>

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<sup>27</sup> 347 US 483 (1954).

<sup>28</sup> See generally Benjamin Muse, *Virginia’s Massive Resistance* (Indiana 1961). See also *Green v County School Board of New Kent County*, 391 US 430, 441–42 (1968); Douglas, *Jim Crow Moves North* at 172–186 (cited in note 7).

<sup>29</sup> See, for example, *Goss v Board of Education of City of Knoxville*, 373 US 683, 684 (1963) (finding unconstitutional the transfer provisions of the formal desegregation plan of school board which allowed students to transfer upon request from such school, where they would be in racial minority back to former segregated school where their race would be in majority violated constitutional requirement of racially nondiscriminatory public school system). See also *Missouri v Jenkins*, 515 US 70, 110-111 (1995) (O’Connor concurring).

There was only token integration of schools before the passage of Title VI, the fund withholding provisions of the 1964 Civil Rights Act.<sup>30</sup> The three branches of government were partners in progress, with the Court's role likely the most important one. *Brown* led to Title VI. The Johnson administration aggressively enforced Title VI. However, when President Nixon refused to withhold funds from discriminatory school districts, federal courts forced him to do so.<sup>31</sup> Moreover, the Court in *Green v County Board of New Kent*,<sup>32</sup> *Swann v Charlotte-Mecklenburg Board of Education*,<sup>33</sup> *Wright v Council of the City of Emporia*,<sup>34</sup> and *Keyes v School District No 1*<sup>35</sup> sweepingly expanded the meaning of *Brown* and Title VI in the face of hostile executive and legislative branches.<sup>36</sup>

In many states of the former Confederacy, *Brown v Board of Education*<sup>37</sup> was met with "massive resistance." The state of Virginia chose to close all its public schools and give vouchers to its students who could choose private schools that were called "segregation academies."<sup>38</sup> After the Supreme Court struck this down, some southern states and school districts repealed segregation mandates and adopted "freedom of choice plans." Yet, racial intimidation and discrimination kept black and white students in the separate schools.<sup>39</sup>

In *Green v County School Board*, the court declared that freedom of choice plans improperly placed responsibility for remedying segregation on its victims, rather than on the

<sup>30</sup> Gary Orfield & Chungmei Lee, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies* (Civil Rights Project/Proyecto Derechos Civiles, UCLA Aug 2007), online at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf> (visited Oct 18, 2014).

<sup>31</sup> See *Adams v Richardson*, 351 F Supp 636 (DDC 1973), affd *Adams v Richardson*, 480 F2d 1159 (DC Cir 1973).

<sup>32</sup> 391 US 430 (1968).

<sup>33</sup> 402 US 1 (1971) ("Swann I").

<sup>34</sup> 407 US 451 (1972).

<sup>35</sup> 413 US 189 (1974).

<sup>36</sup> See text accompanying notes 32–55.

<sup>37</sup> 347 US 483 (1954).

<sup>38</sup> See generally Note, *Segregation Academies and State Action*, 82 Yale L J 1436 (1973). See also *Griffin v County School Board*, 377 US 218, 231–232 (1964).

<sup>39</sup> See James R. Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 Va L Rev 42, 43–44 (1967).

discriminatory school district.<sup>40</sup> Because of this, the Court held that local school districts bore a heavy burden in justifying their use over more effective remedies like busing.<sup>41</sup>

In the early 1970s, *Swann v Charlotte-Mecklenburg Board of Education* held that because housing and school segregation are deeply interrelated, neighborhood school assignments based on geographic proximity did not satisfy the board's duty to desegregate.<sup>42</sup> The Court further noted:

Independent of student assignment, where it is possible to identify a “white school” or a “Negro school” simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown.<sup>43</sup>

In *Wright v City of Emporia*, the Supreme Court held that once a school desegregation plan was in place, a new school system could not be created that might impede the district's ability to desegregate.<sup>44</sup> Specifically, the Court held that school district boundaries between city and suburban schools—even if drawn without discriminatory intent—could not limit the scope or effectiveness of a school desegregation remedy if respecting these boundaries could increase white flight from one of the local school districts.<sup>45</sup>

Another creative tactic was the creation of single-race black schools with all black faculties to *incentivize* blacks to accept segregation.<sup>46</sup> These black schools were often “chosen” by black students who had been subjected to discrimination, intimidation, and other forms of harassment in integrated

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<sup>40</sup> *Green*, 391 US at 441–42 (“Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board.”).

<sup>41</sup> *Id* at 442.

<sup>42</sup> *Swann*, 402 US at 28. (“Racially neutral” assignment plans proposed by school authorities . . . may be inadequate; such plans may fail to counteract the continuing effects of past school segregation. . . . In short, an assignment plan is not acceptable simply because it appears to be neutral.”).

<sup>43</sup> *Id* at 18.

<sup>44</sup> *Wright*, 407 US at 470.

<sup>45</sup> See *id* at 462.

<sup>46</sup> Douglas, *Jim Crow Moves North* at 123–66 (cited in note 7).

schools.<sup>47</sup> Black school faculties became bulwarks of segregation, fearing that they would lose their jobs in an integrated system. These faculties consistently mobilized segments of the black community to oppose school integration efforts.<sup>48</sup>

In *Dayton Board of Education v Brinkman*,<sup>49</sup> the Court declared that a school district, which in 1954 had operated an optional all black city-wide high school with an all-black faculty and three all-black elementary schools and segregated faculty assignments, was segregated by law.<sup>50</sup> It did not matter that Dunbar High School was very popular among part of the black population and that its black faculty fought to preserve it. The Court found that it was an act that improperly facilitated segregation.<sup>51</sup>

In *Columbus Board of Education v Penick*,<sup>52</sup> the Supreme Court noted that despite the school district's avowedly strong preference for neighborhood schools, in times of residential transition, it created optional attendance zones to allow white students to avoid integrated schools, which were often close to the homes of white pupils.<sup>53</sup> The district allowed students in a "small white enclave on Columbus' predominant black near east side . . . to escape attendance at black schools," which the Court called "a classic example of a segregative device designed to permit white students to escape attendance at predominantly black schools."<sup>54</sup>

Finally, in *Milliken v Bradley*,<sup>55</sup> a federal court ruled that it could not require the suburban districts to cooperate in any way with the segregate central city district unless either they or the state separately violated the constitution. Such a violation included proof that the suburban district had intentionally

<sup>47</sup> See id.

<sup>48</sup> See id at 172–86; *Keyes*, 413 US at 235 (Powell concurring).

<sup>49</sup> 443 US 526 (1979).

<sup>50</sup> See id at 541 (upholding *Keyes*, in which the Court held that "purposeful discrimination in a substantial part of a school system furnishes a sufficient basis for an inferential finding of a systemwide [sic] discriminatory intent").

<sup>51</sup> See id (agreeing with the Court of Appeals that the school district's actions "perpetuated and increased public school segregation").

<sup>52</sup> 443 US 449 (1979).

<sup>53</sup> See id at 461 n 8.

<sup>54</sup> Id, quoting *Penick v Columbus Board of Education*, 429 F Supp 229, 245 (SD Ohio 1977).

<sup>55</sup> 418 US 717 (1974).

committed a constitutional violation that caused segregation in the city, or that the state had intentionally drawn the school district boundaries to create segregation between the city and the suburbs or had committed an act of housing discrimination that caused the inner-district segregation.<sup>56</sup>

In *Jenkins v Missouri*,<sup>57</sup> Justice O'Connor defined an inter-district open enrollment violation:

[W]here those [suburban] districts “arrang[e] for white students residing in [a segregated city district] to attend schools in [white suburban districts],” *Milliken I* of course permits interdistrict remedies. . . . Such segregative effect may [also] be present where a predominantly black district accepts black children from adjacent districts or perhaps even where that fact of intradistrict segregation actually causes whites to flee the district. . . for example, to avoid discriminatorily, underfunded schools—and such actions produce regional segregation along district lines. In those cases, where a purely intradistrict violation has caused significant interdistrict segregative effect, certain interdistrict remedies may be appropriate.<sup>58</sup>

In the following sections, we will examine whether all single race charter schools are purely a matter of protected individual choice or whether they unconstitutionally place the burden of integration on the victims of discrimination. When children or their parents choose charter schools, it is like whites choosing segregation academies. Do non-white children really choose single race schools, when they have no real choice for schools that are socially and racially integrated? When a charter opens in a neighborhood in which it would be foreseeable single race, does this run afoul of *Swann* and *Keyes*? Are single race ethically themed charters permissible under *Dayton* and *Columbus*? It is hard to see how single race charters are permissible unless these cases are narrowed or overruled.

If open enrollment has a racially disparate impact, is it an optional attendance boundary prohibited under *Keyes*? How would it be different? When open enrollment transfers whites

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<sup>56</sup> See id at 745.

<sup>57</sup> 515 US 70 (1995).

<sup>58</sup> Id at 110.

from racially diverse districts to whiter ones or blacks from integrated districts to majority non-white districts is it an interdistrict violation under *Milliken* and *Jenkins*? Isn't this sort of action exactly what Justice O'Connor was referring to?

### III. THE MINNESOTA EXPERIENCE WITH CHARTER SCHOOLS

Minnesota has the longest experience with charter schools of any state in the country. Its first charter school opened in 1991 and today there are 150 with nearly 50,000 students.<sup>59</sup>

Charter school proponents promised that charter schools would outperform the public schools and that competition with charters would improve the public schools. They also promised that by severing the link between segregated neighborhoods and segregated schools, charter schools would allow parents of color to attend white and more racially integrated schools.<sup>60</sup> Alternatively, many charter school proponents argued that segregated charters should be encouraged if they can educate students better than traditional public schools.<sup>61</sup>

#### A. Charters and Segregation

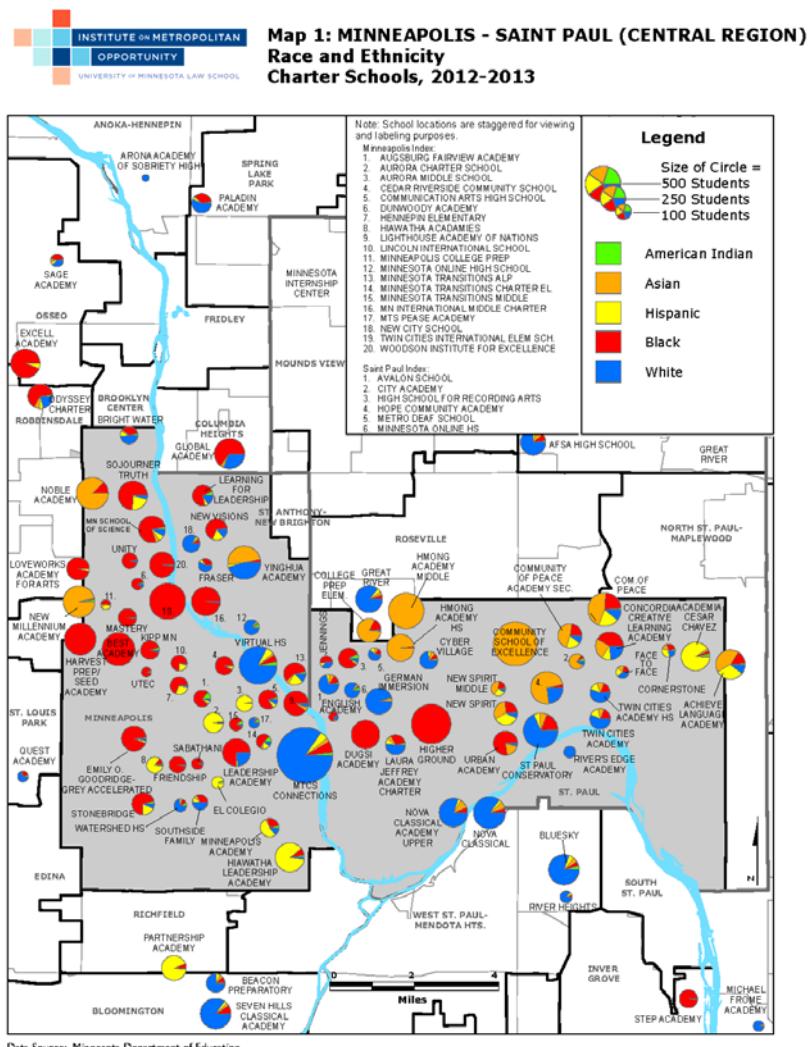
In the Twin Cities, charter schools are much more likely to be non-white segregated than traditional schools and charter students are much more likely to attend a segregated school than traditional public school students.

<sup>59</sup> *Failed Promises: Assessing Charter Schools in the Twin Cities* \*1 (Institute on Race and Poverty 2008), online at <http://www.law.umn.edu/uploads/5f/ca/5fcac972c2598a7a50423850eed0f6b4/8-Failed-Promises-Assessing-Charter-Schools-in-the-Twin-Cities.pdf> (visited Oct 18, 2014).

<sup>60</sup> See Ted Kolderie, *Creating the Capacity for Change: How and Why Governors and Legislatures are Opening a New-Schools Sector in Public Education* 144–45 (Education Week 2004); Chester E. Finn, Bruno V. Manno, and Gregg Vanourek, *Charter Schools in Action: Renewing Public Education* 228–29 (Princeton 2000); Jay P. Greene, *Why School Choice Can Promote Integration*, Education Week (2000), online at <http://www.edweek.org/ew/articles/2000/04/12/31greene.h19.html> (visited Oct 18, 2014); Joe Nathan, *Charter Schools: Creating Hope and Opportunity for American Education* 56–57 (Jossey-Bass 1996). In Michigan, for instance, civil rights advocates collaborated with market proponents to pass charter school legislation to empower poorly performing students of color. See Christopher Lubenski, *Public Schools in Marketized Environments: Shifting Incentives and Unintended Consequences of Competition-Based Educational Reforms*, 111 Am J Educ 464, 472–473 (2005).

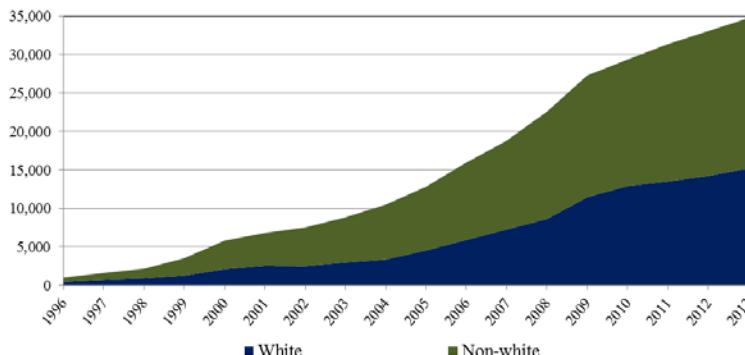
<sup>61</sup> See Bruno V. Manno, Gregg Vanourek, and Chester E. Finn, Jr., *Charter Schools: Serving Disadvantaged Youth*, 31 Educ & Urban Soc 429, 439–441 (1999).

The percentage of charters which are predominantly non-white has been high since the beginning of the movement, remaining in the mid-50s for most years since 1995–1996 (Chart 1). The share of charters that are integrated has varied very little from around 18 to 20 percent. This is despite the fact that, among traditional schools in the region, the percentage that are integrated doubled from 20 to 40 percent while the percentage



that are non-white segregated share has remained well below the share for charter schools during the same period.<sup>62</sup>

**Chart 1: Charter School Enrollments in the Twin Cities, 1996-2013**



Source: Minnesota Department of Education.

Most non-white segregated schools are in the core of the region (Map 1) and many are single-race schools (or very close). Students of color attending charter schools were roughly twice as likely to be in a segregated school setting as their counterparts in the traditional public schools in 2012–2013—88 to 44 percent for black students; 76 to 38 percent for Hispanics; and 82 to 38 percent for Asians.<sup>63</sup>

Eighty-eight percent of black students in charters attended non-white segregated schools in 2012–2013, up from 81 percent in 2000–2001; 76 percent of Hispanic charter students attended non-white segregated schools in 2012–2013, up from 69 percent in 2000–2001; and 82 percent of Asian charter students attended non-white segregated schools in 2012–2013, a slight improvement from 85 percent in 2010–2011.<sup>64</sup>

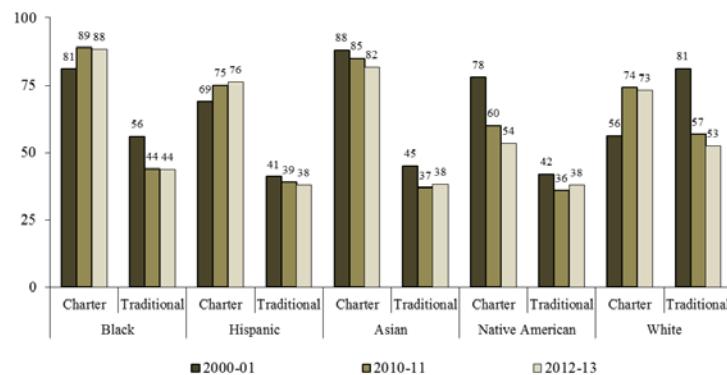
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<sup>62</sup> See *Charter Schools in the Twin Cities: 2013 Update* \*3 (Institute on Metropolitan Opportunity Oct 2013), online at <http://www.law.umn.edu/uploads/16/65/1665940a907fdbbe31337271af733353d/Charter-School-Update-2013-final.pdf> (visited Oct 18, 2014).

<sup>63</sup> Id at \*5.

<sup>64</sup> Id.

**Chart 2: Percentage of Students in Segregated School Settings  
by Race and School Type, 2000 - 2013**



Source: Computed from Minnesota Department of Education data.  
"Segregated setting" is defined as non-white segregated schools for students of color and predominantly white schools for white students.

Charter enrollments peaked at 68 percent non-white in 2003–2004 but growth since then has been split more evenly, and the percentage of charter students who are non-white fell to 56 percent in 2012–2013 (down from 57 percent in 2010–2011). Charter schools are much more likely to serve poor students than traditional schools but recent years have seen a sharp decline in the percentage of charter students who are poor. In 2012–2013, 51 percent of charter students were eligible for free or reduced-price lunch compared to 29 percent in other public schools, but the charter number represents a decline of six points in just two years, from 57 percent in 2010–2011.<sup>65</sup>

#### B. White Flight Charters—Present-Day Segregation Academies?

Will Marshall of the Progressive Policy Institute noted in the early 1990s:

It was so important that [charter schools] started in Minnesota with Upper Midwest progressives and then went to another progressive state like California. It could not have started in the south with a different racial history. I talked with the Dems in my home state

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<sup>65</sup> Id at \*2.

Virginia, and they were not convinced. They saw [chartered schools] as segregation academies.<sup>66</sup>

Early studies of charter schools documented cases where white charter students attended charter schools that were significantly whiter than their traditional public school counterparts.<sup>67</sup> One study found that predominantly white charter schools tended to appear in areas where the public schools were becoming more racially diverse.<sup>68</sup> In Mississippi, for example, charter schools were 60 percent whiter than the hosting school districts.

In Minnesota, the number of predominantly white charters is increasing, and many are located in suburban areas where the traditional schools are becoming more racially diverse.<sup>69</sup> In 2000–2001, white charter students were actually less likely to be in a predominantly white school than their traditional school counterparts—56 percent compared to 81 percent.<sup>70</sup> However, by 2012–2013, the share of white charter students in predominantly white schools had risen to 73 percent while it declined to 53 percent in traditional schools.<sup>71</sup>

The number of predominantly white charters in the suburbs grew by 40 percent in just five years from 20 percent in 2007–2008 to 28 percent in 2012–2013.<sup>72</sup> More than a third of these were part of a single system of charters.<sup>73</sup> The Friends of Education is the authorizer for 17 charters in the Twin Cities

<sup>66</sup> See Ember Reichgott Junge, *Zero Chance of Passage: The Pioneering Charter School Story* 188 (Beaver's Pond 2012).

<sup>67</sup> For a list of these studies, see Linda A. Renzulli and Lorraine Evans, *School Choice, Charter Schools, and White Flight*, 52 Soc Problems 398, 401 (2005).

<sup>68</sup> Id.

<sup>69</sup> See *Charter Schools in the Twin Cities: 2013 Update* at \*6 (cited in note 62).

<sup>70</sup> See *Failed Promises* at \*3 (cited in note 59).

<sup>71</sup> See Chart 2.

<sup>72</sup> These counts exclude five predominantly white schools that are special cases. Sobriety High South, Arona Academy of Sobriety High, and Bluesky charter schools were predominantly white in both years, as were Lionsgate Academy in 2012–13 and Liberty High School in 2007–08. However, the Sobriety High Schools were very small (they have since closed), and their demographic mixes were likely determined by factors other than neighborhood and race. Similarly, Lionsgate Academy specializes in students with special needs related to Asperger's Syndrome or autism-related symptoms, and Liberty High School was a special education school. Bluesky (which was located in St. Paul in 2007–2008 and West St. Paul in 2012–2013) is likely to be less closely tied to its neighborhood than other schools because it is an online school.

<sup>73</sup> See *Charter Schools in the Twin Cities: 2013 Update* at \*6 (cited in note 62).

metro.<sup>74</sup> Twelve of them were predominantly white in 2012–2013—ten in the suburbs and two in St. Paul.<sup>75</sup>

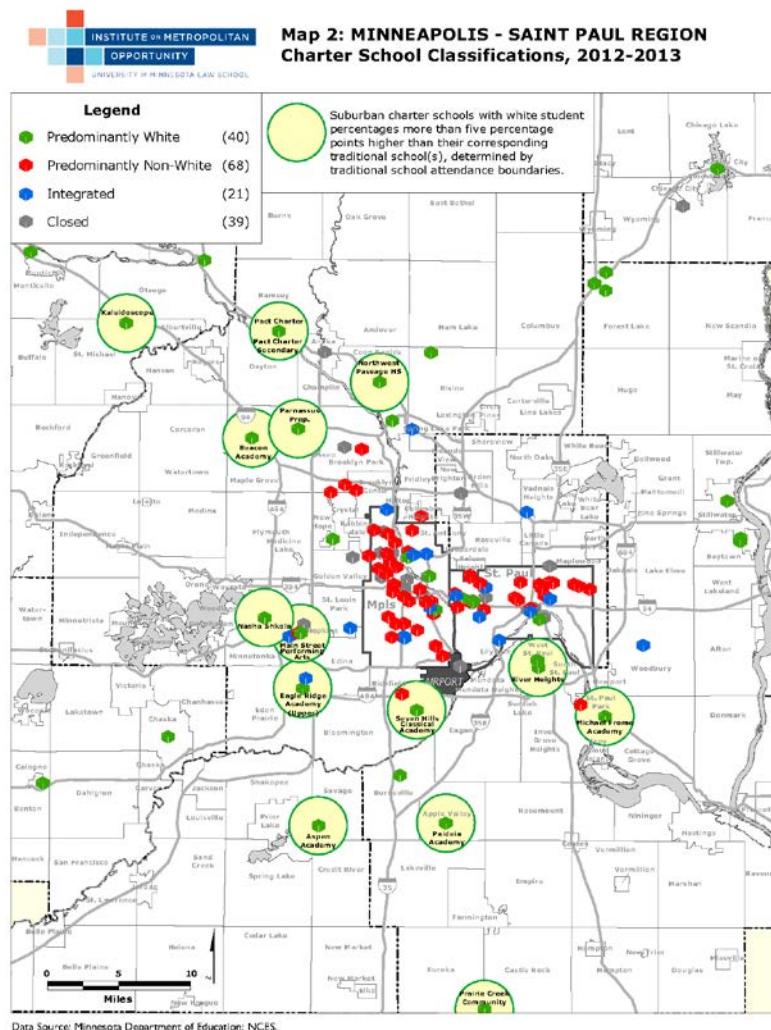
By 2012–2013, fifteen out of twenty-eight (54 percent) of the very white mostly suburban charters had white student percentages more than five percentage points higher than the traditional school(s) within whose attendance boundary they were located.<sup>76</sup> (These charters are circled on Map 2.) Clearly, whether by intent or not, more and more suburban charters are facilitating white flight from increasingly diverse traditional schools in the suburbs.

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<sup>74</sup> See id.

<sup>75</sup> See id.

<sup>76</sup> See id.



Stories about the emergence of some of these schools provides important context. They often appear or grew rapidly in racially diverse suburban areas, particularly when there was local opposition to school district actions which might increase racial integration in local schools. In the early 2000s, the Apple Valley-Rosemount school district was pressured by civil rights advocates to correct a racially gerrymandered school boundary. The school-at-issue's catchment or attendance boundary connected a largely Latino occupied trailer park with a non-

contiguous neighborhood where affordable rental housing was mostly inhabited by black families. In creating this non-contiguous boundary, nearby schools remained comparatively white. Once this boundary was corrected, the state sponsored a new predominantly white charter school named Paideia Academy located next to the newly integrated public school created by the boundary change.<sup>77</sup>

In the early 2000s, as the Osseo school district attempted to integrate a white neighborhood school named Weaver Lake elementary, the nearby all-white charter, Beacon Academy, surged in enrollment.<sup>78</sup> In 2010, the affluent high-performing Eden Prairie school district, which was 25 percent non-white, completed a controversial school redistricting plan that virtually eliminated racial differences that had been increasing across its elementary schools.<sup>79</sup> White parents who did not want to go to newly integrated schools went in increasing numbers to the local all-white charter in that district.<sup>80</sup> The number of white students using open enrollment to attend schools in a neighboring district that was 90 percent white also increased significantly.

The Bloomington School District has twice considered integrated student boundaries. Each time it has chosen not to do so, because of white parent opposition in the first case. The existence of a predominantly white charter school, the Friendship Classical Academy was not helpful in either instance.<sup>81</sup>

<sup>77</sup> See Myron Orfield, *Regional Strategies for Racial Integration of Schools and Housing Post-Parents Involved*, 29 L & Ineq J 149, 155–56 (2011). For another example of the effects of attendance boundaries, see Margaret C. Hobday, Geneva Finn, and Myron Orfield, *A Missed Opportunity: Minnesota's Failed Experiment with Choice-Based Integration*, 35 Wm Mitchell L Rev 936, 965–68 (2009).

<sup>78</sup> See Baris Gumus-Dawes, Myron Orfield, and Thomas Luce, *Dividing Lines: East Versus West in Minneapolis Suburbs*, in Erica Frankenberg and Gary Orfield, eds, *The Resegregation of Suburban Schools: A Hidden Crisis in American Education* 113, 130 (Harvard 2012).

<sup>79</sup> See Susan Eaton, *Not Your Father's Suburb: Race and Rectitude in a Changing Minnesota Community* \*8–9 (One Nation Indivisible 2012), online at <http://www.onenationindivisible.org/wp-content/uploads/2012/03/ONIrptNotYourFathersSuburbFIN.pdf> (visited Oct 18, 2014).

<sup>80</sup> See id at 16.

<sup>81</sup> Kenyatta Bolden, *Backing Down from Brown: The Resegregation of the Bloomington School District* (2004) (on file with author); Carrie Rudd, *Bloomington Middle School Boundaries* (2007) (on file with author); Kelly Smith, *Bloomington Releasing Proposed Boundary Maps*, StarTribune (Nov 11, 2010); Kelly Smith, *Bloomington Schools Consider Changing Boundaries*, StarTribune (Dec 5, 2010).

### C. Charter Schools Don't Perform as Well as Traditional Public Schools

Despite a great deal of evidence to the contrary, charter school advocates continue to argue that charter schools in Minnesota improve student performance.<sup>82</sup> Recently, in the Twin Cities, comparisons by charter advocates have shifted to highlight the performance of a few cherry-picked charters serving high-poverty populations (charters which are also largely single-race) and trying to discredit system-wide comparisons.<sup>83</sup>

Prior to IMO's three studies, several studies examined the performance of charter schools in Minnesota. A 2003 Brookings Institution study found that a third of the charter schools in Minnesota failed to perform adequately according to the state's definition, compared to just 13 percent of all traditional public schools.<sup>84</sup>

The Great Lakes Center found that charter schools in Minnesota performed worse, on average, than demographically identical traditional schools.<sup>85</sup> Over 60 percent of charters showed average test scores that were lower than expected, given their student characteristics.<sup>86</sup> The study also showed that the overall test score performance (pass rates) of charter schools did not improve over time for five of the six math and reading

<sup>82</sup> Virtually every study of the impact of charter schools on student performance in Minnesota has found that charters are out-performed by their traditional counterparts, after controlling for school characteristics like poverty rates among students. For a review of several of these studies, see *Failed Promises* at \*1 (cited in note 59).

<sup>83</sup> See *Minnesota Charters 2014: Building a High-Impact Charter Sector. Closing the Opportunity/Achievement Gap* (Charter School Partners Jan. 6, 2014), online at <http://charterschoolpartners.org/culture-of-reform-and-achievement/minnesota-charters-2014-building-a-high-impact-charter-sector-closing-the-opportunityachievement-gap/> (visited Oct 18, 2014).

<sup>84</sup> See Tom Loveless, *How Well Are American Students Learning? With Special Sections on Homework, Charter Schools, and Rural School Achievement: Part III Charter Schools: Achievement, Accountability, and the Role of Expertise* \*31 Table 3–2 (Brookings 2003), online at [http://www.brookings.edu/~/media/research/files/reports/2003/10/education%20loveless/10education\\_loveless.pdf](http://www.brookings.edu/~/media/research/files/reports/2003/10/education%20loveless/10education_loveless.pdf) (visited Oct 18, 2014).

<sup>85</sup> See Gary Miron, Chris Coryn, and Dawn M. Mackety, *Evaluating the Impact of Charter Schools on Student Achievement: A Longitudinal Look at the Great Lakes States* (Western Michigan University, The Evaluation Center Jun 2007), online at [http://greatlakescenter.org/docs/Research/Miron\\_Charter\\_Achievement/Miron\\_Charter%20Achievement.pdf](http://greatlakescenter.org/docs/Research/Miron_Charter_Achievement/Miron_Charter%20Achievement.pdf) (visited Oct 18, 2014). See especially Appendix E on Minnesota charter school performance.

<sup>86</sup> See id at Appx E 7–8.

tests—only the 5th grade reading score showed slight improvement.<sup>87</sup> In addition, charters showed little or no improvement over time compared to demographically equivalent traditional schools. Minnesota charters ranked fifth out of the six states in this comparison.<sup>88</sup>

Finally, the Office of the Minnesota Legislative Auditor (OLA) in 2008 found that when compared to district schools with similar demographics, charter schools generally did not perform as well.<sup>89</sup> Only 15 percent of charter schools performed better than their traditional counterparts.<sup>90</sup> More than half performed worse in math and about 40 percent performed worse in reading tests.<sup>91</sup> When the study accounted for the higher student mobility rates in charter schools, the difference between the performances of charter school and district schools narrowed, but charter schools still performed worse than traditional schools.<sup>92</sup>

Charter school boosters had little to say in their defense. A 2004 evaluation of the Minnesota charter sector as a whole by one of its founders does not offer a systematic assessment, focusing instead on anecdotes of individual schools.<sup>93</sup> The study points to the inadequacy of snapshot test scores for adequately measuring charter school performance, suggesting that mixed performance by this measure reflects the charter schools' demographics and their relative short time in operation.<sup>94</sup>

Reflecting a common recent trend, charter proponents suggests that the question "How are charter schools doing?" should be modified to ask "How is chartering doing—as a mechanism for getting the new, different, and better schools it

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<sup>87</sup> See id.

<sup>88</sup> See id at Appx E 12, 16, 17. The states included in the study were Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin. See id.

<sup>89</sup> See Office of the Legislative Auditor, *Evaluation Report: Charter Schools 13–15* (June 2008), online at <http://www.auditor.leg.state.mn.us/ped/pedrep/charterschools.pdf> (visited Oct 18, 2014).

<sup>90</sup> See id at 21.

<sup>91</sup> See id.

<sup>92</sup> See id at 26–27. The OLA study has a number of methodological shortcomings that raises some concerns with the findings, detailed in our 2008 study *Failed Promises*. See *Failed Promises* at 23–24 (cited in note 59).

<sup>93</sup> See Jon Schroeder, *Ripples of Innovation: Charter Schooling in Minnesota, The Nation's First Charter School State* \*32 (Progressive Policy Institute 2004), online at [http://www.dlc.org/documents/MN\\_Charters\\_0504.pdf](http://www.dlc.org/documents/MN_Charters_0504.pdf) (visited Oct 18, 2014).

<sup>94</sup> See id at 32–33.

must now have?"<sup>95</sup> It would appear that switching attention from the performance of charter schools to the chartering process itself is a step toward relaxing the strict performance standards the taxpayers demand from all traditional public schools, including and especially the charters.

The Institute on Metropolitan Opportunity (IMO) authored 2008, 2012, and 2013 reports providing clear evidence that traditional public schools outperformed charter schools after controlling for student poverty, race, special education needs, limited language abilities, student mobility rates, and school size.<sup>96</sup> Consistent with the earlier studies and other research, IMO's 2013 report found that student poverty (measured by eligibility for free or reduced price lunch) was the dominant factor in the performance of schools in 2012–2013.<sup>97</sup> The results showed that, all else equal, proficiency rates were 11.2 percentage points lower for math and 5.9 percentage points lower for reading in charter elementary schools than in traditional elementary schools.<sup>98</sup> Identical regressions run with 2010–2011 data showed shortfalls of 7.5 (math) and 4.4 (reading) percentage points, implying that charters as a group are doing worse now than two years ago.<sup>99</sup>

Charts 3 and 4 demonstrate the relationship between student performance and the school characteristic which is, by far, the dominant explanatory variable in the statistical analysis—poverty. The predicted line in these figures corresponds to the performance level one would expect from a school given its student poverty rate. In 2012–2013, the math performance of students in only 31 percent of charter schools was better than expected given the poverty levels of these schools—the rest, 69 percent, under-performed expectations.<sup>100</sup> This represents a significant step back from 2010–2011 when 51 percent of charters out-performed expectations.<sup>101</sup> Similarly, the

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<sup>95</sup> Id at 43.

<sup>96</sup> The regression results for 2010–2011 and 2012–2013 are available on request and the 2007–2008 analysis is available in *Failed Promises* at \*27 Table 1 (cited in note 59). The analysis of 2012–2013 data uses a set of variables identical to the 2010–2011 analysis.

<sup>97</sup> See *Charter Schools in the Twin Cities: 2013 Update* at \*8 (cited in note 62).

<sup>98</sup> See id.

<sup>99</sup> See id.

<sup>100</sup> See id.

<sup>101</sup> See *Charter Schools in the Twin Cities: 2013 Update* at \*8–9 (cited in note 62).

reading performance of students in just 36 percent of charter schools was better than expected (compared to 39 percent in the 2010–2011 analysis).<sup>102</sup>

Traditional elementary schools also fared better for the most part than charters in the study, with 58 percent outperforming expectations in math and 54 percent doing so in reading.<sup>103</sup> Both of these rates represent improvements in the public schools from the 2010–2011 analysis.<sup>104</sup>

If charters as a group have so consistently under-performed traditional schools, why are charter schools so commonly extolled in the press for student performance? The answer can be seen in the public relations strategies of the charter proponents. Shortly after school testing data is released, charter advocates issue reports and press releases detailing the success of cherry picked schools that “beat the odds”—schools with high percentages of low-income students that had the highest percentage of students proficient in reading or math on the official statewide examinations.<sup>105</sup>

In examining the selection of schools “above the line” at high poverty rates in Charts 3 and 4, there is a group of roughly a dozen high-poverty charters exhibiting pass rates significantly better than expected, and for the most part, better than their traditional counterparts. This group represents a class of schools that are important given the significant achievement gaps that exist in the region (and the state) between white students and black students. Research on why they are succeeding is clearly needed. However the charter press does not discuss the entire set of charters, nor note that most of the lowest performing schools are also charters.

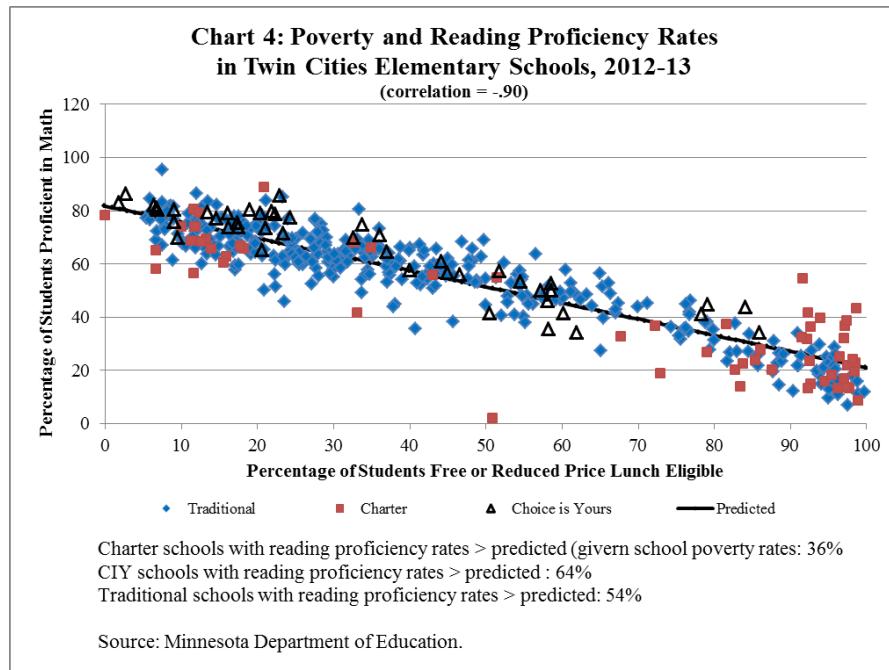
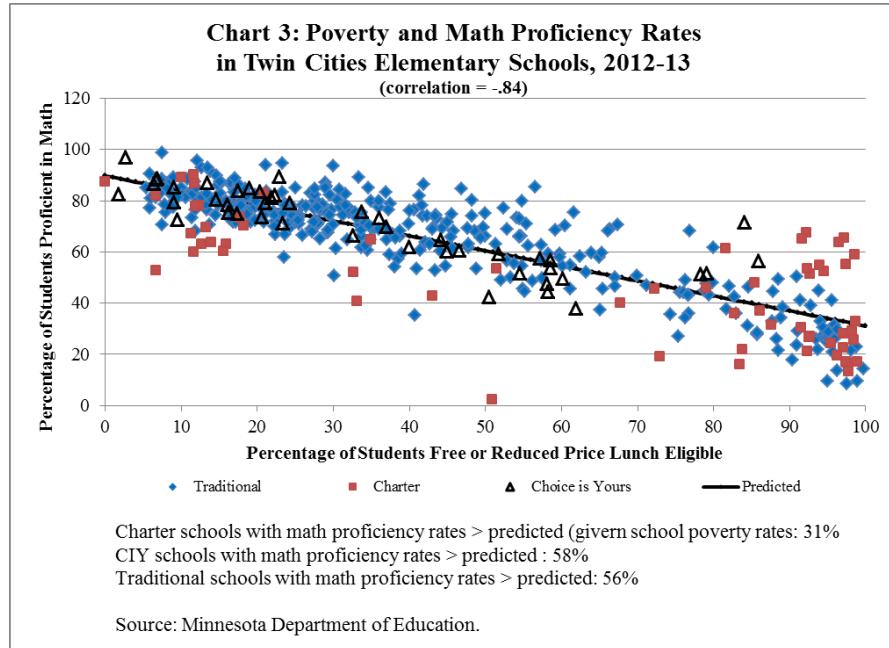
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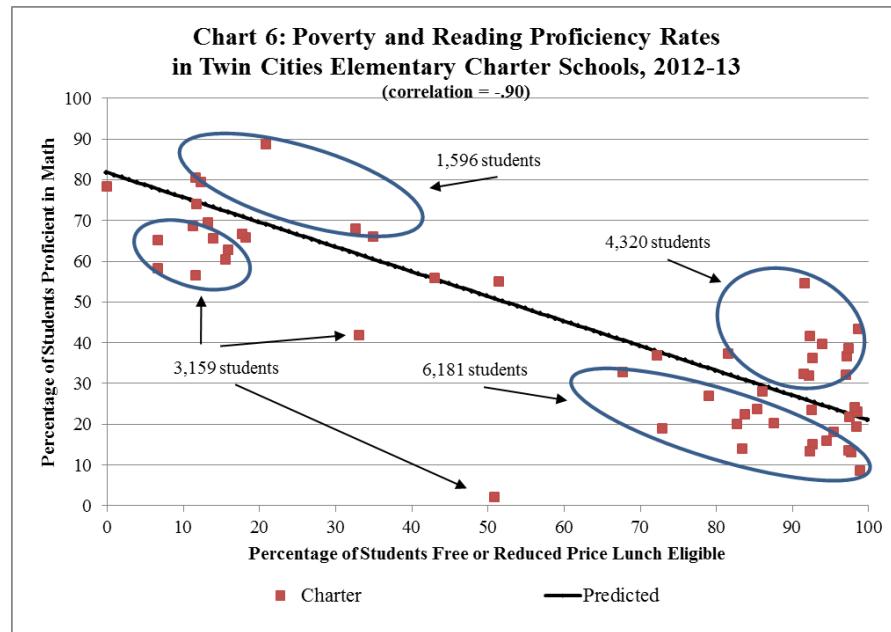
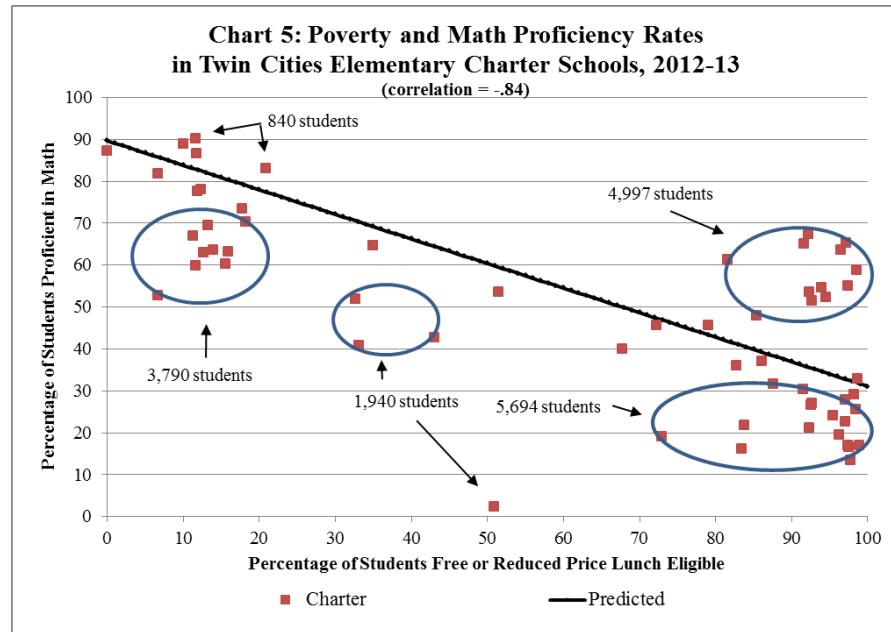
<sup>102</sup> See id at 9.

<sup>103</sup> See id.

<sup>104</sup> See id.

<sup>105</sup> See, for example, Center for School Change Blog (Center for School Change 2014), online at <http://centerforschoolchange.org/blog/> (visited Oct 18, 2014); Charter School Partners (Charter School Partners 2013), online at <http://www.charterschoolpartners.org/> (visited Oct 18, 2014). See also Joe Nathan, *MinnPost recently wrote about the “Beat the Odds” school where CSC offices are located*, Center for School Change Blog (Center for School Change Feb 22, 2013), online at <http://centerforschoolchange.org/2013/02/minnpost-recently-wrote-about-the-beat-the-odds-school-where-csc-offices-are-located/> (visited Oct 18, 2014).





Because of the charters' underperformance, there are costs associated with using the charter system as a testing ground for new ways to teach low-income students.<sup>106</sup> These can be seen in Charts 5 and 6, which show the same information as Charts 3 and 4, but for charter schools alone.<sup>107</sup> The ovals on the chart highlight all of the charters that are more than five percentage points above or below the line showing predicted performance at all free/reduced price lunch eligibility rates.<sup>108</sup> The student counts in the chart show that there are many more students in under-performing charters than in the high-performance group.<sup>109</sup> Among high-poverty charters, there are 14 percent more students (5,694 versus 4,997) in charters under-performing in math than in the high-performance schools and 43 percent more (6,181 compared to 4,320) in schools under-performing in reading.<sup>110</sup> The comparison is even more unbalanced in moderate- and low-poverty schools where there are two to seven times as many students in under-performing schools than in high-performance charters.<sup>111</sup>

The question is whether charters are the best path available to discover ways to better serve low-income students and students of color in order to eliminate achievement gaps with non-poor and white students. One clear cost of the charter approach is a greater share of students, overall, in schools that are significantly under-performing expectations. Every year since the charters started, they have underperformed the public schools. Overall, charters are worse than the public schools, and because of competition with the charters the public schools are weaker than they would otherwise be. Because of the enormous loss of revenue related to the loss of pupils to charters, the Minneapolis public schools have not been able to fire teachers and close buildings fast enough to avoid cutting important remedial programs designed to reduce the achievement gap.

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<sup>106</sup> See *Charter Schools in the Twin Cities: 2013 Update* at \*10 (cited in note 62).

<sup>107</sup> See id.

<sup>108</sup> See id.

<sup>109</sup> See id.

<sup>110</sup> See *Charter Schools in the Twin Cities: 2013 Update* at \*10 (cited in note 62).

<sup>111</sup> See id.

#### IV. THE IMPACT OF CHARTERS ON THE TWIN CITIES REGION'S CENTRAL CITY SCHOOL DISTRICTS

The two central city school districts in the Twin Cities each lose large numbers of students to charter schools—losses that have contributed greatly to declining enrollments in Minneapolis and St. Paul.<sup>112</sup> Charter advocates would argue that the competition leading to these losses enhance the overall performance of the region's schools.<sup>113</sup> The previous section on school performance shows that these gains are spotty at best and they come at a cost.<sup>114</sup>

State money follows students out of public schools to charter schools.<sup>115</sup> When enrollments fall rapidly, total costs do not go down as quickly because rapid enrollment declines require costly actions like school closures, teacher and staff cutbacks, and administrative reorganizations.<sup>116</sup> As a result, districts losing students must devote efforts and resources to deal with the costs of decline, often to the detriment of other educational priorities.<sup>117</sup> For instance, the Minneapolis and St. Paul school districts have had to close school in communities that do not want to lose schools and they have had to fire teachers in order of seniority, which often removes young energetic teachers the district needs.<sup>118</sup> The two city districts have also spent the last ten to fifteen years dealing with one fiscal crisis after another, crises due at least in some part to enrollment losses to charter schools.<sup>119</sup>

Table 2 shows enrollment trends in the Minneapolis and St. Paul school districts from 2000–2001 to 2011–2012 in conjunction with losses to charter schools.<sup>120</sup> Enrollments

<sup>112</sup> See id at 12.

<sup>113</sup> See id.

<sup>114</sup> See *Charter Schools in the Twin Cities: 2013 Update* at \*12 (cited in note 62).

<sup>115</sup> See Minnesota House of Representatives Research Department, *Charter Schools* (Nov 2005), online at <http://www.house.leg.state.mn.us/hrd/pubs/chrtchl.pdf> (visited Oct 14, 2014).

<sup>116</sup> See id.

<sup>117</sup> See id.

<sup>118</sup> See id.

<sup>119</sup> See *Charter Schools in the Twin Cities: 2013 Update* at \*12 (cited in note 62).

<sup>120</sup> See id. The “resident students attending charters” estimates were derived from two sources. The Minnesota House Research Department provides estimates for all districts for the period 2006–2007 through 2011–2012. Estimates for the period from 2000–2001 through 2009–2010 are available from other IMO research on open

declined during this period by 29 percent in Minneapolis (from 48,834 to 34,436) and by 16 percent in St. Paul (from 45,115 to 37,864). During this period, state and federal aid *per pupil* to Minneapolis fell by about 12.5 percent between 2007–2008 and 2012–2013 by about 5.5 percent for St. Paul (correcting for inflation).<sup>121</sup>

In Minneapolis, almost half of the enrollment declines during the period from 2000–2012 were the result of additional students leaving the district for charters—6,800 more resident students attended charters in 2011–2012 than in 2000–2001, while total enrollments declined by 14,400. In St. Paul, the contribution was even greater—58 percent (4,200 out of 7,250) of total enrollment declines were from aggregate losses to charters.<sup>122</sup>

Although some of these losses were to charter schools which out-perform some traditional schools in the two districts, Charts 3–6 make it clear that most were not.<sup>123</sup> This begs the question of whether the enormous stresses imposed on two of the region's largest school districts have been worth the costs.<sup>124</sup>

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enrollments. For a description of this data set, see *Open Enrollment and Racial Segregation in the Twin Cities* at \*1 (cited in note 23). The two data series are not fully comparable, so the House Research data was used for 2006–07 through 2011–2012, while the earlier years were extrapolated from the 2006–2007 House Research estimate using growth rates computed from the IMO open enrollment data set. Total enrollment data are from the Minnesota Department of Education.

<sup>121</sup> Computed from Minnesota Department of Education (MDE) Revenue Summary Reports; total enrollment data from MDE data reports; and from Bureau of Labor Statistic estimates of the Consumer Price Index for all urban consumers in the Minneapolis-St. Paul metropolitan area.

<sup>122</sup> See *Charter Schools in the Twin Cities: 2013 Update* at \*12–13 (cited in note 62). The two districts lose large numbers of students to open enrollment as well. In 2010, the net loss in Minneapolis was about 1,200 students and in St. Paul it was about 700. *Open Enrollment and Racial Segregation in the Twin Cities* at \*12 Table 2 (cited in note 23).

<sup>123</sup> See *Charter Schools in the Twin Cities: 2013 Update* at \*13 (cited in note 62).

<sup>124</sup> See *id.* The third district, Anoka, is not hurt as badly.

**Table 1: Student Losses to Charters from the Minneapolis and St. Paul School Districts, 2000-2012**

<u>Year</u>	<u>Resident Students Losses to Charters</u>		<u>Resident Students Attending District Schools</u>		<u>Resident Student Losses as a Percentage of District Enrollments Plus Resident Student Losses</u>	
	<u>Minneapolis</u>	<u>St. Paul</u>	<u>Minneapolis</u>	<u>St. Paul</u>	<u>Minneapolis</u>	<u>St. Paul</u>
2000-01	2,007	2,871	48,834	45,115	4	6
2001-02	2,100	3,343	48,156	44,201	4	7
2002-03	3,006	3,472	46,037	43,923	6	7
2003-04	3,972	3,792	43,397	42,510	8	8
2004-05	5,190	4,029	40,510	41,123	11	9
2005-06	5,683	4,225	38,532	41,267	13	9
2006-07	6,514	4,446	37,033	40,658	15	10
2007-08	7,730	4,888	34,999	39,681	18	11
2008-09	8,000	5,566	34,680	38,560	19	13
2009-10	8,261	6,100	34,441	38,096	19	14
2010-11	8,399	6,644	34,336	37,859	20	15
2011-12	8,818	7,072	34,436	37,864	20	16

Sources: Minnesota House Research Department and Minnesota Department of Education.

## V. THE COMPETITIVE IMPACT OF CHARTER SCHOOLS

One of the primary justifications for charter schools is the argument that, by engendering competition, they will enhance the performance of the entire school system, including traditional schools forced to respond to charter school competition.<sup>125</sup> However, a number of commonly observed actions by both charter and traditional schools undermine this argument, include skimming students, public school initiated charters, and aimed student recruitment.<sup>126</sup>

There is evidence that in some places charter schools may be skimming the least-costly-to-educate students from the public school system.<sup>127</sup> The degree to which charter schools skim such students depends on the financial incentives they face through the structure of the per-pupil education funding formulas.<sup>128</sup> Such skimming increases per student costs for traditional

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<sup>125</sup> See id at \*12.

<sup>126</sup> See generally See *Charter Schools in the Twin Cities: 2013 Update* (cited in note 62); *Failed Promises* (cited in note 59).

<sup>127</sup> See *Failed Promises* at \*36–37 (cited in note 59).

<sup>128</sup> See id at 38.

districts while, at the same time, forcing them to deal with the extra costs associated with declining enrollments.<sup>129</sup>

While student skimming was once relatively limited in the Twin Cities, it is beginning to show up in some predominantly white urban and suburban neighborhoods where the schools are more racially diverse than the neighborhoods.<sup>130</sup> As noted above, charter schools that skim students create new avenues for white flight and deepen racial and economic segregation in the traditional public school system.<sup>131</sup>

A number of charter schools in the Twin Cities have competed by serving specific ethnic niches, a practice particularly detrimental for students of color because it contributes to racial and economic segregation. By concentrating poverty in ethnically-segregated schools, ethnic-niche-based competition increases the number of students of color in exactly the kinds of schools that research shows to be the lowest-performing.<sup>132</sup>

One common way public school districts compete with charter schools is to initiate charter schools of their own.<sup>133</sup> In response to ethnic-niche-based competition from charter schools and the financial incentives that reward educating costly-to-educate students, school districts have created their own highly-segregated charter schools.<sup>134</sup> For instance, Minneapolis Public Schools caved to parental pressure and opened the Hmong International Academy, intended as an alternative to the now-primarily-black Lucy Stark Laney Elementary—effectively consigning each student body to institutions made up of “their own” racial group. This trend, along with new “ethno-centric” programs within traditional schools and some magnet schools have further intensified segregation within the traditional public school system.<sup>135</sup>

Ultimately, the impact of ethnic-niche-based competition on traditional public schools depends on the underlying type of

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<sup>129</sup> See id at 36–38.

<sup>130</sup> See id at 37.

<sup>131</sup> See *Failed Promises* at \*47 (cited in note 59).

<sup>132</sup> See id.

<sup>133</sup> See id.

<sup>134</sup> See id.

<sup>135</sup> See *Failed Promises* at \*47 (cited in note 59).

niche.<sup>136</sup> Given that research clearly implies that student body diversity is associated with better academic outcomes—such as higher graduation rates, higher college attendance rates, higher earnings in jobs, and more comfort living and working in an integrated context—niche competition based on race, disability, or income is counter-productive.<sup>137</sup>

It is also not clear that academic factors or outcomes are enhanced by competition in a charter-based system. Contrary to what charter proponents expected, there is evidence that school choice decisions by parents are often not based primarily on academic performance.<sup>138</sup> Parents often choose schools based on a host of other factors including location, safety, transportation, and special educational preferences.<sup>139</sup> In addition, rather than promoting diverse curricular and instructional practices, charter schools often revert to traditional forms of curriculum and instruction. At the same time, charter school competition frequently pushes public schools to mount marketing campaigns, diverting resources away from classrooms.

There is strong evidence, in particular, that parents of color as well as white parents often choose a school because it mostly serves students of the same race as their child. When parents choose schools based on race instead of academic quality, the result will virtually always be that students of color end up in segregated schools with very high poverty rates. Because high poverty schools are associated with high drop out rates, low college attendance, and low job earning, this undermines academic outcomes for those schools and for students of color.

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<sup>136</sup> See id.

<sup>137</sup> See id.

<sup>138</sup> See *Failed Promises* at \*44 (cited in note 59), citing Nanette Asimov, *Few Parents Seize Chance to Transfer Schools/’No Child Left Behind’ Made Offer Mandatory* (The San Francisco Chronicle Oct 9, 2003), online at <http://www.sfgate.com/education/article/Few-parents-seize-chance-to-transfer-schools-2554068.php> (visited Oct 18, 2014); *Few in Martin Take Advantage of Options under US School Law* (Palm Beach Post July 20, 2004).

<sup>139</sup> See *Failed Promises* at \*44 (cited in note 59), citing Christopher Lubienski, *School Diversification in Second-Best Education Markets: International Evidence and Conflicting Theories of Change*, 20 Educ Pol 323, 323–44 (May 2006); Christopher Lubienski, *Innovation in Education Markets: Theory and Evidence on the Impact of Competition and Choice in Charter Schools*, 40 Am Educ Rsrch J 395, 417–19 (2003). Numerous studies show that a substantial share of charter schools are using a “back-to-basics” or “core knowledge” approaches in the classroom—standard curricular approaches used by traditional public schools.

A choice environment of this sort is not the great equalizer, as charter proponents argue, because not all choices are created equal.<sup>140</sup> This is because the choices available to white and middle-class parents invariably includes better performing schools than those available to lower-income parents and parents of color.<sup>141</sup> Existing social and economic inequalities that shape the lives of parents thus directly shape their school choices and the set of schools they consider for their children, further reproducing these inequalities.<sup>142</sup>

However, a significant body of literature suggests that charter schools compete by skimming the most able, least-costly-to-educate students from traditional public schools.<sup>143</sup> Under

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<sup>140</sup> See *Failed Promises* at \*46 (cited in note 59).

<sup>141</sup> See id.

<sup>142</sup> See id.

<sup>143</sup> See *Failed Promises* at \*36 (cited in note 59). See generally Robert Bifulco and Helen F. Ladd, *School Choice, Racial Segregation, and Test-Score Gaps: Evidence from North Carolina's Charter School Program*, 26 J Pol Analysis & Mgmt 31 (2006); Robert Bifulco, Helen F. Ladd, and Stephen Ross, *Public School Choice and Integration: Evidence from Durham, North Carolina* (National Center for Analysis of Longitudinal Data in Education Research Feb 14, 2008), online at [http://www.urban.org/UploadedPDF/1001151\\_school\\_choice.pdf](http://www.urban.org/UploadedPDF/1001151_school_choice.pdf) (visited Oct 18, 2014); Kevin Booker, Ron Zimmer, and Richard Buddin, *The Effect of Charter Schools on School Peer Composition* (RAND Education Oct 2005), online at [http://www.ncspe.org/publications\\_files/RAND\\_WR306.pdf](http://www.ncspe.org/publications_files/RAND_WR306.pdf) (visited Oct 18, 2014); Casey D. Cobb and Gene V. Glass, *Ethnic Segregation in Arizona Charter Schools*, 7 Educ Pol Analysis Archives 1 (1999); Thomas S. Dee and Helen Fu, *Do Charter Schools Skim Students or Drain Resources?*, 23 Econ Educ Rev 259 (2004); Nevbahar Ertas, *Public School Responses to Charter School Presence* (Georgia Institute of Technology and Georgia State University 2007), online at [https://smartech.gatech.edu/bitstream/handle/1853/16280/ertas\\_nevbahar\\_200708\\_phd.pdf?sequence=1](https://smartech.gatech.edu/bitstream/handle/1853/16280/ertas_nevbahar_200708_phd.pdf?sequence=1) (visited Oct 18, 2014); Edward Fiske and Helen F. Ladd, *When Schools Compete: A Cautionary Tale* (Brookings 2000); Erica Frankenberg and Chungmei Lee, *Charter Schools and Race: A Lost Opportunity for Integrated Education*, 11 Educ Pol Analysis Archives (2003); Jeffrey R. Henig and Jason A. MacDonald, *Locational Decisions of Charter Schools: Probing the Market Metaphor*, 83 Soc Sci Q 962 (2002); Goodwin Liu and William L. Taylor, *School Choice to Achieve Desegregation*, 74 Fordham L Rev 791 (2005); Christopher Lubienski and Charisse Gulino, *Choice, Competition, and Organizational Orientation: A Geo-Spatial Analysis of Charter Schools and the Distribution of Educational Opportunities* (National Center for the Study of Privatization in Education Oct 2007), online at [http://www.ncspe.org/publications\\_files/OP148.pdf](http://www.ncspe.org/publications_files/OP148.pdf) (visited Oct 18, 2014); Yongmei Ni, *Are Charter Schools More Racially Segregated Than Traditional Public Schools?* (Michigan State University, The Education Policy Center Mar 2007), online at <http://files.eric.ed.gov/fulltext/ED498628.pdf> (visited Oct 18, 2014); Linda A. Renzulli, *District Segregation, Race Legislation, and Black Enrollment in Charter Schools*, 87 Soc Sci Q 618 (2006); Renzulli and Evans, 52 Soc Problems 398 (cited in note 67); Amy Stuart Wells, *Beyond the Rhetoric of Charter School Reform: A Study of Ten California School Districts* (UCLA Charter School Study 1998); Amy Stuart Wells, et al, *Charter Schools and Racial and Social Segregation: Yet Another Sorting Machine?*, in Richard D. Kahlenberg, ed, *A Notion at Risk: Preserving Public Education as an Engine for Social Mobility* 169 (Century 2000).

most charter laws, charter schools cannot pick and choose their students. However, charter schools frequently shape their student enrollment through their recruitment and marketing efforts, their parental involvement requirements, and their discipline or expulsion practices.<sup>144</sup>

How and where charter schools choose to advertise affects their student recruitment. Their admission process usually requires parent meetings with school officials, where the fit between the school and family is informally scoped out. During these meetings, students may be steered to apply or not apply based on the expectations of both parties. Many charters ask parents to sign a parental involvement contract, which requires parents to volunteer a certain amount of hours to the charter school. Students whose parents cannot commit to these parental involvement contracts can be denied admissions. Finally, charter schools can weed out troubled students after admission through discipline and expulsion practices.

In St. Paul, for instance, Nova Classical Academy, which is located in the predominantly white Groveland-Highland neighborhood of St. Paul, effectively siphons off white middle-class students from the racially diverse traditional public schools in the area.<sup>145</sup> Similarly, some suburban school districts, where individual schools are beginning to show signs of racial and economic transition, have seen predominantly white charters spring up near those schools.<sup>146</sup> Examples of such schools include Beacon Academy and Beacon Preparatory School in Plymouth, Paideia Academy in Apple Valley, and Seven Hills Classical Academy in Bloomington.<sup>147</sup> All of these schools have

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<sup>144</sup> See *Failed Promises* at \*36 (cited in note 59). See also Wells, *Beyond the Rhetoric* at 43 (cited in note 143); Geoffrey Walford, *Diversity, Choice, and Selection in England and Wales*, 33 Educ Admin Q 158, 162 (1997).

<sup>145</sup> As Henig and MacDonald show in the case of Washington, DC, charter schools could also skim non-white middle-class students in racially diverse school districts. See Henig and MacDonald, *Locational Decisions of Charter Schools*, 83 Soc Sci Q at 962, 973, 975, 977 (cited in note 143). Yinghua Academy, a mostly Asian Chinese immersion school in St. Paul, presents an example of such non-white skimming. The student poverty rate at Yinghua Academy fluctuates around 10 percent—much lower than the poverty rates of surrounding public schools.

<sup>146</sup> See *Failed Promises* at \*38 (cited in note 59).

<sup>147</sup> See id. In 2005, twenty-two of the thirty-four charter schools located in the Twin Cities suburbs were predominantly white, four of them were non-white segregated, and eight of them were integrated. Of these twenty-two predominantly white schools, three went out of business, one was an online school, and four were specialty schools that did not compete with public schools. Of the remaining fourteen predominantly white

admission interviews, parental involvement requirements, and strict disciplinary policies that can be used to selectively admit students.<sup>148</sup> The result in many cases is an increase in the rate of transition in surrounding traditional schools.<sup>149</sup>

Segregative ethnic competition between traditional and charter schools can be seen in the Twin Cities, especially in the urban school districts that face severe competition from “ethno-centric” charters. Charter entrepreneurs have often targeted segregated neighborhoods where the public schools are truly terrible. They promise parents that their single-race alternative will help their kids and many parents near terrible public schools will try anything. In most cases, however, the charter entrepreneurs’ claims are grossly exaggerated. Even though the public schools are terrible, their schools are often as bad or worse. As a result, many children soon leave the charter to try something else.

When children move to charter schools, the public schools lose funding. And thus, to maintain student market share, the public schools have sought waivers from civil rights rules to create single-race themed public schools to compete with the charter school marketers to keep student and their public funding.

For example, as the Minneapolis and St. Paul public school districts continued to lose their Hmong students to Hmong-focused charter schools, they decided to compete by starting Hmong-focused programs or magnet schools of their own to maintain their student “market share” and state funding dollars.<sup>150</sup> To compete with the charters, both city districts had

suburban charter schools, six of them were located in areas where the closest traditional public school showed increases in the non-white share of students, or increases of the share of low-income students of at least five percentage points in the five years prior to the emergence of the charter school. In fact, as the superintendent of Rosemount-Apple Valley-Eagan school district notes, the emergence of Paideia Academy in Apple Valley certainly increased the percentage of students of color at Cedar Park Magnet school—a school that came into existence as a result of the school district’s effort to desegregate its racially identifiable schools. Of the eighteen students who left Cedar Park for Paideia Academy, sixteen of them were white and only two were black. Similarly, of the 142 students that left Cedar Park this academic year, 72 percent were white. Personal communication with John Currie, the Superintendent of District 196, November 2, 2008.

<sup>148</sup> See *Failed Promises* at \*38 (cited in note 59).

<sup>149</sup> See id.

<sup>150</sup> See *Failed Promises* at \*41 (cited in note 59), citing Wameng Moua, *Are Hmong Students Making the Grades?*, Twin Cities Daily Planet (Mar 25, 2008), online at <http://www.tcdailyplanet.net/article/2008/03/19/are-hmong-schools-making-grades.html>

to seek exemptions from local civil rights rules that forbid such single-race schools. Hmong International Academy, a Hmong-focused program, was the Minneapolis Public School District's response to the district's declining Hmong enrollment.<sup>151</sup> The Academy started as a program within the Lucy Laney Elementary School building, a north Minneapolis school attended by a relatively small group of Hmong students, along with African-American students who constituted the majority of the student body.<sup>152</sup> During the day, the children of different races were kept apart at all times. Class periods were different so that they never had to cross each other in the hallways. As the program expanded, Hmong International Academy subsequently moved to a separate location in North Minneapolis.<sup>153</sup> What started as a "school within a school" program that separated Hmong students from the African-American students eventually led to the creation of two separate school facilities, each primarily serving a specific racial group.<sup>154</sup>

Similarly, the St. Paul school district responded to losses of Hmong students to Hmong-focused charters by creating a Hmong-focused magnet school in the district's heavily Hmong-populated Phalen Lake area.<sup>155</sup> Both of the resulting Hmong schools in Minneapolis and St. Paul were low performing. Thus, the single-race charters have not created a race to the top or toward integration, but a race to the bottom and more profound segregation.

## VI. CHARTER MISMANAGEMENT

Minnesota Department of Education school data shows that thirty-nine charter schools have closed since 1995.<sup>156</sup> While the reasons for these closings are not listed, newspaper and other accounts suggest a disproportionate share of charter school

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(visited Oct 18, 2014).

<sup>151</sup> See *Failed Promises* at \*41 (cited in note 59).

<sup>152</sup> See id.

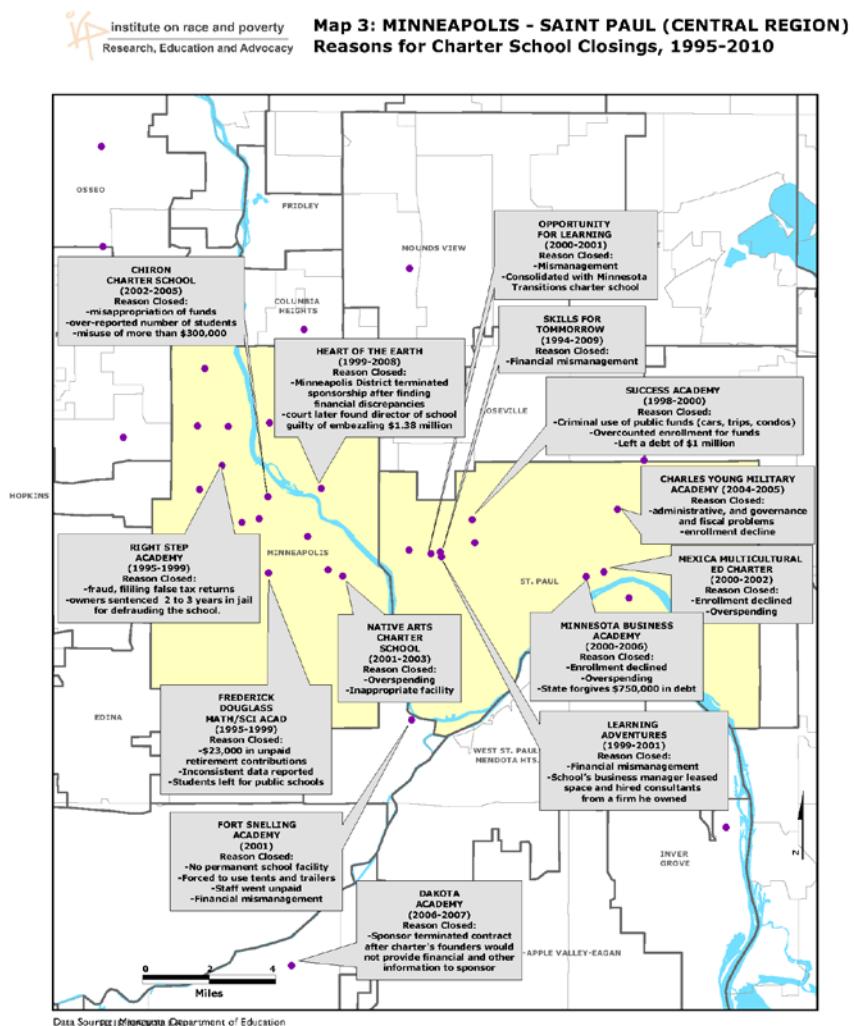
<sup>153</sup> See id.

<sup>154</sup> See id.

<sup>155</sup> See *Failed Promises* at \*41 (cited in note 59), citing Moua, *Are Hmong Students Making the Grades?* (cited in note 150).

<sup>156</sup> Update of "Failed Promises: Assessing Charter Schools in the Twin Cities" \*9 (Institute on Race and Poverty Jan 2012), online at [https://www.law.umn.edu/uploads/32/40/3240a8492f4c1d738fa87d975a4e5ea5/65\\_2012\\_Update\\_of\\_IRP\\_2008\\_Charter\\_School\\_Study.pdf](https://www.law.umn.edu/uploads/32/40/3240a8492f4c1d738fa87d975a4e5ea5/65_2012_Update_of_IRP_2008_Charter_School_Study.pdf) (visited Oct 18, 2014).

closings result from malfeasance or gross mismanagement of some sort.<sup>157</sup> Map 3 shows the reasons for closing of fourteen charter schools where the reasons could be found in the public record.



<sup>157</sup> See id.

Four of the fourteen closed as the result of criminal acts involving misappropriation of funds.<sup>158</sup> Another seven involved financial mismanagement or irregularities, which didn't cross the threshold into illegality (although at least two instances included elements suggesting malfeasance).<sup>159</sup> Only three closings were for relatively benign reasons like inadequate facilities or enrollment declines.<sup>160</sup> While not a full sample of the thirty-nine charter schools, it is suggestive of problems in the charter sector not commonly seen in traditional public school systems.<sup>161</sup>

## VII. OPEN ENROLLMENT

Minnesota's pioneering open-enrollment system (OE) enables parents and students to leave one school for another without the expense of moving.<sup>162</sup> Open enrollment allows parents a wider choice in matching a school's programs to a child's needs and creates clearer competition between schools that could encourage innovation or improvement.<sup>163</sup> Yet, open enrollment also resembles past illegal discriminatory transfer programs in that it appears to accelerate racial or economic transition in racially diverse school districts. This is possible because, after operating in compliance with the state desegregation rule for a decade, open enrollment was exempted from the rule in 2001.<sup>164</sup>

IMO's 2013 study analyzed OE's effects on racial and economic segregation across the metro's sixty-nine school districts between 2000 and 2010.<sup>165</sup> It found that OE increased segregation in the region, with the segregative trend growing stronger over time.<sup>166</sup> In 2009–2010, 36 percent of OE moves were segregative, 24 percent were integrative, and the rest were

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<sup>158</sup> See id.

<sup>159</sup> See id.

<sup>160</sup> See *Update of "Failed Promises"* at \*9 (cited in note 156).

<sup>161</sup> There are no similar newspaper stories or other claims of public school corruption.

<sup>162</sup> See *Open Enrollment and Racial Segregation in the Twin Cities* at \*1 (cited in note 23).

<sup>163</sup> See id.

<sup>164</sup> See id.

<sup>165</sup> See generally *Open Enrollment and Racial Segregation in the Twin Cities* at \*1 (cited in note 23).

<sup>166</sup> See id at 1.

race-neutral.<sup>167</sup> The percentage of segregative moves grew significantly during the decade from 23 percent to 36 percent, a change due almost entirely to a large increase among white open enrollees.<sup>168</sup>

The region's three central cities (including St. Cloud) are the biggest losers in OE.<sup>169</sup> Minneapolis, St. Paul, and St. Cloud each lose substantial numbers of white students to nearby districts.<sup>170</sup> Students open enrolling out of the three central city districts were much more likely to be white than those remaining behind, and virtually all were enrolling in districts with white shares substantially greater than the district they left.<sup>171</sup> Similarly, open enrollees into Minneapolis and St. Paul were not only much less likely to be white than a typical student in the districts they left, but they were less likely to be white than resident students in the two city districts.<sup>172</sup> Many racially diverse suburban districts also lost substantial numbers of white students to adjacent white suburban districts, and the districts that had the largest net gains from OE were a group of predominantly white districts physically close to more diverse urban and suburban districts.<sup>173</sup> The following tables help to illustrate the racial and economic segregation trends resulting from OE.

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<sup>167</sup> See id at 1, 8 Table 1. The shares are similar for the poverty measure. The threshold for classifying a move as segregative or integrative was an inter-district difference of more than 10 percentage points in the relevant shares. See Table 1 and the associated discussion.

<sup>168</sup> See *Open Enrollment and Racial Segregation in the Twin Cities* at \*1 (cited in note 23).

<sup>169</sup> See id.

<sup>170</sup> See id.

<sup>171</sup> See id at \*9.

<sup>172</sup> See *Open Enrollment and Racial Segregation in the Twin Cities* at \*9 (cited in note 23).

<sup>173</sup> See id at 14.

**Table 2: Distribution of Integrative and Segregative Open Enrollment Moves by Race 2000-01 and 2009-10**

<u>Racial/Ethnic Group</u>	2000-01		2009-10		% Point Change	
	<u>Integrative</u>	<u>Segregative</u>	<u>Integrative</u>	<u>Segregative</u>	<u>Int.</u>	<u>Seg.</u>
White	12%	20%	19%	36%	7%	16%
Non-white	29	36	36	38	7	2
Black	28	40	26	32	-2	-8
Hispanic	n.a.	n.a.	6	12	n.a.	n.a.
Asian	n.a.	n.a.	13	14	n.a.	n.a.
Total	16	23	24	36	8	13
Free-Red. Price Lunch Elig.	21	27	30	33	9	6

Integrative: A move by a white student from a district where the white percentage of students is more than 10 percentage points higher than the white share in the receiving district. The equivalent calculation is made for each racial/ethnic group.

Segregative: A move by a white student from a district where the white percentage of students is more than 10 percentage points lower than the white share in the receiving district. The equivalent calculation is made for each racial/ethnic group.

**Table 3: Open Enrollment by Race and Income, City Districts in 2009-2010**

<u>District</u>	<u>Pre-OE Resident Students</u>	<u>Open Enrollments Out</u>	<u>Open Enrollments In</u>	<u>Open Enrollment Net</u>	<u>Net as a % of Pre-OE Resident Total</u>
	<u>% White</u>	<u>% White</u>	<u>Average Receiving Districts</u>	<u>% White</u>	<u>Average Sending Districts</u>
Minneapolis	44,744	2,452	1,256	-1,196	-3
St. Paul	43,926	2,458	1,775	-683	-2
St. Cloud	10,919	1,234	38	-1,196	-11

<u>District</u>	<u>Pre-OE Resident Students</u>	<u>Open Enrollments Out</u>	<u>Average % Non-white Receiving Districts</u>	<u>Open Enrollments In</u>	<u>Average % Non-white Sending Districts</u>
	<u>% FRED<sup>174</sup></u>	<u>% FRED</u>	<u>Average % FRED Receiving Districts</u>	<u>% FRED</u>	<u>Average % FRED Sending Districts</u>
Minneapolis	28	54	61	22	53
St. Paul	26	53	64	25	64
St. Cloud	76	92	94	92	94

<u>District</u>	<u>Pre-OE Resident Students</u>	<u>Open Enrollments Out</u>	<u>Average % FRED Receiving Districts</u>	<u>Open Enrollments In</u>	<u>Average % FRED Sending Districts</u>
	<u>% FRED<sup>174</sup></u>	<u>% FRED</u>	<u>Average % FRED Receiving Districts</u>	<u>% FRED</u>	<u>Average % FRED Sending Districts</u>
Minneapolis	67	28	36	67	45
St. Paul	72	48	37	61	37
St. Cloud	47	33	24	11	26

Pre-OE Resident Students = Actual Enrollment + OE Out - OE In + CIY Students Out  
- CIY Students In + Charter Students Out

Averages are weighted, based on the share of OE flows to or from all other districts.

Source: Minnesota Department of Education.

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<sup>174</sup> “FRED” signals students on Free and Reduced-cost Lunch.

**Table 4: Open Enrollment by Race and Income, Greatest Net Sender Suburban Districts in 2009-2010**

<u>District</u>	Pre-OE Resident Students	Open Enrollments <u>Out</u>	Open Enrollments <u>In</u>	Open Enrollment <u>Net</u>	Net as a % of Pre-OE Resident Total
	% White	% White	Average Receiving Districts	Average In % White	Average Districts
Anoka-Hennepin	42,251	1,956	969	-987	-2
Robbinsdale	12,968	1,563	760	-803	-6
Osseo	22,877	2,215	1,426	-789	-3
Burnsville-Eagan-Savage	10,738	1,044	607	-437	-4
Columbia Heights	3,248	731	300	-431	-13
Eastern Carver	9,576	666	266	-400	-4
White Bear Lake	8,789	757	389	-368	-4
<u>District</u>	Pre-OE Resident Students	Open Enrollments	Average % White Receiving Districts	Open Enrollments	Average % White Sending Districts
	% White	% White			
Anoka-Hennepin	78	63	64	61	67
Robbinsdale	55	51	61	47	52
Osseo	54	46	62	35	62
Burnsville-Eagan-Savage	63	66	76	63	78
Columbia Heights	44	62	61	36	58
Eastern Carver	85	82	85	88	84
White Bear Lake	83	79	77	74	68
<u>District</u>	Pre-OE Resident Students	Open Enrollments	Average % FRED Receiving Districts	Open Enrollments	Average % FRED Sending Districts
	% FRED	% FRED			
Anoka-Hennepin	29	38	38	38	34
Robbinsdale	41	40	34	37	43
Osseo	37	43	39	52	40
Burnsville-Eagan-Savage	34	29	21	34	20
Columbia Heights	64	46	42	60	45
Eastern Carver	16	11	12	20	19
White Bear Lake	25	21	24	35	36

Pre-OE Resident Students = Actual Enrollment + OE Out - OE In + CIY Students Out  
 - CIY Students In + Charter Students Out

Averages are weighted, based on the share of OE flows to or from all other districts.

Source: Minnesota Department of Education.

The group of suburban districts with the greatest net gains from OE in 2009–2010 is composed primarily of districts gaining students from white flight.<sup>175</sup> White students represented more than 87 percent of resident students in four—Minnetonka, Edina, Orono, and Mahtomedi—and 79 percent in a fifth—St. Anthony-New Brighton.<sup>176</sup> OE inflows to each of these districts

<sup>175</sup> See id at 13. See also id at 15 Map 4; id at 22 Table 4.

<sup>176</sup> See *Open Enrollment and Racial Segregation in the Twin Cities* at \*18 (cited in note 23).

were also predominantly white—ranging from 77 to 94 percent white.<sup>177</sup> In each case, inflows to these districts came from districts that were more diverse on average than the receiving districts and, in each case, white students were over-represented in OE (compared to the districts they came from).<sup>178</sup>

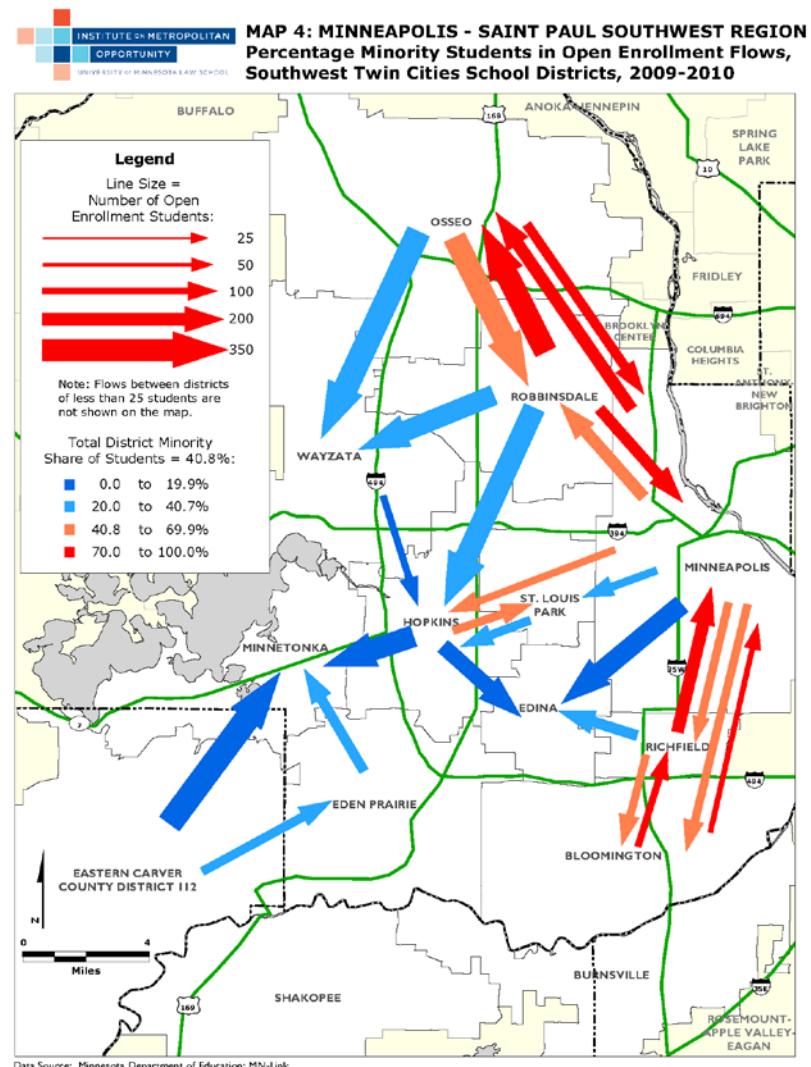
What happens when a very white district attracts only white students from surrounding more racially diverse districts? The most dramatic story involves the Minnetonka district, which was the only one of the large westerns suburban districts that both derived a large share of its enrollment from open enrollment, but at the same time would not accept poor, non-white suburbs from Minneapolis through the voluntary interdistrict transfer program connected to the Choice is Yours settlement.

Two of the three largest OE flows into the Minnetonka School District are from Hopkins and Eden Prairie, two districts which are significantly more racially diverse (and diversifying more rapidly) than Minnetonka. In 2009–2010, Minnetonka resident students were 90 percent white, compared to 66 percent in Hopkins and 75 percent in Eden Prairie. In that year, 354 students open enrolled from Hopkins and 88 percent of them were white. The difference between open enrollees from Eden Prairie and Eden Prairie's resident student mix were not as great—156 students open enrolled from Eden Prairie to Minnetonka and 76 percent were white. However, at that time, Eden Prairie had recently gone through a controversial planning process, which created more pro-integrative attendance boundaries for its elementary schools. During that process, the threat of open enrolling to Minnetonka was raised more than once by opponents of the plan, and it is likely that OE flows (and the threat of leaving) still exacerbate tensions associated with racial change in the district.

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<sup>177</sup> See *id.*

<sup>178</sup> See *id.* Although the racial differences are relatively small in some cases (the white share of students in Orono was only five points higher than the average for a typical sending district, for instance), they are consistent. See *id.* at 18 n 16.



**Table 5: Open Enrollment by Race and Income, Greatest Net Receiver Districts in 2009-2010**

<u>District</u>	Pre-OE Resident Students	Open Enrollments Out	Open Enrollments In	Open Enrollment Net	Net as a % of Pre-OE Resident Total
Minnetonka	7,449	239	1,332	1,093	15
Edina	7,062	108	1,058	950	13
Brooklyn Center	1,662	300	988	688	41
St. Anthony-New Brighton	1,055	52	712	660	63
Orono	2,121	104	736	632	30
Fridley	2,398	284	879	595	25
Mahtomedi	2,670	51	634	583	22
<u>District</u>	Pre-OE Resident Students	Open Enrollments Out	Average % White Receiving Districts	Open Enrollments In	Average % White Sending Districts
Minnetonka	91	80	76	82	76
Edina	87	63	58	77	50
Brooklyn Center	29	21	55	38	58
St. Anthony-New Brighton	79	44	57	84	46
Orono	93	87	81	94	88
Fridley	57	46	55	53	55
Mahtomedi	92	67	75	90	80
<u>District</u>	Pre-OE Resident Students	Open Enrollments Out	Average % FRED Receiving Districts	Open Enrollments In	Average % FRED Sending Districts
Minnetonka	9	19	22	7	23
Edina	6	28	37	8	46
Brooklyn Center	73	64	42	57	40
St. Anthony-New Brighton	21	62	44	10	55
Orono	8	12	17	8	18
Fridley	53	57	47	57	47
Mahtomedi	10	45	31	7	26

Pre-OE Resident Students = Actual Enrollment + OE Out - OE In + CIY Students Out  
 - CIY Students In + Charter Students Out

Averages are weighted, based on the share of OE flows to or from all other districts.

Source: Minnesota Department of Education.

The largest OE flow into Minnetonka is from the Eastern Carver district. In 2009–2010, this included 417 students, 88 percent of whom were white.<sup>179</sup> Although Eastern Carver is

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<sup>179</sup> See *Open Enrollment and Racial Segregation in the Twin Cities* at \*18 (cited in

itself a predominantly white district, the district recently went through a boundary drawing process for its two high schools which maintained the separation between the city of Chaska (which is increasingly diverse) and the areas surrounding it (which are predominantly white).<sup>180</sup>

The effect of open enrollment into Minnetonka weighed heavily on more racially diverse adjacent districts as they assessed potential boundary changes.<sup>181</sup> Hopkins attempted to draw racially integrative boundaries in the early 2000s but reversed course when 170 students in the whitest school attendance area threatened to open enroll into Minnetonka.<sup>182</sup> Eastern Carver County decided against a racially integrative high school boundary decision at least partly in light of its already substantial open enrollment losses to Minnetonka.<sup>183</sup> Finally, in the most public of boundary decisions with racial implications, Eden Prairie parents opposing the integrative boundary decision threatened to open enroll into Minnetonka when the district decided to implement the integrative decision.<sup>184</sup>

As noted above, students open enrolling out of the central city districts in the Twin Cities were much more likely to be white than those remaining behind, and virtually all were enrolling in districts with white shares substantially greater than the district they left.<sup>185</sup> At the same time, open enrollees into Minneapolis and St. Paul were not only much less likely to be white than a typical student in the districts they left but they were less likely to be white than resident students in the two city districts.<sup>186</sup>

The conduct of the Minnetonka school district, a predominantly white, high-performing district west of Minneapolis, bears examination under Justice O'Connor's construction of *Milliken*. Minnetonka is the whitest local district in a group of four districts that interact extensively through

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note 23). See also Table 5.

<sup>180</sup> See id at \*19.

<sup>181</sup> See id.

<sup>182</sup> See id.

<sup>183</sup> See *Open Enrollment and Racial Segregation in the Twin Cities* at \*19 (cited in note 23).

<sup>184</sup> See id.

<sup>185</sup> See id at \*19–20.

<sup>186</sup> See id at 9.

Open Enrollment flows. It refused to become part of the Choice is Yours settlement with the City of Minneapolis and continues to refuse to admit Minneapolis students under that program.<sup>187</sup> The state has taken no action to require its agent, the Minnetonka school district, to become involved in this program, despite the fact that it is roughly the same distance from Minneapolis as two of its neighbors that do participate.

In the last decade, four suburban districts in the Twin Cities western suburbs, Hopkins<sup>188</sup>, St. Louis Park<sup>189</sup>, Eden Prairie<sup>190</sup> and Eastern Carver County<sup>191</sup> completed boundary changes with the potential to enhance racial integration in their schools, as is required or permitted under the Equal Protection Clause of the United States Constitution,<sup>192</sup> parallel state constitutional requirements or authority, and pursuant to the Minnesota School Desegregation Rule. In pursuing this goal, each of the districts was arguably constrained and undermined by the actions of the state of Minnesota and its agent, the Minnetonka school district, through the improper use of the state-sponsored “open enrollment” system.

Before, during, and after the boundary decisions in the four districts, and after they had refused to admit minority students from Minneapolis, the Minnetonka school district actively recruited parents and students away from other districts through an expensive and unique paid-for advertising campaign undertaken in neighborhood local newspapers or through other media, including television and radio.<sup>193</sup> In 2010, as the

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<sup>187</sup> The West Metro Education Project (WMEP) is a voluntary group of districts that accept children from Minneapolis under the Choice is Yours Program. All of Minneapolis’ close suburbs except Minnetonka participate. See *Member Districts* (West Metro Education Program), online at <https://sites.google.com/a/wmep.k12.mn.us/wmep-k12-mn-us/member-districts> (visited Oct 18, 2014).

<sup>188</sup> Hobday, Finn, and Orfield, 35 Wm Mitch L Rev at 965–69 (cited in note 77).

<sup>189</sup> Allie Shah, *New Start Times, Boundaries for St. Louis Park Schools*, (Star Tribune Mar 17, 2010), online at <http://www.startribune.com/local/west/87602057.html> (visited Oct 18, 2014).

<sup>190</sup> Eaton, *Not Your Father’s Suburb* (cited in note 79).

<sup>191</sup> Patrice Relerford, *No Balancing Act for Chanhassen, Chaska*, Star Tribune B1 (May 18, 2008); Kelly Smith, *Chaska Schools Face Wholesale Turnover in Leaders*, (Star Tribune Nov 30, 2010), online at <http://www.startribune.com/local/west/110907864.html> (visited Oct 18, 2014); Andrew Hart, *An Analysis of the Chanhassen/Chaska High School Boundaries* (June 2012) (student paper on file with author).

<sup>192</sup> US Const Amend XIV, § 1.

<sup>193</sup> See *Building Support for Educators in Racially Changing Suburbs: NSCD Statement on School Boundary Changes in Eden Prairie, Minnesota* \*4 (The National

neighboring Eden Prairie School District sought to implement pro-integrative boundary changes, Minnetonka increased its media expenditure resulting in white flight from Eden Prairie to Minnetonka.<sup>194</sup>

As each of the four school districts has officially considered or implemented legally permissible pro-integrative boundary strategies, white parents whose children might be required to attend more racially integrated schools in their districts than they were presently attending either threatened to use, or actually used, the state supported open-enrollment system to attend much whiter schools in the Minnetonka School District. According to the superintendents of the Hopkins and Eden Prairie school districts, Minnetonka actively recruited these parents, even as the metropolitan newspapers noted that their actions would both cause more racial segregation in these districts and make it more difficult to draw racially integrated boundaries.<sup>195</sup>

This conduct by both white parents and the Minnetonka school district and its implications was covered extensively in the Minneapolis Star Tribune and other media.<sup>196</sup> In each case, both the state and its agent, the Minnetonka school district, were on notice that this conduct was causing greater segregation

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Coalition on School Diversity), online at [http://www.school-diversity.org/pdf/NCSD\\_Eden\\_Prairie\\_Statement.pdf](http://www.school-diversity.org/pdf/NCSD_Eden_Prairie_Statement.pdf) (visited Oct 18, 2014). See also Ron Schachter, *Students Wanted!: As Competition For Students Heats Up, Districts Are Turning To Advertising—And Are Prospering*, (District Administration Feb 2007), online at <http://www.districtadministration.com/article/students-wanted> (visited Oct 18, 2014).

<sup>194</sup> See Lisa Kaczke, *Study: Open Enrollment Causing Segregation* (Sun Current Jan 23, 2013), online at <http://current.mnsun.com/2013/01/study-open-enrollment-causing-segregation/> (visited Oct 18, 2014).

<sup>195</sup> See id. See also Interview with John Schultz, Superintendent of Hopkins; Interview with Melissa Krull, Superintendent of Eden Prairie; Paul Grossel, *Number of Eden Prairie Students Leaving to Minnetonka Not Known Until March*, Eden Prairie News (Jan 21, 2011).

<sup>196</sup> See, for example, Katherine Kersten, *A Bad Idea Goes 'Round and 'Round* (Star Tribune Nov 13, 2010), online at <http://www.startribune.com/opinion/107585253.html> (visited Oct 18, 2014); Myron Orfield, *Myron Orfield: Eden Prairie Plan Healthy, Thoughtful* (Star Tribune Nov 18, 2010), online at <http://www.startribune.com/opinion/109027574.html> (visited Oct 18, 2014); Kelly Smith, *Eden Prairie Parents Turn up Heat in School Battle* (Star Tribune Jan 25, 2011), online at <http://www.startribune.com/local/west/114616324.html> (visited Oct 18, 2014); Jon Tevlis, *Busing Fight Feels like Lots of Drama on a Smallish Stage* (Star Tribune Jan 29, 2011), online at <http://www.startribune.com/local/west/114868869.html> (visited Oct 18, 2014). See also, Beth Hawkins, *Eden Prairie School Board to Grapple with Contentious Boundary Plan Tonight* (MinnPost Nov 23, 2010), online at <http://www.mnpost.com/learning-curve/2010/11/eden-prairie-school-board-grapple-contentious-boundary-plan-tonight> (visited Oct 18, 2014).

between Minnetonka and the surrounding districts and within the surrounding districts.<sup>197</sup> That this conduct—observed, sanctioned, and rewarded by state law—increased racial segregation within and between districts was both understood and clearly foreseeable.

One could argue that by clear state action, Minnesota has created an open enrollment system that allows Minnetonka to refuse to admit low-income children seeking to open enroll from Minneapolis in its system, while at the same time it officially sanctioned and rewarded Minnetonka's segregative conduct in recruiting white children from racially integrated schools in nearby districts. In officially and perhaps improperly exempting Minnetonka segregative actions from state and federal civil rights law, and by rewarding its conduct with increased state aid payment has the state of Minnesota intentionally caused segregation in one district? Furthermore, have those actions in turn directly caused racial segregation in: the 1) Eden Prairie; 2) St Louis Park; and the 3) Hopkins school districts and 4) every other school district in the metropolitan area?

### VIII. ARE MINNESOTA'S CHARTER AND OPEN ENROLLMENT PROGRAMS UNCONSTITUTIONAL?

Charter school advocates argue that racial segregation in charter schools is not de jure segregation prohibited by *Brown*. Charter segregation is a matter of "choice," not discrimination, writes director of the Center for School Change at Macalester College Joe Nathan:

People choosing of their own free will to attend a public school is the exercise of liberty. The right to assemble and exercising freedom of choice is guaranteed in the *Bill of Rights*. How then is choosing which charter school to attend not consistent with the right of assembly? Unlike imposed segregation, charter schools include all who apply or wish to come. Unlike segregated schools of the 1950's and 1960's, these schools most certainly do not exclude anyone because of their race or color of skin.<sup>198</sup>

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<sup>197</sup> See Kaczke, *Study: Open Enrollment Causing Segregation* (cited in note 194).

<sup>198</sup> Bill Wilson and Joe Nathan, *Giving Parents Choice Among Various Schools is the OPPOSITE of Forced Segregation* (Charter Notebook Feb 8, 2012), online at

In some ways, the position of the modern charter movement with regard to racial integration is not unlike the view expressed by the Supreme Court in *Plessy v Ferguson*,<sup>199</sup> which we must remember did not itself forbid racial integration but only allowed the states to do so. “If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits and a voluntary consent of individuals.”<sup>200</sup> In other words, integration if it occurs must be based on the choices of both races to be integrated.

*Brown* forbids Jim Crow segregation, but cases after *Swann* and *Keyes* also permitted a finding of intentional segregation based on gerrymandering school boundaries, school construction and additional policies with segregative effects, school transfer policies with racially disparate impacts, systematically unequal facilities, curriculum and extra-curricular policies, and segregative faculty assignments. The fact that segregation was a reasonably foreseeable outcome was a relevant part of the finding of discrimination.

Most constitutionally problematic are the white-flight charter schools that appear in racially diverse school attendance areas and often grow rapidly when the school district attempts to integrate its schools. These are not “segregation academies” prohibited by *Griffin*, because they do not forbid non-white students from attending.<sup>201</sup>

Nathan is correct that these schools do not announce segregation as a goal, with all the implications of non-white inferiority. Theoretically, non-white children are welcome, should they choose such a school. Yet, in many parts of the country, these white charter schools use an interview process, require parental volunteering, and undertake other discipline or screening processes that appears to have the disparate impact of keeping non-white students out.<sup>202</sup>

When these less overtly discriminatory screening processes have sharply disparate racial impacts, the state has an

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<http://www.charternotebook.org/giving-parents-choice-among-various-schools-i/> (visited Oct 18, 2014).

<sup>199</sup> 163 US 537 (1896).

<sup>200</sup> Id at 551.

<sup>201</sup> See Wilson and Nathan, *Giving Parents Choice*, Charter Notebook (cited in note 198).

<sup>202</sup> See *Update of “Failed Promises”* at \*38 (cited in note 156).

obligation to investigate and through testing make sure that discrimination is not taking place. To do otherwise is to allow a practice that will have a clearly foreseeable segregative effect to go forward.

Recently, the Department of Education Office for Civil Rights issues a guidance document which declared, “Charter schools located in a district subject to a desegregation plan (whether the plan is court ordered, or required by a Federal or State administrative entity) must be operated in a manner consistent with that desegregation plan.”<sup>203</sup> It is illegal to allow a separate state-supported public school or school district to interfere with or undermine in any way the efforts of a school district or state to integrate a dual school system.<sup>204</sup> At least two courts have held that charter schools cannot operate in a manner that would interfere with an existing school desegregation plan.<sup>205</sup> These rules are clearest when there is a court ordered integration remedy,<sup>206</sup> but should they be less clear when the district has decided voluntarily to be integrated or when the schools are racially integrated based on residential integration?

The court in *Parents Involved in Community Schools v Seattle School District No. 1*<sup>207</sup> stated that diversity and avoiding racial isolation remain a compelling governmental interest that an elected school board may pursue absent a finding of intention discrimination.<sup>208</sup> Can the state interfere with the districts effort to do this without a finding of discrimination?

Justice Kennedy seems to find an administrative determination of the need for a desegregation plan enough to prohibit interference.<sup>209</sup> Yet what if the school district has itself

<sup>203</sup> US Department of Education, Office for Civil Rights, *Guidance Letter on Charter Schools* 3–4 (May 14, 2014), online at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405-charter.pdf> (visited Oct 18, 2014).

<sup>204</sup> See *Wright*, 407 US at 470.

<sup>205</sup> See *Berry v School District of Benton Harbor*, 56 F Supp 2d 866, 870–72 (WD Mich 1999); *Beaufort County Board of Education v Lighthouse Charter School Committee*, 516 SE2d 655, 659 (SC 1999).

<sup>206</sup> See generally Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 Tulane L Rev 563 (2001).

<sup>207</sup> 551 US 701 (2007).

<sup>208</sup> *Parents Involved*, 551 US at 783.

<sup>209</sup> See generally *Schuette v Coalition to Defend Affirmative Action*, 134 S Ct 1623 (2014).

made a finding that it needs to undertake its plan to avoid a constitutional violation or that its previous system was dual and its action was a necessary remedial step? What sort of deference would be due the locality's determination? Surely there is an interest in local district pro-active action to avoid litigation. Moreover, since *Milliken*, the Supreme Court seems to place at least some value in local control over these issues.<sup>210</sup> Perhaps the court's holdings in employment discrimination cases might provide some guidance here.<sup>211</sup>

What about the creation of single-race, non-white schools, rooted in the argument that racial homogeneity may provide desperately needed security, racial confidence, and freedom from discrimination for low incomes non-white students? While it is hard to find credible defenders of the white flight charters, leaders of non-white charter schools frequently make impassioned arguments that single race academic environments are necessary to close the achievement gap. Here, potential victims of discrimination—like the leaders of the all-black schools prohibited by the Supreme Court in Columbus and Dayton, Ohio—sometimes become proponents of segregation, arguing that single-race schools benefit the achievement of non-white children.

Such leaders can be compelling both to non-white citizens, but are often also greatly celebrated by conservative defenders of white segregated schools and neighborhoods. Together white and non-white proponents of segregated education can be more than a match for civil rights advocates who, in any case, often operate with little public support. Let's examine these arguments in light of what we know of the Twin Cities context. In the Twin Cities, there are several non-white charters that beat the odds and have quite good test scores. But a clear majority of the single race non-white charters have very low test scores and are among the region's very worst schools. A disproportionate share of the schools experiencing corruption problems are single-race non-white, high poverty charter schools.

While these single race schools are growing fast, can we really say that non-white students are choosing racial

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<sup>210</sup> But see *Parents Involved*, 551 US 746–49 (2007) (striking down the desegregation plan created by local elected officials).

<sup>211</sup> See generally *Ricci v DeStefano*, 557 US 557 (2009).

segregation as best for their children? Often, the only other choice is a traditional school with similar demographics or a non-white multi-racial, mostly-poor school with poor academic performance. In this type of situation, are non-white charter students really “choosing” segregation or simply preferring one sort of segregation over another? If the surrounding neighborhood schools are all non-white and poor, it is hard to argue the creation of single race non-white charter is a problematic as the white flight charters surrounded by racially diverse schools.

Yet one difference is that the single race schools are being consciously created. If we accept the principle that an all-black school or all-Hmong school is a good idea based on solidarity and freedom of association, how can we counter the creation of all-white schools based on the same arguments without running afoul of *Bakke*? Certainly, the German-American students at the Twin Cities German Immersion Academy charter school in St. Paul (which is 95 percent white) would argue that spending time on their unique culture and language heritage strengthens their sense of self and improves their confidence and ability to learn. How do we say that all-black or all-Hmong schools are permissible but that the all-white charter school is not?

In the end, both the white flight academies and ethically themed schools place the burden of integration of the victims of discrimination and their families. As *Green* outlined, the potential for school practices that discourage integration and the likely differences in wealth and educational attainment that operated in the post-*Brown* Virginia remain present in the racially and socially stratified world of urban and suburban schools.<sup>212</sup>

How many low-income black or Latino children will choose to spend their days at the German Immersion charter, totally dominated by affluent white students, where they will be instructed in German and concentrate their studies on German history, art, and culture, just in order to attend an integrated facility? Similarly, how many middle-income whites will chose to attend the all-black Higher Ground Academy, which concentrates on basic skills and empowerment for low-income

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<sup>212</sup> See *Green*, 391 US at 435–36.

African-Americans? Clearly, both types of schools will inevitably be segregated.

If charter schools most often reflect the racial composition of their neighborhoods, why shouldn't they be held to the same standards as newly created public schools? Under *Swann* and *Keyes*, when the public school system opened or added capacity to a school building in way that contributed to segregation, the Court declared this to be evidence of intentional discrimination.<sup>213</sup> It is very hard to say that charter schools whose location and or thematic decisions create foreseeably segregated schools are not equally constitutionally suspect. When foreseeably segregated charter schools are sponsored or approved by the another entity or district and they draw children into schools more segregated than those in their home district, this is evidence of an intra-district violation, requiring an interdistrict remedy. If such schools are state-sponsored and approved, they would be in addition evidence of a state-level violation.

In term of the issue of open enrollment, the Supreme Court in *Keyes v Denver School District No 1*,<sup>214</sup> *Dayton Board of Education v Brinkman*<sup>215</sup> and *Columbus Board of Education v Penick*<sup>216</sup> declared the state-sanctioned transfer policies that systematically and foreseeably increase racial segregation in a district's schools or between school districts can support a finding of discrimination.<sup>217</sup> In *Missouri v Jenkins*,<sup>218</sup> Justice O'Connor found that when suburban "districts 'arrang[e] for white students residing in [urban] districts to attend [suburban] schools'" that "*Milliken I* . . . permits interdistrict remedies."<sup>219</sup>

Minnesota's open enrollment system has clear disparate impacts. Whites use it more often to leave integrated schools that to attend them. White students are more likely to have parents with cars that can drive them to different school

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<sup>213</sup> See *Swann*, 402 US at 20–21; *Keyes*, 413 US at 202.

<sup>214</sup> 413 US at 212–14.

<sup>215</sup> 443 US at 540–42.

<sup>216</sup> 429 US at 465–68.

<sup>217</sup> See *Keyes*, 413 US at 235 (Powell, J., concurring). The failure to adhere to a district's approved integration plan is also a factor that may result in a finding of intentional segregation; Gary Orfield, *Must We Bus?: Segregated Schools and National Policy* 20 Table 1–1 (Brookings 1978).

<sup>218</sup> 515 US 70 (1995).

<sup>219</sup> Id at 110.

districts. Whites are more likely to have social networks informing them of the availability and quality of these whiter districts. Whites are more likely to feel comfortable moving to attend whiter school areas. It is clearly foreseeable that open enrollment will continue to increase racial segregation. Thus in this sense, Minnesota's open enrollment system "arranges for" white students residing in a segregated city district to attend schools in whiter suburban districts and "arranges for" black students in integrated districts to attend segregated city schools and thus runs afoul of the Constitution.

## IX. CONCLUSION

School choice programs in Minnesota have grown rapidly and spread to other states, despite the fact that they have met few of their original goals. Charter schools in Minnesota from their outset have underperformed their traditional counterparts and, by drawing enrollment and state funding from these schools, made the public school system weaker than it has ever been. Many charter schools are intentionally or at least foreseeably segregated, and have also encouraged traditional school districts to pursue more segregative policies than they otherwise would have. Public school districts have sought exemptions from civil rights rules to create predominantly non-white schools (which are oftentimes low-performing) to compete for market share with intentionally segregated charters. Moreover, the emergence of all-white charter schools—essentially white flight academies—has put pressure on the public schools to create special-themed, predominantly white schools to keep white students in the traditional system. Virtually all of the choice-based rationales now used by charter advocates were once used by segregationist to avoid the requirements of *Brown*. Similarly, while Minnesota's Open Enrollment program facilitates a great deal of student movement from one district to another, it has also contributed to growing inter- and intra-district segregation in the state's schools, especially in the Twin Cities.

Both choice programs have failed to meet two of the most prominent objectives espoused by their original supporters—more racially integrated schools and elimination of the achievement gap. At the same time, they have done nothing to meet the requirements of several Supreme Court decisions

regarding racial fairness in public schools. This is especially true of the charter school system. Many charter proponents openly support the creation of intentionally segregated charter schools. In short, choice programs in Minnesota have evolved to the point where constitutional remedies are both possible and necessary to return the programs to their original goals.

