

CHARTERS, CHOICE, AND RESEGREGATION

Leland Ware* and Cara Robinson**

The charter schools movement is one of the fastest growing developments in the educational arena. The publication of *A Nation at Risk: The Imperative for Educational Reform*¹ in 1983 set off shock waves in the educational establishment. The report found that standardized test scores were declining, teachers were less demanding, and American schools were falling behind their foreign counterparts. The report concluded that “[t]he educational foundations of our society are presently being eroded by a rising tide of mediocrity which threatens our very future as a Nation and a people.”² Charter schools, vouchers, and other programs were among the reactions aimed at reforming the nation’s public schools.

The charter school concept was first introduced by Massachusetts teacher, Ray Budde, in his book, *Education by Charter: Restructuring School Districts*.³ Albert Shanker, who was the president of the American Federation of Teachers, embraced Budde’s idea, publicized it widely and persuaded his organization to endorse charter schools at its 1988 Convention.⁴ Charter supporters envisioned schools that would be created by educators and parents, who would develop new curricula and innovative approaches to teaching strategies.⁵ Parents and teachers would obtain a “charter” from school boards to carry out the programs they proposed. The goals, objectives, and responsibilities of the school’s sponsors would be specified in the charter. Monitoring and evaluation would be important features of the program. The charter’s duration would be limited, typically three to five years. Renewals would be conditioned on an evaluation of the success of the program. Supporters predicted that successful charters schools would inspire reform and improvements in traditional public schools.

The charter concept has also been embraced by groups ranging from the trade unionist American Federation of Teachers to neo-liberal economic theorists. In *Politics, Markets, and America’s Schools*,⁶ John Chubb and Terry Moe argued that public schools were failing because entrenched interests had too much control over educational policy. Schools were

* Louis L. Redding Chair and Professor of Law & Public Policy, School of Urban Affairs and Public Policy, University of Delaware

** Ph.D. Candidate, School of Urban Affairs and Public Policy, University of Delaware

1. Nat’l Comm’n on Excellence in Educ., U.S. Dep’t of Educ., *A Nation at Risk: The Imperative for Educational Reform* (1983).

2. *Id.*

3. RAY BUDDE, *EDUCATION BY CHARTER: RESTRUCTURING SCHOOL DISTRICTS, KEY TO LONG-TERM CONTINUING IMPROVEMENT IN AMERICAN EDUCATION* (1988).

4. JOE NATHAN, *CHARTER SCHOOLS: CREATING HOPE AND OPPORTUNITY FOR AMERICAN EDUCATION* 65-71 (1996).

5. Joseph O. Oluwole and Preston C. Green, III, *Charter Schools Under the NCLB: Choice and Equal Educational Opportunity*, 22 ST. JOHN’S J.L. COMM. 165, 176 (2007); Judith Johnson and Alex Medler, *The Conceptual and Practical Development of Charter Schools*, 11 STAN. L. & POL’Y REV. 291, 291-293 (2000) (“By expanding public school choice, charter schools are providing options that families want for their children and are helping people throughout our public school systems ask what each of us can do to improve education for all children.”).

6. JOHN CHUBB & TERRY MOE, *POLITICS, MARKETS AND AMERICA’S SCHOOLS* (1990).

obligated to respond to school boards, teachers' unions, state governments, and others whose interests sometimes conflicted with those of students. This would change with the advent of charter schools. When the government's education monopoly was eliminated, new educational providers would enter the market and compete with existing schools. The new organizations would establish instructional programs that performed better than those provided by the government monopoly. Parents and students would be "free to choose" the schools which best met their educational needs. In such an environment the most effective schools would thrive and unproductive schools would go out of business.⁷

Charter schools are popular, but they are also controversial.⁸ Supporters claim that charters will allow community residents to influence the nature and content of schooling in ways that democratize the educational system. They also believe that charters offer curricula and teaching methodologies that are not available in public schools.⁹ Thus, charters will promote educational excellence through innovative approaches to learning, curricula, and instruction.¹⁰ Critics argue that charters will increase segregation and racial isolation. They fear that charters will divert resources from traditional public schools and undermine the educational system. Minority students who enroll in charters are likely to be the most able students, leaving poorer and less prepared students in public schools.¹¹

This article examines one aspect of the charter debate — the influence of charter schools on school desegregation efforts. Part one examines the development and organizational structure of charter schools. Part two shows that in metropolitan communities across the nation student enrollments in charter schools are far less diverse than in traditional public schools. Part three examines school desegregation efforts in Delaware and explains why the Neighborhood Schools Act will adversely affect student body diversity. Part four shows that student populations in Delaware's charter schools are far less diverse than those found in public schools. Part five explains why resegregation in public schools is caused by the segregated housing patterns that persist in most metropolitan communities. The article concludes with an analysis of *Parents Involved in Community Schools v. Seattle School District* and *Meredith v. Jefferson County School District*¹² and explains how that decision will undermine efforts to promote student body diversity in public and charter schools.

The data show that the average black charter student attends school with a higher percentage of black students and a lower percentage of white students than those attending traditional public schools. White students typically attend charter schools with a much higher percentage of white students than their overall share of the charter school population. This leaves most minority students in the nation's central cities with a Hobson's choice; they can attend public schools

7. James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi Market for Education*, 2007 U. ILL. L. REV. 839 (2007).

8. Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 PENN ST. L. REV. 43 (2004) (describing the numerous court challenges to charter schools).

9. Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753 (2000).

10. Maurice R. Dyson, *Putting Quality Back Into Equality: Rethinking The Constitutionality Of Charter School Enabling Legislation & Centric School Choice In A Post-Grutter Era*, 36 RUTGERS L.J. 1 (2004).

11. Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563 (2001).

12. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 127 S. Ct. 2738 (2007).

which are, more likely than not, intensely segregated or they can enroll in an inner city charter school where, on average, they will be more segregated than they would have been had they remained in public schools.¹³

I. The Organizational Structure Of Charter Schools

Charter schools are intended to function like private schools. They are funded with tax revenues but they operate without the constraints that burden the typical public school system. There are three layers of bureaucracy to which public schools must respond: local school districts, state boards of education, and the U.S. Department of Education. Public schools are established by states and governed primarily by state laws. Local school districts are political subdivisions of state governments. Public schools are usually operated by elected governing boards and financed primarily by local property taxes. School boards appoint a superintendent who is responsible for the management of the schools. States license teachers, set certification standards, and provide financial assistance to local districts. The federal government provides financial assistance through categorical grants. This financial assistance is conditioned upon the state and local school boards' agreement to develop programs which reflect educational priorities set by Congress.¹⁴

In charter schools, the regulatory demands of the state, federal, and local bureaucracies are largely eliminated. Charter proponents believe that this freedom facilitates the development of community-based educational programs and provides opportunities for parents to become more involved in the operation and governance of schools. As a result, charters range from those featuring experimental teaching techniques to those with a "back-to-basics" approach. Charter operators include for-profit corporations, nonprofit organizations, coalitions of parents, and teachers and community groups.

As charter schools are governed by state laws, there are many variations among them; however, they tend to follow the model that Budde and Shankar advocated. They are in the main:

...nonsectarian public schools of choice that operate with freedom from many of the regulations that apply to traditional public schools. The "charter" establishing each such school is a performance contract detailing the school's mission, program, goals, students served, methods of assessment, and ways to measure success. The length of time for which charters are granted varies, but most are granted for 3-5 years. At the end of the term, the entity granting the charter may renew the school's contract. Charter schools are accountable to their sponsor — usually a state or local school board — to produce positive academic results and adhere to the charter contract. The basic concept of charter schools is that they exercise increased autonomy in return for this accountability. They are accountable for both academic results and fiscal practices to several groups: the sponsor that grants them, the parents who choose them, and the public that funds them.¹⁵

Minnesota enacted the first charter school law in 1991.¹⁶ In the decade that followed, forty states, the District of Columbia, and Puerto Rico adopted charter school legislation. Delaware was among the states that enacted legislation

13. *Zelman v. Simmons-Harris*, 536 U.S. 639, 707 (2002) (Ohio program providing vouchers for some students to attend public or private school, including religious school, held not to violate First Amendment's establishment of religion clause. Souter dissented, characterizing the students' options as a "Hobson's choice").

14. WILLIAM J. REESE, *AMERICA'S PUBLIC SCHOOLS: FROM THE COMMON SCHOOL TO "NO CHILD LEFT BEHIND"* (2005).

15. U.S. Charter Schools, http://www.uscharterschools.org/pub/uscs_docs/o/index.htm.

16. U.S. Department of Education, *Evaluation of the Public Charter Schools Program: Final Report* (2004).

authorizing charter schools. The state's Charter School Act¹⁷ provides that any person, university, college, or nonreligious, non-home-based entity that can meet the requirements of the law can establish a charter school. The state and local school boards are authorized to grant charters. There is no limit to the number of schools that can be chartered. A school must have two or more grades, from kindergarten through twelve and at least two hundred students. A charter school is authorized to enroll fewer than two hundred, but not less than one hundred students, during its first two years of operation. The same enrollment requirement (less than 200 but more than 100) applies to schools that serve at-risk or special education students. Charter schools must be managed by a board of directors that operates independently of any local school board.

Charters are granted for an initial period of four years and are renewable every five years thereafter. A charter will not be renewed if the operators do not comply with the provisions of its charter. Charters are funded using the same per student formula that applies to traditional public schools; one hundred percent of state funding based on the state's unit funding formula and one hundred percent of local school district funding based on previous year's per-pupil expenditure from the school in which the student resides. The law also provides for transportation serving low-income students.

Charter schools are exempt from all provisions of the state's education code and all school district regulations, except those specified in the state's charter school law. The state does not provide funding to construct charter school facilities. Each school must identify and finance its buildings. However, the Charter School Act requires the State Department of Education to annually publish, and to make available to applicants and existing charter schools, a list of vacant and unused buildings or unused portions thereof owned by the State or school districts that may be suitable for housing charter schools.

Charter operators are obligated to submit an annual report which describes their progress in meeting their student performance goals. The report must include a financial statement that identifies revenues, expenditures, assets, and liabilities. Charters must submit yearly enrollment data to the school districts in which they are located. Charters must also have written enrollment confirmation from the students' parents. Charter school teachers are not covered by school district collective bargaining agreements. They can negotiate their own agreements as a separate bargaining unit in the charter school or work without a collective bargaining agreement.

II. Charter Schools And Resegregation In Metropolitan Communities

One of the arguments made by charter school opponents is that schools located in communities in which the population is largely segregated — white or black — are likely to experience *de facto* segregation.¹⁸ To prevent this outcome, eleven states included diversity requirements in their charter school laws.¹⁹ Two of these, South Carolina and Nevada, have numerical racial balancing requirements. The others require charter schools to reflect the racial composition of the entire districts in which they are located.

17. DEL. C. ANN. tit. 14, § 501. See also Kathi A. Karsnitz, *Charter Schools: Mile Markers On The Road Of Reform Or A Dead End For Public Education?*, 16 DELAWARE LAWYER 5 (1999).

18. Suhrid S. Gajendragadkar, *The Constitutionality of Racial Balancing in Charter Schools*, 106 COLUM. L. REV. 144 (2006). See also Gerard Toussaint Robinson, *Can the Spirit of Brown Survive in the Era of School Choice? A Legal and Policy Perspective*, 45 HOW. L.J. 281 (2002).

19. These states are California, Connecticut, Florida, Kansas, Minnesota, Nevada, New Jersey, North Carolina, Ohio, South Carolina, and Wisconsin. Gajendragadkar, *supra*, note 18.

Efforts to assure diversity in charters have not been effective. A study published by the Harvard Civil Rights Project in 2003 examined the racial composition of the nation's charter schools.²⁰ Using 2000-01 data, the researchers found that charter schools were, on average, more segregated than traditional public schools. That year, there were thirty-four states with charter schools. Forty-three percent of the charter students were white, thirty-three percent were black, and nineteen percent were Latino.

The public school population at the national level had a significantly higher percentage of white students and a lower percentage of black students than charters. The percentage of black students attending charters was nearly twice the proportion of black students enrolled in public schools. Nearly ninety percent of black charter students attended schools in which minority students were more than fifty percent of the population. Seventy percent of the black charter students were enrolled in schools in which ninety to one hundred percent of the students were racial minorities. This compared to thirty-four percent of black students who attended non-charter public schools with a ninety to one hundred percent minority student population. During the same year, the average white charter student attended a school in which the student population was seventy-two percent white.²¹

After reviewing the national numbers, the researchers examined data in sixteen states. In those states, most of the charter schools were located in cities. States that had higher percentages of charter students in cities were less likely to have significant white enrollments in those schools. More than half of the charter students in the sixteen states attended schools located in central cities; a third of the students attended charter schools in suburban communities.²² Only three states, Florida, Georgia, and Colorado, had larger percentages of charter students attending schools in suburban communities. In every state except Georgia, charter schools had higher black enrollment percentages than public schools. White students in every state attended schools with a much higher white percentage than their overall share of the charter population. In every state except Arizona, Georgia, and Colorado, at least half of black charter students attended schools with ninety to one hundred percent minority populations.²³ From their analysis of the data, the researchers concluded that:

Seventy percent of all black charter school students attend intensely segregated minority schools compared with 34% of black public school students. In almost every state studied, the average black charter school student attends school with a higher percentage of black students and a lower percentage of white students.

White students in every state studied attend schools with a much higher white percentage than their overall share of the charter school population. In many states, however, white charter school students are exposed to substantial percentages of non-white students. Furthermore, there are pockets of white segregation where white charter school students are as isolated as black charter school students.²⁴

20. E. Frankenberg and C. Lee, *Charter Schools and Race: A Lost Opportunity for Integrated Education*, EDUCATION POLICY ANALYSIS ARCHIVES, Vol. 11, no. 32 (Sept. 5, 2003), <http://epaa.asu.edu/epaa/v11n32/>.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

III. School Desegregation In Delaware

Delaware's Charter School law was enacted in 1995 against the backdrop of a decades-long struggle to desegregate the state's public schools. Delaware was among the six consolidated cases from five jurisdictions that are remembered as *Brown v. Board of Education*.²⁵ As in almost all of the southern states, school desegregation in Delaware proceeded slowly. In 1968, the Delaware legislature enacted the Educational Advancement Act. The law prohibited any school district with a population of 12,000 or more students from consolidating with other school districts. The only district with a population of more than 12,000 students was Wilmington, which had the largest proportion of the state's African-American students. The law would have confined most of northern Delaware's black students to Wilmington schools. In 1970, a motion was filed in a pending desegregation case in the Delaware District Court, *Evans v. Buchanan*, claiming, among other things, that the Educational Advancement Act violated Delaware's duty to eliminate racially-identifiable schools.²⁶

While *Evans* was pending, the United States Supreme Court held in *Milliken v. Bradley*²⁷ that suburban school districts surrounding Detroit could not be required to participate in court-ordered desegregation plans unless it could be shown that their actions had contributed to segregation in the city. This meant that there could be no interdistrict remedy without proof of an interdistrict violation. *Evans* was one of the few cases in which this rigorous requirement was satisfied. The District Court found that the Educational Advancement Act had a significant role in prolonging segregation in Wilmington and New Castle County schools. The court issued a metropolitan remedy that included Wilmington and the suburban school districts in New Castle County.²⁸ In 1976, the three-judge panel in *Evans* rejected plans submitted by the parties and ordered the eleven school districts in New Castle County to be merged into a single district.²⁹ This resulted in a consolidation of the districts and busing to achieve the racial balance within individual schools. For the next two decades school desegregation proceeded, using busing to achieve racial balance in individual schools.

In the early 1990s the Supreme Court's desegregation jurisprudence changed with the decisions in *Board of Education of Oklahoma City v. Dowell*,³⁰ *Freeman v. Pitts*,³¹ and *Missouri v. Jenkins*.³² In the 1968 decision in *Green v. County School Board, New Kent County*,³³ the Supreme Court had held that school boards were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination

25. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

26. *Evans v. Buchanan*, 379 F. Supp. 1218, 1219 (D. Del. 1974).

27. 418 U.S. 717 (1974).

28. The Supreme Court ultimately affirmed this ruling in *Delaware State Board of Education v. Evans*, 446 U.S. 923 (1980).

29. The Delaware legislature subsequently divided New Castle County into four districts with portions of Wilmington in each district. DAVID P. VARADY & JEFFREY A. RAFFEL, *SELLING CITIES: ATTRACTING HOMEBUYERS THROUGH SCHOOLS AND HOUSING PROGRAMS* 224 (1995).

30. 498 U.S. 237 (1991).

31. 503 U.S. 467 (1992).

32. 515 U.S. 70 (1995).

33. 391 U.S. 430 (1968).

would be eliminated root and branch.”³⁴ In the early 1990s cases the Supreme Court relaxed the standard for determining whether school districts had achieved this “unitary status.” Under the revised standard, school districts could be released from court supervision if they complied in “good faith” with the original desegregation decree and eliminated vestiges of segregation “to the extent practicable.” The Court also found that if single-race schools were caused by the racial compositions of the neighborhoods in which they were located, rather than by the actions of school officials, this would not be interpreted as a violation of the desegregation obligation.

After these decisions school districts across the nation were — and currently are being — released from federal court supervision.³⁵ In 1996, applying the modified standard, the United States Court of Appeals for the Third Circuit affirmed a trial court’s ruling that the school districts in New Castle County had achieved unitary status.³⁶

In 2000 the Neighborhood Schools Act (“NSA”) was adopted by Delaware’s General Assembly to “establish and implement a plan for neighborhood schools in Northern New Castle County that is fair and equitable to all affected children in New Castle County.”³⁷ The NSA required school districts to “develop a Neighborhood School Plan ... that assigns every student within the district to the grade-appropriate school closest to the student’s residence, without regard to any consideration other than geographic distance and the natural boundaries of neighborhoods.”³⁸

Under the NSA, school districts could deviate from the geographic proximity requirement if they were able to demonstrate that a “substantial hardship” justified a different assignment plan. The law permitted districts to present alternate plans using different configurations if they believed the alternate plans would be more effective in accomplishing the legislation’s goals. This meant that districts were obligated to develop student assignment plans that complied with the NSA’s proximity requirement and, if they elected to do so, they could develop an alternate assignment plan and submit both to the State Board of Education for approval.³⁹

When New Castle County’s desegregation plans were under federal court supervision, the City of Wilmington was divided among four districts in northern New Castle County to promote student body diversity. Recognizing the NSA’s segregative potential, three of the four districts with Wilmington students resisted implementing the NSA’s proximity requirements. One of them, the Brandywine school district, was granted an exemption. The two remaining districts, Christina and Red Clay, each submitted two plans, both of which were rejected by the State Board of Education. Red Clay presented a third plan in 2004 after the legislature amended the NSA and made clear that a third plan could be submitted. That plan was approved by the State Board of Education in 2004.⁴⁰ Christina operated without an approved plan until a suit was filed that resulted in an order requiring it to do so.⁴¹ As there are high levels of residential segregation

34. *Id.* at 437-38.

35. GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION, THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996).

36. *Coalition to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752 (3d Cir. 1996).

37. DEL. C. ANN. tit. 14, § 220. *See also Harden v. Christina School District*, 924 A.2d 247 (Del. Ch. 2007).

38. DEL. C. ANN. tit. 14, § 223.

39. *Harden*, 924 A.2d at 248.

40. The official decision and order on Red Clay’s application was delayed and formally issued in 2005.

41. *Harden*, 924 A.2d at 250.

in several of Wilmington's neighborhoods, the implementation of NSA would clearly have resulted in *de facto* segregation in local schools.⁴²

IV. The Racial Composition Of Delaware's Charter Schools

The student populations in Delaware's charter schools, like those across the nation, are far less diverse than the state's traditional public schools. Thirteen of the seventeen charter schools that operated during the 2007-2008 school year had enrollments that were highly segregated (seventy-five percent one race or higher). In 2000 Delaware had a total population of 783,600. According to the Census 74.6% of Delawareans were white; 19.2% were black or African-American; 2.1% were Asian; 0.3% were American Indian or Alaska Native; less than 0.1% were Native Hawaiian or Other Pacific Islander; 2% were some other race, and 1.7% reported two or more races. Delaware's Hispanic population grew by a substantial 136% during the decade of the 1990s, increasing from 15,820 persons in 1990 to 37,277 persons in 2000. By the end of the decade the Hispanic population constituted 4.8% of the state's total population.⁴³ As figure 1 indicates, the state's black residents are concentrated in the City of Wilmington and to a lesser extent in the City of Dover, the state's capital. Over the last ten years there has been an increase in the minority populations in the suburban areas of New Castle and Kent Counties.

Figure 1: Percent of Population by Race, Delaware Counties and Cities, 2000

<i>Race</i>	<i>New Castle</i>	<i>Kent</i>	<i>Sussex</i>	<i>Wilmington</i>	<i>Dover</i>
White	73.10%	73.50%	80.30%	35.50%	54.90%
Black	20.20%	20.70%	14.90%	56.40%	37.20%
Asian	2.60%	1.70%	0.70%	0.70%	3.20%
American Indian & Alaska Native	0.20%	0.60%	0.60%	0.30%	0.50%
Native Hawaiian & Other Pacific Islander	0.00%	0.00%	0.00%	0.00%	0.00%
Some Other Race	2.20%	1.30%	2.00%	5.20%	1.60%
Two or More Races	1.60%	2.20%	1.40%	2.00%	2.60%

SOURCE: 2000 Census: Summary File 1 (Washington, DC: United States Census Bureau), 2000.

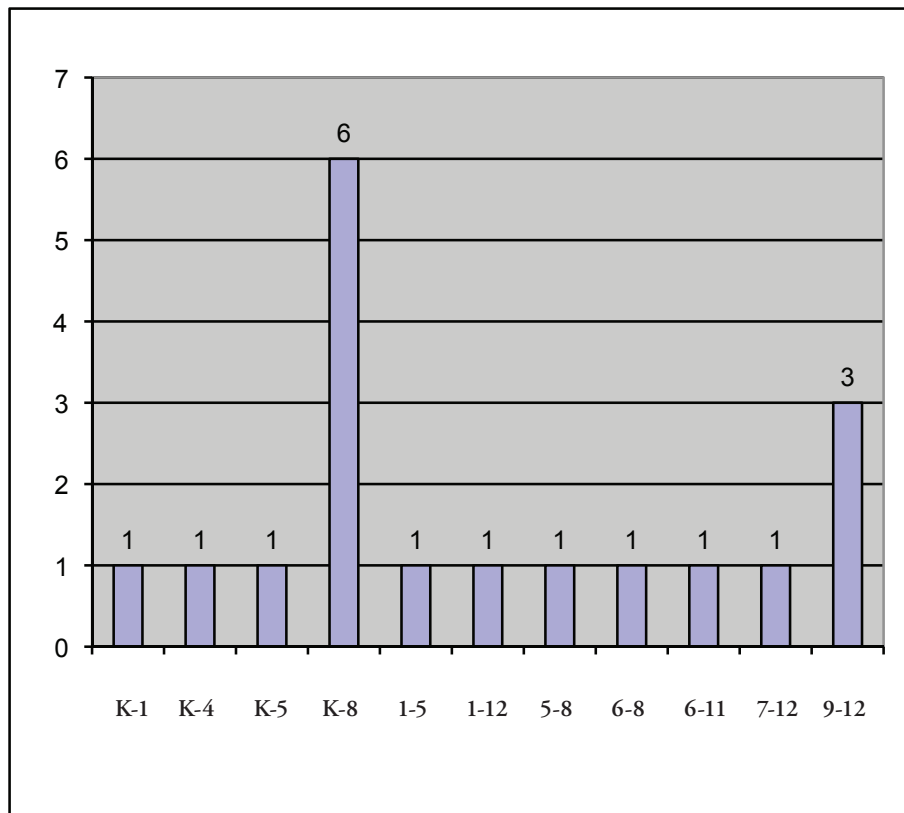
42. CensusScope, http://www.censuscope.org/us/m9160/chart_dissimilarity.html; Leland Ware and Steven Pequet, *Delaware Analysis of Impediments to Fair Housing Choice* (2003), <http://www.udel.edu/ccrs/Fair%20Housing%20Report/Fair%20Housing%20Impediments%20Report.htm>; Mike Chalmers, *Bias in Housing on the Rise in Delaware, Activists Want Better Enforcement, Fines*, DELAWARE NEWS JOURNAL, Sept. 30, 2007.

43. Leland Ware and Steven Pequet, *Analysis of Impediments to Fair Housing Choice in Delaware* (2003), <http://www.udel.edu/ccrs/Fair%20Housing%20Report/Fair%20Housing%20Impediments%20Report.html>.

Delaware's first charter school opened in 1996. Currently, there are eighteen charter schools approved for operation by the Delaware Department of Education during the 2008-2009 school year. Four of these schools are located in Kent County, one in Sussex County, six in greater New Castle County, and eight in the City of Wilmington. Sixteen of the eighteen charter schools were open during the 2007-2008 school year.⁴⁴ Of those, four opened during the years 1996-1999, six from 2000-2002, and six more from 2003-2007.⁴⁵

Figure 2 shows the grade distribution of Delaware's charter schools.

Figure 2: Number of Schools by Grade Level



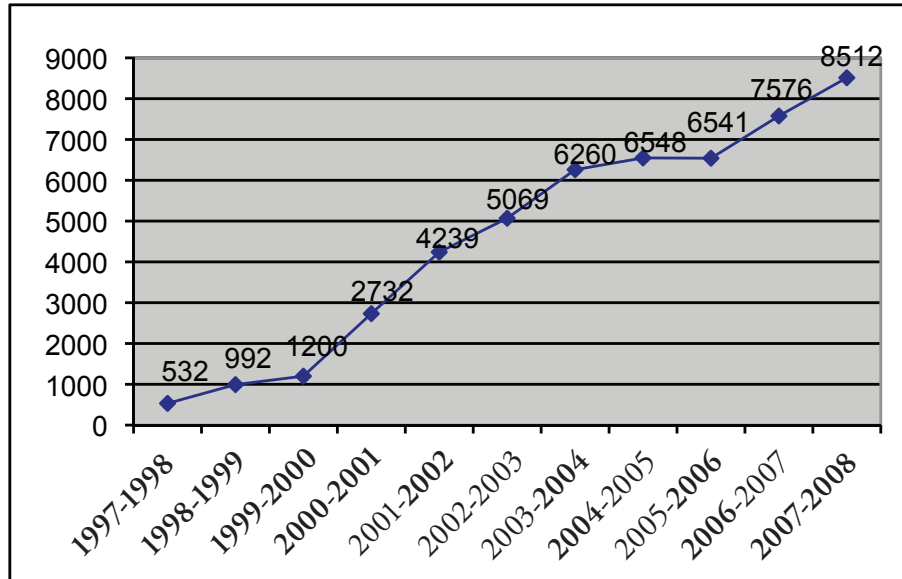
SOURCE: *List of Delaware Charter Schools* (Dover, DE: Delaware Department of Education), 2007.

44. One school, Marion T. Academy, was closed following the 2007-2008 school year.

45. The Delaware General Assembly placed a temporary moratorium on new charter school applications effective July 2008.

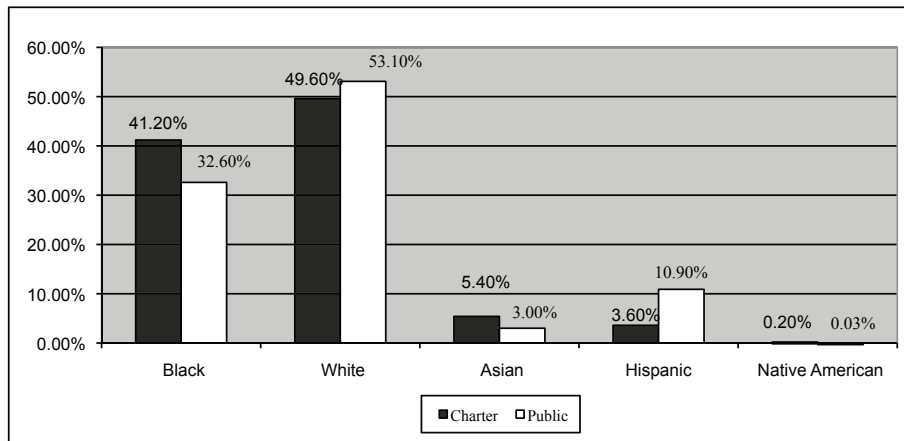
During the 2007-2008 school year, 8,512 students were enrolled in charter schools. This represents 6.9% of the public school student population and reflects a 935 student enrollment increase from 2006-2007. Figure 3 shows the enrollment trends of Delaware's charter schools since 1997-1998.

Figure 3: Delaware Charter School Enrollment, 1997-1998 to 2007-2008



SOURCE: *Annual Enrollment Reports* (Dover, DE: Delaware Department of Education), 1997-2007.

As figure 3 indicates, charter schools are growing. The enrollment trends mirror those found in other states — Delaware's charter schools are segregated by race as compared to the state's public schools. For the 2007-2008 school year, there were 3,502 black students, 4,220 white students, 458 Asian-American students, 302 Hispanic students, and 24 Native American students enrolled in Delaware's charter schools. Figure 4 shows the proportion of students by race enrolled in charter schools versus public schools in Delaware.

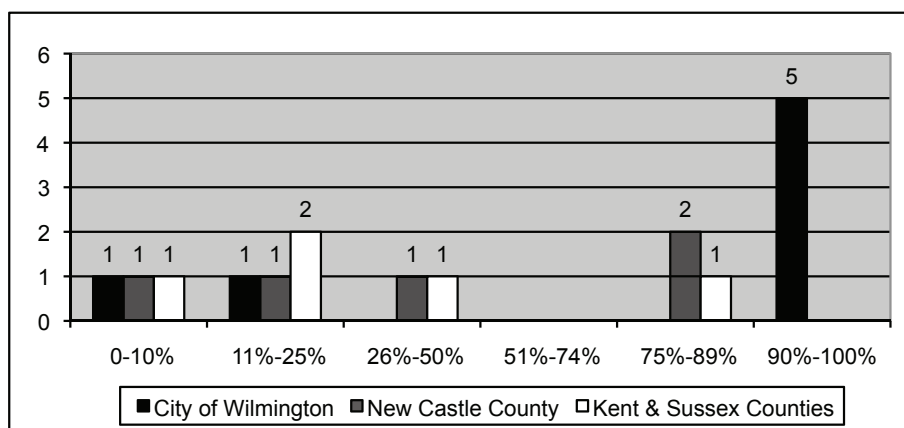
Figure 4: Charter and Public School Enrollment by Race, 2007-2008

SOURCE: *Annual Enrollment Report* (Dover, DE: Delaware Department of Education), 2007.

NOTE: There were 115,529 student enrolled in the public school system as of September 30, 2007.

As figure 4 shows, blacks represent a larger proportion of students enrolled in charter schools (41.2%) than in public schools (32.6%). Furthermore, seven charter schools have black enrollments of seventy-five percent or higher; six schools have white enrollments of seventy-five percent or higher. Thirteen of the seventeen charter schools operating during the 2007-2008 school year had highly segregated student bodies. Of the seven schools with greater than seventy-five percent black student enrollment, five are located in the City of Wilmington. The enrollment in each of these five schools is more than ninety percent black. Of the six schools with greater than seventy-five percent white enrollment, three are located in greater New Castle County and none in the City of Wilmington. The urban/suburban racial divide is reflected in charter school development and operation.

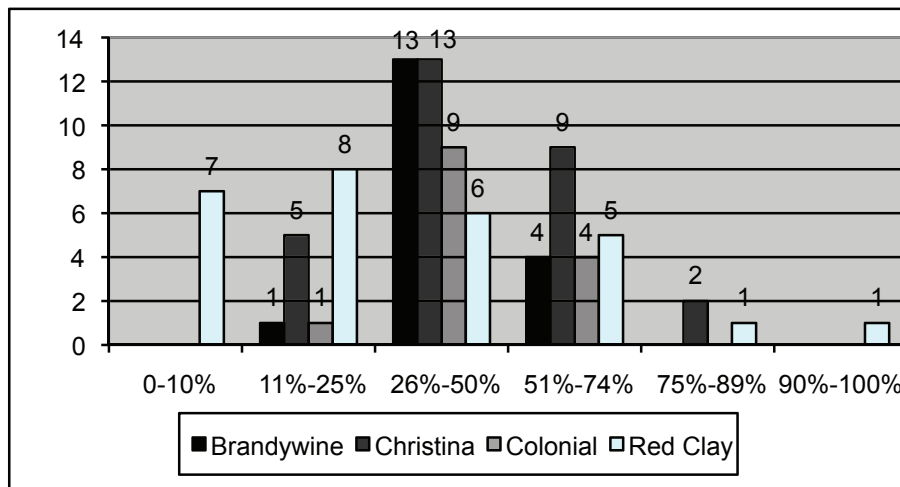
Figure 5: Percentage of Black Students, by Charter School & Geography, 2007-2008



SOURCE: *Annual Enrollment Report* (Dover, DE: Delaware Department of Education), 2007.

As figure 5 shows, only two charter schools (one in New Castle County and one in Kent County) fall within the range representative of black public school enrollment statewide (twenty-six to fifty percent). Sixty-three percent of black students attend charter schools that are greater than fifty percent minority. Sixty percent of black students attend charter schools with enrollments that are more than *ninety* percent minority. By comparison, in the four northern New Castle County public school districts, 44.5% of black students attend schools in which the minority population is greater than fifty percent and only 2.9% attend schools with a minority population above ninety percent.

The four school districts in northern New Castle County — Brandywine, Christina, Colonial, and Red Clay — contain a total of eighty-nine schools. During the 2007-2008 school year, only four had student body populations that were more than seventy-five percent black. In addition, there are only four schools that had a student body population that was greater than seventy-five percent white. This figure is likely to change as student placement plans required by the NSA are implemented. The distribution of black student enrollment in traditional public schools is presented in figure 6.

Figure 6: Percentage of Black Students Enrolled in Northern New Castle County Schools

SOURCE: *Annual Enrollment Report* (Dover, DE: Delaware Department of Education), 2007.

The public schools in New Castle County currently have diverse student enrollments. Students across the four districts attend schools with black populations that range from twenty-six percent to seventy-four percent. As figure 5 shows, only two of seventeen charter schools have black student populations in that range. In a 2007 review of the Delaware charter school system, the Western Michigan Evaluation Center found:

In terms of family income [in 2005-2006], 5 charter schools were found to be “segregative high income.” By our own definition, to be segregative high-income means the charter schools should have a difference greater than 10 points in the percentage of their students qualifying for FRL [free/reduced lunch] and the district’s FRL. On the other hand, 5 charter schools were found to be “segregative low-income,” since they enrolled a substantially higher proportion of FRL students than the local district.⁴⁶

Four of the five charter schools identified by the Western Michigan report as “segregative low-income” are located in the City of Wilmington and all of them are greater than seventy-five percent black.⁴⁷ Three of the five schools identified as “segregative high-income” are greater than seventy-five percent white. Only one is located in Wilmington.⁴⁸ The majority of the charter schools in Delaware are more segregated by race and income than the state’s traditional public schools. Since 1996, charter schools have been an expanding alternative to the state’s traditional public school system. If this trend continues, more students will be placed in segregated learning environments. The schools, often cited as innovative alternatives to the public schools, have been established across the state but they are concentrated in New Castle

46. Gary Miron, Anne Cullen, Brooks Applegate and Patricia Farrell, *Evaluation of Delaware Charter School Reform* (Kalamazoo, MI: The Evaluation Center, Western Michigan University) (Mar. 2007).

47. The fifth school is located in Dover.

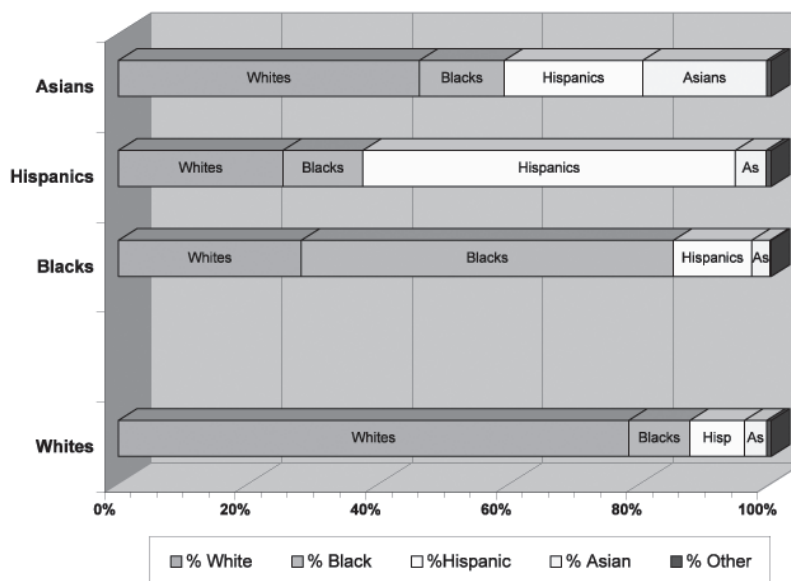
48. One school, located in Wilmington, is less than 10% black while 20% Asian and 68% white.

County and the City of Wilmington. The data show far less diversity in the student populations of charter schools as compared to public schools.

V. Separate Neighborhoods And Segregated Schools

Segregation in charter schools is just one piece of a much larger puzzle — neighborhood demographics that cause *de facto* segregation in schools. Researchers at the Lewis Mumford Center for Comparative Urban and Regional Research found that, nationally, the average white student attends a school that is more than seventy-eight percent white. Only nine percent of other children in this typical school are black. The average black student's school is more than half black. Hispanic children attend majority Hispanic schools, but black students are by far the most segregated minority group,⁴⁹ as shown in Figure 9, which shows the levels of school integration experienced by large racial and ethnic groups within the nation's cities.

Figure 7: Diversity Experienced in Each Group's Typical School – National Metropolitan Average



SOURCE: Choosing Segregation: Racial Imbalance in American Public Schools, 1990-2000 (Albany, NY: Lewis Mumford Center, 2000), figure 1.

49. John R. Logan, Jacob Stowell and Deirdre Oakley, *Choosing Segregation: Racial Imbalance in American Public Schools, 1990-2000* (2002), <http://mumford.albany.edu/census/SchoolPop/SPReport/page1.html>. The researchers used the standard measure of segregation, the "Index of Dissimilarity." This measure captures the degree to which two groups are evenly spread among schools in a given city. Evenness is defined by the racial composition of the city as a whole. The index ranges from 0 to 100, giving the percentage of children in one group who would have to attend a different school to achieve racial balance. A value of 60 or above is considered very high. Values of 40 to 50 are usually considered moderate levels of segregation, while values of 30 or less are considered low.

When *Brown* was decided in 1954, housing patterns were highly segregated as a result of decades of redlining,⁵⁰ racially restrictive covenants, and other discriminatory practices. During the post-World War II era of the 1940s and 1950s, cities were undergoing a historic transformation as white families rapidly relocated to suburban communities.⁵¹ This was made possible by a prosperous post-war economy and federal subsidy programs such as Veterans Administration and Federal Housing Authority loans. The suburban communities as we know them were developed during this period. However, black families who had the resources to purchase suburban homes were excluded by discriminatory practices, many of which were imposed by the federal government, which required racially restrictive covenants on government insured mortgage loans.⁵² Housing discrimination was outlawed by the Fair Housing Act of 1968, a generation after suburban communities had been established as all white enclaves.

Before and after the adoption of the Fair Housing Act exclusionary zoning practices contributed to the perpetuation of segregated neighborhoods. During the late-nineteenth century, land use planners decided that the public's health, safety, and welfare would be promoted by separating commercial and industrial uses from residential areas. By the early twentieth century, land use controls extended the separation principle to residential communities. Single-family and multi-family residential units were separated into different zones.⁵³ This excluded many low and moderate-income families from areas which were designated as single-family districts. Multi-family zones were often limited to older neighborhoods. Renters and lower-income families were locked into urban cores.⁵⁴

Suburbanization frustrated efforts to integrate schools in most urban communities. With the introduction of school desegregation plans, which included court-ordered busing in the late 1960s,⁵⁵ "white flight" to suburban areas continued. By that time, however, residential patterns had already been established: black families were concentrated in urban centers while white families resided in suburban areas beyond the city limits. In *Milliken v. Bradley*,⁵⁶ civil rights advocates

50. "Redlining" is a discriminatory practice institutionalized by a federal government agency, the Home Owners' Loan Corporation, in the 1930s and widely used in the real estate industry. It was used to evaluate the risks associated with loans made in specific neighborhoods. The Home Owners' Loan Corporation's underwriting guidelines established four categories of neighborhood quality. The lowest of these was color-coded red and declared ineligible for government loans. Black neighborhoods were rated in the fourth category. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 77 (1993); Amy E. Hillier, *Spatial Analysis of Historical Redlining: A Methodological Exploration*, 14 *JOURNAL OF HOUSING RESEARCH* 37 (2003).

51. Massey & Denton, *supra* note 50 at 74-78. See also *Ethnic Diversity Grows, Neighborhood Integration Lags Behind*, (Lewis Mumford Center ed., revised Dec. 18, 2001), <http://mumford1.dyndns.org/cen2000/WholePop/WPreport/page1.html>.

52. MELVIN L. OLIVER AND THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 18 (1995).

53. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926) (established the power of localities to develop and regulate land use through zoning).

54. CHARLES M. HARR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* (1996) (a case study of the New Jersey Supreme Court case, *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983), which held that the equal protection and due process clauses of the New Jersey constitution prohibited localities from using exclusionary zoning ordinances and building codes to restrict the development of low- and moderate-income housing).

55. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971) (approving busing as a means of achieving racial balance in schools).

56. 418 U.S. 717 (1974).

attempted to counter white flight by proposing a school desegregation plan that would have included the city of Detroit, Michigan and the surrounding suburban districts. The trial court ruled for the plaintiffs but the United States Supreme Court ultimately held that the lower court exceeded its authority when it imposed a remedy that included suburban school districts. The Court found that suburban school districts were not responsible for the segregated conditions in Detroit. With limited exceptions, *Milliken* prevented courts from including suburban districts in desegregation plans.

The problem that the lawyers in *Milliken* attempted to address has not been resolved. The pattern of racial minorities residing in central cities surrounded by mostly white suburbs persists to this day. As one researcher explained:

Cities are disproportionately non-white, with over 52 percent of blacks and 21 percent of whites residing in central-city neighborhoods; while suburbs are disproportionately white, where 57 percent of whites but just 36 percent of blacks reside. Segregation, particularly between blacks and whites, persists at high levels, and Hispanic/white segregation has increased in recent years. The typical white resident of metropolitan areas resides in a neighborhood that is 80 percent white, 7 percent black, 8 percent Hispanic and 4 percent Asian. A typical black person lives in a neighborhood that is 33 percent white, 51 percent black, 11 percent Hispanic and 3 percent Asian. And a typical Hispanic resident lives in a community that is 36 percent white, 11 percent black, 45 percent Hispanic and 6 percent Asian.⁵⁷

Continuing segregation is not the product of black and white income disparities. African-Americans do not enjoy the range of housing choices that are available to white families with similar incomes and credit histories because discriminatory practices persist in the nation's housing markets.⁵⁸ Studies commissioned by the U.S. Department of Housing and Urban Development (HUD) document the discriminatory practices of housing providers.⁵⁹ A HUD report based on data derived from a series of matched pair tests found that African-American homebuyers encountered discrimination in housing markets nationwide. White homebuyers were favored over blacks in seventeen percent of tests. White homebuyers were more likely to be shown homes in more predominantly white neighborhoods than similarly situated blacks.⁶⁰

Showing black and white buyers homes in different neighborhoods is referred to as "steering." It is driven by real estate agents' assumption that whites will not want to live in neighborhoods with more than a token number of minority residents. This unlawful practice is widespread and researchers have found that real estate agents are now using schools as a proxy for the race. White home seekers were discouraged from considering homes in racially mixed neighborhoods on the grounds that the local schools were "bad." This was a coded message which meant the schools had high minority enrollments. The researchers also found that neighborhoods from which whites were steered were recommended favorably to African-American and Latino purchasers.⁶¹

57. Gregory D. Squires and Charis E. Kubrin, *Privileged Places Race, Opportunity and Uneven Development in Urban America NIH*, Shelterforce online Issue #147 (Fall 2006); see also GREGORY D. SQUIRES & CHARIS E. KUBRIN PRIVILEGED PLACES: RACE, RESIDENCE, AND THE STRUCTURE OF OPPORTUNITY (2006).

58. Massey & Denton, *supra* note 50.

59. See generally John Yinger, U.S. Dep't of Housing and Urban Development, Housing Discrimination Study, *Incidence of Discrimination and Variations in Discriminatory Behavior* ix, 1 (1991); JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION 51-52, 121 (1995).

60. *Discrimination in Metropolitan Housing Markets: National Results from Phase 1 of the Housing Discrimination Study* (2000), <http://www.huduser.org/publications/hsgfn/phase1.html>.

61. *Unequal Opportunity – Perpetuating Housing Segregation in America*, National Fair Housing Alliance (2006), <http://www.mvfairhousing.com/pdfs/2006%20Fair%20Housing%20Trends%20Report>.

Studies have consistently shown that whites will desert neighborhoods when they reach a “tipping point” and become “too black.”⁶² This is fueled by the perception that the presence of African-Americans in a neighborhood causes property values to decline. This belief is driven by stereotypes, overt bias, and unconscious discrimination.⁶³ Some scholars have argued that continuing residential segregation reflects the preferences of African-Americans.⁶⁴ Polling data indicate that this view is held by most white Americans,⁶⁵ but the empirical evidence rebuts these claims. In a recent study, Kryson and Farley found that African-Americans prefer mixed communities in which the racial balance is fifty percent white and fifty percent black.⁶⁶ But, unlike the subtle motives that drive the choices of many white homebuyers, African-Americans’ preference for an equal racial mix stems in part from fears of isolation and the possibility of encountering hostility in predominately white neighborhoods.⁶⁷

Large numbers of middle and upper-middle class blacks have moved to suburban communities but these tend to be older, first-ring suburbs that are adjacent to poor neighborhoods in cities. In suburban communities African-Americans tend to reside in predominately black suburban neighborhoods. Many affluent African-Americans prefer to live in upscale homes surrounded by people who have similar educational and income levels, in pleasant locations where the potential for racial conflict is minimized.⁶⁸ Fear of isolation and conflict is not a concern for white homebuyers with similar incomes and

62. Unconscious discrimination has been the subject of a large body of psychology research. Dovidio and Gartner have explored “aversive” discrimination which they define as a subtle and unintentional form of bias that describes the actions of many white Americans who possess egalitarian values and do not believe that they are not prejudiced against racial minorities. People who engage in aversive discrimination harbor negative racial beliefs but they are not consciously aware of these feelings. And, if they have any awareness of their negative racial attitudes, they disassociate those feelings from their self-images as persons who do not engage in discrimination. Individuals who harbor unconscious racial beliefs are not likely to discriminate against racial minorities when it would be obvious to others and themselves, but they tend to engage in discrimination when there are race-neutral justifications for their behavior. SAMUEL L. GAERTNER & JOHN F. DOVIDIO, *REDUCING INTERGROUP BIAS: THE COMMON INGROUP IDENTITY MODEL 3* (2000); see also SAMUEL L. GAERTNER & JOHN F. DOVIDIO, *THE AVERSIVE FORM OF RACISM, IN PREJUDICE, DISCRIMINATION AND RACISM: THEORY AND RESEARCH* (John. F. Dovidio eds.).

63. Bruce L. Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 *STAN. L. REV.* 245, 251-54 (1974) (discussing the twenty-five to sixty percent “tipping point” at which white families have been documented to flee a neighborhood because its growing numbers of black residents will mark it as a “Black neighborhood”); Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 *CORNELL L. REV.* 729, 744-45 (2001) (suggesting the tipping point is forty percent); Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 *U. MIAMI L. REV.* 1051, 1053-59 (1998) (discussing the longstanding perception of many white realtors, home-sellers and buyers that the presence of African-Americans in a neighborhood causes property values to decline); Oliver & Shapiro, *supra* note 52 at 147-51 (homes of similar design, size, age and appearance are priced higher in white communities than in black or integrated communities).

64. ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA’S “RACIAL” CRISIS* (1998); ABIGAIL & STEPHAN THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1999).

65. Among Whites, 82% believed that Blacks had the same access to housing as Whites. Gallup Poll Social Audit, *Black - White Relations in the United States, 2002-2003 Update*. A recent CNN poll contains similar findings. Poll: Most Americans see lingering racism — in others, December 12, 2006, *available at* www.cnn.com/2006/US/12/12/racism.poll/index.html.

66. Maria Kryson and Reynolds Farley, *The Residential Preferences of Blacks: Do They Explain Segregation*, *SOCIAL SCIENCES*, Vol. 80, No. 3, 937-80 (2002).

67. Cashin, *supra* note 63.

68. ANDREW WIESE, *PLACES OF THEIR OWN: AFRICAN-AMERICA SUBURBANIZATION IN THE TWENTIETH CENTURY* (2004).

credit histories. While there has been significant progress, segregated neighborhoods are a ubiquitous feature of the American landscape. If neighborhoods were more integrated, schools would have more racially diverse student populations.

VI. The Seattle And Louisville Cases

The impact of residential segregation on diversity in public schools was at the center of the United States Supreme Court's decision in two consolidated cases: *Parents Involved in Community Schools v. Seattle School District* and *Meredith v. Jefferson County School District*.⁶⁹ The cases involved challenged assignment plans developed to assure that student populations in individual schools broadly reflected the racial demographics of the school districts. The purpose of the plans was to prevent the *de facto* segregation which would have occurred if student assignments had been made on the basis of the proximity of neighborhoods to schools.

Parents in the two districts filed civil actions contending that the plans were discriminatory because in some cases, they prevented white students from enrolling in schools they preferred. When the case reached the Supreme Court the majority found that the school districts violated the Equal Protection Clause of the Fourteenth Amendment by considering race when making attendance assignments.

Jefferson County Public Schools operated public schools in metropolitan Louisville, Kentucky. After a federal court found that the district had maintained a segregated school system, it operated under court supervision until 2000 when it achieved unitary status. In 2001, the school district implemented a voluntary student assignment plan that required schools to maintain a minimum black enrollment of fifteen percent and a maximum black enrollment of fifty percent. If students had been assigned based on the proximity of schools to students' homes, many of the schools would have been *de facto* segregated.

In Seattle most of the white students lived in northern Seattle, most of the minority students lived in the southern part of the city. In 1998, the district adopted an assignment plan which allowed incoming ninth graders to choose from among any of the district's high schools by indicating their assignment preferences in rank order. If too many students identified the same school as their first choice, the district used "tiebreakers" to determine which students would be assigned. First preference was given to students who had a sibling enrolled in the school. The second tiebreaker considered the student's race. Seattle used the racial tiebreaker as part of a plan developed to ameliorate the effects of segregated housing patterns.

When racial classifications are used by the government there must be a "compelling justification" and the means chosen must be "narrowly tailored" to achieving the policy's goals.⁷⁰ In his plurality opinion, Chief Justice John Roberts argued that the student assignment plans violated the Fourteenth Amendment because they lacked a compelling justification and the means chosen were not narrowly tailored to achieving the school districts' goals of promoting student body diversity.

In *Grutter v. Bollinger*,⁷¹ a case involving the University of Michigan's affirmative action admissions program, the Court had previously held that student body diversity *is* a compelling governmental interest. Chief Justice Roberts

69. 551 U.S. 701, 127 S. Ct. 2738 (2007).

70. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *Korematsu v. United States*, 323 U.S. 214 (1944); *Loving v. Virginia*, 388 U.S. 1 (1967).

71. 539 U.S. 306 (2003).

determined that the Seattle and Louisville cases were not controlled by *Grutter* because diversity in that case consisted of “a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”⁷² In this case, “race [was] not considered as a broader effort to achieve exposure to widely diverse people, culture, ideas, and viewpoints.”⁷³

The school districts in Seattle and Louisville argued that their assignment plans were necessary to address the consequences of segregated housing patterns. Citing rulings in voting rights and affirmative action cases,⁷⁴ Chief Justice Roberts rejected the argument stating “remedying past societal discrimination does not justify race-conscious government action.”⁷⁵ Chief Justice Roberts also found that the school districts did not satisfy the narrow tailoring requirement. They had not explored race neutral alternatives prior to resorting to a race conscious approach and the plans did not provide for an individualized review of applicants.

Justice Anthony Kennedy provided the fifth vote for the majority ruling, which struck down the assignment plans as violations of the Equal Protection Clause of the Fourteenth Amendment. Justice Kennedy agreed with the plurality’s conclusion that the student assignment plans were not narrowly tailored, but he disagreed with Chief Justice Roberts’ rejection of student body diversity as a compelling justification. Justice Kennedy stated that “[t]he nation has a moral and ethical obligation to fulfill [its] historic commitment to creating an integrated society that ensures equal opportunity for all of its children.”⁷⁶ Student body diversity is a compelling educational goal; school districts have a strong interest in avoiding racial isolation in schools.

Justice Kennedy argued that school officials can consider the racial composition of schools and adopt policies that promote student body diversity. They can devise race conscious measures that address racial isolation in individual schools. Such measures may include “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhood; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.”⁷⁷ However, “individual racial classifications ... may be considered only if they are a last resort”⁷⁸ This means that race neutral plans that promote diversity must be explored and exhausted before resorting to race conscious student assignments.

This 2007 decision will undermine efforts to promote diversity in public and charter schools. This decision means not only that *de facto* segregation will continue, it also restricts the ways in which school districts can develop strategies to promote student body diversity.⁷⁹

72. *Parents Involved*, 127 S. Ct. at 2742.

73. *Id.*

74. *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996) (“[A]n effort to alleviate the effects of societal discrimination is not a compelling interest”); *City of Richmond v. Croson*, 488 U.S. 469, 498-99 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (“Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy”).

75. *Parents Involved*, 127 S. Ct. at 2758.

76. *Id.* at 2797.

77. *Id.* at 2792.

78. *Id.*

79. James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131 (2007).

The decisions in *Dowell*, *Freeman*, and *Jenkins* in the 1990s had allowed formerly segregated school districts to be released from federal court supervision even if some schools remained segregated as a result of neighborhood housing patterns. The Court effectively approved *de facto* segregation. *Parents Involved* goes further; school districts cannot make assignments which consider the students' race, even when the assignments are made to promote diverse student populations. This means, among other things, that state laws with racial balance requirements for charter schools are not likely to survive an Equal Protection challenge after *Parents Involved*. Schools must explore race neutral plans to promote student body diversity. The Court has made clear that race conscious assignments can only be used as a "last resort."⁸⁰

Chief Justice Roberts' plurality opinion in *Parents Involved* attempted to distinguish *Grutter's* diversity rationale on the ground that elementary and high schools are different from colleges and universities. But the age of the students and the academic settings are irrelevant to the *Grutter* majority's reasoning. The value of diversity rests on the educational benefits derived from the interactions of students with different backgrounds and life experiences. This is what the school districts in Seattle and Louisville were attempting to accomplish. Student assignments which result in single-race schools in segregated neighborhoods preclude the sort of student interactions and "cross-racial understanding" that the *Grutter* majority valued.

Chief Justice Roberts assumed that continuing residential segregation is attributable to "past societal discrimination."⁸¹ Segregated neighborhoods are indeed the legacy of decades of discriminatory policies and practices but that is not the primary factor. Populations in metropolitan communities are not the same as they were in 1968 when the Fair Housing Act was adopted. Many inner city neighborhoods have been gentrified with affluent residents displacing lower income families. Office complexes and sports arenas are located on land which had been residential neighborhoods in central city locations. Recently arrived immigrants populate ethnic enclaves in central cities and in suburban communities. Large numbers of African-Americans have moved from central city neighborhoods to suburban communities. Despite these dynamic population shifts, African-Americans still reside in predominately black neighborhoods, including many located in suburban communities. Neighborhood segregation today is the product of discriminatory practices that are widespread in the nation's housing markets and residential choice, driven by overt and unconscious discrimination.

Parents Involved rests on the same flawed assumptions that were made in the cases that redefined the standard for determining unitary status. The majorities in *Dowell*, *Freeman*, and *Jenkins* assumed that the lingering patterns of residential segregation were the result of the private choices of individual families. The assumption was that blacks prefer segregated neighborhoods. Yet, the data show that blacks prefer integrated neighborhoods but their residential choices are constrained by race.

The Supreme Court's decision in *Parents Involved* will not affect Delaware as it already prohibits consideration of race in student assignments. However, the case makes integration in public and charter schools far more difficult given the high levels of residential segregation in most metropolitan communities.⁸² The decision leaves an opening for the use of

80. *Parents Involved*, 127 S. Ct. at 2792.

81. *Id.* at 2758.

82. *Parents Involved* has been the subject of a growing body of scholarly commentary. See, e.g., Jonathan Fischbach, Will Rhee, and Robert Cacace, *Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation After Parents Involved in Community Schools*, 43 HARV. C.R.-C.L. L. REV. 491 (2008); James E. Ryan, *The Supreme Court, 2006 Term: Comment: The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131 (2007); J. Harvie Wilkinson III, *The Supreme Court, 2006 Term: Comment: The Seattle and Louisville School Cases: There is no Other Way*, 121 HARV. L. REV. 158 (2007); Michael J. Kaufman, *PICS in Focus: A Majority of the Supreme Court Reaffirms the Constitutionality of Race-Conscious School Integration Strategies*, 35 HASTINGS CONST. L.Q. 1 (2006); Ronald Turner, *The Voluntary School Integration Cases and the Contextual Equal Protection Clause*, 51 HOW. L.J. 251 (2008); Leslie Yalof Garfield, *Adding Colors to the Chameleon: Why the Supreme Court Should Have Adopted a New Compelling Governmental Interest Test for Race-Preference Student Assignment Plans*, 56 KAN. L. REV. 277 (2008); D. Marvin Jones, *Plessy's Ghost: Grutter, Seattle and the Quiet Reversal of Brown*, 35 PEPP. L. REV. 583 (2008).

race-neutral approaches such as those suggested in Justice Kennedy's concurring opinion, but diversity will be difficult to achieve in most urban districts.⁸³ Data using the 2000 Census show high levels of segregation in the nation's communities; thirty-three of the top fifty metropolitan areas are intensely segregated. The remaining seventeen are segregated and none was within the range that would be considered integrated.⁸⁴ Urban school districts are usually coterminous with the cities in which they are located. Suburban districts are typically separate and politically autonomous. This city-suburban separation means student populations will reflect the segregated housing patterns that persist in most urban communities.⁸⁵

VII. Conclusion

America is rapidly becoming more diverse but the population is starting to segment itself into residential enclaves.⁸⁶ Over the past three decades Americans have been locating their residences among people with similar lifestyles, beliefs, and political ideologies. This trend is producing increasingly homogeneous and culturally segregated communities. Immigration is rising rapidly and large metropolitan areas are becoming more multiracial and multilingual. Some have reacted to this trend by retreating to smaller communities where they can live among people who look like them, think like them, and comport themselves in similar ways. This demographic trend is one of the many factors contributing to racial composition of metropolitan regions.

School desegregation plans which relied on busing and other racial balance strategies were designed to counteract the effects of segregated neighborhoods. Advocates expected that when schools desegregated other aspects of American society would follow suit. This has occurred to a significant degree but the progress has not extended to everyone. Those with the means are taking advantage of a wide range of choices about where they live, where they work, and the schools that their children attend. But for some, the choices are severely constrained. Black students in central city neighborhoods can choose a public school, which is likely to be intensely segregated, or they can enroll in a charter school, in which the level of segregation is, on average, even higher than public schools. For these residents, "Where to elect there is but one, / 'Tis Hobson's choice—take that, or none."⁸⁷

83. In Texas, graduates in the top 10 percent of their high school classes are admitted automatically to the public college or university of their choice. The law was enacted in response to *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), which struck down the University of Texas' affirmative action plan. *10 Percent Plan Survives in Texas*, *Inside Higher Ed* (May 29, 2007), at <http://inside-highered.com/news/2007/05/29/percent>.

84. *Ethnic Diversity Grows, Neighborhood Integration Lags Behind*, Lewis Mumford Center (Apr. 2001), <http://mumford1.dyndns.org/cen2000/WholePop/WPreport/page2.html>.

85. GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION, THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 19-22* (1996); James E. Ryan, *Schools, Race and Money*, 109 *YALE L.J.* 249, 284-86 (1999).

86. RICHARD FLORIDA, *WHO'S YOUR CITY?: HOW THE CREATIVE ECONOMY IS MAKING WHERE TO LIVE THE MOST IMPORTANT DECISION OF YOUR LIFE* (2008); BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* (2008).

87. THOMAS WARD, *ENGLAND'S REFORMATION: A POEM IN FOUR CANTOS* (1719). Thomas Hobson (1545–1631) operated a carrier and horse rental business in Cambridge, England at the turn of the 17th century. Hobson rented horses mainly to Cambridge University students but refused to rent them out other than in their correct order. The choice his customers were given was this or none, *i.e.* Hobson's choice. *American Heritage Dictionary*.

