

RACE, CLASS, AND RELIGION: CREAMING AND CROPPING IN RELIGIOUS, ETHNIC, AND CULTURAL CHARTER SCHOOLS

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This Article is devoted to one of the most fascinating contemporary developments in American public education—the phenomenal rise of religious, ethnic, and cultural charter schools. Religious, ethnic, and cultural charter schools are established by a religious or ethnic community with the aim of providing an education saturated with the respective values and culture of that community. Despite their growing prevalence and the significant legal challenges they pose, they have, thus far, not been given sufficient attention by legal scholars. What little discussion there is focuses solely on religious charter schools’ incompatibility with the First Amendment’s Establishment Clause.

While the Establishment Clause challenge constitutes one central challenge to religious charter schools, another crucial aspect of their operation should be highlighted: their negative impact on the educational opportunities of children from racial minorities and lower socioeconomic classes. The Article argues that because of their unique characteristics, religious, ethnic, and cultural charter schools are especially likely to have negative effects on educational equality, and makes the case for legislative intervention in order to prevent this outcome. First, the Article exposes and explores the central

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detrimental effects of religious, ethnic, and cultural charter schools: racial and socioeconomic segregation, and the twin-processes of “creaming” and “cropping.” Then, based on a comprehensive critical survey of all charter legislation in the United States aimed at preventing segregation in the different states, the Article argues that charters’ antidiscrimination rules have the surprising effect of worsening inequality instead of alleviating it, and that the legislative measures aimed at ensuring integration cannot fully promote equality. Therefore, the Article supports a different strategy, adopted recently in Delaware, according to which religious and ethnic charter schools should be authorized only if they do not compromise the education of students in traditional public schools.

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I. INTRODUCTION

A perplexing new phenomenon is gaining prevalence in American public education—religious, ethnic, and cultural charter schools (“REC charter schools”). REC charter schools are established by a religious or cultural community with the aim of providing an education according to the values, historical context, and culture of that particular group. Considering that charter schools are essentially public schools, a religious charter school may seem like an oxymoron—an unconstitutional establishment of religion. The fact is, however, the charter school movement has enabled private entities to establish schools, and religious communities were quick to follow suit. In the past decade or so, dozens of religious charter schools have emerged. Despite the fact that controversy has accompanied their establishment, this trend is showing no signs of decline.

Legal scholars have not yet given REC charter schools sufficient attention, despite their growing prevalence and the significant legal challenges they pose. What little discussion there is focuses solely on religious charter schools (as opposed to REC charter schools) and their incompatibility with the First Amendment’s Establishment Clause.¹ Ethnic and cultural charter schools have received little, if any, attention. There is another crucial aspect of operation of religious charter schools that has largely been overlooked in the literature, namely their effect on educational opportunity. Since education administrators and legal scholars wrongly assume that REC charter schools are no different in this respect than any other charter school, this pressing issue has not received any special regulatory treatment or scholarly attention. This Article aims to fill this void and to shed light on the unique and intricate ways in which REC charter schools disrupt educational equality. This Article also aims to show how REC charter schools’ special characteristics render

¹ U.S. CONST. amend. I (stating that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”).

insufficient the legal regulations aimed at ensuring equality in regular charter schools. Finally, this Article presents a more promising legislative strategy for ameliorating these adverse effects on educational equality.

The Eleanor Kolitz Hebrew Language Academy (“EKHLA”) is a San Antonio, Texas-based K-8 charter school. It “shares a building with a Jewish community center and a Holocaust museum.”² The school operates on the campus of what used to be a private Jewish day school that went by the same name until it closed, just prior to the establishment of EKHLA. The name and campus are not the only things that the charter school shares with its private predecessor; the head of EKHLA and most of its staff and students are the same as that of the private Jewish day school.³ Being a public charter school, EKHLA is not allowed to actively endorse religion, and Judaism is pointedly absent from the information on its website regarding the school’s mission and curriculum. Thus, the stated school mission is to offer “a rich and innovative curriculum, with passionate teachers and extraordinary student support.”⁴ Yet, despite attempts to steer clear of thorny First Amendment quandaries, EKHLA nevertheless has a strong link to Jewish culture and religion: EKHLA suggests a unique specialization—all its students have daily Hebrew classes, with the aim to reach proficiency

² Edgar Walters, *Trying to Keep Religion out of the Charter School Classroom*, N.Y. TIMES (Oct. 17, 2013), http://www.nytimes.com/2013/10/18/us/trying-to-keep-religion-out-of-the-charter-school-classroom.html?_r=0 [https://perma.cc/U3BC-PBGX].

³ *Id.* However, enrollment more than doubled when the school transformed into a charter school, as children from other schools also enrolled at EKHLA.

⁴ *About Us*, ELEANOR KOLITZ HEBREW LANGUAGE ACADEMY, <http://www.ekhla.org/about-us/> [https://perma.cc/M32F-Q5ND]. The teachers at EKHLA, according to their website, “know their students individually,” and “educate the whole student to be gracious, kind and tolerant.” EKHLA’s goal is “to develop curious lifelong learners who have a sense of responsibility to the world.”

in the Hebrew language,⁵ and the school follows the Jewish calendar.⁶ A school like EKHLA offers Jewish parents a dream solution: (almost) all of the advantages of a Jewish day school without the costs. It provides education saturated with Jewish culture and identity, including rigorous study of Hebrew. Additionally, EKHLA aims to offer a first class secular education—high student achievement and preparation for higher education and the competitive job market.⁷

⁵ *Hebrew*, ELEANOR KOLITZ HEBREW LANGUAGE ACADEMY, <http://www.ekhla.org/academics/hebrew/> [https://perma.cc/34VK-6P36]. EKHLA explains its choice to specialize in Hebrew in strictly secular terms. EKHLA's website informs visitors that "[m]any studies have shown that learning a second language increases both cognitive and creative ability" and that "Hebrew is now the official language of Israel, a growing nation of significant geo-political importance and an important world player especially in the area of technology." *Id.*

⁶ *FAQs*, ELEANOR KOLITZ HEBREW LANGUAGE ACADEMY, <http://www.ekhla.org/contact-us/faqs/> [https://perma.cc/XQ3V-8WB6]. According to the school website, "EKHLA is closed on traditional American holidays, on other days when student attendance would be expected to be low, and on days when the Campus where EKHLA is located will be closed." *Id.* In other words, EKHLA is closed on Jewish holidays.

⁷ Traditionally, private schools often boast higher quality secular education than public schools. Education policy researchers argue that religious private schools in particular outperform public schools, supposedly thanks to their rich educational values. William H. Jeynes, an education professor at California State University-Long Beach, presented an analysis of 90 different studies regarding student achievement in traditional public schools, public charter schools, and religious schools, concluding that students in religious schools had the highest achievement—even after controlling for student socioeconomic status ("SES"). See William H. Jeynes, *A Meta-Analysis on the Effects and Contributions of Public, Public-charter, and Religious schools on Student Outcome*, 87 PEABODY J. OF EDUC. 305 (2012). As a result, various education reforms, such as the charter school movement, try to emulate the structural characteristics of private schools to reproduce the educational qualities attributed to private schools. However, some researchers have contested these findings, and they argue that private schools' advantages over others are only attributable to the advantageous backgrounds of the students, and the peer effects they generate. See CHRISTOPHER A. LUBIENSKI & SARAH THUELE LUBIENSKI, *THE PUBLIC SCHOOL ADVANTAGE: WHY PUBLIC SCHOOLS OUTPERFORM PRIVATE SCHOOLS* (2014). In their book, Lubienski and Lubienski found that, when controlling for student SES and peer effects, public schools actually do

At the same time, EKHLA and other REC charter schools liberate parents from the burdensome tuition of private schools, as well as from the constant concern for the financial sustainability of parochial schools.⁸ There is one further important characteristic of private schools that REC charter schools such as EKHLA succeed in emulating—they create a relatively homogeneous student body, and allow middle class parents to avoid sending their children to public schools with children from racial minority communities or children from lower socioeconomic status (“SES”). This characteristic, while perhaps not openly discussed, is definitely appealing to many parents. Research concerning parental decision-making in education confirms that this consideration is extremely salient, ranking high on the list of considerations in the choice of a school.⁹

This Article begins with an analysis of the segregated nature of REC charter schools—of which EKHLA is merely one example—and the effects that REC charter schools have on the traditional public schools around them. The challenge to equality caused by REC charter schools is comprised of related concerns: these schools’ worsening of racial and socioeconomic segregation, and the creation of subtler forms of educational stratification that negatively impact educational equality—“creaming” and “cropping.”¹⁰

better than private schools. They explain this finding as pedagogical stagnation that is the outcome of private schools’ autonomy. *See id.* at 117–21.

⁸ See Raysh Weiss, *The Price of JewSchool*, JEW SCHOOL (Apr. 11, 2011), <http://jewschool.com/2011/04/11/26057/the-price-of-jewschool/> [<https://perma.cc/DPF2-6S8J>] (noting that Jewish day school tuition varies significantly, but can exceed \$20,000 per year).

⁹ See, e.g., CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* 109–10 (2006) (arguing that the percentage of racial minority students in a specific public school district was a dominant factor in determining private school enrollment rates).

¹⁰ For the use of the terms “creaming” and “cropping,” see Natalie Lacireno-Paquet et al., *Creaming Versus Cropping: Charter School Enrollment Practices in Response to Market Incentives*, 24 EDUC. EVALUATION & POLICY ANALYSIS 145, 155 (2002) (concluding that while

“Creaming” and “cropping” are processes by which the best (brightest and most motivated) students, and students from high SES, leave one school in favor of another, leaving the former depleted of its stronger students and leaders. The composition of a school’s student body influences the quality of education because of the importance of peer effects for student attainment.¹¹ Therefore, the exit of high achievers has destructive consequences for public schools and the students remaining in them. “Creaming” refers to the exit of advantaged students and high achievers, whereas “cropping” refers to the equivalent case in schools serving disadvantaged communities. The students who leave the traditional public school in the second case may be neither socioeconomically advantaged nor high achievers, but they still have higher abilities than students who remain in the public school system.

Generally, critics of the charter school movement have accused charter schools of creating these three negative effects: worsening segregation, creaming, and cropping.¹² Indeed, some of the charter school legislation analyzed in this Article has been specifically designed to address these concerns. The pioneering argument made in this Article, however, is that because of their special characteristics, REC charter schools are especially prone to these negative phenomena, much more so than regular charter schools. REC charter schools are especially likely to be racially segregated because they appeal primarily to members of religious and ethnic communities. Additionally, students who leave public schools in order to attend REC charter schools are likely to be from privileged families relatively advantaged, creating creaming (in the case of privileged communities) and cropping (in the case of underprivileged communities). The processes

Washington, D.C.’s studied school system did not cause creaming, it did cause cropping and therefore failed to serve the district’s most disadvantaged students—namely English-language learners and those requiring special education services).

¹¹ See *infra* note 98.

¹² See *infra* notes 108–12.

caused by REC charter schools should trouble not only charter school opponents, for whom religious charter schools are merely another example of the shortcomings of the charter movement, but should be of interest also to charter schools' most ardent advocates, who strive to perfect the operation of charter schools. Such advocates should be concerned with the proliferation of certain charter schools that defy attempts to maintain equal access and opportunity for all students in the charter movement.

This Article proceeds as follows: Part II describes religious, ethnic, and cultural charter schools; their development; and their special characteristics. This Part pays some attention to the different kinds of schools that may be referred to as REC charter schools, the benefits they bestow on their students, and the communities they serve. Part II-C briefly reviews Establishment Clause challenges that confront religious charter schools, presenting some of the religious practices that religious charter schools engage in, the opposition they have encountered, and the litigation that has already evolved around them. The conclusion of Part II-C is that so long as religious charter schools are careful not to actively endorse religion, they will be able to withstand constitutional challenge.

Part III presents the main challenge this Article poses to REC charter schools—namely that they hinder the educational opportunities of children from racial minorities and lower SES. This Part details three different educational processes that these schools cause: they worsen socioeconomic, racial, and ethnic segregation (Part III-B); they induce creaming (Part III-C); and they create cropping (Part III-D). This Part also characterizes the circumstances in which each phenomenon is likely to occur and substantiates the descriptions with social science studies. Part III-E concludes this section by addressing two possible counterarguments. First, this Part states that even if REC charter schools create these negative effects, they should not be restricted because they promote the educational opportunities of some students. These benefits, it could be

argued, outweigh the possible disadvantages. The second counterargument suggests that the argument in this Article does not challenge REC schools but rather challenges choice reforms in general. This Part also stresses that the challenges presented apply especially to REC charter schools and, therefore, even charter enthusiasts should be concerned about REC charter schools.

Part IV analyzes the role of law and its potential to mitigate the challenges depicted in Part III. It outlines three different strategies that state legislatures have adopted for contending with segregation: antidiscrimination (Part IV-A); requiring reflective student composition (Part IV-B); and shifting the focus to public schools (Part IV-C). Additionally, this part evaluates these strategies' expected effectiveness in promoting educational equality. This Article concludes that only provisions that require considering the effect charter schools will have on the wider educational environment have potential to mitigate the influences discussed above. Such provisions enable education administrators to make sure that the advantages students derive from REC charter schools are not gained at the expense of students remaining in traditional public schools. Whether such measures will, in fact, be effective depends on the way they are implemented and on their ability to withstand political pressure.

II. WHAT ARE RELIGIOUS, ETHNIC, AND CULTURAL CHARTER SCHOOLS?

A. Charter Schools and Religious, Ethnic, and Cultural Charter Schools

REC charter schools are merely one sub-category of charter schools, which are hybrids of public and private schools. Although the charter movement is highly diverse and encompasses many different kinds of schools, charter schools share the following core dimensions: they are privately established and run schools of choice; they are publicly funded, free, and generally open to all students; they are not

subject to some of the rules and regulations that apply to traditional public schools; and they have autonomy in designing their curriculum and management, though they remain accountable for their students' achievements.¹³

Advocates of the charter movement argue that incorporating private elements into public education will bring about academic improvement, both for students studying in charter schools and for traditional public schools, which will be positively affected by the competition.¹⁴ Autonomy and local control are basic tenets of charter schools. Private organizations—free from some of the regulations that apply to public schools—establish and run charter schools.¹⁵ As a result, charter schools are able to accommodate the needs and preferences of the groups and communities they serve. Publicly-funded choice is another central characteristic of charter schools. It aims to create competition and ensure all children have access to quality education, thus promoting equality of opportunity.¹⁶

¹³ JOSEPH MURPHY & CATHERINE DUNN-SHIFMAN, UNDERSTANDING AND ASSESSING THE CHARTER SCHOOL MOVEMENT, 3–5, 17, 51–55 (2002) (defining charter schools and describing various ideologies upon which different charter schools are built); JACK BUCKLEY & MARK SCHNEIDER, CHARTER SCHOOLS: HOPE OR HYPE? 2–3 (2007) (identifying the structural characteristics of charter schools).

¹⁴ See, e.g., Yongmei Ni & David Arsen, *The Competitive Effects of Charter Schools on Public School Districts*, in THE CHARTER SCHOOL EXPERIMENT: EXPECTATIONS, EVIDENCE, AND IMPLICATIONS 93 (Christopher A. Lubienski & Peter C. Weitzel, eds., 2010) (addressing how competition from charter schools has affected public schools).

¹⁵ See MURPHY & SHIFMAN, *supra* note 13, at 150–57 (discussing arguments that lack of regulation has affected the quality and efficiency of charter schools). But see Jay Heubert, *Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation*, 32 HARV. C.R.-C.L. L. REV. 301 (1997) (noting that several federal rules apply to charter schools, such as those regarding discrimination and students with disabilities). There have been debates whether other rules regarding discipline and expulsion apply to charter schools. See *infra* note 24.

¹⁶ According to choice proponents, publicly-funded choice enables all children to choose quality education, an ability that was formerly available only to children of wealthy parents (who could, for example, buy a house in the “right” school district or enroll in a private school). See, e.g.,

Since charter schools erupted onto America's education landscape about two decades ago,¹⁷ they have dominated scholarly discussion of education, igniting endless research and debate. Despite the abundance of educational research examining charter schools, the evidence regarding them is still inconclusive. Do they indeed improve student performance?¹⁸ Have they been a "rising tide that lifts all boats?" Have they had a positive effect on public schools?¹⁹

MURPHY & SHIFFMAN, *supra* note 13, at 157; JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS & AMERICAN'S SCHOOLS* 219–26 (1990) (publicly funded choice will expand opportunities for all children).

¹⁷ The first charter school opened its doors in September 1992 in St. Paul, Minnesota, and by the year 1998, there were over 1,000 nationwide. See MURPHY & SHIFFMAN, *supra* note 13, at 28, 32. By 2006, over 3,500 charter schools operated in thirty-seven states and served over a million students. See BUCKLEY & SCHNEIDER, *supra* note 13, at 1. Currently, only seven states have not legislated charter laws. *Charter School Law, THE CTR. FOR EDUC. REFORM*, <https://www.edreform.com/issues/choice-charter-schools/laws-legislation/> [<https://perma.cc/D5XP-S3WU>].

¹⁸ Eric P. Bettinger, *The Effect of Charter Schools on Charter Students and Public Students, Schools*, 24 *ECON. OF EDUC. REV.* 133 (2005) (finding no significant effects of charter schools on charter school students' performance compared to neighboring public school students); Gary Miron, *Performance of Charter Schools and Implications for Policy Makers*, in *THE CHARTER SCHOOL EXPERIMENT*, *supra* note 14, at 74, 87–89; *EXPECTATIONS, EVIDENCE, AND IMPLICATIONS*, 74, 87–89 (Christopher A. Lubienski & Peter C. Weitzel eds., 2010) (arguing that there is no conclusive evidence that charter schools are attaining better educational outcomes than traditional public schools). These disappointing outcomes are due to insufficient autonomy and funding, or, conversely, they can be attributed to insufficient supervision and to charter schools' financial motivations. See MARTIN CARNOY ET AL., *THE CHARTER SCHOOL DUST-UP: EXAMINING THE EVIDENCE ON ENROLLMENT AND ACHIEVEMENT* 106 (2005) (noting that, on average, no evidence shows that charter schools outperform regular public schools; and that evidence shows that charter schools, on average, have a negative impact).

¹⁹ See Ni & Arsen, *supra* note 14, at 118–19. Scholars and researchers commonly use the "rising tide" metaphor in the debate concerning charter schools and competition between different types of schools. See, e.g., Caroline M. Hoxby, *School Choice and School Productivity: Could School Choice be a Tide that Lifts All Boats?*, in *NAT'L BUREAU OF ECON. RESEARCH CONFERENCE REPORT, THE ECONOMICS OF SCHOOL CHOICE* 287 (Caroline M. Hoxby ed., University of Chicago Press

Are they more socially integrated than the typical public school?²⁰ Have they fulfilled the expectation of becoming laboratories of innovation in education?²¹

Charter schools have also dominated legal scholarship and case law discussing various aspects of their operation, such as the constitutionality of charter schools,²² how they

74th ed. 2003) (examining three choice reforms and finding that regular public schools boosted their productivity when exposed to competition).

²⁰ See *infra* Part III-B.

²¹ See MURPHY & SHIFFMAN, *supra* note 13, at 178–82 (arguing that charter schools have yet to prove that they promote educational innovation, at least in the sense of “breakthrough change”). It is possible that the competition over students has led charter schools to choose “tried and true” educational strategies, and consequently, charter schools have not created innovation. However, research shows that charter schools widen the use of new educational practices created within the public sector. See Lubienski & Weitzel, *supra* note 14, at 15, 21. Carnoy et al. rightly point out that many charter schools bring “new players and resources into the public education sector, because their charters require them to identify “local stakeholders and partners.” CARNOY ET AL., *supra* note 16, also point out that innovation and quality do not necessarily go together because experimentation in education, like in any other field, will inevitably yield both successful and unsuccessful results). See also Lubienski, *Grading Charter Schools: Access, Innovation, and Competition*, in THE CHARTER SCHOOL EXPERIMENT 15, 23 (Christopher A. Lubienski & Peter C. Weitzel eds., 2010).

²² Several courts have rejected arguments that charter schools violate relevant state constitutions and do not qualify for public funding. See, e.g., *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745 (Ct. App. 1999); *Council of Orgs. & Others for Educ. About Parochial, Inc. v. Governor*, 566 N.W.2d 208 (Mich. 1997); *In re Grant of the Charter School Application of Englewood on the Palisades Charter School*, 727 A.2d 15 (N.J. Super. Ct. App. Div., 1999). See also CHAD A. READLER ET AL., NAT’L ALL. FOR PUB. CHARTER SCH., WE’VE BEEN HERE BEFORE: CHARTER SCHOOL OPPONENTS USE THE SAME LEGAL ARGUMENTS AND LOSE EVERY TIME (2013), http://www.publiccharters.org/wp-content/uploads/2014/01/Weve-Been-Here-Before_20131119T144720.pdf [https://perma.cc/PZ6Q-9DLK]. Additionally, there are disagreements as to whether charter schools are state actors. See, e.g., *Caviness v. Horizon Cmty. Learning Center, Inc.*, 590 F.3d 806, 808 (9th Cir. 2010) (finding that “a private non-profit corporation that runs a charter school” was not a state actor while acting as an employer).

should be funded,²³ discipline in charter schools,²⁴ accommodation of students with disabilities,²⁵ and conflicts

²³ Given that educational resources are limited and all too often insufficient to begin with, adding thousands of new schools is a strain on a school district's budget, so struggles are to be expected. As demonstrated in the cases below, states try to cope with added expenses in different ways such as funding charter schools less than traditional schools; withholding funding for charter school buildings; or by setting caps on the number of charter schools or enrolled students in each district. In reaction, charter school leaders claim that school districts discriminate against them, compared to other public schools, and that the financial support they receive is inadequate. *See, e.g., Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 349 (2009) (in which charter schools alleged that the manner in which the Charlotte-Mecklenburg Board of Education apportioned funds resulted in the underfunding of local charter schools).

On the other hand, charter school opponents argue that school districts often favor charter schools, and that funding them causes harm to traditional public schools. *See, e.g., Jersey City Educ. Ass'n v. Jersey City*, 720 A.2d 356 (N.J. Super. Ct. App. Div. 1998) (rejecting the claim that the use of public monies for a charter school building is prohibited); *New York City Parents Union v. Bd. of Educ. of City Sch. Dist. of New York*, 1 N.Y.S.3d 76, 77 (N.Y. App. Div. 2015) (rejecting the argument that co-locating charter schools and traditional public schools violated the N.Y. Constitution and denied public schools students an adequate sound basic education). *See also* Lisa Lukasik, *Deconstructing a Decade of Charter School Funding Litigation: An Argument for Reform*, 90 N.C. L. REV. 1885 (2012) (describing the decade-long legal struggle concerning charter school funding in North Carolina); Larry Maloney, *Charter School Finance*, in HANDBOOK OF RESEARCH ON SCHOOL CHOICE 179 (Mark Berends et al. eds., 2009) (finding mixed results after comparing levels of spending in traditional public schools and charter schools).

²⁴ Courts have exempted charter schools from holding hearings in student dismissal cases. These rulings compromise students' rights and give charter schools more control over the students they educate. *See, e.g., Scott B. v. Bd. of Tr. of Orange Cty. High Sch. of the Arts (Cal.)*, 158 Cal. Rptr. 3d 173 (Cal. Ct. App. 2013) (ruling charter schools exempt from a California law requiring due process hearing procedures for public school students prior to expulsion); *Lindsey v. Matayoshi*, 950 F. Supp. 2d 1159 (D. Haw. 2013) (finding that the plaintiff, a student who was expelled from a charter school, was not denied her entitlement to public education because she was given access to an alternative program, and therefore was not entitled to a due process hearing). *See also* Rosa K. Hirji, *Are Charter Schools Upholding Student Rights?*, A.B.A.: SEC. OF LITIG. (Jan. 14, 2014), <http://apps.americanbar.org/litigation/committees/childrights/content/artic>

that occur when charter and traditional public schools share buildings.²⁶ It is clear, therefore, that the debate over the effectiveness of charter schools is still ongoing. Meanwhile, more than two million students attend charter schools today, and demand for charter schools continues to grow.²⁷

Within this enormously diverse category of charter schools, this Article focuses on one kind of charter school—REC charter schools. Sometimes called religious charter

les/winter2014-0114-charter-schools-upholding-student-rights.html [https://perma.cc/3V9V-ZP5M] (discussing these decisions).

²⁵ U.S. GOV'T. ACCOUNTABILITY OFF., CHARTER SCHOOLS: ADDITIONAL FEDERAL ATTENTION NEEDED TO HELP PROTECT ACCESS FOR STUDENTS WITH DISABILITIES (2012), <http://www.gao.gov/assets/600/591435.pdf> [https://perma.cc/B6UK-6XFS] (finding that “[c]harter schools enrolled a lower percentage of students with disabilities than traditional public schools”).

²⁶ See Fernanda Santos, *N.A.A.C.P. On Defensive As Suit on Charter Schools Splits Group's Supporters*, N.Y. TIMES (June 10, 2011), http://www.nytimes.com/2011/06/11/nyregion/naacp-on-defensive-for-suit-against-charter-schools.html?_r=0 [https://perma.cc/KQM2-N64R]; Carl Companile & Beth DeFalco, *De Blasio Faces Three New Charter-School Law Suits*, N.Y. POST (Mar. 10, 2014), <http://nypost.com/2014/03/10/de-blasio-faces-three-new-charter-school-lawsuits/> [https://perma.cc/SPJ9-NUBN] (noting arguments that charter schools co-located with traditional public schools have better access to the common labs, gyms, libraries, cafeteria, computers, etc.).

²⁷ According to the National Alliance for Public Charter Schools (NAPCS) published in the 2014-2015 school year, approximately 2.9 million students attended charter schools. NAT'L ALL. FOR PUB. CHARTER SCH., ESTIMATED NUMBER OF PUBLIC CHARTER SCHOOLS & STUDENTS (2015), http://www.publiccharters.org/wp-content/uploads/2015/02/open_closed_FINAL.pdf [https://perma.cc/LGD6-ZFJM].

schools,²⁸ “faith-based” charter schools,²⁹ or “ethnocentric niche charter schools,”³⁰ specific ethnic, cultural, and religious communities establish REC charter schools to offer education to community members according to their culture, historical perspectives, values, and customs.³¹

²⁸ See Benjamin Siracusa Hillman, Note, *Is There a Place for Religious Charter Schools?* 118 YALE L.J. 554 (2008) (describing “religious charter schools”); LAWRENCE D. WEINBERG, RELIGIOUS CHARTER SCHOOLS, LEGALITIES AND PRACTICALITIES (2007) (analyzing whether religious based charter schools could comport with the constitution); Marcia. J. Harr Bailey & Bruce S. Cooper, *The Introduction of Religious Charter Schools: A Cultural Movement in The Private School Sector*, 18 J. OF RES. ON CHRISTIAN EDUC. 272, 278–280 (2009) (describing several charter schools sponsored by religious communities and associations and calling them “religious charter schools”).

²⁹ See Charles J. Russo & Gerald M. Cattero, *Faith-Based Charter Schools: An Idea Whose Time Is Unlikely to Come*, 13 CATH. EDUC. 509 (2013) (arguing what authors call “faith-based” charter schools are unlikely to survive); Craig N. Horning, *The Intersection of Religious Charter Schools and Urban Catholic Education: A Literature Review*, 16 CATH. EDUC.: A J. OF INQUIRY & PRAC. 364 (2013) (reviewing literature relating to Catholic education and what author calls “religious” and “faith-based” charter schools).

³⁰ See Robert A. Fox et al., *The Line Between Cultural Education and Religious Education: Do Ethnocentric Niche Charter Schools Have a Prayer?*, 36 REV. OF RES. IN EDUC., 282–83 (2012) (using the term “ethnocentric niche charter schools” to refer to niche charters formed “to foster an understanding of” and to instruct “from the point of view of, or help preserve a specific culture”).

³¹ See Harr Bailey & Cooper, *supra* note 28, at 276 (noting that religious charter schools supplement the curriculum with cultural “perspectives, values, and customs”). Fox et al. define them as schools that are “specifically established to foster an understanding of, provide instruction from the point of view of, or help preserve a specific culture such as Native Hawaiian, Native American, or East African; ethnicity such as Latino or Somali; or language such as Mandarin, Yu’pik, Towa, or Hawaiian.” Fox et al., *supra* note 30, at 283–84; Eckes et al “charter schools that have been founded to serve the particular needs of a certain population” that center around religious or cultural uniqueness. See Suzanne Eckes, et al., *Legal and Policy Issues Regarding Niche Charter Schools: Race, Religion, Culture, and the Law*, 5 J. OF SCH. CHOICE 85, 105, n.1 (2011) (defining ethnocentric charter schools as “charter schools that have been founded to serve the particular needs of a certain population,” which in this context refers to those that center on religious or cultural uniqueness); Siracusa Hillman defines them as “a charter schools “operated by a religious

REC charter schools are a natural extension of the ideals of the charter school movement, which encourages the development of diverse schools with different and specialized missions. Communities of parents organize to establish schools, and in so doing open up possibilities for localized and varied public education, according to their specific tastes and preferences.³² Inevitably, religious, ethnic, and cultural communities that face financial difficulties in sustaining denominational education, seize the opportunity this movement offers thereby creating a new form of public education—REC charter schools.

Although a relatively new phenomenon, REC charter schools are already widespread and religiously, ethnically, and culturally diverse. REC charter schools have specialized

organization or by a group of people bound by a common religious viewpoint.” Siracusa Hillman, *supra* note 28, at 561.

³² These groups can be organic, such as religious communities, but also ad-hoc groups that organize around a common educational goal and do not share a comprehensive identity.

in Arabic,³³ Hebrew,³⁴ Greek,³⁵ Hawaiian,³⁶ Mandarin,³⁷ German,³⁸ and Turkish languages.³⁹ Some REC charter

³³ The Tareq Ibn Zeidan Tarek ibn Ziyad Academy (“TIZA”), which taught Arabic in Minnesota, is one prominent example. It will be discussed in further detail in this Article. *See infra* Part II and Part III-E. *See also* Harr Bailey & Cooper, *supra* note 28 (discussing Tarek ibn Ziyad Academy).

³⁴ There are at least two chains of Hebrew charter schools; the Hebrew Charter School Center supports nine Hebrew charter schools around the country. *See* Hebrew Public, <http://hebrewcharters.org> [<https://perma.cc/24WS-FLDX>]. The Ben Gamla Hebrew Charter School chain supports at least four charter schools in South Florida. *See* Ben Gamla Charter School South, <http://www.bengamlaplantation.org> [<https://perma.cc/T2KU-EBZN>]; Ben Gamla Charter School Plantation, <http://www.bengamla-charter.com> [<https://perma.cc/2ND6-8DYQ>]; Ben Gamla Charter School Palm Beach, <http://www.bengamlapalmbeach.org> [<https://perma.cc/H6QL-L4EV>]; Ben Gamla Charter School Kendall, <http://www.bengamlakendall.org> [<https://perma.cc/7LM5-NLPN>].

³⁵ *See, e.g.*, Hellenic Classical Charter School in Brooklyn, NY, <http://www.hccs-nys.org> [<https://perma.cc/LK4T-9N3D>].

³⁶ Nina K. Buchanan & Robert A. Fox, *To Learn and to Belong: Case Studies of Emerging Ethnocentric Charter Schools in Hawaii*, 11 EDUC. POL’Y ANALYSIS ARCHIVES (2003) (describing three native Hawaiian charter schools). *See also* Hawaiian-Focused Charter Schools, http://www.ksbe.edu/communityeducation/site/programs/grades_5-8/charter_schools [<https://perma.cc/ZG37-EATV>] (reporting that as of 2012 there were seventeen Hawaiian focused public charter schools in Hawaii).

³⁷ *See, e.g.*, *About Us*, Pioneer Valley Chinese Immersion Charter School, <http://www.pvcics.org/about-us> [<https://perma.cc/FX86-65LL>]. *See also* Chinese Immersion Schools, <https://miparentscouncil.org/full-mandarin-immersion-school-list/> [<https://perma.cc/NJG7-W427>] (listing Chinese immersion programs nationwide).

³⁸ *See, e.g.*, The Goethe International Charter School of Los Angeles, <http://www.goethecharterschool.org> [<https://perma.cc/F6QB-YFNG>] (offering English/German dual language immersion); Twin Cities German Immersion School in Minnesota, <http://tcgis.org> [<https://perma.cc/GVC8-LXSD>]; Rilke Schule German School of Arts and Science in Alaska, <http://rilkeschule.asdk12.org/> [<https://perma.cc/7SQK-6N6Z>] (focusing on the German language).

³⁹ The “Harmony” network of charter schools was established by Turkish expatriates. *See* Citizens Against Special Interest Lobbying in Public Schools, A Guide to the Gulen Movement’s Activities in the US, <http://turkishinvitations.weebly.com> [<https://perma.cc/PP64-GQQW>]. According to websites operated by people who oppose the network there are currently 140 schools belonging to the network operating in twenty-six states. *See infra*, note 88.

schools are established by Native American,⁴⁰ Native Alaskan,⁴¹ and Hmong⁴² communities. Others are associated with the Waldorf approach⁴³ or the Catholic Church.⁴⁴ The exact number of REC charter schools in the United States is unknown, and depends on the exact definition used. In 2009, one study estimated that there were as many as 113 charter

⁴⁰ By 2010, thirty-one charter schools were established in Native American reservations, accounting for fifteen percent of all public schools in reservations. National Alliance for Public Charter Schools, *Public Charter Schools Growing on Native American Reservations* (Aug. 15, 2013), <http://www.publiccharters.org/press/public-charter-schools-growing-native-american-reservations/> [<https://perma.cc/55MZ-XCWJ>].

⁴¹ See, e.g., Alaska Native Cultural Charter School, http://www.publiccharters.org/wp-content/uploads/2015/07/csp_template_anccs_web.pdf [<https://perma.cc/6YS5-JYQE>] (offering courses in Yup'ik and other Native Alaskan languages); Yup'ik Immersion School in Bethel, Alaska started as a program within a public school and gained charter status in 1999. Yup'ik Immersion School History, http://web2.lksd.org/ayaprun/Ayaprun_Elitnaurvik/School_History.html [<https://perma.cc/HV4K-KE43>].

⁴² In Minnesota alone there are at least seven charter schools focusing on Hmong language and culture designed to serve the large Hmong population that arrived from Laos in the 1970s. See Harr Bailey & Cooper, *supra* note 28, at 281–82.

⁴³ See e.g., Woodland Charter School in South Oregon, <http://www.woodlandcharterschool.org> [<https://perma.cc/8FFL-HLW6>] (a tuition-free public school offering a Waldorf education); see also Alliance for Public Waldorf Education, <http://www.allianceforpublicwaldorfeducation.org/> [<https://perma.cc/3GVD-Q2QC>] (a national alliance of schools and organizations committed to quality Public Waldorf Education). The Waldorf approach is based on an understanding of the human being as a being of body, soul, and spirit, not primarily as members of any specific nation, ethnic group or race, but as members of humanity. The education mirrors the basic stages of a child's development from childhood to adulthood, and is adapted to the age of the child—experience, play, and art for younger children, and scientific, observational, and experimentation in the older years. See Association of Waldorf Schools of North America, *Waldorf Education: An Introduction*, https://waldorfeducation.org/waldorf_education [<https://perma.cc/H3LN-9PJB>].

⁴⁴ See Bruce S. Cooper et al., *Finding a Golden Mean in Education Policy: Centering Religious and Public Schools*, 87 PEABODY J. OF EDUC. 368 (2012).

schools with a central cultural theme in their mission.⁴⁵ But the number is probably much higher, and growing.⁴⁶

Though there are differences between charter schools that serve various religious groups, linguistic and ethnic minority groups, and groups that share cultural or ideological identities, this Article argues that these charter schools share important similarities in their potential to influence educational equality. Therefore, this Article refers to all of these schools using the term “REC charter schools.”⁴⁷ The differences between various REC charter schools include the motivation for their establishment,⁴⁸ as well as their respective curriculums.⁴⁹ Another important distinction concerns the socioeconomic status of the religious or ethnic communities different REC charter schools serve—from disadvantaged minorities to wealthy communities. Despite seemingly significant differences between REC charter

⁴⁵ See Eckes et al., *supra* note 31.

⁴⁶ To my understanding, Eckes et al. do not refer to the Harmony network of schools that have established over 130 charter schools nationwide. Including these schools in the count therefore more than doubles their estimate. *Id.*

⁴⁷ I also include in the category charter schools established by communities that share any other core identity, such as an ideology or way of life. When the argument applies only to a certain kind of charter school, I will state which kind of school it applies to explicitly. For example, when discussing First Amendment issues (Part II-C), I refer to charter schools that serve religious groups and not cultural communities. However, the distinctions between religious cultural and ethnic are not always clear-cut, and are often disputed, partly because some religious groups are also distinct ethnic and cultural groups. There has also been controversy regarding the establishment of a Waldorf charter school based on the Anthroposophic approach, due to the disagreement whether the approach is a religious belief or an ideological way of life. *See infra* note 87.

⁴⁸ For example, the financial crisis that parochial schools face is a motivation that applies mostly to religious charter schools because cultural communities rarely establish private schools. *See infra* Part II-B.

⁴⁹ Charter schools that teach a foreign language are an example of a unique curriculum that is not offered in traditional public schools.

schools and the communities they serve, they cause similar effects in terms of student composition.⁵⁰

B. Explaining the Popularity of Religious, Ethnic, and Cultural Charter Schools

There are several reasons why REC charter schools are increasingly popular. One explanation is the continuous and severe financial strain that religious communities face in funding parochial education. Between 2000 and 2006 alone, some 1200 private parochial schools closed due to financial problems and many others struggled to meet their financial obligations.⁵¹ As parochial education becomes more expensive and rapidly loses financial viability, religious communities have adopted practical alternatives to fund religious schooling, such as voucher programs that direct public funding to private schools through parental choice. They have also established REC charter schools, publicly funded schools that nonetheless give religious communities autonomy to design their educational mission and control hiring of educational staff and management.⁵² In this sense, the charter movement enables religious communities to replicate the religious school systems they can no longer afford.

Many religious charter schools have replaced closing private parochial schools. EKHLA is one example. After

⁵⁰ Namely, they potentially induce the concentration of disadvantaged students in the traditional public schools. In privileged communities this phenomenon is characterized as “creaming” whereas in disadvantaged communities this is characterized as “cropping.”

⁵¹ See Russo & Cattaro, *supra* note 29, at 518; Margaret F. Brinig & Nicole Stelle Garnett, *Catholic Schools, Charter Schools, and Urban Neighborhoods*, 79 U. CHI. L. REV. 31, 31–32 (2012) (stating that over 1,600 Catholic schools have closed in the past two decades).

⁵² The choice between charter schools and voucher programs depend on different variables. For example, although vouchers enable the schools to maintain more of their religious characteristics (albeit not completely, either), their funding may be lower than that of charter schools, and only the voucher students are funded, whereas in charter schools all students are funded.

being hit by the financial crisis in Catholic education, many private Catholic schools have also converted into charter schools.⁵³ While removing explicit references to religion, these Catholic charter schools maintain a staggering resemblance to their predecessors, often serving the same students; hiring the same teachers; and using the same facilities as the parochial schools they replaced.⁵⁴

Other communities also have taken advantage of the option to create specialized, publicly-funded schools to strengthen their culture and heritage. Education is an effective way to ensure the inculcation of a minority group's language, culture, and values. Hawaiian, African-American, and Native American communities are therefore eager to establish REC charter schools.⁵⁵

Religious, ethnic, and cultural communities may also be motivated to establish specialized charter schools because of the disadvantages that racial, ethnic, linguistic, and religious minority children face in public schools. For example, public schools' calendars do not always accommodate different religious holidays, forcing students from religious minority groups to either miss school or

⁵³ See Cooper et al., *supra* note 44, at 371–374; Brinig & Garnett, *supra* note 51; Horning, *supra* note 29; Nicolle Stelle Garnett, *Are Charters Enough Choice? School Choice and the Future of Catholic Schools*, 87 NOTRE DAME L. REV. 1891 (2012); Fox et al., give the example of Center City Public Charter Schools in Washington, DC that operates six former Catholic schools and proposed the conversion of four Catholic schools in Brooklyn, NY. See *supra* note 30, at 284.

⁵⁴ See Cooper et al., *supra* note 44, at 371; Aaron Saiger, *Charter Schools, The Establishment Clause and the Neoliberal Turn in Public Education*, 34 CARDOZO L. REV. 1163 (2013). Another example is the Hellenic Classical Charter School in NYC, founded in 2005 in place of a Greek Orthodox parochial school. Though it lacks formal religious instruction, the atmosphere at school has been described as resembling that of a religious school—traditional and disciplined. The school teaches Greek language, history and literature as well as Latin. See Harr Bailey & Cooper, *supra* note 28, at 281.

⁵⁵ For Hawaii charter schools, see *supra* note 36. For Native American charter schools, see *supra* note 40.

compromise their religious obligations. Also, the content of the school curriculum may, at times, be in tension with the students' values and beliefs. The dress norms at public schools and especially those required for physical education ("PE") may be at odds with religious norms. Issues of gender separation, in general or in PE, may be significant for certain religious and cultural groups. While public schools may accommodate religious students by granting individual exemptions in certain cases,⁵⁶ this may entail excluding the student from the educational activity. Religious charter schools, on the other hand, accommodate the needs and preferences of the religious communities they serve. School calendars and schedules do not clash with the religious holidays and obligations;⁵⁷ cafeteria food suits religious requirements; and religious charter schools even adapt curriculum to include content that community members value (and exclude content that they do not). They also adjust school activities such as PE or health education to avoid conflicts with students' religious convictions.⁵⁸

As a result, a religious charter school may be much more comfortable and inviting for religious students. Interestingly, these seemingly advantageous traits are sometimes subject to attacks from members of the religious minority group. Objectors regard REC charter schools as a severe threat to struggling parochial schools because they make it more difficult for parochial private schools to attract

⁵⁶ Not all exemptions, however, would be allowed. See *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) in which the court did not grant exemptions from parts of the reading curriculum.

⁵⁷ Although REC charter schools are not uniform on this point. For example, Ben Gamla charter school does not close on the Jewish holidays and follows the official county calendar instead. See *Siracusa Hillman*, *supra* note 28, at 570. On the other hand, EKHLA does, see *supra* note 6.

⁵⁸ Kalasmi charter school in Minnesota offers gender segregated gym classes, an issue that is crucial for its Muslim students. See *Fox supra* note 30, at 290.

students and donors.⁵⁹ Opponents from within also bemoan the loss of rigorous religious instruction that newly-established public charter schools cannot maintain.⁶⁰

Children from disadvantaged religious, cultural, and ethnic minority groups suffer further disadvantages in public schools that REC charter schools may be able to solve. Cultural and linguistic differences between children from minority communities and their teachers and peers may result in negative effects on children's academic performance. As a result of these differences, children from disadvantaged minority groups are also more likely to be diagnosed (and misdiagnosed) with disabilities, especially when these diagnoses rely on teacher evaluation.⁶¹ Biases against children from racial and ethnic minority groups are deeply embedded in schools, making even integrated schools potentially discriminatory.⁶² Some REC charter schools expressly seek to avoid this problem, and some of them state this aim explicitly. Hmong Academy, a charter school located in St. Paul, Minnesota established for children originally from Laos, states in its mission that, although "many students are performing satisfactorily in public schools, many remain behind grade level, hampered by linguistic and cultural differences."⁶³ This school aims to provide "opportunities for

⁵⁹ This applies to cases in which the REC charter schools do not replace them altogether, and when there are still parochial schools that compete with the new charter schools.

⁶⁰ Religious charter schools may only accommodate religion, as opposed to private denominational schools that can actively endorse religion and offer a comprehensive religious education. For detail, see *infra* Part II. For these claims concerning Catholic schools see Horning, *supra* note 29. For a similar objection regarding Hebrew Charter School, see Siracusa Hillman, *supra* note 28, at 571. See also Russo & Cattero, *supra* note 29, at 83, 85–86.

⁶¹ See Robert A. Garda Jr., *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071 (2005).

⁶² See *infra* note 104.

⁶³ Harr Bailey & Cooper, *supra* note 28, at 282.

improved pupil learning that are too often missing in other schools.”⁶⁴

In addition, students from disadvantaged racial and ethnic communities often experience problems in traditional public schools that make REC charter schools attractive.⁶⁵ These children are far more likely than their ethnic majority peers to attend run-down, underfunded schools that lack qualified teachers and advanced academic curricula.⁶⁶ With inadequate public education and unaffordable private education, charter schools have become an attractive option for members of these communities, and they offer hope of a better education. The Tarek ibn Ziyad Academy (“TIZA”) was an Arab charter school based in Inver Grove Heights, Minnesota.⁶⁷ The students at TIZA, a majority of whom were Muslim of Somali origin, transferred from highly segregated and inadequate public schools, where most students have very low educational attainment as well as truancy and disciplinary problems. In the short time it operated, TIZA demonstrated remarkable improvement in student achievement, outperforming even some of the suburban schools in its district.⁶⁸

⁶⁴ *Id.*

⁶⁵ Although the problems that different disadvantaged communities face vary according to their specific circumstances and history (slavery, immigration, poverty, etc.), they share many of the educational challenges.

⁶⁶ See, e.g., JONATHAN KOZOL, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA* (2005), Ch. 5 (indicating that inner city schools focus on test preparation to the exclusion of art, geography and even science) & Ch. 7 (detailing the poor conditions in inner city schools, that lack basic supplies, classroom space and heating).

⁶⁷ The TIZA case will be discussed at length in *infra* Part II.

⁶⁸ See Harr Bailey & Cooper, *supra* note 28, at 279. The school eventually closed in 2011, after their sponsor, the Islamic Relief non-profit, was disqualified under the 2009 legal ban of out-of-state sponsors, and the school failed to find an alternative sponsor. The refusal of other entities to undertake sponsoring the school was directly linked to the controversy regarding its Islamic identity. *Id.*

Religious and ethnic minority students also often experience social exclusion in public schools, especially when their religion requires them to dress and eat differently than most of their peers and abstain from participating in after-school activities.⁶⁹ Children may feel out of place, excluded, misunderstood, and silenced. These feelings negatively affect their social and psychological wellbeing and have dire consequences in terms of their academic development and the roles they assume in society as adults. Negative experiences in school diminish children's self-esteem and curtail their self-expectations, and thus are destructive for their future. Therefore, despite the traditional ethos of public education as a socially unifying force charged with fostering tolerance amidst diversity, the everyday experiences of minority group children in public schools are often ones of exclusion and alienation.

REC charter schools grant children from minority communities opportunities to feel like they belong and take pride in their heritage and identity. Although these children remain part of minority groups in larger society, REC charter schools aim to provide them with a safe haven where people do not mock them for their different traditions; where they are understood; and where their language and culture are dominant. When REC charter schools are successful, they enable children of religious, ethnic, and cultural minority groups to thrive, succeed, and develop self-esteem and leadership skills. Minority children in REC charter schools can "shed their old roles as oppositional and low performing and . . . take on new images as leaders, role models and scholars."⁷⁰ Their positive experiences in school help develop

⁶⁹ See Fox, *supra* note 30 (finding that as a result of these differences, schools become key sites of tension for Muslim adolescent newcomers).

⁷⁰ According to Fox et al., the TIZA and Kalasmi Charter school, another Minnesota based ethnocentric charter school that serves East African immigrants, "promoted positive socialization where students were able to build a good self concept and find comfort in who they are as East African immigrants and as Muslims while they also established their

positive attitudes toward public institutions, trust others, and gain confidence, all of which are critical for their development as participatory and involved citizens.⁷¹

One final motivation may drive parents in religious or cultural minority groups—especially those from affluent socioeconomic backgrounds—to establish REC charter schools, creating severe concerns that are the focus of this Article: a desire to evade the racial and socioeconomic integration in public schools and create enclaves where middle class children study together at the public's expense.⁷² For example, Hebrew charter schools not only offer a curriculum that focuses on Jewish culture, but they also guarantee that students will study among a relatively homogeneous population of middle class and non-racial minority students, much as one would expect in a Jewish private day school.⁷³

Segregationist motivations—rather than *bona fide* religious ones—and their troubling outcomes have long been a driving force behind private denominational education worldwide. In picking a school for their children to attend, parents equally prioritize academic excellence and religious

identity as American citizens . . . and develop confidence in their abilities to become full and equal members of US society.” See *supra* note 30, at 287–88; See also Eckes et al, *supra* note 31, at 86–87; Harr Bailey & Cooper, *supra* note 28. But see GALSTON ALONSO ET AL., OUR SCHOOLS SUCK: STUDENTS TALK BACK TO A SEGREGATED NATION ON THE FAILURES OF URBAN EDUCATION (2009), 4–6, 31–67 (arguing that minority children do not, in fact, have negative and oppositional attitudes toward schools and toward education).

⁷¹ For the same reason, the National Indian Education Association adopted a resolution to support charter schools for Native Hawaiian, American Indians, and Alaska Natives, recognizing that these schools can release students from negative experiences of exclusion. See Eckes, *supra* note 31 at 87.

⁷² See Clotfelter, *supra* note 9 at 110.

⁷³ Although religious charter schools are required to accept children that are not members of the religious community and are not allowed to charge tuition, I argue that they are still likely to be relatively homogeneous. For a detailed explanation, see *infra* Part III-B.

education.⁷⁴ In the post-*Brown v. Board of Education*⁷⁵ era, parents seeking racially segregated education turned to private schools in order to avoid desegregation, and sectarian schools proved better equipped to maintain racial segregation than secular ones.⁷⁶ REC charter schools are merely the newest version of this age-old motivation. As this Article describes in Part III, the composition of the student body has a significant effect on the quality of education offered in the school and on children's educational achievement. Therefore, religious, ethnic, and cultural minority parents often prefer to enroll their children in schools that do not serve many

⁷⁴ This is the case in certain European countries, where religious schools thrive despite rapid secularization of society. Religious schools are losing their religious uniqueness and differ from public schools mainly in their preferable academic quality and the fact that they serve children from privileged backgrounds. See Jaap Dronkers, *Do Public and Religious Schools Really Differ? Assessing the European Evidence*, EDUCATING CITIZENS: INTERNATIONAL PERSPECTIVES ON CIVIC VALUES AND SCHOOL CHOICE 287–312 (Patrick J. Wolf & Stephen Macedo eds., 2004); Denis Meuret, *School Choice and its Regulation in France*, *id.*, at 238. See also Tammy Harel Ben Shahr & Eyal Berger, Religious Justification Elitist Outcome: Torani Schools in Israel (Sept. 18, 2016) (unpublished manuscript),

http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=2565876

[<https://perma.cc/4BAK-ZSKV>] (providing empirical support that a certain kind of religious public school in Israel (Torani schools) is being used as a means for avoiding integration).

⁷⁵ 347 U.S. 483 (1954).

⁷⁶ Clotfelter, *supra* note 9, at 103, 109; Martha Minow, *Confronting the Seduction of Choice: Law, Education and American Pluralism*, 120 YALE L.J. 814, 821–24 (2011). Seeking segregation in private schools proved unsuccessful when the Supreme Court ruled in *Runyon v. McCrary*, 27 U.S. 160 (1976), that a private school could not refuse to accept a black student. *Runyon*, however, concerned a non-sectarian private school. In two later cases, the court struck down two such decisions of private denominational schools, stating that the decisions were not based on a *bona fide* religious conviction, but rather resulted from racist motivations. While not allowing racial segregation in the specific cases, the decisions do imply that had such a religious claim been substantiated, discrimination may have been permitted. See Evan H. Zucker, Note, Section 1981 After *Runyon v. McCrary*: The Free Exercise Right of Private Sectarian Schools to Deny Admission to Blacks on Account of Race, 1977 DUKE L.J. 1219 (1978) (describing these cases and arguing that the interest in eliminating racial discrimination outweighs free exercise rights). See also *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

disadvantaged children. There are various strategies to achieve this goal, such as living in a segregated neighborhood or enrolling in a private school. REC charter schools enable parents to achieve this goal without incurring the costs associated with these strategies.

The paragraphs above detailed the advantages that REC charter schools hold for their communities, and the motivations members of religious and ethnic communities may have in establishing them. Not every single motivation applies to every minority community and charter school. For example, disadvantaged religious and ethnic minority groups are more likely to suffer from inadequate traditional public school systems than privileged religious groups; and not all religious communities experience contradictions between their culture and values and those expressed in public schools. Still, as this Article further argues in Part III, REC charter schools as a whole create similar educational processes that justify an amalgamated discussion. Furthermore, while some of the motivations for establishing these schools are commendable, REC charter schools nonetheless raise significant legal and normative challenges.

C. REC Charter Schools and the Establishment Clause

REC charter schools pose serious challenges for public education in the United States. The concern that has elicited the most public and scholarly attention involves only religious (or faith-based) charter schools. Religious charter schools pose a threat to the United States Constitution's longstanding commitment to secular public education and religious neutrality, found in the Establishment Clause of the First Amendment.⁷⁷ Against this constitutional backdrop, religious charter schools may appear to be an oxymoron.⁷⁸ Indeed,

⁷⁷ U.S. CONST. amend. I.

⁷⁸ Federal law conditions federal funding for charter schools on their being non-sectarian and not affiliated with religious institutions (20

some of the strongest objections to religious charter schools are based on their apparent violation of the prohibition of the establishment of religion.⁷⁹

While courts have fluctuated their approaches to religion in Establishment Clause cases,⁸⁰ Establishment Clause jurisprudence is becoming more permissive of both religious activities allowed within public schools⁸¹ and the transfer of public funds to religious institutions.⁸² A majority of legal scholars conclude that, so long as religious charter

U.S.C. § 7221i (2)(E) (2012)). Some states also explicitly prohibit religious institutions from founding charter schools. However, these restrictions can be overcome by creating a clear organizational divide between the sectarian organization and the school. The more challenging issues are those of substance, restricting religious instruction. These will be referred to shortly.

⁷⁹ I am assuming that charter schools are public schools and that the First Amendment applies to them. Siracusa Hillman notes that this question is “unsettled.” *See supra* note 28, at 561. *See also supra* note 22.

⁸⁰ *See Russo & Cattaro supra* note 29, at 512–17 who describe three phases in court jurisprudence regarding public financial support for religious institutions including schools. In addition to suggested fluctuations and developments, First Amendment doctrine is notoriously vague, declared by courts as being in “hopeless disarray” and “suffering from a sort of jurisprudential schizophrenia.” *Id.* at 510–11.

⁸¹ The traditional test that courts use is the three pronged test set in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), according to which in order to survive scrutiny the government action (a) must have a secular purpose; (b) must not have the primary effect of either advancing or inhibiting religion; and (c) must not result in an excessive government entanglement with religion. Over the years the court has relaxed the test, especially the third prong. *See Eckes, supra* note 31.

⁸² The growing tolerance to public funding of parochial schools culminated in the 2002 Supreme Court decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), in which a majority of five upheld a voucher scheme in Ohio that included private religious schools. The court reasoned that the voucher scheme did not violate the First Amendment despite the passage of public money to religious schools because the state funding was intermediated by individual choice. For a critique of *Zelman v. Simmons-Harris* see Moshe Cohen-Eliya & Yoav Hammer, *An Argument from Democracy Against School Choice: A Critique of Zelman v. Simmons-Harris*, 49 LOYOLA L.REV. 859 (2003) (arguing that funding religious schools through voucher systems jeopardizes democratic stability).

schools do not endorse but merely accommodate religion,⁸³ and operate independent of religious institutions,⁸⁴ they should withstand First Amendment challenges.⁸⁵ Courts have verified these predictions in several cases.⁸⁶ Still, there are

⁸³ “Accommodation v. endorsement” is the terminology used by Siracusa Hillman, based on the Lemon decision. *See supra* note 28, at 562. *See also* Sarah M. Isgur, Note, “Play in the Joints:” *The Struggle to Define Permissive Accommodation Under the First Amendment*, 31 HARV. J.L. & PUB. POL’Y 371, 373–79 (2008).

⁸⁴ As required by Federal law, *see supra* note 78.

⁸⁵ Other writers, however, disagree with this conclusion. Gabrielle Marie D’Adamo, for example, argues that religious charter schools should be found unconstitutional. She explicitly refers to the Ben Gamla and Khalil Gibran International Academy in Brooklyn (which is not a charter school). *See* Gabrielle Marie D’Adamo, Note, *Separatism in the Age of Public School Choice: A Constitutional Analysis*, 58 EMORY L.J. 547 (2008). Russo & Cattero also question the constitutionality of religious charter schools. Writing in 2009, they estimate that religious charter schools will meet insurmountable constitutional barriers and are therefore unlikely to succeed. They point to various legal issues that should prove difficult, such as governance, oversight, place of prayer and religious activity within schools, admission of non-member students, and employment of staff. *See supra* note 29, at 521. On the other hand, there are scholars who believe that the courts have not gone far enough and that in light of Zelman, publicly funded religious charter schools should be allowed to engage in explicit religious activity, rather than merely accommodating religious students or teaching about religions as a culture. *See* Saiger, *supra* note 54.

⁸⁶ *ACLU of Minnesota v. TIZA*, No. 09-138 (D. Minn. Filed Oct. 1, 2010) (denying a motion to dismiss in which the ACLU argued that TIZA was endorsing Islam). The suit was dropped eventually once the school closed. *See* Siracusa-Hillman, *supra* note 28, at 567; Harr-Bailey & Cooper, *supra* note 28, at 278–80; Horning, *supra* note 29, 372 (all discussing the TIZA case). *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897 (W.D. Mich. 2000) (finding that so long as the school’s practices were voluntary, not led by school staff, and as long as the school did not discriminate between different groups, praying, reading the Bible, and distributing religious material do not violate the First Amendment. In *Porta v. Klagholz*, 19 F. Supp. 2d 290 (D. N.J. 1998), a New Jersey court found that leasing a building from a church did not violate the First Amendment.

It should be noted, however, that some state constitutions are more restrictive with regard to the establishment of religion than the Federal constitution. *See* Fox et al., *supra* note 30, at 286; and Russo & Cataro, *supra* note 29, at 511. For example, although the Federal court allows religious schools to participate in voucher schemes, some states do not. *See*

cases of public objections and disputes between schools and departments of education both at the chartering stage,⁸⁷ and after their establishment.⁸⁸

e.g., *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) (in which Florida's Supreme Court invalidated a voucher program that included religious schools). Adopting these more restrictive approaches may, however, raise objections from the opposite direction, namely that denying the ability to establish a religious charter school, when it is allowed by the Federal constitution, violates the freedom of religion also enshrined in the First Amendment. The differences between Federal and state rules can also refer to the rules regarding who may sponsor/authorize charter schools. Some states restrict the authorizers so that religious entities cannot sponsor charter schools. *See e.g.*, MINN. STAT. § 124D.10 (2015); subd. 3.5; 10 (b)(2) that was amended in 2009; *Brookwood Presbyterian Church v. Ohio Dept. of Edn.*, 2013-Ohio-3260 (2013) (in which it was decided that Brookwood Presbyterian Church was not an "education oriented entity" as the law requires but rather a religious institution, and therefore could not become a charter school sponsor).

⁸⁷ A charter for a school based on the Waldorf approach (associated with the Anthroposophic movement), for example, was denied in Oakland, California, based, among other things, on the assertion that the suggested school was religious. *See* Liz Ditz, *Publicly Funded Waldorf Education* (Oct. 23, 2010), http://lizditz.typepad.com/i_speak_of_dreams/2010/10/publicly-funded-waldorf-education.html [https://perma.cc/Y5PG-NWKS]; Debra Snells, *People for Legal and Nonsectarian Schools (PLANS)*, <http://www.waldorfcritics.org> [https://perma.cc/7JX5-EZSN]; *The Education Report, A Waldorf-inspired public charter school in Oakland? Not likely* (Jan. 19, 2010), <http://bigeducationape.blogspot.com/2010/01/waldorf-inspired-public-charter-school.html> [https://perma.cc/3FSW-PX7E]. Although the school was eventually authorized the following year. *See* *Community School for Creative Education*, <http://www.communityschoolforcreativeeducation.org/> [https://perma.cc/6XSW-BSAT]. Other Waldorf schools have also been authorized such as the Woodland Charter School in South Oregon. *See* *Woodland Charter School*, <http://www.woodlandcharterschool.org> [https://perma.cc/ARV5-MMEL].

⁸⁸ Several websites are active in opposition to Harmony Charter School Network, which focuses on Turkish culture and language, and argue that they preach Islam. *See* *Citizens Against Special Interest Lobbying in Public Schools, Proposed Gulen Charter Schools* (Dec. 3, 2014), <http://gulencharterschools.weebly.com/proposed-gulen-charter-schools.html> [https://perma.cc/ZA56-ES9X]. The Broward County School Board in Florida ordered *The Ben Gamla Hebrew Charter School* to suspend all its Hebrew lessons due to the concern that they were used for teaching Judaism. Hebrew classes were reinstated only when the board was satisfied

In terms of the daily practices and curricula, charter schools, like other public schools, are not allowed to mandate praying or teaching of religious texts while endorsing their divine truth,⁸⁹ charter schools can integrate the secular teaching of religious texts into their curricula, focusing on the cultural and historical aspects of these texts. Additionally, the First Amendment does not prohibit charter schools from teaching foreign languages, even when those languages are historically associated with certain religions (i.e., Hebrew, Arabic).⁹⁰ Charter schools may also accommodate student-initiated prayer in school by designating a space within the school for it⁹¹ and adopt certain educational values that coincide with values that feature in certain religious beliefs.⁹²

that the content was purely secular. Sharon Higgins, Charter School Scandals: Ben Gamla, <http://charterschoolscandals.blogspot.co.il/2010/07/ben-gamla-charter-school.html> [https://perma.cc/T986-H8YF]. See also Harr Bailey & Cooper, *supra* note 28, at 284–85. Hawaiian Charter schools begin their school day with an incantation recited by all teachers and students. Hawaiian leaders explain that this is a cultural protocol rather than a prayer, that has secular goals such as focusing students' attention on school, demonstrating respect for the school and teachers, preparing students to engage in the work ahead, and connecting the students to the Hawaiian culture. However, critics have argued that this is compulsory praying and should be prohibited. Eckes et al., *Legal and Policy Issues Regarding Niche Charter Schools: Race, Religion, Culture, and the Law*, 5 J. OF SCH. CHOICE 85, 94 (2011); Fox et al., *supra* note 30, at 291–96.

⁸⁹ See *Lee v. Weisman*, 505 U.S. 577 (1992) (ruling that public schools may not sponsor student prayer even if the prayer is non-denominational); *Doe v. Human*, 725 F. Supp. 1503 (W.D. Ark. 1989) (stating that public schools may not teach the Bible as religious dogma).

⁹⁰ See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating a law that restricted the use of a foreign language as the language of instruction as well as foreign language instruction under a certain age). Meyer was a teacher in a one-room parochial school who taught the Bible in German, and was fined for this act.

⁹¹ See Harr-Bailey and Cooper, *supra* note 28, at 277; Weinberg, *supra* note 28, at 21. A school might also be allowed to allot time for prayers so that they do not clash with other school activities.

⁹² See Horning, *supra* note 29, at 370; Weinberg, *supra* note 28.

Religious charter schools cannot display religious elements or symbols, except during religion classes that take place in the school⁹³ before and after the school day.⁹⁴ Finally, religious charter schools cannot discriminate in hiring teachers, though they may require certain behavior within the school in accordance with the charter school's worldview.⁹⁵ Given these restrictions on the practice and teaching of religion, it is ultimately up to each religious community to decide whether religious charter schools are—all things considered—a desirable educational option for them.

III. REC CHARTER SCHOOLS AND EQUAL EDUCATIONAL OPPORTUNITY

While religious charter schools may face challenges concerning the First Amendment, attention to another significant concern REC charter schools raise is long overdue.⁹⁶ The remainder of this Article examines REC charter schools' effects on educational equality of opportunity. Part III describes the educational processes that give rise to the concern, and Part IV analyzes state charter school legislation in states and its ability to contend with these processes.

Opponents of the charter school movement are concerned that charter schools worsen inequality and segregation. REC charter schools are especially susceptible to these problems, much more so than other charter schools. They are more likely to be racially and socioeconomically segregated and are also more likely than other charter schools

⁹³ See Harr-Bailey & Cooper, *supra* note 28, at 277.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Suzanne Eckes has referred to the concern that these schools may engage in direct ethnic or religious discrimination of prospective students or teachers. However, the critique I put forward here goes far beyond this concern, and persists even if religious schools comply with antidiscrimination rules. See Suzanne E. Eckes, *Charter School Legislation and the Potential to Influence Student Body Diversity*, in Lubienski & Weitzel, *supra* note 14, at 51–71.

to induce two related phenomena—creaming and cropping—that negatively impact education in public schools. In order to appreciate the severity of segregation, creaming, and cropping, it is first necessary to stress the importance of student composition for equal educational opportunity.

A. Student Composition: The Peer Effect

Several different factors affect the quality of education students receive. The factor most often discussed is funding, and structural inequalities that cause disparity in resource allocation have justly been the focus of much legal attention. This Article focuses, however, on another factor influencing the quality of education, namely on student composition. Education is a unique good, in which the quality of the outcome depends on the identity of the consumers. Studying in a class with bright and motivated peers who cultivate academic aspirations and share their cultural capital improves student achievement.⁹⁷ Some researchers argue that, taken alone, the “peer group effect” is the most important factor influencing educational outcome.⁹⁸ As a result, grouping together high ability students improves education. The peer effect explains part of the “private school effect,” the advantage that private schools demonstrate in student achievement.⁹⁹ Private schools enjoy higher student achievement, in part, because they concentrate high achievers who create positive peer effects. The peer effect also explains

⁹⁷ GARY ORFIELD & CHUGMEI LEE, WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY 15–16 (2005).

⁹⁸ This factor was first highlighted in The Coleman Report in 1966. James S. Coleman, *The Concept of Equality of Education Opportunity*, 38 HARV. EDUC. REV. (1967). See also KIRK A. JOHNSON, THE PEER EFFECT ON ACADEMIC ACHIEVEMENT AMONG PUBLIC ELEMENTARY SCHOOL STUDENTS (2000); For updated evidence from five different countries, and between schools with different characteristics, ownership, funding, and enrollment, see Ron W. Zimmer & Eugenia F. Toma, *Peer Effects in Private and Public Schools Across Countries*, 19 J. POL’Y ANALYSIS & MGMT. 75 (2000).

⁹⁹ Together with their SES and race, this arguably explains the advantage of private schools. See Lubienski & Lubienski, *supra* note 7.

why grouping together children with low ability causes a further deterioration in their educational achievements. In addition to having inferior educational prospects, they are not exposed to the advantages of highly talented and motivated peers, and this, in turn, adversely affects the quality of the education they receive.¹⁰⁰

Students' academic ability is correlated with their background circumstances. The academic abilities and attainments (as expressed in test scores and evaluations) of students from affluent families tend to be higher than those of students from low-income families.¹⁰¹ Several structural conditions lead to this outcome. Students from poorer backgrounds are less likely to have adequate health care and nutrition.¹⁰² They are more likely to be exposed to violence, family crisis and unrest, and other situations that impede their capacity for uninterrupted learning. Their parents are less likely to be involved in their children's education, and to be able to assist them with their homework as they are themselves less educated, and may be working multiple jobs.¹⁰³ They typically own fewer books, have not been read to as infants as much as their middle class peers, and their parents are less likely to engage with them in cognitively stimulating activities.

¹⁰⁰ See Orfield & Lee, *supra* note 97, at 15.

¹⁰¹ See e.g., Richard D. Kahlenberg, *Socioeconomic School Integration* 85 N.C. L. REV 1545 (2006-2007); RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 25-35 (2001) (citing numerous studies finding that a school's socioeconomic status is second only to social background as a determinant of students' academic successes); Russell W. Rumberger & Gregory J. Palardy, *Does Segregation Still Matter? The Impact of Student Composition on Academic Achievement in High School*, 107 TCHRS. C. REC 1999, 2014 (2005) (finding that students' and school SES are equally influential); and RICHARD ROTHSTEIN, CLASS AND SCHOOLS 37-47 (2004) (arguing that students from lower SES are less likely to have adequate health care and adequate conditions for learning).

¹⁰² See ROTHSTEIN, *id.*

¹⁰³ ANNETE LAREAU, UNEQUAL CHILDHOODS: CLASS RACE AND FAMILY LIFE (SECOND EDITION WITH AN UPDATE A DECADE LATER 1-6 (2011).

What follows is that grouping together students according to social class (for example, when neighborhoods are segregated) also entails grouping together students according to academic ability, and vice-versa.¹⁰⁴ In other words, social segregation further compromises the educational opportunities of disadvantaged children. Accordingly, schools that serve middle class communities are likely to serve a higher percentage of high achievers, and the positive peer effects in these schools are likely to induce further educational benefits.

Grouping together high achievers from affluent families also reinforces disparities in the allocation of educational resources. Schools that educate high achievers attract better teachers,¹⁰⁵ so schools that serve disadvantaged children are also staffed by less professional teachers.¹⁰⁶

¹⁰⁴ Accordingly, there is a large body of research that shows that ability grouping results in socioeconomic segregation. See Daniel J. Losen, *Silent Segregation in Our Nation's Schools*, 34 HARV. C.R.-C.L. L. REV. 517 (1999); George Ansalone, *Schooling, Tracking, and Inequality*, 7(1) J. CHILD. & POVERTY 33 (2001); Jeannie Oakes, *Two Cities' Tracking and Within-School Segregation*, 96 TCHR. C. REC. 681 (1995); Anthony D. Greene, *Tracking Work: Race-Ethnic Variation in Vocational Course Placement and Consequences for Academic and Career Outcomes*, 1(1) INT'L J. EDUC. STUD. 9 (2014); Mary Cipriano-Walter, *Falling off the Track: How Ability Tracking Leads to Intra-School Segregation*, 41 T. MARSHALL L. REV. 25 (2015).

¹⁰⁵ While intuitively, there is such a thing as better and worse teachers, determining what makes one a good teacher is much more complicated. Hanushek, for example, claims that the difference in added value between good and bad teachers can amount to more than a year's worth of studying. However, he states that there is no reliable way to identify effective teachers through class size, salary, and education. See Erik Hanushek, *School Resources and Student Performance*, in DOES MONEY MATTER 59-60 (Gary Burtless ed., 1996). *But see* NATIONAL CENTER FOR EDUCATION STATISTICS, MONITORING SCHOOL QUALITY: AN INDICATOR REPORT (2000), <http://nces.ed.gov/pubs2001/2001030.pdf> [<https://perma.cc/3NLP-MRZU>] (arguing that possessing academic skills; teaching in the field of training, experience and participation in professional development programs are all measurable parameters for quality teachers).

¹⁰⁶ See HEATHER G. PESKE, KATI HAYCOCK, TEACHING INEQUALITY: HOW POOR AND MINORITY STUDENTS ARE SHORTCHANGED ON TEACHER QUALITY (Education Trust 2006), <http://eric.ed.gov/?id=ED494820>

Schools serving advantaged children also benefit from parental involvement. Advantaged parents are typically more involved in schools and contribute their resources and time.¹⁰⁷ As a result, student composition and peer effects join other social causes of educational deprivation and amplify existing patterns of educational inequality.

B. Segregation Within Religious, Ethnic, and Cultural Charter Schools

As previously mentioned, it is highly debated whether charter schools generally increase or decrease segregation. Research addressing this issue shows that the charter movement serves the same or an even greater share of racial minorities and poor students as public schools.¹⁰⁸ Some writers point to this data as proof that the charter movement has succeeded in fulfilling its promise to promote integration through choice.¹⁰⁹ Others highlight that, while the charter system serves high rates of minority and poor students, this may be because they are established in majority-minority

[<https://perma.cc/6AUU-DB97>]; Erica Frankenberg, *The Segregation of American Teachers*, 17 EDUCATION POLICY ANALYSIS ARCHIVES 1 (2009); and John J. Janssen, *Public School Finance, School Choice, and Equal Educational Opportunity in Texas: The Enduring Importance of Background Conditions*, 10 REV. LIT. 1, 9 (2000) (citing research showing that the SES of families is one of the most important factors influencing the supply of teachers to a certain district).

¹⁰⁷ Catherine Hickman Wehlburg et al., *High School Parent Involvement: Relationships with Achievement, Grade Level, SES, and Gender*, 28 J. RESEARCH & DEVELOPMENT IN EDUC. 125 (1995).

¹⁰⁸ For data according to race, see MURPHEY & SHIFFMAN, *supra* note 13, at 73–75; for data according to socio-economic status, see David R. Garcia, *Charter schools Challenging Traditional Notions of Segregation*, in Lubienski & Weitzel, *supra* note 14, at 33.

¹⁰⁹ See Garcia, at 33, 46–49; Eckes, *supra* note 96, at 51, 59; and James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839 (2007).

districts.¹¹⁰ As a result, specific charter schools are segregated in measures that are equal to, and exceed that of public schools,¹¹¹ making them, according to some, “the most segregated sector of public schools.”¹¹²

Educators and lawmakers regard segregated schooling as a negative condition and they make efforts to avoid it. There are two distinct reasons why segregated schooling is undesirable. First, given the correlation described above between SES, race, and educational achievement, and the effects of peers on the quality of schools, segregation is likely to have an adverse effect on the educational opportunities of children from lower SES and racial minorities. This reason is a consequential one, meaning that if outcomes were to be different than the ones policymakers expect, there would be no reason to continue opposing segregation. The second reason underlying the disapproval of segregation along class and race does not depend on its assumed negative consequences. The integration of students from diverse backgrounds is viewed by some as an important function of public education, crucial to developing social equality, and enabling members of society to participate as equals in politics and the market.¹¹³ There may be cases, however, in which segregation may have educational benefits for students from underprivileged classes,¹¹⁴ in which case we must prioritize

¹¹⁰ See Eckes, *id.*, at 51, 53; Garcia, at 38. See also JANET D. MULVEY ET AL., *BLURRING THE LINES: CHARTER, PUBLIC, PRIVATE AND RELIGIOUS SCHOOLS COMING TOGETHER* 78–79 (2010).

¹¹¹ *Id.*

¹¹² See Lubienski & Weitzel, *supra* note 14, at 15, 18; Garcia, *id.*, at 38, finding that two times the share of minority students studied in intensely segregated schools in charter schools, compared to minority students in public schools.

¹¹³ The most explicit defense of this position is put forward by Elizabeth Anderson in her book, *THE IMPERATIVE OF INTEGRATION* (2010).

¹¹⁴ TIZA may be one example, though there are many others. See discussion in Part II-E, *infra*. See generally MICHEL MERRY, *EQUALITY CITIZENSHIP AND SEGREGATION: A DEFENSE OF SEPARATION* (2003) (arguing that there are cases in which integration is not the best option for students from disadvantaged communities).

between the value of integrated learning and the duty to promote the education of disadvantaged children.¹¹⁵

As a separate category of charter schools, REC charter schools have not yet been subject to empirical research. Therefore, there is no available data concerning their racial composition; however, some assumptions can be made based on general characteristics of REC charter schools. Members of specific communities that are often racially homogenous and have similar socioeconomic characteristics establish REC charter schools. Although non-members may enroll if they choose, these schools are naturally more attractive to members' specific communities. Therefore, REC charter schools are especially likely to be segregated along racial, ethnic and SES lines. This kind of voluntary segregation also happens in other schools of choice, such as schools suggesting specialized curricula,¹¹⁶ or schools of choice designed specifically for servicing "at risk" students.¹¹⁷ However, the correlation between race and ethnicity is stronger in REC charter schools, in which the community is often defined also along ethnic lines.

This correlation is stronger in REC charter schools that teach foreign languages, as the preference to study a foreign language such as Hebrew or native Hawaiian is not distributed evenly among the population.¹¹⁸ In addition to being more attractive and advantageous to members of the

¹¹⁵ While there is merit in the claim that successful, high quality segregated schools are probably better than unsuccessful integrated schools, there is no reason to infer from past failures that effective forms of integration cannot be designed.

¹¹⁶ See Harr Bailey & Cooper, *supra* note 28; Mulvey, et al., *supra* note 111, at 82 (observing that "[b]y designing schools to focus on curricula that attract the white and more socio-economically affluent, segregation is subtly accomplished through parent and student choice").

¹¹⁷ See MURPHY & SHIFFMAN, *supra* note 13, at 75, 122.

¹¹⁸ However, the acquisition of certain foreign languages such as Mandarin has gained popularity with middle class parents, as another way to give their children an "edge" in the competitive educational landscape. This kind of bilingualism is also the way Hebrew classes are explained on the websites of certain Hebrew charter schools. See *supra* note 5.

community, fulfilling an important goal that these families have in instilling the community's identity in the children, the centrality of the language in the school's curriculum may create relative disadvantages for non-member students whose families don't speak the language, and who are not exposed to the language outside the school. This may also be a factor in the decision whether to transfer from public schools to REC charter schools at higher grades, because of the accumulated gaps in language proficiency. Therefore, member families' relative advantage in access to REC charter schools is likely to grow as the stage of education progresses.

Finally, being established by specific communities for their children, we can reasonably assume that REC charter schools will be located in or near neighborhoods where members of specific communities are concentrated. This is expected to result in schools that are socioeconomically and ethnically homogeneous, rather than diverse. Based on these assumptions, REC charter schools are likely to be racially, ethnically, and socially segregated. There are, however, more intricate and subtle ways of educational stratification likely to occur in religious charter schools. I am referring to the twin-phenomena of "creaming" and "cropping" that have significant implications on the student composition of both religious charter schools and the traditional public schools around them. While the two effects are similar in many ways, there are important differences between them with regards to the REC charter schools in which they are likely to occur and the effects they may have on the public schools.

C. Creaming

Private schools and prestigious public schools of choice attract high achieving and motivated students from advantaged families. When these children are drawn out of public schools, this leaves the public schools depleted of advantaged children and of the resources they bring with them, causing a decline in the quality of education. The deterioration in education quality caused by decreases in

resources and the negative peer effect induces even more students to leave, creating a downward spiral. Eventually, only the most disadvantaged students remain in public schools. The gradual accumulation of multiple decisions made by individual students (and their parents) to move to private schools or other schools of choice has a profound negative effect on public schools and, more importantly, on the children who study in them.

Creaming schools group together high achievers, who experience advantageous peer effects. At the same time, education in public schools gradually deteriorates, both compared to the education provided by the creaming schools, and also compared to the education they were able to supply before the process of creaming began.¹¹⁹ Different factors determine whether a school will be able to cream students, all related to what is perceived by potential students and their parents as making the school “better” than the public school they currently attend.¹²⁰ Things such as better test scores; better track record in graduates’ placements in college; better facilities; more options for advanced placement (“AP”) courses or college prep; better qualified teachers and better teacher-student ratios; ample educational resources for supplies, field trips, labs and technology; a safe and pleasant environment; and, importantly, the concentration of high ability peers, can all contribute to a school’s reputation and influence its ability to cream students.

¹¹⁹ ADAM SWIFT, HOW NOT TO BE A HYPOCRITE: SCHOOL CHOICE FOR THE MORALLY PERPLEXED PARENT 38–41 (2003).

¹²⁰ In order to cream, schools do not necessarily have to be, in fact, better. They merely have to be perceived as such. For example, student test scores are not necessarily good indicators of school quality, because they do not factor in the added value of the school. Therefore, a school educating a high share of underprivileged or disabled children may be doing a better job, but still getting lower test scores. However, this problematic indicator may turn out to be a self-fulfilling prophecy, attracting advantaged students to certain schools, who then create a positive peer effect, which will, in turn, improve educational quality. See also LUBIENSKI & LUBIENSKI, *supra* note 7.

Most of the factors detailed above can be reduced to two main advantages. The first is financial advantage (which can ensure a rich curriculum, more qualified teachers, better facilities), and the second is student composition. When a school's prestige is related to test scores and Ivy League placement, the school is, in part, enjoying the benefits of having advantaged students study in it. High ability students, even more than financial incentives, help retain good teachers,¹²¹ and strongly affect violence rates and school environment.

Private schools are the paradigmatic example of creaming schools, enjoying both advantages. They have the resources to offer students attractive courses and campuses, including state-of-the-art computer and science labs, gyms, and pools; being able to offer higher pay, they can hire qualified teachers and employ enough staff members to ensure students receive individualized attention. Private schools are able to select their students and usually charge tuition. Therefore, they admit disproportionate numbers of children from advantaged families, creaming them from the public schools.¹²²

The question of whether charter schools create creaming is more complicated. While the primary motivation behind the charter movement was improving educational achievement, another advantage that proponents stressed is the potential that charter schools held for promoting integration. According to advocates, the choice element in the charter movement (together with other choice based reforms such as vouchers, school choice and magnet schools) helps overcome residential segregation by severing the link between the place people live and the school to which they go. While in the traditional regime only the wealthy could choose a school, by buying a house in the "right" neighborhood, or by

¹²¹ See *supra* note 106.

¹²² See *e.g.* RUBEN A. GAZTAMBIDE-FERNANDEZ, *THE BEST OF THE BEST: BECOMING ELITE AT AN AMERICAN BOARDING SCHOOL* 26–40 (2009).

going private, school choice allows all parents to choose a school for their children.

Charter schools (and public schools more generally), as opposed to private schools are not allowed, as a rule, to sort their students.¹²³ Therefore, when enrollment to charter schools exceeds their capacity, assignment is to be determined by a lottery.¹²⁴ This, supposedly, prevents creaming because it ensures that students of all ability levels have an equal chance of attending the charter school. Additionally, charter schools are publicly funded and free.¹²⁵ This too, should prevent the selection (or self-selection) of students from affluent families, and keep the student bodies of both the charter schools and the traditional public schools racially and socioeconomically diverse.

Despite the lack of formal barriers, evidence indicates that charter schools are in fact more accessible to advantaged children. Choosing a school, especially when choice is not mandated,¹²⁶ requires parents to be proactive with regard to the school their children attend. It requires understanding the significance of the decision, gaining access to information, having social webs that offer guidance and support, and the ability to navigate a complicated system. As a result, advantaged parents—those who are better educated, involved and motivated, and those who are better connected, make better educational choices for their children, and their

¹²³ *But see* CHESTER E. FINN JR & JESSICA A. HOCKETT, EXAM SCHOOLS: INSIDE AMERICA'S MOST SELECTIVE PUBLIC HIGH SCHOOLS (2012) (describing public schools that are academically selective).

¹²⁴ *See* Part IV for the legal rules regarding enrollment to charter schools.

¹²⁵ *See infra*, Part IV.

¹²⁶ There may be differences in this regard between choice schemes in which all are required to choose a school, and cases in which the default is assigning children to a designated school and allowing opting out by choosing a different school.

children are disproportionately represented in desirable schools of choice.¹²⁷

Practical difficulties also create barriers for disadvantaged children. Transportation to a school located outside the neighborhood can be a significant burden for disadvantaged individuals. The distance can also bar poor children from enrolling in a school if they are expected to assume responsibilities in the house such as helping financially or taking care of siblings. Disadvantaged children may be disinclined to enroll their children in schools outside the neighborhood, concerned that their children will feel out of place. Consequently, schools of choice in general, and charter schools among them, are prone to creaming. This

¹²⁷ See BRUCE FULLER & RICHARD F. ELMORE, WHO CHOOSES? WHO LOSES?: CULTURE, INSTITUTIONS & THE UNEQUAL EFFECTS OF SCHOOL CHOICE (1996) (findings from the US); JUSTINE S. HASTINGS, ET. AL., PREFERENCES, INFORMATION AND PARENTAL CHOICE BEHAVIOR IN PUBLIC SCHOOL CHOICE, NAT'L BUREAU OF ECON. RES. WORKING PAPER NO. 12145 (2007), <http://www.nber.org/papers/w12145> [<https://perma.cc/Q5BE-2RJJ>] (stating that low-income families place much less weight on academics when choosing schools, decreasing their academic gains); JUSTINE S. HASTINGS ET AL., PARENTAL PREFERENCES AND SCHOOL COMPETITION: EVIDENCE FROM A PUBLIC SCHOOL CHOICE PROGRAM, NAT'L BUREAU OF ECON. RES. WORKING PAPER NO. 11805 (2006), <http://www.nber.org/papers/w11805> [<https://perma.cc/G7R2-TE8Z>] (finding that preference attached to school's test scores increases with student's income); Geoff Whitty, *Creating Quasi-Markets in Education: A Review of Research on Parental Choice and School Autonomy in Three Countries*, 22 REV. OF RES. IN EDUC. 3 (1997) (reviewing the research from England, the United States and New Zealand concerning student placement in school choice programs according to SES). PAULINE MUSSET, SCHOOL CHOICE AND EQUITY: CURRENT POLICIES IN OECD COUNTRIES AND A LITERATURE REVIEW, 25 OECD EDUC. WORKING PAPERS, NO. 66 (2012), <http://dx.doi.org/10.1787/5k9fq23507vc-en> [<https://perma.cc/A5VY-H6QK>] (acknowledging unequal advantages for students from low SES in school choice programs in OECD countries). For a legal discussion of the disadvantages that racial minorities experience in school choice programs see Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083 (2014). For a response, see Aaron Saiger, *What We Disagree About When We Disagree About School Choice*, 99 IOWA L. REV. BULL. 1, 49 (2014) (arguing that school choice presents an improvement from the status quo).

concern was explicitly addressed in charter legislation, with disputable levels of success.¹²⁸

Researchers have not yet studied creaming and cropping in REC charter schools. This is unfortunate, because there are good reasons to suspect that these processes will be more prevalent in REC charter schools than in other charter schools. Therefore, even those persuaded by charter proponents that the movement has overcome the challenge of creaming should be concerned when confronted with the argument below.

Like other charter schools, REC charter schools cannot formally restrict access to certain students. No religious or other sorting may take place, and students belonging to the relevant religious or cultural community may not receive preference in the admissions process. This would seem to relieve concerns that religious charter schools create a special problem of access, and imply that if there is a creaming problem, it is no worse than in other charter schools. However, closer examination suggests that the special characteristics of REC charter schools (at least those that serve privileged communities)¹²⁹ make them especially likely to induce creaming. Thus, REC charter schools pose an especially grave challenge to equality of opportunity in education.

Consider a Hebrew charter school like EKHLA. EKHLA primarily attracts students for two main reasons. First, parents of a child, who previously studied in Jewish day schools with tuition, may prefer that their child attend a free charter school like EKHLA, despite the reduction in religious education. Second, Hebrew charter schools like EKHLA may attract Jewish children who formerly attended public schools. The exodus of a significant number of children from public

¹²⁸ See *infra* Part IV.

¹²⁹ REC charter schools serving disadvantaged minorities are more likely to create cropping, as will be described in Part III-D.

schools to Hebrew charter schools like EKHLA can have negative effects on the public schools they leave, and may cause negative peer effects.¹³⁰ EKHLA offers the advantages of a private Jewish day school for free; and it encourages students that would otherwise attend public schools and contribute to the diversity and positive peer effect to leave in favor of a homogeneous, community-based school. Families are likely to consider, in making this decision, the fact that the charter school is likely to be more ethnically and socioeconomically homogeneous, and serves a lower share of disadvantaged students relative to the local public school.

While this process is similar to those that occur in private schools, it is potentially far more widespread when charter schools are concerned, because they, as opposed to private schools, are free. Therefore, if previously only people who held very strong religious beliefs or were extremely wealthy (or both) would choose the private school option, and many of the middle class children remained in public schools, REC charter schools have changed this and made the exit from traditional public schools much easier.¹³¹

To make things worse, the creaming effect caused by REC charter schools is even more pervasive than merely

¹³⁰ Naomi Fejgin, *Factors Contributing to the Academic Excellence of American Jewish and Asian Students*, 68 SOC. OF EDUC. 18 (1995). Charter schools that attract children of Asian origin, such as those teaching Mandarin, may have the same effects. If all students enrolling in the charter school previously attended a private school, they would not have contributed to the peer effect in public education in any case. However, what is usually the case is that establishing an REC charter school induces students to leave both private schools and traditional public schools. When EKHLA converted from a private Jewish day school, for example, its enrollment increased from a hardly viable 80 students to 200. *See supra* note 3.

¹³¹ Admittedly, public schools in advantaged neighborhoods would often serve few or no poor children anyway and have beneficial peer effects. In this case, there would likely to be less motivation to establish a religious charter school. If such a school were to be established, and indeed no creaming occurred, that would be all for the best, and the school should not be restricted. For the legal discussion, see *infra* Part IV-C.

extracting members of the religious or cultural community from public schools. After the initial creaming of children belonging to the community, and the subsequent decline of public schools, other students may also make an effort to leave the public school, not wanting to remain in the “sinking boat.” Non-member children are obviously free to choose any other school (charter or private), but REC charter schools may also be attractive to non-members as well, creating a “secondary creaming” of non-member students. REC charter schools serving middle class communities are likely to be schools that in addition to the cultural and ethnic focus also offer high quality education in secular terms.

REC charter schools serving advantaged communities attract primarily children of members, so positive peer effects, safe and positive school environment and good scores on tests are to be expected. They also enjoy relative financial prosperity because although they are not allowed to charge tuition, they are allowed (as all public schools are) to accept donations. These elective payments are an extremely significant factor in the inequality of resources between schools,¹³² and because charter schools often receive lower public funding, they are even more dependent than traditional public schools on private contributions for their establishment and operation.¹³³ Housing charter schools in campuses shared with other community institutions, such as religious congregations or ethnic communities, can help ensure the schools’ financial stability.

¹³² Parents’ contributions in wealthy areas can reach thousands of dollars each year (\$1,500 in Menlo Park; \$2,300 in Hillsborough, CA; and \$3,400 in Marin County). Rural areas or poor inner-city districts are not able to raise these funds, some receiving less than \$100 a year per child. See Rob Reich, *Opinion Not Very Giving*, N.Y. TIMES (JUNE 3, 2012), <http://www.nytimes.com/2013/09/05/opinion/not-very-giving.html> [<https://perma.cc/BLG6-EENX>] (discussing parent donation requests and figures raised for different school districts).

¹³³ See *supra* note 23.

Because of these advantages, some non-member families who seek a better education for their children are willing to “tolerate” the specialized curriculum at an REC charter school. It seems that this softened religious or cultural focus is a small price to pay for all the advantages REC charter schools have to offer. Accordingly, Ben Gamla Charter School and other Hebrew charter schools report that each year, several non-Jewish students enroll into their schools, presumably because they are attracted to the schools’ academic quality and other benefits.¹³⁴ The Hellenic Classical Charter School in New York City emphasizes classical studies as well as Greek and Latin, and incorporates Socratic questioning as a central learning strategy. However, its mission is just as much about granting its students a competitive education as it is about having them experience Greek culture.¹³⁵ The school’s popularity transcends the Greek community; in fact, less than fifty percent of the school’s students are of Greek origin.¹³⁶ All the other students are attracted to the benefits that the school has to offer in comparison to traditional public schools.¹³⁷

Not all REC charter schools are equally attractive to non-members; the closer the charter school’s mission and culture is to that of the non-members, or to that of traditional

¹³⁴ See Siracusa Hillman, *supra* note 28, at 569 (noting that some non-Jewish students attend Ben Gamla Charter School).

¹³⁵ *Mission Statement*, THE HELLENIC CLASSICAL CHARTER SCHOOL, <http://www.hccs-nys.org/file/nav/19403110> [<https://perma.cc/D7EY-H4VW>]. See also Harr Bailey & Cooper, *supra* note 28, at 280–81 (discussing cultural aspects of Hellenic Classical Charter School).

¹³⁶ See Harr Bailey & Cooper, *supra* note 28, at 281.

¹³⁷ Other religious charter schools also serve non-member students. Catholic private schools, for example, traditionally serve disadvantaged, inner-city students, the majority of whom are not Catholic. The conversion charter schools that have replaced some Catholic private schools continue to serve both Catholic and non-Catholic students. See Horning, *supra* note 29, at 375 (noting that about seventy percent of students in Catholic schools converting to charters in Washington, D.C. were not Catholic, so resulting charter schools’ potential populations of Catholic students were limited). See also MULVEY ET AL., *supra* note 111, at 81.

public schools, the more attractive it will be.¹³⁸ The fact that the religious characteristics in REC charter schools are relatively mild and that religious activity is non-coercive makes it easier for students who do not belong to the community to attend the schools. If the specialized content is limited to history, culture, and universal values, then this seems like a reasonable price for non-member families to pay for an excellent education. Research pointing out the benefits of bilingualism is used to persuade parents that learning a foreign language is an advantage, rather than a price. As a result, going to one of these REC charter schools is beneficial, in educational terms, even for non-member families.

Still, enrolling one's children in an REC charter school is not the most natural decision for a non-member family, as the decision requires sophistication and resourcefulness on the part of parents. As a result, secondary creaming of non-member students is potentially even more selective than the initial creaming of member students. It is reasonable to assume that the more advantaged and well-informed non-member parents will choose an REC charter school for their children (whereas, within the community, there is likely to be at least some diversity with regard to SES).

In addition, there are more mundane mechanisms that would make REC charter schools less accessible to non-member children who are also not affluent. First, while they do not require tuition, REC charter schools (more so perhaps than other charter schools) may involve extensive extracurricular activities that are based on parents' payments, discouraging parents who are not affluent from applying to the school.¹³⁹ Second, although religious charter

¹³⁸ This might also depend on the availability and quality of other educational options in the area, such as regular charter schools.

¹³⁹ As I mentioned above, there is an unfortunate lack of empirical research on REC charter schools, but it is expected that charging fees for extracurricular activities will exclude certain students. For research regarding parental payment for extracurricular activities in public schools, see Marc D. Puntus, *Education Fees in Public Schools: A Practitioner's*

schools (as are charter schools in general) most often employ open-enrollment policies and therefore cannot reject students, they are still able to manipulate enrollment, making access easier for certain non-member students than for others. Examples of this include focusing outreach efforts in wealthy neighborhoods or offering courses and curricula that are attractive to educated parents. By doing so, schools can affect the identity of students that enroll and attract students from advantaged groups.¹⁴⁰ As a result, non-member students who attend REC charter schools established by privileged minorities are likely to be children from privileged backgrounds, and thus are likely to aggravate the creaming effect.

An interesting observation concerning religious practices in charter schools arises from this analysis. In order to comply with the First Amendment, religious charter schools ensure that their religious character is relatively mild. This, in turn, makes religious charter schools more attractive to non-members. Non-member parents might not be willing to expose their children to explicit religious preaching, but do not object to the secular teaching of religion as a culture. Observing the First Amendment restrictions, therefore, induces creaming. The less problematic schools are in terms of the First Amendment, the more centered they are on culture and language, the more problematic they potentially become in terms of equality. Religious charter schools that would actively endorse religion, compelling students to participate in rituals and religious teaching, would likely be

Guide, 73 B.U. L. REV. 71 (1993) (analyzing constitutional and state statutory implications of pay-to-play); Kate I. Rausch, *Pay-to-play: A Risky and Largely Unregulated Solution to Save High School Athletic Programs from Elimination*, 39 SUFFOLK U. L. REV. 583 (2006) (arguing pay-to-play subverts free public education as a concept); Shannon M. Ryan, *Fees for Extracurricular Activities Alienate Students Who Would Otherwise Participate and Should Be Replaced With Alternative Means of Fundraising*, 13 SETON HALL J. SPORT L. 239, 239–40 (2003) (noting pay-to-play discourages participation by students).

¹⁴⁰ Admittedly, this manipulation is not unique to REC charter schools and can be performed by any school of choice.

unconstitutional under the First Amendment but would be far less likely to create creaming. Accordingly, liberalizing the First Amendment restrictions to allow more religious practices in charter schools might deter non-member families from enrolling in the schools, thus reducing creaming.

While the process of creaming is well documented in empirical research in education (although, as noted, not with regard to the category of REC charter schools specifically), its outcomes and severity are highly contingent on the circumstances of each relevant case. For example, despite the characteristics described above, a Hebrew charter school may fail to cream students if the public school has a good reputation or an admired principal that causes students to stay.¹⁴¹ Additionally, if a public school is converted into a charter school and continues to teach all of its students, there may be no problem of creaming.¹⁴² Moreover, despite the description above, there may be REC charter schools that attract non-members who are not privileged. For example, Harlem Hebrew Language Academy, established in 2013, features, in addition to the Hebrew studies, a “specialized Social Studies curriculum . . . focusing on Harlem’s history as a focal point of migration and immigration.”¹⁴³ And indeed, Harlem Hebrew Language Academy is racially diverse,

¹⁴¹ These are merely examples of possible considerations parents may have in evaluating the quality of a school. When local public schools are considered good, member families will also be less motivated to establish a charter school in the first place. Motivation to establish a charter school may be stronger, however, amongst families currently enrolled in private parochial schools.

¹⁴² Although converting a traditional public school into a religious, ethnic, or cultural charter school may have the effect of excluding non-member students whose parents are not interested in the specialized curriculum.

¹⁴³ *See About Us*, HARLEM HEBREW LANGUAGE ACADEMY CHARTER SCHOOL, <http://www.harlemhebrewcharter.org> [<https://perma.cc/W9GU-NWVX>].

attracting non-members who are not necessarily from privileged backgrounds.¹⁴⁴

Careful design of school policy can therefore have a significant influence on student composition. And still, anecdotal evidence of REC charter schools that do not induce creaming cannot alleviate the egalitarian concern any more than an unsuccessful private school rebuts the egalitarian aversion toward private schools in general. Rather, this implies that the legal treatment of charter schools should reflect their different effect on public schools, restricting primarily those that have negative influence.¹⁴⁵ REC charter schools that do not create creaming should serve as important examples to demonstrate how the aims of religious charter schools can be realized without harming public schools around them.

While the concerns regarding creaming may seem relatively limited in scope, applying only to specific schools in specific circumstances, they are actually likely to become increasingly relevant. The uninterrupted proliferation of REC charter schools serving advantaged communities is likely to encourage groups of advantaged parents—whether they belong to religious communities or not—to establish their own charter schools, a process which will, in all likelihood, aggravate inequality in education.

D. Cropping

Not all REC charter schools neatly fit the description above. When members of a marginalized minority establish a charter school designed to accommodate their unique cultural or linguistic needs, creaming does not occur. Through no fault of their own, students from racial and ethnic minorities are

¹⁴⁴ To my knowledge, there is no data exploring whether African American students attending Harlem Hebrew are advantaged in relation to those attending neighboring public schools.

¹⁴⁵ See *infra* Part IV-C (developing this implication).

often the lowest achievers in the public education system, and educating them is challenging and expensive.¹⁴⁶ When they leave racially diverse public schools, therefore, they do not cause a negative peer effect in the public schools. Additionally, a charter school that enrolls a majority of children belonging to disadvantaged minorities would probably not induce further creaming of students from outside the community: students, especially the most advantaged students, would not leave their public schools in order to attend the charter school. Therefore, while these schools no doubt contribute to racial isolation, they cannot be accused of creaming.

They can be expected, however, to create cropping—a phenomenon closely related to creaming—in which specialized schools serve local disadvantaged communities but exclude the most disadvantaged members of the community, who remain in traditional public schools. Cropping is likely to occur when public schools are racially segregated and inadequate,¹⁴⁷ driving parents from within the marginalized community to seek better educational opportunities for their children. Charter schools constitute an attractive option, because they are publicly funded and free. However, the most severely disadvantaged children are least likely to make the most of the newly available opportunities. They remain in traditional public schools, and suffer the consequences of negative peer effects. Once again, the private decisions individuals make to leave public schools have negative consequences for the students remaining in them.

Cropping may occur through selection to private schools. Prestigious schools often make efforts to diversify

¹⁴⁶ Kevin Carey, *Education Funding and Low Income Children: A Review of Current Research*, CENTER ON BUDGET AND POLICY PRIORITIES, <http://www.cbpp.org/archives/11-7-02sfp3.htm> [https://perma.cc/Z4RW-YDBR] (demonstrating that studies show disadvantaged students require about twice the resources that their advantaged peers require to achieve the same educational outcomes).

¹⁴⁷ Examples of such schools are described in KOZOL, *supra* note 66, and ALONSO ET AL., *supra* note 70.

their student bodies by reaching out to marginalized minorities and identifying students with high potential and offering them scholarships and other means of assistance. By doing so, these schools create racial diversity and grant the “chosen few” advantageous educational opportunities. At first glance, this can be said to have a positive effect on equality; it promotes diversity and offers educational opportunity to minority children. However, this view is misleading for a number of reasons.

First, it should be noted that cropping blurs evidence of racial inequality in selective schools, but does not necessarily indicate equal access. For example, a school may be racially diverse, but if the accepted minority students present a higher level of ability than the average student, this may indicate that access is unequal, and that while the best students from racial minority groups are able to enter, many others are effectively barred. Additionally, students with equal levels of talent may have different chances of succeeding in a selective school, as they come less prepared and do not have the ongoing support that students from affluent families have. Yet, even more to the point, while promoting diversity in selective schools, cherry-picking the most capable students, selective schools create a negative peer effect in the public schools, leaving them “cropped low.”

REC charter schools are expected to cause cropping because the students who are more likely to enroll in them are the relatively advantaged students within the minority—those who have parents with the knowledge and ability to help establish a charter school or to choose an existing one.¹⁴⁸ And while the numbers of children from the community able to enroll in an REC charter school established on their behalf are much greater than those who will be accepted to a prestigious private school, as long as the public schools continue to operate, cropping remains a problem. In fact, the problem is

¹⁴⁸ See *supra* Part III-C (explaining these barriers).

probably made worse, because the traditional public school loses more of its students and resources.¹⁴⁹

The TIZA charter school can be an illuminating example. TIZA was established to serve children from Somali-Muslim families, who were formerly educated in hyper-segregated, underfunded public schools. Following TIZA's success, the school was oversubscribed and enrollment required a lottery. However, given the findings presented above concerning disadvantaged parents and their skills in choosing schools, the most disadvantaged students are the least likely to apply or be represented at a school like TIZA.¹⁵⁰ These students are much more likely to remain in public schools that will further deteriorate due to lack of resources and negative peer effects. The conclusion is that in granting these students a much-deserved chance, religious charter schools serving insular and marginalized minorities harm the most disadvantaged members of their own community.

E. Addressing Two Counterarguments

Two counterarguments should be addressed at this point. The first concerns the application of the argument against REC charter schools in cases of those serving disadvantaged minorities, such as TIZA. Schools like TIZA or Native American charter schools serve some of the nation's most disadvantaged children, children whose public schools provide an extremely inadequate education. Therefore, even if these schools do induce crowding, they still offer disadvantaged students better educational opportunities than they have and should thus be applauded rather than denounced.

¹⁴⁹ This problem does not arise when public schools are converted into charter schools and serve all students from the original public school.

¹⁵⁰ See generally Whitty, *supra* note 127, at 19 (noting that some features of charter schools may exclude "students from certain disadvantaged groups").

TIZA, for example, ranked high on the Minnesota Comprehensive Assessment Exams, outperforming some of the best suburban schools in its area.¹⁵¹ TIZA's English as a Second Language ("ESL") program was recognized for its success and innovation, and the school opened a second location and became a mentor for several other start-up charter schools.¹⁵² Hmong Academy in St. Paul, Minnesota also has shown similar success. In three years, levels of success on the Basics Skills Test leaped from a bleak ten percent of 9th and 10th graders to an impressive seventy-five percent of 9th through 12th graders, and the graduation rate of their first graduating class was ninety percent.¹⁵³

Another Hmong charter school, The Community of Peace Academy, was one of the top twenty Minnesota schools in improved math skills, and was also noted for a relatively high rate of passing reading exams, even though English was not the first language for most students.¹⁵⁴ Charter schools serving Native Americans have also shown initial encouraging results in educating some of America's most failing students.¹⁵⁵ Therefore, criticizing such religious charter schools, let alone restricting them, might seem extremely misguided, and egalitarians should instead support the establishment of additional REC charter schools focusing on excluded minorities. Moreover, it could be argued that trying to prevent individual students from leaving failing public schools in favor of more promising REC charter schools would constitute the cruel sacrifice of one student for the sake of another.

¹⁵¹ See Harr Bailey & Cooper, *supra* note 28, at 279.

¹⁵² *Id.*

¹⁵³ *Id.* at 283.

¹⁵⁴ *Id.* at 284.

¹⁵⁵ *Public Charter Schools Growing on Native American Reservations*, NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS, <http://www.publiccharters.org/press/public-charter-schools-growing-native-american-reservations> [https://perma.cc/7HXG-JP97] (stating charter schools serving Native American populations "are aiming to improve student learning and some schools are beginning to succeed").

I concede that absent appropriate alternatives, decision-makers should be very cautious when restricting successful schools serving marginalized minorities. If all students could attend REC charter schools (and public schools would close), cropping might cease to be an issue. Still, it is crucial to pay attention to the concerns detailed above for two reasons. First, it is important to stress that despite their success, REC charter schools are not the perfect solution for the education of racial and ethnic minorities. There may not be a better alternative available at present, but designing a systematic solution that does not advantage one child at the expense of another is still indispensable.

Additionally, even if REC charter schools that induce cropping should not be restricted, it is crucial that policymakers acknowledge cropping and its negative effects. They have an obligation to ensure that all students, including those remaining in traditional public schools, have sufficient educational opportunities. Stressing only the positive aspects of REC charter schools may mistakenly imply that school boards and states have realized their obligations to students of racial and ethnic minorities by supporting charter schools. Pointing out the negative effects of cropping shows that this is not so.

The second possible counterargument is that the critique suggested above—according to which creaming and cropping are negative outcomes of choice—effectively amounts to undermining the rationale of competition that underlies the charter movement as a whole. The reality of children leaving public schools in favor of better (charter) schools is an essential part of the market mechanism of competition. Competition is based on consumers' freedom to choose among different providers, which in turn pushes all to excel. Even if creaming and cropping have a negative effect on public schools, it is merely a temporary setback. Public schools will be compelled to improve in order to prevent students from leaving them, or in order to tempt them back.¹⁵⁶ Accordingly,

¹⁵⁶ See CHUBB & MOE, *supra* note 16.

creaming and cropping, are, essentially, a sign that the market is working as it should. Proponents of the charter movement, therefore, could object that creaming and cropping are not negative phenomena, but rather simply part and parcel of the process of improving education for all through competition. If so, it would seem that showing that REC charter schools create creaming and cropping would not be considered a cause for concern among charter proponents, and such an argument should instead be understood as part of a more general argument against incorporating competition in educational reforms.

But this counterargument is misguided. There has been substantial debate regarding the advisability of competition in education, including arguments challenging the assumption that competition can improve education for all students.¹⁵⁷ However, REC charter schools create special causes for concern that should trouble not only those who oppose the movement in general, but also those that celebrate it. The assumption underlying the charter movement is that competition is a vehicle for improvement, and that it will improve education for all. Proponents of charter schools are also committed to the idea that choice and the advantages of it should be equally accessible to all. Therefore, the fact that a certain kind of charter school, namely REC charter schools, is disadvantaging children from marginalized groups should be of interest not only to opponents of the charter movement that may use it as another proof of its ills, but even more so to charter enthusiasts, who seek to improve the operation of charter schools.

IV. LEGAL REGULATION OF CHARTER SCHOOLS

This Part focuses on state charter legislation, primarily on rules regarding student enrollment, and examines the ability of the strategies adopted by different states to contend with the challenges presented above. State charter legislation is clearly not the only possible track to

¹⁵⁷ See FULLER & ELMORE, *supra* note 127.

contend with inequalities that charter schools may create. Other legal tools, such as equal protection claims (both federal¹⁵⁸ and state¹⁵⁹), state constitutions' education clauses,¹⁶⁰ and Title VI of the Civil Rights Act of 1964,¹⁶¹ have

¹⁵⁸ The effectiveness of Equal Protection challenges, however, is questionable. Intentional discrimination would be hard to prove in the case of REC charter schools, and the Supreme Court ruled out SES as a suspicious classification that warrants strict scrutiny in Federal Equal Protection claims. See *San Antonio v. Rodriguez*, 411 U.S. 1, 16 (1973) (holding no strict scrutiny analysis of equal protection claim in a class action where plaintiffs were students from poor families).

¹⁵⁹ State Equal Protection clauses may have a better chance to be able to prevent inequality, as they are, in some of the states, more inclusive than the United States Constitution. Thus, for example, unequal funding in different districts in California was found unconstitutional despite the Supreme Court's decision in *San Antonio v. Rodriguez*. *Id.* See *Serrano v. Priest*, 557 P.2d 929, 929 (Cal. 1976). In another case, the Connecticut Supreme Court declared *de-facto* segregation unconstitutional. See *Sheff v. O'Neill*, 678 A.2d 1267, 1283 (Conn. 1996). For a general discussion, see Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L. J. 1013 (2003).

¹⁶⁰ Different states have stated the right to education, and the state's equivalent duty to supply education in different terms: some ensuring an "adequate education," others a "thorough and efficient education," a "sound basic education," etc. See Josh Kagan, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241 (2003). An argument based on the education clause would have to establish that the negative effects for traditional public schools were so severe that they no longer supplied adequate education. Despite the harm that REC charter schools purportedly cause traditional public schools, there are often other causes, such as insufficient funding and untrained teachers, that are responsible for the inadequacy of education. The argument that charter schools make public schools inadequate (due to the financial effect they have on public schools) was rejected in *New York City School Bds. Ass'n. v. Board of Educ. of City School Dist. of City of N.Y.*, 50 A.D.2d 826 (N.Y. App. Div. 2d Dep't 1975).

¹⁶¹ Title VI prohibits discrimination on the basis of race, color or national origin in programs that receive federal financial assistance and therefore applies to almost all charter schools. Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000D (1964). It applies not only in cases of intentional discrimination but also in cases of disparate impact, which may be more suitable for religious charter schools. However, Title VI does not apply to discrimination based on SES, and therefore would not capture all cases of creaming. Additionally, disparate impact theory is mostly suitable to address racial isolation and would not capture all cases of creaming and

all been invoked with varying degrees of success to promote equality in education. They have also been extensively discussed in literature. Charter legislation, however, is another primary and potentially effective legal tool to promote equality.¹⁶² Legislation sets out the rules that govern charter schools from their inception and can therefore potentially counter some of the problems before they are created. Legislation details aspects of charter school operation that affect issues of equality, such as enrollment, tuition, and location.

cropping. Finally, Title VI does not give rise to an individual cause of action except in cases of intentional discrimination. In all other cases, a complaint must be filed with the Office of Civil Rights (“OCR”). *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding no private right of action for plaintiffs seeking to enforce Title VI Civil Rights Act of 1964 regulations concerning disparate impact).

A complaint regarding racial and socioeconomic segregation allegedly caused by charter schools in Delaware was filed to the OCR in March 2014 by the American Civil Liberties Union (“ACLU”) and the Community Legal Aid Society (“CLASI”) and is still pending. *See ACLU and CLASI File Complaint with Office of Civil Rights*, AMERICAN CIVIL LIBERTIES UNION OF DELAWARE (Dec. 2, 2014), <http://www.aclu-de.org/news/aclu-de-files-complaint-with-office-of-civil-rights/2014/12/03> [<https://perma.cc/TBY7-4EAE>]. While there are indications that the OCR is an active player that helps states comply with antidiscrimination rules, there has also been criticism concerning its effectiveness. *See* U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, HELPING TO ENSURE EQUAL ACCESS TO EDUCATION: REPORT TO THE PRESIDENT AND SECRETARY OF EDUCATION (2012), <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-2009-12.pdf> [<https://perma.cc/5QPP-D9DB>] (describing enforcement and compliance actions taken by the OCR); *but see* Alison Renfrew, *The Building Blocks of Reform: Strengthening Office of Civil Rights to Achieve Title IX’s Objectives*, 117 PENN. ST. L. REV. 563 (2012) (describing the main problems with the OCR in the context of Title IX); Bonnie P. Tucker, *Section 504 of the Rehabilitation Act After Ten Years of Enforcement: The Past and the Future*, 1989 U. ILL. L. REV. 845 (1989) (describing problems with the OCR in the context of § 504).

¹⁶² States have different rules regarding matters such as the entities that may establish charter schools; the agencies authorized to issue charters; the kinds of charter schools that may be established; the exemptions that charter schools have from regulations that apply to traditional public schools; issues of employment, collective bargaining and teachers’ unions; student enrollment; and others. *See* Fox et al., *supra* note 30, at 283 (arguing that state charter rules are relatively uniform).

Upon examination of the measures adopted in the different states in order to promote diversity, three different strategies emerge. The first category consists of anti-discrimination state laws that also ensure open enrollment. The second category includes states whose charter laws require, in addition to open enrollment, that student composition in charter schools reflect the school districts' population and offer different possibilities to obtain it. The third and final category consists of provisions that examine the effect that charter schools have on traditional public schools' composition and quality.

In the following pages, each strategy is described and analyzed. The conclusion that follows is that while the first two strategies may be able to promote equality in the case of charter schools in general, they are unlikely to be effective in the case of REC charter schools. The third strategy, which involves examining both charter schools and traditional public schools in their vicinity, is the strategy that is most likely to be able to promote diversity, integration, and equality of educational opportunity in the case of REC charter schools.

A. Antidiscrimination

Charter legislation in all states forbids charter schools to sort students on the grounds of race or religion.¹⁶³ Other categories of prohibited discrimination, such as creed, sex, national origin, religion, ancestry, disability, or sexual orientation, vary from state to state. In most states, charter schools are required to maintain open enrollment, so student sorting is not allowed. Random selection is then used when schools are oversubscribed. Federal financial support is

¹⁶³ Discrimination would also cause charter schools to lose federal funding. For a description of state charter legislation, see Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563, 592–96 (2001); Preston C. Green III & Joseph O. Oluwole, *Charter Schools: Racial-Balancing Provisions and Parents Involved*, 61 ARK. L. REV. 1 (2009) (describing state charter legislation on racial balance).

granted to open-enrollment charter schools, creating an additional incentive for charter schools to maintain this policy. Another rule that applies to charter schools in all states is the prohibition of tuition fees, which is also meant to ensure equal access and prevent SES segregation. Some of these laws also state that charter schools shall be subject to desegregation plans that apply to the school district.¹⁶⁴

In some states, such as Iowa,¹⁶⁵ Colorado,¹⁶⁶ and Idaho,¹⁶⁷ the antidiscrimination provisions are the only limitations on charter schools' admissions policy. These states rely on charter schools to be attractive enough through their

¹⁶⁴ In most cases this is stated briefly and does not seem to place any additional burden on charter schools. Arkansas, however, has a detailed section regarding the influence of a charter school on desegregation efforts, making it essentially more like requirements from the third category. *See infra* Part IV-C (addressing state legislation that requires examining the effects that charter schools have on student composition in traditional public schools). The Arkansas legislation requires that:

(a) The applicants for a public charter school, the local school district board of directors for the district in which a proposed public charter school would be located, and the authorizer shall carefully review the potential impact of an application for a public charter school on the efforts of a public school district or public school districts to comply with court orders and statutory obligations to create and maintain a unitary system of desegregated public schools.

(b) The authorizer shall attempt to measure the likely impact of a proposed public charter school on the efforts of public school districts to achieve and maintain a unitary system.

(c) The authorizer shall not approve any public charter school under this chapter or any other act or any combination of acts that hampers, delays, or in any manner negatively affects the desegregation efforts of a public school district or public school districts in this state.

ARK. CODE ANN. § 6-23-106 (2016).

¹⁶⁵ IOWA CODE § 256F.4(3) (2014).

¹⁶⁶ COLO. REV. STAT. § 22-30.5-104 (2016).

¹⁶⁷ IDAHO CODE ANN. § 33-5205 (3)(k); 33-5206 (1) (2016).

programs and quality to students from all walks of life, creating a diverse applicant pool. By requiring random selection and prohibiting discrimination and charging tuition, legislators hope to ensure that charter schools will reflect the general population and will not cream or crop.

However, while these measures may have a positive effect in the case of charter schools in general, they are likely to be insufficient in the case of REC charter schools. As was demonstrated in Part III, REC charter schools are especially likely to attract racially homogeneous applicants. Moreover, not only is the antidiscrimination requirement insufficient to promote equality, it actually *aggravates* the creaming effect. Antidiscrimination provisions allow students that are not members of the community to enroll in the school, thus enabling secondary creaming, or in other words, creaming of non-members from public schools.

B. Reflecting the Racial and Socioeconomic Composition of School Districts

In addition to antidiscrimination rules, some states have introduced legislation aimed at creating racial balancing in charter schools.¹⁶⁸ The goal of these provisions is to ensure that student composition in charter schools reflects that of the general population in the school district. Some of these provisions focus on the chartering stage, giving the chartering agency authority to deny a petition for a charter when the

¹⁶⁸ See Parker, *supra* note 163, at 578–81 (surveying state legislation on charter school racial and ethnic balancing); Green & Oluwole, *supra* note 163, at 21–36 (identifying provisions on racial balancing for charter schools).

requirements are not met. In California,¹⁶⁹ South Carolina,¹⁷⁰ Kansas,¹⁷¹ Rhode Island,¹⁷² Wisconsin,¹⁷³ and Florida¹⁷⁴ the application for a charter must specify the measures the school will undertake to ensure racial and socioeconomic balance that reflects the composition of the population. Ohio requires that the ways in which the charter school will “achieve racial and ethnic balance reflective of the community it serves” be detailed in the contract establishing the charter school.¹⁷⁵ New Jersey requires charter schools to design their admission policies to seek, “to the maximum extent practicable,” a cross-section of the community’s school age population, including racial and academic factors.¹⁷⁶ Hawaii does not require

¹⁶⁹ CAL. EDUC. CODE § 47605(b)(5)(G) (2015) (effective Jan. 1, 2016) (stating that an application may be denied if the petition does not contain a reasonably comprehensive discussion of “the means by which the school will achieve a racial and ethnic balance among its pupils that is reflective of the general population residing within the territorial jurisdiction of the school district to which the charter petition is submitted”).

¹⁷⁰ S.C. CODE ANN. § 59-40-60(F)(9) (2014) (stating that an application must describe how it “plans to ensure that the enrollment of the school is similar to the racial composition of the local school district in which the charter school is to be located or the targeted student population of the local school district that the charter school proposes to serve”).

¹⁷¹ KAN. STAT. ANN. § 72-1906(d)(2) (2004) (noting that in order to qualify for establishment or continuation, the charter school must demonstrate that the students be “reasonably reflective of the racial and socio-economic composition of the school district as a whole”).

¹⁷² R.I. GEN. LAWS § 16-77.2-2(a)(10) (2010). The charter school must describe enrollment “policy or policies that outline outreach and recruitment programs to encourage the enrollment of a diverse student population.”

¹⁷³ WIS. STAT. § 118.40(1)(m)(b)(9) (2015). The petition must detail the “means by which the school will achieve a racial and ethnic balance among its pupils that is reflective of the school district population.”

¹⁷⁴ FLA. STAT. § 1002.33 (7)(a)(8) (2016). The application should address “the ways by which the school will achieve a racial/ethnic balance reflective of the community it serves or within the racial/ethnic range of other public schools in the same school district.”

¹⁷⁵ OHIO REV. CODE ANN. § 3314.03(A)(7) (LexisNexis 2016).

¹⁷⁶ N.J. STAT. ANN. § 18A:36A-8(e) (1996). In *In re Grant of Charter Sch. Application of Englewood on the Palisades Charter School*, 754 A.2d 687 (N.J. 2000), the court declared that the education commissioner is required to perform an assessment on the effects a charter school will have

charter schools to reflect the racial composition of the community. Instead, Hawaii has enacted several antidiscrimination rules, imposes a requirement to perform a lottery to determine admission, and allows weighted lotteries that give priority to disadvantaged students.¹⁷⁷

In some states, charter legislation does not simply require the charter school to detail the measures it intends to adopt in order to bring about racial balance, but it goes a step further and requires charter schools to actually achieve specified goals of racial balance. South Carolina legislation states that the racial composition of the student body may not differ by more than twenty percent from “that of the local school district in which the charter school is located or that of the targeted student population of that school district that the charter school proposes to serve.”¹⁷⁸ Nevada’s charter legislation requires that the charter school shall, “if practicable, ensure that the racial composition of pupils enrolled in the charter school does not differ by more than ten percent from the racial composition of pupils who attend public schools in the zone in which the charter school is located.”¹⁷⁹ North Carolina requires, within a year of the charter school’s operation, that the school population “reasonably reflect the racial and ethnic composition of the general population . . . or the racial and ethnic composition of the special population that the school seeks to serve.”¹⁸⁰

Other measures meant to promote student diversity are also suggested in the legislation of some states. In Minnesota, for example, a charter school may limit admission to “residents of a specific geographic area in which the school is located when the majority of students served by the school

on the racial balance in the school district, a duty that falls into the third category, described in Part IV-C *infra*.

¹⁷⁷ HAW. REV. STAT. § 302D-34 (2014).

¹⁷⁸ S.C. CODE ANN. § 59-40-50(B)(7) (2008).

¹⁷⁹ NEV. REV. STAT. § 388A.453(3) (2016).

¹⁸⁰ N.C. GEN. STAT. § 115C-218.45(3) (2014).

are members of underserved populations.”¹⁸¹ Missouri’s charter legislation allows charter schools to give preference, when oversubscribed, to residents of a specified area around the school, so long as this does not result in the establishment of racially or socioeconomically isolated schools.¹⁸² Connecticut’s state board gives preference to charter schools established in a district in which seventy-five percent or more of the students belong to racial minorities.¹⁸³

Provisions regarding racial composition of charter schools are also found in the context of probation and renewal of existing charters. Connecticut allows the Commissioner of Education to place a charter school on probation if it fails to achieve measurable progress in reducing racial, ethnic, and economic isolation.¹⁸⁴ It also allows the state board of education not to renew a charter if the school has not been able to attract and retain sufficient students with low academic performance, students eligible for free lunch, students with behavioral difficulties, and English language learners.¹⁸⁵ A charter may be revoked in South Carolina if the racial balance is not similar to that of the local school district, after the board of trustees (which grants charters) has considered the recruitment efforts and the racial composition of the applicant pool to determine if they are operating in a discriminatory manner.¹⁸⁶

The measures outlined above were designed by legislatures in order to address the concern that charter schools would deepen racial segregation. Some of the provisions are so demanding that they would not allow a charter school to open or to renew its charter if the student body does not reflect the racial balance of the population. Regretfully, despite the best of intentions, this strategy is

¹⁸¹ MINN. STAT. § 124E.11(a)(3) (2015).

¹⁸² MO. REV. STAT. § 160.410(2)(1) (2016).

¹⁸³ CONN. GEN. STAT. § 10-66bb(c) (2015). Although this does not necessarily guarantee racial diversity, quite often it has the opposite result.

¹⁸⁴ *Id.* at § 10-66bb(h)(1)(C).

¹⁸⁵ *Id.* at § 10-66bb(g).

¹⁸⁶ S.C. CODE ANN. § 59-40-70(D) (2014).

unlikely to effectively prevent racial and socioeconomic segregation, creaming, and cropping in REC charter schools. Some of the doubts regarding effectiveness are common to charter schools in general as I will show, however, they are especially acute in the case of REC charter schools.

First, most of the measures described above require that the racial composition in the charter school reflect that of the general population—or in some cases, that of the community that the school serves. This aims to create economic and racial integration at the level that exists within the school district. However, when the general population is geographically segregated into different school districts, these provisions will not promote integration in any meaningful way. The goal these rules aim to achieve, therefore, is relatively modest: to merely avoid being more segregated than public schools in the district. In light of the notion that charter schools were lauded as a way to overcome residential segregation, this goal is disappointing.

REC charter schools are likely to avoid the requirements of these laws. Most notably, some of the provisions state explicitly that student composition should reflect the ethnic composition of the school district *or* the community the charter school serves. North Carolina, for example, requires charter schools to “reasonably reflect the racial and ethnic composition of the general population residing within the local school administrative unit in which the school is located *or the racial and ethnic composition of the special population that the school seeks to serve.*”¹⁸⁷ REC charter schools aim to serve a specific ethnic or cultural community. Therefore, these provisions will have no diversifying effect on them, except when there are distinguishable sub-groups within the relevant community.¹⁸⁸

¹⁸⁷ N.C. GEN. STAT. § 115C-218.45(3) (2016) (emphasis added).

¹⁸⁸ This provision may be effective in integrating sub-communities that may be marginalized within the community. Even this, however, would depend on the way the mission of the school was determined.

Further, some of the provisions in this category focus on charter school efforts rather than on outcomes. Thus, a charter school may be in compliance with the legislation, so long as it has made a sufficient effort to comply. This includes instances where the school ultimately failed to achieve a reflective student composition.¹⁸⁹ Moreover, even when legislation requires reflective outcomes, the provisions are sometimes softened. For example, some legislation state that the composition of students should be reflective, “if practicable,”¹⁹⁰ “to the maximum extent practicable,”¹⁹¹ or it should “reasonably reflect” student composition in the school district.¹⁹²

Perhaps most importantly though, all these provisions focus on racial and socioeconomic composition within charter schools. As such, they are designed to contend with concerns of worsening racial and socioeconomic segregation within REC charter schools. However, they do not address the concerns of creaming and cropping. A charter school may demonstrate racial diversity and can reflect the ethnic composition of the district yet still cause creaming and cropping.

To capture the problems of creaming and cropping, the focus of the legislation must shift from merely examining student composition *within* charter schools to a more comprehensive examination of the charter school within its surroundings. This requires checking the influence of the charter school on the social composition and peer effects in the

Theoretically, the school’s mission could be determined in such a way that would exclude specific sub-communities from it.

¹⁸⁹ See e.g., S.C. CODE ANN. § 59-40-70 (2014). In the case of South Carolina, when a charter school doesn’t reflect the general population, the applicant pool is checked for discriminatory policies. However, the applicant pool in an REC charter school is also expected to be homogeneous, making this provision ineffective.

¹⁹⁰ NEV. REV. STAT. § 386.580(1) (2015).

¹⁹¹ N.J. STAT. ANN. § 18A:36A-8(e) (2016).

¹⁹² N.C. GEN. STAT. § 115C-218.45(3) (2016).

surrounding public schools, which is the promise of the third strategy.

There is a further problem with the provisions detailed above inasmuch as they are interpreted as requiring charter schools to give preference in enrollment to students according to race. If this is indeed the case, then these provisions may also be subject to constitutional challenges because they explicitly refer to students' race as a primary factor in admission to schools.¹⁹³

In the 2007 landmark *Parents Involved* decision,¹⁹⁴ the Supreme Court struck down two programs designed by boards of education to promote racial diversity that explicitly used race as a factor in student assignment. One program in Seattle introduced race as a tie-breaker in schools that were not racially balanced. Under this program, when deciding between two applications with equal merit, racial minorities were preferred.¹⁹⁵ In the second program, in Jefferson County, oversubscribed schools were required to use weighted lotteries, in a manner that would promote racial balance.¹⁹⁶ The majority in *Parents Involved* was not convinced that the defendants had seriously considered race-neutral alternatives to their policies that could promote diversity.¹⁹⁷ They were also not persuaded that the racial classifications used were

¹⁹³ See Suhrid S. Gajendragadkar, *The Constitutionality of Racial Balancing in Charter Legislation*, 106 COLUM. L. REV. 144 (2006) (arguing that "strong" racial balancing provisions are not sufficiently narrowly tailored to survive strict scrutiny, whereas "weak" provisions are. The Article precedes the decision in *Parents Involved*, therefore the legal analysis will have likely changed). See also Green & Oluwole, *supra* note 163, which stresses the distinction between provisions of mandatory and hortatory racial balance: between provisions that prescribe a stated percentage of reflectiveness and provisions requiring indeterminate measures of racial balance.

¹⁹⁴ *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

¹⁹⁵ *Id.* at 711–13.

¹⁹⁶ *Id.* at 716–17.

¹⁹⁷ *Id.* at 722–25.

necessary in order to promote diversity.¹⁹⁸ Finally the court opined that the programs did not include a meaningful individualized review of student assignments.¹⁹⁹ Therefore, the Supreme Court found that both programs were not sufficiently narrowly tailored to meet their goals.²⁰⁰

Justice Anthony Kennedy, the swing vote in *Parents Involved*, outlined some of the possible measures that school boards would be allowed to pursue in order to promote diversity and that would be viewed as narrowly tailored. These measures include “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.”²⁰¹ Other possibilities in the same vein (though not detailed in the decision) include making schools accessible and attractive to diverse communities by suggesting courses that appeal to groups underrepresented in the school population; making the public sphere in schools more inviting to them; and so forth.

The implication of the *Parents Involved* ruling is that when designing programs for promoting racial diversity, school districts must first consider racially neutral measures that do not target specific students and treat them differently because of their race. Additionally, when race is taken into account in individual assignment decisions, districts are required to maintain an individualized process of student assignment that considers multiple factors in addition to

¹⁹⁸ *Id.* at 725–33.

¹⁹⁹ *Id.* at 733–35.

²⁰⁰ *Id.* at 745. Justice Kennedy concurred with the majority that the programs were not sufficiently narrowly tailored. However, he joined the dissent in stating that diversity in K–12 education is a compelling state interest. *Id.* at 783, 790 (Kennedy, J., concurring).

²⁰¹ *Id.* at 789.

race.²⁰² In light of the Supreme Court's ruling in *Parents Involved*, charter legislation that entails treating specific students differently on account of their race may be deemed insufficiently narrowly tailored and may not withstand judicial review.²⁰³

Choosing a location for a charter school in light of the goal to create a reflective student body, as some states have done, may hold more promise in abating the challenges to REC charter schools.²⁰⁴ A school's location has an important effect on enrollment patterns because location and transportation are significant obstacles that disadvantaged students face in accessing high quality schools. Choosing a location is no simple matter for charter schools that are often required to fend for themselves in acquiring suitable campuses. Sharing buildings that belong to the religious or ethnic community is therefore often the most convenient option for REC charter schools. However, this entails that the school will be located in proximity to the concentrations of families of the community, which may aggravate segregation. Additionally, it is unlikely that merely choosing a location can fully appease the egalitarian objection. It is not always

²⁰² Following *Parents Involved*, the United States Department of Education Office for Civil Rights and the United States Department of Justice Civil Rights Division issued joint Diversity Guidelines for school districts, in which they detail the measures that school districts may adopt in order to promote diversity in a constitutional manner. The guidelines advise school districts to first examine race neutral measures, and then use generalized race-based approaches that do not refer to any specific student. Individualized racial examination should be used as a last resort, and be narrowly tailored to the specific goals of the district. In these cases, race may be considered alongside other considerations in assessing a student's assignment. In any case, "no student should be insulated—based on his or her race—from an assessment or comparison to all other students' applicants." See U.S. DEPARTMENT OF JUSTICE AND U.S. DEPARTMENT OF EDUCATION, GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS, <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html> [<https://perma.cc/ZG3P-W2YR>].

²⁰³ See Gajendragadkar, *supra* note 193.

²⁰⁴ MINN. STAT. § 124E.11(a)(3) (2015); MO. REV. STAT. § 160.410(2)(1) (2016); CONN. GEN. STAT. § 10-66bb(c) (2015).

possible to find a location that promotes diversity and does not cause creaming or cropping. Insisting on a location that promotes integration and prevents creaming and cropping may unduly impede the establishment of REC charter schools. Therefore, although some states have instated rigorous provisions aiming to promote reflective enrollment in charter schools, as was detailed in this section, this second strategy is also insufficient to contend with the special challenges that REC charter schools pose.

C. Examining the Effect of Charter Schools on Traditional Public Schools

The main barrier that prevents the first two strategies from mitigating concerns of equality is that they focus exclusively on enrollment policy and student composition *within* charter schools. As such, they miss the effects that charter schools have on traditional public schools, namely creaming and cropping. In order to efficiently cope with these processes, it is just as important to examine the composition of the student body in traditional public schools as it is to examine it in the charter school itself. The third strategy does just that.

Only a few states have adopted legislation in this vein. Delaware charter school law represents the most comprehensive measure, stating that:

An authorizer considering an application . . . shall also *consider the potential positive and negative impact of the proposed new school . . . on the schools and the community from which the charter school's new students will likely be drawn . . .* determining whether the proposed new school or expansion is contrary to the best interests of the community to be served, including both those students likely to attend the charter school *and those students likely to attend traditional public schools in the*

community . . . This information regarding the charter school's impact may be the basis for conditions imposed on the charter school.²⁰⁵

Connecticut's education code requires the charter application to specify the measures in its enrollment policy that will ensure diversity,²⁰⁶ and instructs the State Board of Education to consider, when deciding whether to grant a charter, the effect a charter school will have on the reduction of racial, ethnic and economic isolation in the region in which it is to be located.²⁰⁷ Arkansas requires authorizers to carefully consider the "potential impact of an application for a public charter school on the efforts of a public school district or public school districts to comply with court orders and statutory obligations to create and maintain a unitary system of desegregated public schools."²⁰⁸

Some states do not require authorizers to consider the effect on traditional public schools explicitly, but create an institutional setting in which such arguments can be heard. Thus, some states, including Connecticut,²⁰⁹ Rhode Island,²¹⁰ Oregon,²¹¹ New Mexico,²¹² and Massachusetts,²¹³ require holding a public hearing before approving an application. Another measure that may have important, though indirect,

²⁰⁵ DEL. CODE ANN. tit. 14., § 511(b)(3)–(4) (2015) (emphasis added).

²⁰⁶ CONN. GEN. STAT. § 10-66bb(d)(8)(C) (2016).

²⁰⁷ *Id.* at § 10-66bb(c).

²⁰⁸ ARK. CODE ANN. § 6-23-106(a) (2013).

²⁰⁹ CONN. GEN. STAT. § 10-66bb(f) (2015).

²¹⁰ R.I. GEN. LAWS § 16-77.2-3(b) (2010).

²¹¹ OR. REV. STAT. § 338.055 (2) (2014).

²¹² N.M. STAT. ANN. § 22-8B-6(J) (2015).

²¹³ MASS. GEN. LAWS § 89(h) (2014). "Before final approval to establish a commonwealth charter school, the board shall hold a public hearing on the application in the school district in which the proposed charter school is to be located and solicit and review comments on the application from the local school committee of each school district from which the charter school is expected to enroll students and any contiguous districts."

effects on these issues are the requirements included in the Connecticut legislation to collect data regarding diversity and the measures taken to promote it.²¹⁴ While this measure does not affect student composition in any specific case, it does provide important indirect benefits. Obtaining data regarding the effects of an education policy is a crucial step in designing desirable and effective policies and adapting them to the local circumstances. One of the difficulties in promoting effective education policy is the lack of reliable studies regarding their impact. This measure, therefore, is an auxiliary step that may be useful in complementing any other measure adopted by legislators.²¹⁵

Additionally, while this Article focuses on state legislation, states can also use regulations to address these issues. In New Jersey, for example, regulations concerning charter petitions require the Commissioner of Education to assess the student composition of a charter school and the effects that the loss of students may have on the district.²¹⁶ The Commissioner of Education is also required to make an annual assessment of active charter schools,²¹⁷ and if it is found that a charter school creates a segregation effect, the Commissioner can impose a remedy.²¹⁸

²¹⁴ CONN. GEN. STAT. § 10-226h (2012); CONN. GEN. STAT. § 10-66cc(b)(4) (2015). See also MASS. GEN. LAWS § 89(kk) (2016).

²¹⁵ The importance of “research based evidence” has been stressed by courts with regard to the adequacy litigation, in which courts required states to supply evidence as to the funding required in order to supply adequate education. See Deborah A. Verstegen, *Towards a Theory of Adequacy: The Continuing Saga of Equal Educational Opportunity in the Context of State Constitutional Challenges to School Finance Systems*, 23 ST. LOUIS U. PUB. L. REV. 499, 503, 512 (2004); William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185 (2003).

²¹⁶ N.J. ADMIN. CODE § 6A:11-2.1(j) (2014).

²¹⁷ *Id.* at 6A, 6A:11-2.2(c).

²¹⁸ *In re* Charter School Appeal of Greater Brunswick Charter School, 753 A.2d. 1155, 1164 (N.J. Super A.D. 1999).

The third strategy has several important advantages. The first needs little explanation. If the problem, in terms of equality, lies in the effects that REC charter schools have on other schools, then *this* is what should be examined by chartering agencies. The third strategy, therefore, expresses a better understanding of educational realities than the other two strategies.

Another advantage of the third strategy is that it enables authorizers to consider the unique circumstances of each case instead of applying uniform measures that do not necessarily suit the school. As was described in Part III, educational processes, such as creaming and cropping, have a certain logic to them, but are also highly contingent on specific circumstances. Therefore, even if we can make some well-founded evaluations as to the expected influence certain schools may have, the circumstances of each case can make a difference. Making decisions in each case according to its merits ensures that REC charter schools that do not negatively impact traditional public schools will be allowed to operate and benefit their students and communities. It also suggests that schools will be able to learn from positive experiences in which REC charter schools have not had a negative effect on surrounding schools. Additionally, authorizing agencies can approve a charter while conditioning it on specific actions that may minimize creaming and cropping, such as strengthening traditional public schools or reaching out to diverse populations and encouraging them to enroll. When such actions can effectively decrease the problem, religious charter schools will be allowed to flourish with minimal negative effects for other students.

Granting discretion to authorizers also means that they will, in certain cases, be allowed to authorize a charter school even when it creates creaming or cropping and worsens segregation. The negative effects that REC charter schools may have are not the conclusive consideration in any specific case, and authorizers will have to determine whether the benefits that a charter school holds outweigh its shortcomings. There is a certain type of case in which

allowing such discretion is especially important: when REC charter schools offer quality education for children from disadvantaged communities who have been deprived of meaningful educational opportunities. In these cases, chartering agencies may be justified in approving them despite the negative effect they may have on traditional public schools. The third strategy allows chartering agencies to strike a balance between the interests of REC charter schools' founders and students and the interests of traditional public school students.

In addition to its effectiveness, the third strategy does not run afoul of the Supreme Court's ruling in *Parents Involved*.²¹⁹ Although its aim is promoting racial diversity (along with minimizing the harm of creaming and cropping), this strategy does not entail targeting specific students according to their race. The advantages noted above with regards to the third strategy also apply to charter schools in general. Still, the special characteristics of REC charter schools justify analyzing them separately. The processes described are more severe in REC charter schools, and the strategies that can potentially mitigate challenges in regular charter schools are less effective.²²⁰

Admittedly, adopting the third strategy may entail restricting REC charter schools when they create severe damage to public schools. If the assumptions in Part III turn out to be accurate, this would not be the exception, but rather the rule. Still, only charter schools that have negative effects on traditional public schools would be restricted, and even those would be able to take measures in order to prevent creaming and cropping. When the harm cannot be rectified, charter applications would be denied (or revoked). Despite the restrictive consequences, this should not be seen as a disadvantage of the strategy. As was shown in this Article, legislators in all states with charter schools have attempted

²¹⁹ *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

²²⁰ See *supra* Part III-C.

to prevent racial segregation using different legal strategies. The third strategy follows their lead, differing merely in its better chances to reach this shared goal.

Before concluding, one concern regarding this strategy should be noted—namely the concern that the provisions will not be implemented. In order to be effective, charter agencies and state departments of education must be committed to these aims and be willing to actually put them into practice and deny charter petitions in cases of racial segregation, creaming and cropping. This is easier said than done. Multiple political, social, and financial pressures are involved in the establishment and operation of charter schools. Organizations, parents, and businesses can have vested interests in specific schools or in the movement as a whole, and decisions denying applications for charters are often unpopular. This is especially so as the restrictions at hand are aimed at successful charter schools rather than at those that fail. Therefore, it remains to be seen whether the legislation in Delaware, for example, will be effective in preventing racial segregation, creaming, and cropping.²²¹ For example, it would be significant to observe whether charter schools would, in fact, be denied authorization on the ground that they cause harm to traditional public schools. Furthermore, it would be important to examine whether the existence of this provision encourages charter school leaders to design their schools with awareness and responsibility to the other public schools in their area, so that they avoid creaming and cropping.

²²¹ The Delaware Department of Education website allows access to charter applications and applications for renewal or modification of charters. Upon completing this Article, there was only one application dated from after the new legislation, The Great Oaks Charter School in Wilmington. The application states that the targeted population is children with educational deficits, low income students and special education students. The application details the expected effect on the education in Wilmington in general. *Great Oaks Charter School-Wilmington School Proposal*, DEL. DEP'T. OF EDUC. <http://www.doe.k12.de.us/cms/lib09/DE01922744/Centricity/Domain/151/GreatOaksApplSchoolNarrative.pdf> [<https://perma.cc/BNV4-ZSK9>].

In considering the implementation of these measures, it seems likely that an explicit legislative provision such as the one in Delaware will be more effective than general provisions that require examining whether the charter school is beneficial to the community, and legislation will be more effective than regulations. Creating procedures that ensure the consideration of charter school effects on public schools, such as adding a question concerning this in the forms used in applications and renewals, or mandating responses from public schools and parent groups, may also be an effective way to force decision makers to take these effects into consideration. This may also help groups of parents or traditional public schools oversee the implication of these provisions. While the effectiveness of these measures depends on the fervor with which decision makers in each of the states protect traditional public schools, some of these measures can help make their task more feasible. Assuming effective implementation, allowing chartering agencies to restrict the establishment and operation of charter schools when they have negative effects on public schools is the best strategy currently available to address the egalitarian challenges posed by REC charter schools. States that are committed to this end would therefore be advised to adopt measures of this kind.

V. CONCLUSION

Religious, ethnic, and cultural charter schools are becoming commonplace, serving growing and diverse populations. Despite being a relatively new phenomenon, REC charter schools have already attracted public and legal attention, primarily concerning questions of the establishment of religion. This Article tackled a different challenge that they raise—namely, that REC charter schools might worsen racial and SES segregation, and have negative effects on traditional public schools. While charter schools in general face challenges concerning their diversity and their effect on public schools, the unique characteristics of REC

charter schools make them especially prone to these processes.

This Article aimed to highlight these special challenges that have been overlooked thus far, examine and evaluate the legal solutions, and recommend the most promising solutions. Although states around the country have undertaken legislative efforts to ensure equal access to charter schools and student diversity within them, only a few thus far have chosen a legislative strategy that offers an appropriate response to the challenge. Requiring charter authorizers to consider the effect that REC charter schools have on the education that *all* students receive is the measure best suited to allow REC charter schools to continue to offer innovative and diverse educational possibilities to the families that seek them, without compromising traditional public school students' educational opportunities. A growing number of states will likely be confronted with the challenges of REC charter schools in the coming years. It is therefore imperative that states adopt legislation that can help ensure the core values of equality in education.