

**RACE-CONSCIOUS CHARTER SCHOOLS AND THE
ANTIBALKINIZATION PERSPECTIVE OF EQUAL PROTECTION**

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INTRODUCTION

“The enduring hope is that race should not matter; the reality is that too often it does.”¹ It is the way in which the individual Justices on the United States Supreme Court approach this reality that defines the Equal Protection Clause jurisprudence.² This in turn dictates what race-related actions we, as a society, are permitted to engage in under the law. Today the school choice movement has led to the creation of charter schools with a racialized curriculum. An example of such a school is the Marcus Garvey African Centered Academy in Detroit, Michigan. Under the Court’s emerging interpretation of the Equal Protection Clause, known as the antibalkanization perspective, the Garvey Academy and other race-conscious charter schools are unconstitutional. That is to say, these schools reduce social cohesion so much that it expectedly leads to segregation.

For many years, scholars have treated the Justices’ approaches to race in strictly binary terms: anti-classification and anti-subordination.³ The majority of the Justices on the Court, who are deemed “race conservatives,” espouse the anti-classification view.⁴ The anti-classification viewpoint is based on the belief that the Con-

* J.D. Candidate 2013. This is dedicated to every teacher who tells his or her students, “Yes, you can.” It is especially for my dear friend, Alexandra, who every morning walks into her classroom in the South Bronx and fills it with strength and love. I would also like to thank my family for encouraging me to pursue this topic regardless of its controversy. Lastly, I could not have written this Comment without the advice of Professor of Law Kermit Roosevelt, who helped me find the law to match the ideas I so desperately wanted to convey.

1 *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

2 The Equal Protection Clause of the Fourteenth Amendment states that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

3 Reva B. Siegel, *From Colorblindness To Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1281 (2011).

4 *See id.* at 1281–82 (defining the phrases “race conservatives,” “race progressives,” “race moderates,” and “antibalkanization”).

stitution protects individuals, not groups.⁵ In the tradition of Justice Harlan's dissent in *Plessy v. Ferguson*, they believe the law is color-blind.⁶ As a result, these Justices tend to strike down civil rights initiatives such as affirmative action policies because they classify individuals on the basis of race.⁷ On the other end of the spectrum, the minority members of the Court who may be called "race progressives," maintain the anti-subordination view of race.⁸ These Justices tend to uphold racial equality laws because they find racial stratification harmful.⁹ They seek to eradicate the vestiges of historical racial oppression.¹⁰

Law Professor Reva B. Siegel, has breathed new life into this stale, binary framework by terming a third emerging and independent approach to the Court's equal protection jurisprudence: the antibalkanization perspective.¹¹ Here, the median voters on the Court, also known as "race moderates," in both upholding *and* limiting racial equality laws, operate under a different set of principles and concerns than those of the majority and the minority members.¹² Their main concern is with social cohesion.¹³ These median Justices, in seeking "to avoid racial arrangements that balkanize and threaten social cohesion," do not fall neatly into either the anti-classification or the anti-subordination camp.¹⁴ Therefore, the antibalkanization perspective's concern with ending the social divisiveness that comes from increasing the salience of one's race makes it an independent, competing theory with the Court's predominant approaches to race.

5 *Id.* at 1281.

6 *See id.* at 1282; *see also* *Plessy v. Ferguson*, 163 U.S. 537, 554–55 (1896) (Harlan, J., dissenting).

7 Siegel, *supra* note 3, at 1281.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.* at 1297.

12 *Id.* at 1281. The median voters espousing the antibalkanization principle began with Justice Powell in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), Justice O'Connor in *Gruiter v. Bollinger*, 539 U.S. 306 (2003), and under the Roberts Court with Justice Kennedy in *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

13 Siegel, *From Colorblindness to Antibalkanization*, *supra* note 3, at 1281.

14 *Id.* at 1299. However, aspects of the antibalkanization conceptual framework are clearly borrowed from the anti-subordination view. For example, proponents of the antibalkanization principle recognize that in order to "get beyond race, it may be necessary to take race into account" in order to remedy racial wrongs without stirring racial resentment. *Id.* at 1302. Therefore, the goal of promoting social cohesion requires a consideration of social context and meaning, an endeavor that is also at the heart of the anti-subordination principle.

This Comment uses the emerging antibalkanization perspective to analyze the constitutionality of race-conscious charter schools.¹⁵ It does so by analyzing one school in particular, the Marcus Garvey African Centered Academy. Race-conscious charter schools will be referred to as public schools that have Afrocentric curricula. In these public schools, there is an emphasis on the importance of being a member of the African-American race in nearly every single aspect of the students' educational experience.¹⁶ After Justice Kennedy's concurrence in *Parents Involved*, the Court favors racial initiatives that enhance the commonality of individuals in society and dismisses those that accentuate differences.¹⁷ Therefore, under this perspective, race-conscious charter schools are unconstitutional because a racialized curriculum can be expected to lead to segregation, the most dramatic result of breaking down social cohesion.

In Part I, this Comment will address the origins of the charter school movement by analyzing the Court's failure to dismantle de facto segregation after *Brown v. Board of Education*.¹⁸ During this time period, the Court was unable to secure meaningful desegregation across the country. As a result, inner-city public schools in particular, which are predominately attended by poor racial minorities, continued to fail while public schools in wealthier regions attended by non-racial minorities tended to thrive.¹⁹ As a reaction to the failure of traditional public schools, the black community took its children's education into its own hands. In hopes of a better education, parents chose to send their children to alternative public schools with an Afrocentric focus. Part II will provide background information defining charter schools and explaining their general operation. Part III will serve as a close examination of a race-conscious charter school, the Marcus Garvey African Centered Academy. Part IV will then apply the antibalkanization perspective to the Garvey Academy and similar charter schools by analyzing *Garrett v. Board of Education*.²⁰ *Garrett* was the only recent case at the time this Comment was written to reach the federal

¹⁵ This Comment will not analyze charter schools under the anti-classification or the anti-subordination perspectives.

¹⁶ *Garvey Academy*, DETROIT PUB. SCH., <http://detroitk12.org/schools/school/313> (last visited Mar. 15, 2013).

¹⁷ See Siegel, *supra* note 3, at 1301–02 (describing the antibalkanization perspective as rejecting initiatives that increase the salience of race, even when it enhances “racial justice”).

¹⁸ *Brown I*, 347 U.S. 483 (1954).

¹⁹ Due to unequal access to resources and de facto residential segregation, the pattern of racial segregation in the public school system essentially remained unchanged after *Brown I*.

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

district court and touch on the issue of race-conscious charter schools.

The Comment will conclude by using *Garrett* as a predictor that the constitutionality of race-conscious charter schools will have to be litigated in the near future. It is this Commenter's hope that, when confronted with such litigation, society chooses to improve traditional public schools rather than create and fund identity-focused charter schools. This will give children in this country a real opportunity to experience greater equality in education, something the Supreme Court of the United States could never quite accomplish on its own.

I. THE SUPREME COURT'S FAILURE TO SECURE AN ERA OF DESEGREGATION

In the landmark case *Brown v. Board of Education*, the Supreme Court held that racially segregated public schools were unconstitutional.²¹ The problem then became how the principles of racial equality in education under *Brown I* would be translated into practice. What would a desegregated public school system look like? How do we create equal educational opportunities on a non-racial basis? In 1955, Chief Justice Warren's decision in *Brown II* attempted to solve this problem.²² The immediate goal was to give African-American children a place in what were traditionally "white" schools.²³ Yet, the ultimate goal was the full transition to a "unitary, nonracial system of public education."²⁴ However, *Brown II* was an incredibly weak attempt at achieving this goal. The Court found that the solution to creating a "system of public education freed of racial discrimination" was simply to defer to local school authorities.²⁵ In essence, the Court left important decisions such as inter-district busing to the same school authorities that were once and are likely still riddled with racial discrimination.²⁶ To add insult to injury, the Court then ordered that desegregation initiatives be done with "all deliberate speed,"

21 347 U.S. at 495.

22 *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) [hereinafter *Brown II*].

23 *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 436 (1968).

24 *Id.*

25 *Brown II*, 349 U.S. at 299–301. While the local school authorities were primarily responsible for solving racial problems, it was the courts' job to consider whether the school system's actions were a good faith implementation of the constitutional principles in *Brown I*. *Brown II*, 349 U.S. at 299.

26 The predominately black public schools were still likely to be disadvantaged by limited resources and were ultimately powerless in the overall decision-making process.

which provided a weak, uninformative timeline for states and localities to adhere to.²⁷

The decision in *Brown II* did very little in the way of enforcing meaningful desegregation in public schooling. Worse, the Supreme Court, when confronted with school desegregation cases after *Brown II*, gradually became disinclined to aid in the fight for racial equality in education. For example, at the start of the desegregation era, many school districts found an end-run around the desegregation mandate by implementing “freedom of choice” plans.²⁸ Freedom of choice plans gave parents the right to choose the school they wanted their children to attend.²⁹ These plans allowed white parents to keep their children in all-white public schools.³⁰ The Court resolved this issue in *Green* by holding that freedom of choice plans failed to meet the standards and principles of desegregation set out in *Brown II* unless they quickly achieved de facto desegregation.³¹

In the context of school busing initiatives, the Supreme Court initially allowed lower courts to order inter-district busing in neighborhoods that were de facto segregated.³² However, judicial support for inter-district busing waned when the Court decided *Milliken v. Bradley*.³³ In *Milliken*, the Court “prevented busing across city and county lines [as a form of relief] even if the resulting school systems were predominately Black and predominately white.”³⁴ Most recently, the Court in *Board of Education v. Dowell* put the proverbial nail in the coffin of desegregation efforts.³⁵ The majority suggested that a school district had engaged in enough desegregation even though dissolving the desegregation order would severely compromise the principles of *Brown I*.³⁶ The Court remanded the case to determine whether the desegregation decree could be dissolved and the school district could

²⁷ *Brown II*, 349 U.S. at 301.

²⁸ *Green*, 391 U.S. at 433–34.

²⁹ *Id.*

³⁰ *See id.* at 441 (“In three years of [the plan’s] operation, not a single white child has chosen to attend [the all-black] Watkins school . . . [T]he school system remains a dual system.”).

³¹ *Id.* at 437, 440–41.

³² *E.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 29–30 (1971); *see also* *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 214 (1973) (imposing a duty to desegregate even without evidence of past de jure segregation).

³³ 433 U.S. 267 (1977).

³⁴ Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 *YALE L.J.* 1285, 1291 (1992).

³⁵ 498 U.S. 237 (1991).

³⁶ *Id.* at 251–52 (Marshall, J., dissenting) (suggesting that thirteen years of desegregation was not enough in a district that threatened to re-emerge as an all-white public school, inflicting the very kind of stigmatic injury that *Brown I* sought to eliminate).

return to its former one-race, all-white status.³⁷ As a result of the Supreme Court's judicial back-stepping, desegregation decrees across the country were gradually terminated even if the school districts did not meaningfully reach unitary status.³⁸

Today we see a heavy pattern of racially segregated neighborhoods and public schools in nearly all of our country's cities.³⁹ In 1955, the Court had the opportunity to usher in an era of desegregation in education that would truly stand for something more than constitutional principles on a page. They failed to do so. One possible explanation for this failure is that enforcing desegregation on the ground was beyond the Supreme Court's institutional competency.⁴⁰ As Chief Justice Warren suggested in *Brown II*, these issues were "local school problems" that varied across regions.⁴¹ There is a strong argument to be made that it was not in the province of the Court to create and enforce uniform school busing programs and other desegregation initiatives. Rather, these issues were something that the federal or state legislature, along with local school officials, ought to have decided. An alternative explanation is that the Court may simply be better at saying no to institutional initiatives than suggesting and/or requiring them.⁴²

Despite the possible exculpating reasons for the Court's failure to enforce desegregation in public schooling, the reality is that our country is still paying the price. Today, many scholars believe that as a result we, as a society, have entered into an age of "resegregation."⁴³ With resegregation comes old constitutional problems dressed up in new clothes. However, today's resegregation initiatives in education are *not* created out of racial animus as they previously were under the segregation era. Rather, these initiatives are part of a larger school choice movement. Race-conscious charter schools developed in part as an alternative means of educating black children. It was meant to provide them with a better education and a chance at a real future. These charter schools were an opportunity for parents to do more than stand by helplessly while their children slipped through the public school system's all too welcoming cracks.

³⁷ *Id.* at 249–50.

³⁸ Kevin D. Brown, *Reexamination of the Benefit of Publicly Funded Private Education for African-American Students in a Post-Desegregation Era*, 36 IND. L. REV. 477, 477 (2003).

³⁹ Jarvis, *supra* note 33, at 1285.

⁴⁰ In considering why the Court failed to strongly enforce desegregation efforts, Professor of Law Kermit Roosevelt, suggested that institutional competency could be one reason.

⁴¹ 349 U.S. 294, 299 (1955).

⁴² This consideration was also brought to my attention by Professor Kermit Roosevelt.

⁴³ See, e.g., Jarvis, *supra* note 34; Brown, *supra* note 38.

II. THE CHARTER SCHOOL MOVEMENT IN THE ERA OF RESEGREGATION

As mentioned previously, it is no secret that public education in America is struggling.⁴⁴ Our country embarrassingly lags behind its international counterparts in reading, mathematics, and science test scores.⁴⁵ Again, those who feel the failure of our public school system the most tend to be poor, racial minorities in central cities. Parents of these individuals are especially concerned about their children's education.⁴⁶ Understanding that the Supreme Court and the state, federal, and local governments have failed to provide equal access to quality education, African-American parents have taken this matter into their own hands. They are among the leaders of the school choice movement, demanding nontraditional alternatives, like charter schools, in the educational marketplace for their children.⁴⁷

A. *Defining Charter Schools*

The charter school movement is best described as a reinvention of public education.⁴⁸ The movement began in 1991, when Minnesota became the first state to pass charter school legislation as a means of addressing the state's educational failings.⁴⁹ It quickly caught national attention and followers.⁵⁰ The charter school movement gained strong federal support with the authorization of the Public Charter School Program ("PCSP"),⁵¹ which is administered by the Department

⁴⁴ *U.S. Falls in World Education Rankings, Rated 'Average,'* HUFFINGTON POST (Oct. 1, 2012), http://www.huffingtonpost.com/2010/12/07/us-falls-in-world-education-rankings_n_793185.html.

⁴⁵ *Id.*

⁴⁶ CHESTER E. FINN, JR. ET AL., CHARTER SCHOOLS IN ACTION: RENEWING PUBLIC EDUCATION 14 (2000).

⁴⁷ *Id.*

⁴⁸ *Id.* at 16–17. The charter school movement is an educational reform effort which eliminates real governmental provision of schools. Its origins can be traced to educator Ray Buddle, who “envisioned an educational system in which school districts granted charter agreements to teachers who wished to create new curricula.” Pearl Rock Kane & Christopher J. Lauricella, *Assessing the Growth and Potential of Charter Schools*, in PRIVATIZING EDUCATION: CAN THE MARKETPLACE DELIVER CHOICE, EFFICIENCY, EQUITY, AND SOCIAL COHESION? 203, 204 (Henry M. Levin ed., 2001).

⁴⁹ JOSEPH MURPHY & CATHERINE DUNN SCHIFFMAN, UNDERSTANDING AND ASSESSING THE CHARTER SCHOOL MOVEMENT 27 (2002).

⁵⁰ *Id.* at 29.

⁵¹ Improving America's Schools Act, Pub. L. No 103-382, 108 Stat. 3518 (1994) (originally codified at 20 U.S.C. § 8061 (1994)).

of Education.⁵² PCSP funds state grant programs for charter schools.⁵³ PCSP has provided millions of dollars over the years to new and existing charter schools.⁵⁴

Today the movement has grown tremendously with approximately forty-one states having charter school legislation.⁵⁵ In the 2004–2005 school year alone, approximately 400 new charter schools opened.⁵⁶ Indeed, “[f]ew reforms in the history of schooling have spread so quickly.”⁵⁷ Yet as popular as charter schools are, few outside of the education system understand exactly what they are and how they operate.

Charter schools are “publicly funded, independently operated schools that are allowed to operate with more autonomy than traditional public schools in exchange for increased accountability.”⁵⁸ Put simply, charter schools are public schools that have the freedom to produce results in the manner they think best. That is, charters have “wide-ranging control over their own curriculum, instruction, staffing, budget, internal organization, calendar, schedule, and much more.”⁵⁹ However, if a charter school fails to produce the satisfactory results promised in their performance agreement with the state, funding is denied and the school is forced to shut down.⁶⁰ So long as charters keep their side of the agreement, they remain exempt from the state and local regulations that apply to traditional public schools.⁶¹ Despite the differences between charters and traditional public schools, charter schools are still funded by tax dollars.⁶² Like

52 U.S. DEP’T OF EDUC., EVALUATION OF THE PUBLIC CHARTER SCHOOLS PROGRAM: FINAL REPORT, at ix (2004), available at <http://www2.ed.gov/rschstat/eval/choice/pcsp-final/finalreport.pdf>.

53 *Id.*

54 Suhrid S. Gajendragadkar, *The Constitutionality of Racial Balancing in Charter Schools*, 106 COLUM. L. REV. 144, 149 (2006) (“[PCSP] initially allocated \$6 million in start-up capital to charter schools. By 2001, PCSP distributions . . . had grown to \$190 million.”).

55 *Understanding Charter Schools*, NAT’L CHARTER SCH. RES. CTR., <http://www.charterschoolcenter.org/priority-area/understanding-charter-schools> (last visited Feb. 18, 2013).

56 Gajendragadkar, *supra* note 54, at 150. However, it is difficult to estimate the number of charter schools with any precision because enrollment figures fluctuate whenever a new school or grade level opens. Kane & Lauricella, *supra* note 48, at 207.

57 Kane & Lauricella, *supra* note 48, at 203.

58 *Understanding Charter Schools*, *supra* note 55.

59 FINN, ET AL., *supra* note 46, at 15.

60 PAUL T. HILL & ROBIN J. LAKE, CHARTER SCHOOLS AND ACCOUNTABILITY IN PUBLIC EDUCATION 4 (2002).

61 *Id.* at 4–5.

62 FINN, ET AL., *supra* note 46, at 15. Public funds are provided in a set amount for every child the charter school enrolls. HILL & LAKE, *supra* note 60, at 4.

conventional public schools, charters are open to all students in a given school district who wish to enroll.⁶³

B. *The Origins of Race-Conscious Charter Schools*

The principles behind the school choice movement which led to the creation of charter schools can be traced to the Court's 1925 decision in *Pierce v. Society of Sisters*.⁶⁴ In *Pierce*, the Supreme Court held that parents have a fundamental right to raise and educate their children as they choose.⁶⁵ Historically, when the exercise of this right has served racial ends, it has been easy to evade integration.⁶⁶ The same is true today in the era of resegregation. Here, racial integration "grows more elusive as school choice enables new forms of student separation based on identities and aspirations."⁶⁷

With the expansion of the charter school movement came a grassroots desire to create schools based on racial identity.⁶⁸ Parents and local school districts pushed for the incorporation of Afrocentric cur-

⁶³ FINN, ET AL., *supra* note 46, at 15.

⁶⁴ 268 U.S. 510 (1925).

⁶⁵ *Id.* at 535.

⁶⁶ See Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 821 (2011) (suggesting that school choice was used as a tool of resistance against desegregation after the *Brown I* decision, as white parents sent their children to all-white private schools to avoid integration); See also Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563, 600 (2001) ("[P]arental choice has been known to foster segregation."). A more specific example is the "freedom of choice" plans referenced earlier, which were used by white school districts to avoid the desegregation decrees of *Brown II*.

⁶⁷ Minow, *supra* note 66, at 834.

⁶⁸ It is important to note that this country has seen an explosion of identity charter schools other than Afrocentric schools. For example, there is the Harvey Milk High School designed for lesbian, gay, bisexual, and transgender students, Hispanic cultural charters, Hebrew language charters, Muslim cultural charters, Armenian charters, and Christian conservative charters for home-schooled children. See Benjamin Siracusa Hillman, Note, *Is There a Place for Religious Charter Schools?*, 118 YALE L.J. 554 (2008) (arguing in favor of religious charter schools); Note, *Church, Choice, and Charters: A New Wrinkle For Public Education?*, 122 HARV. L. REV. 1750 (2009) (assessing the constitutionality of religious charter schools). While the charters listed above are constitutionally problematic, they are not subject to the same level of heightened constitutional scrutiny as race. While both race and religion are subject to the same test of strict scrutiny, the Court is far more likely to defer in cases of religion than in cases of race. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 857-62 (2006). A question arises regarding the Hispanic charters because it is unclear if they are about race, culture, or language. Additionally, the Harvey Milk school for LGBT students would likely receive rational basis review if challenged. Therefore, while legal challenges may be posed against these alternative public schools in the future, there is a better chance that those schools would survive the Court's scrutiny even if racial identity schools would not.

riculum. They believed that reviving racial pride would lead to academic success.⁶⁹ Specifically, it was thought to empower black students by “improving their self-confidence, their self-esteem, and consequently, their educational achievement,” all of which are considered absent in traditional public schools.⁷⁰ This goal is accomplished by “teach[ing] basic courses by using Africa and the sociohistorical experience of Africans and African-Americans as its reference points.”⁷¹ Black students are encouraged to study school subjects and the world from a viewpoint “that places their cultural group at the center of the discussion,” something that is hardly ever done in public schools—or private schools for that matter—in this country.⁷² Simply put, this alternative schooling melds pride in black history and one’s self with traditional education.⁷³

However, as laudable as this community initiative is, race-conscious charter schools remain constitutionally problematic because they erode social cohesion in the worst way possible—these schools can lead to racial segregation.

III. A CLOSER LOOK: THE MARCUS GARVEY AFRICAN CENTERED ACADEMY

“I will have faith in myself . . . I can learn! I must learn!”⁷⁴ That is the Marcus Garvey Academy’s school creed. At assembly, students sing the black national anthem, the school creed, and recite black history facts.⁷⁵ Students are required to participate in these activities before they commence any academic exercises.⁷⁶ A “green line to success” is painted throughout the hallways that students must walk on the way to their classrooms.⁷⁷ In class, students are required to acknowledge and greet adults in *kiswahili*.⁷⁸ Inside the classroom and

69 See Nancy Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, 2005 U. ILL. L. REV. 455, 504 (2005) (suggesting that Afrocentric curriculums can be considered “remedial segregation”).

70 Jarvis, *supra* note 34, at 1294.

71 Brown, *Reexamination*, *supra* note 38, at 488.

72 *Id.* at 489.

73 Jarvis, *supra* note 34, at 1294.

74 Chastity Pratt Dawsey, *How Marcus Garvey Academy Rises Above: Family Oriented Atmosphere Contributes To Success, part 4*, DETROIT FREE PRESS (Feb. 10, 2010), <http://www.freep.com/article/20100210/NEWS01/101230106/Part-4-5-How-Marcus-Garvey-Academy-rises-above>.

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.*

throughout the school, “every subject and bulletin board includes mention of African or African-American history or culture.”⁷⁹ Students are also taught the *Nguzo Saba*, which includes the seven principles of Kwanzaa, the Egyptian values system, and African and African-American history which are incorporated into their traditional public school education.⁸⁰

The Garvey Academy is a kindergarten through eighth-grade charter school. The school’s mission statement is “[t]o provide a high-performing learning environment emphasizing academic excellence and community service with an African-centered curriculum.”⁸¹ The school provides a wide array of traditional school programs combined with unique Afrocentric programs to effectuate its goal of academic, social, and community success.⁸²

Based on the 2011 enrollment demographic statistics, the Garvey Academy has enrolled 552 black students, one white student, one Asian student, and zero Hispanics.⁸³ A study conducted in May 2011 by Public School Review, an organization that provides free, detailed profiles of U.S. public schools and their surrounding communities, has estimated that the Garvey Academy student body is 97% black.⁸⁴ The Public School Review also compared this figure with the average percentages in Michigan public schools, where black students make up 23% and white students make up 68%.⁸⁵ From these statistics, it is apparent that an Afrocentric curriculum is mainly attractive to African Americans.⁸⁶ However the Garvey Academy cannot and does not select their students on the basis of race.⁸⁷ Therefore, there is no evi-

79 *Id.*

80 *Id.*

81 *Garvey Academy*, DETROIT PUB. SCH., <http://detroitk12.org/schools/school/313> (last visited Mar. 15, 2013).

82 For example, in addition to honor roll clubs, advanced classes, science fairs, student council, and sports, the Garvey Academy also offers rites of passage trainings, manhood programs, and Kwanzaa feasts. *Marcus Garvey Academy*, K12 ACADEMICS, <http://www.k12academics.com/national-directories/public-school/marcus-garvey-academy> (last visited Mar. 15, 2013).

83 *See Garvey Academy—Current Enrollment Demographics as of 9/24/11*, DETROIT PUB. SCH., <http://detroitk12.org/schools/reports/profiles/313.pdf> (last visited Mar. 15, 2013).

84 *Garvey Academy*, PUB. SCH. REVIEW, http://www.publicschoolreview.com/school_ov/school_id/40185 (last visited Feb. 6, 2013).

85 *Id.*

86 Indeed, many charter schools are designed to attract a particular racial group. Parker, *supra* note 66, at 601–02.

87 *See HILL & LAKE*, *supra* note 60, at 4 (noting that “charter schools may not handpick their students” and that if too many applicants apply, then charters must conduct an admissions lottery).

dence of intentional racial discrimination. But, that does not change the fact that the school is in effect composed of only one race.

In 2008, the Garvey Academy outperformed the state average in most categories on the state-wide exams.⁸⁸ Seeing as at the time this Comment is written the Garvey Academy still receives funding and is in operation, it is safe to say that it is holding up its end of the performance agreement to both the state of Michigan and the parents of the Garvey students. The academic and social success that the Garvey Academy and charter schools like it are attempting to achieve is truly admirable. However, that does not make it constitutional. Unfortunately, what the community wants and what the Constitution demands may be very different things.⁸⁹ When such conflict occurs, what the Constitution mandates must be placed above all else.

IV. ANALYZING THE CONSTITUTIONALITY OF RACE-CONSCIOUS CHARTER SCHOOLS UNDER THE ANTIBALKINIZATION PERSPECTIVE

As previously mentioned, the antibalkinization perspective of the median voters on the Supreme Court is concerned with social cohesion.⁹⁰ It is this concern that drives the median voters to both uphold racial equality laws and strike them down.⁹¹ The origins of this independent lens used to view Equal Protection Clause cases can be traced to Justice Powell and to Justice O'Connor.

In *Regents of the University of California v. Bakke*, Justice Powell's "diversity" rationale for allowing affirmative action programs in higher education was clearly the result of his concern for social cohesion.⁹² In *Bakke*, Justice Powell held that if a school could show that it needed an affirmative action program in order to further the diversity of viewpoints—meaning admitting students of different backgrounds to further the educational experience of all in the classroom—then the policy should be upheld.⁹³ In Justice Powell's line of reasoning, viewpoint diversity fosters social cohesion because it brings different

⁸⁸ Dawsey, *supra* note 74.

⁸⁹ Even policies that seek to benefit racial minorities are not always seen as beneficial under the Court's equal protection jurisprudence. See, e.g., Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004) (noting that the Court has struck down numerous affirmative action laws which are laws benefitting racial minorities in schooling and employment, under strict scrutiny review, predominately by those on the court who espouse the anti-classification perspective).

⁹⁰ Siegel, *supra* note 3, at 1299.

⁹¹ *Id.*

⁹² 438 U.S. 265 (1978).

⁹³ *Id.* at 312–16.

members of our society together. It does not create resentment or divisiveness as would be the case if the admissions criteria were based on something like a racial quota.

Justice O'Connor embraced Justice Powell's diversity rationale, and with it, his concern for social cohesion, in *Grutter v. Bollinger*.⁹⁴ In *Grutter*, Justice O'Connor held that the University of Michigan Law School's race-conscious admissions program should be upheld because the state had a compelling interest in attaining a diverse student body.⁹⁵ She said that in order to create legitimate leaders in our society, "it is necessary that the path to leadership be visibly *open* to talented and qualified individuals of *every* race and ethnicity."⁹⁶ Her concern for preserving social cohesion is evident from her own words.

Justice Kennedy expanded upon the views of his predecessors on the Court by espousing what became known as the antibalkanization perspective in his concurrence in *Parents Involved*.⁹⁷ In striking down the use of racial balancing in school admissions to diversify local public schools, he expressed his disdain for policies that have the effect of "exacerbate[ing] group division."⁹⁸ For Justice Kennedy, increasing the salience of race as a factor is what compromises social cohesion. That is because increasing the salience of race highlights one's differences instead of one's commonalities to others in society. In order to live in a society where race no longer matters, highlighting differences only thwarts this goal. Justice Kennedy's concern is clear given his fear of the government classifying an individual's racial identity. In *Parents Involved*, he said that "to be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society."⁹⁹ For Justice Kennedy, "both racial stratification and its

⁹⁴ 539 U.S. 306, 307 (2003).

⁹⁵ *Id.* at 343. The race-conscious admissions program was also narrowly tailored because admissions decisions were not based on racial quotas but rather on a flexible and holistic analysis like that of the Harvard Plan. *Id.* at 334–35.

⁹⁶ *Id.* at 332 (emphasis added).

⁹⁷ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782–98 (2007) (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy's concurrence is viewed as the controlling opinion.

⁹⁸ Siegel, *supra* note 3, at 1308. Justice Kennedy is not opposed to racial policies that enhance social cohesion. Rather, he only finds those laws that increase the salience of race which—in his view and in the views of the former median justices—create social divisiveness to be a violation of the Equal Protection Clause. See *Parents Involved*, 127 U.S. at 788–89 (Kennedy, J., concurring in part and concurring in the judgment) ("[School districts] are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.").

⁹⁹ *Id.* at 797 (Kennedy, J., concurring in part and concurring in the judgment).

repair each have the potential to balkanize.” Therefore, such policies are inconsistent with the meaning of the Equal Protection Clause of the Constitution.¹⁰⁰

In applying this developing perspective of the Supreme Court’s Equal Protection Clause jurisprudence to race-conscious charter schools, it is clear that they are unconstitutional because they break down social cohesion leading to the racial segregation of school children. In other words, race-conscious charter schools are the epitome of increasing the salience of race—the very thing that Justice Kennedy feared most. As mentioned previously, the Court struck down a school district’s attempt at racial balancing in order to diversify the local public schools in *Parents Involved*. This was an *integrationist* effort. In comparison, race-conscious charter schools may in fact be considered worse under this constitutional interpretation because race-consciousness can be expected to lead to segregation.¹⁰¹ That is because segregation can be considered the most severe result of breaking down social cohesion.

An example of the erosion of social cohesion by the Garvey Academy can be found by looking no further than to the school’s enrollment patterns. As previously mentioned, approximately 97% of the student body is African-American.¹⁰² The demographics of the Garvey Academy demonstrate that an Afrocentric curriculum would presumably be more appealing to African Americans.¹⁰³ This finding is cor-

100 Siegel, *supra* note 3, at 1308. To Justice Kennedy and the former median voters, both intentional discrimination and measures meant to remedy discrimination are unconstitutional if they threaten social cohesion.

101 See Jarvis, *supra* note 34, at 1299 (“Implicit in Afrocentric curricula is a rejection of the integrationist approach . . .”).

102 *Garvey Academy*, PUB. SCH. REVIEW, http://www.publicschoolreview.com/school_ov/school_id/40185 (last visited Feb. 6, 2013).

103 It may be the case that attraction to these charter schools is in part due to the pre-existing racialized residential patterns. It could be the case that the school district that created the charter school is predominately African-American to begin with so those students from that pool of the population opt into the charter school. That would mean that there is no new segregation being created. The problem, as mentioned in the introduction, can be viewed as systemic. Moreover, the Civil Rights Project at UCLA conducted a 2010 study finding that “charter schools are more racially isolated than traditional public schools in virtually every state and large metropolitan area in the nation.” See ERICA FRANKENBERG ET AL., THE CIVIL RIGHTS PROJECT, CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS 4 (Jan. 2010), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenberg-choices-without-equity-2010.pdf>. The study attributed the fact that “[c]harter schools attract a higher percentage of black students than traditional public schools, in part because they tend to be located in urban areas.” *Id.* However, this study did *not* address the phenomenon of race-conscious or other identity charter schools. Therefore, putting a racial label on a charter school still has an

roborated by the Garvey Academy's operation. The name of the school, "The Marcus Garvey African Centered Academy," alone is enough to signify to the world that this school is meant to serve African Americans and African Americans only.¹⁰⁴ Looking to the internal operations of the school, from morning assembly to the hallway bulletin boards to the daily lesson plans, these students are reminded of the color of their skin. It therefore makes sense that African Americans alone would choose this alternative as a tool of academic and social success. However, what this seemingly benign attraction to schools like the Garvey Academy does in practice is threaten cohesion in our society by opening the door to the segregation of black students.

Further evidence of race-conscious charter schools' ability to break down social cohesion comes from the reaction of scholars like Dr. Kenneth B. Clark. Dr. Clark, whose psychological research helped steer the Supreme Court's decision in *Brown*, now finds himself back in a world that he and so many other civil rights leaders dedicated their lives to changing.¹⁰⁵ In the wake of the *Garrett* decision, discussed below, Dr. Clark expressed his disdain for race-conscious charter schools. He said, "It's outrageous. It's absurd. It's a continuation of the whole segregation nonsense."¹⁰⁶ He also noted that these schools did not make any sense "unless this society wants to regress."¹⁰⁷ Dr. Clark's outrage makes it clear that schools with an Afrocentric curriculum are sending a message. Although they are not intentionally discriminating against other racial or ethnic groups in their admissions process, the undeniable effect of the existence of such schools is segregation. Under the antibalkanization perspective, this is antithetical to social cohesion. Therefore, these schools must be deemed unconstitutional.

independent effect of not only attracting African Americans, but also dismissing members of other racial groups.

104 The school was named after the famous black scholar and orator, Marcus Garvey, who was a strong proponent of the Black Nationalism and Pan-Africanism movements in the early twentieth century. *People & Events: Marcus Garvey, 1887-1940*, PBS, http://www.pbs.org/wgbh/amex/garvey/peopleevents/p_garvey.html (last visited Feb. 19, 2013).

105 Sam Roberts, *Separate Schools For Male Blacks Igniting Debate*, N.Y. TIMES, Nov. 12, 1990, at B1. The research referred to is Dr. Clark's famous "doll studies" in *Brown I*, in which he used dolls to study children's attitudes about race to prove that segregation bred a sense of inferiority in black children. *Brown v. Board at Fifty: "With an Even Hand,"* LIBRARY OF CONGRESS, <http://www.loc.gov/exhibits/brown/brown-brown.html> (last visited Mar. 15, 2013).

106 Roberts, *supra* note 105, at 1.

107 *Id.*

To state what may be obvious, if the Garvey Academy were a private school, there would not be a constitutional issue. Rather, Garvey and charters like it are *public* schools. Even though these schools may resemble private schools, they still bear the imprimatur of the state in the racial representations they make. However, there *is* another problem. The reality is that many of the families who send their children to these charter schools cannot afford to send their children to the private schools of their choice due to obscenely high tuition fees and/or the inability to obtain or pay for transportation. Therefore, charter schools allow low-income families to act as a powerful consumer in an educational marketplace that has traditionally been beyond their reach.¹⁰⁸ However, these charter schools *are* funded by tax dollars. They are funded not just by the tax dollars of the parents who send their children to these schools, but also by parents who do not. Therefore, despite the control over education that the charter school gives certain taxpayers, the public and the state still fund this racialized curriculum. To say that a charter school embraces race-consciousness is no different than saying that the state of Michigan does. *That* is the source of the problem.

A. Garrett as an Indicator of Future Litigation

While race-conscious charter schools are unconstitutional under the antibalkanization perspective, the issue has yet to be litigated at *any* level of our court system. However, there is one case that reached the federal district court in the Eastern District of Michigan that skimmed the top of the issue of race-conscious public schooling.¹⁰⁹ This Comment maintains that *Garrett v. Board Of Education* has left open the possibility for future litigation over race-conscious char-

¹⁰⁸ The author does not discuss school voucher programs because that presupposes a discussion of the Establishment Clause of the First Amendment that is beyond the scope of this Comment. However, it is important to keep in mind that voucher programs in the past have enabled some low income families to send their children to private schools although they have predominately been parochial schools. See *generally* *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

¹⁰⁹ In addition to *Garrett*, there were two other attempts at creating an all-male, all-African-American academy that were also found unconstitutional. In Florida's Dade County school system, there was a proposal to "limit one kindergarten and one first grade class to black male students taught by a male teacher." Roberts, *supra* note 105, at 1. The Department of Education found that the proposal violated three federal civil rights protections. *Id.* This was found "regardless of the fact that 98 percent of the school's students were black." *Id.* A similar proposal was rejected in the Milwaukee public school system. See Michael John Weber, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099, 1100 (1993). However, the most notable is the *Garrett* decision which, as a result, will be the focus of this Part's analysis.

ter schools.¹¹⁰ It predicts that the results of future litigation will be unfavorable to the school district as it would have been in *Garrett* if the racial issue was ever fully addressed.

In the events leading up to the *Garrett* decision, Detroit sought to create three male academies.¹¹¹ The all-male academies were to have an Afrocentric curriculum.¹¹² The school board justified the creation of these academies as a way of saving at-risk black male youth.¹¹³ It was a response to the crisis of “high homicide, unemployment, and drop-out rates” that African American males faced, especially in cities like Detroit.¹¹⁴ “The primary rationale for the [a]cademies [was] simply that co-educational programs aimed at improving male performance have failed.”¹¹⁵

A few weeks before the all-male academies were scheduled to open, the parents of African-American female students from Detroit sued the school board for a violation of the Equal Protection Clause of the Fourteenth Amendment among other statutes.¹¹⁶ Specifically, they claimed that the creation of the all-male academies and the exclusion of female students constituted sex-based discrimination.¹¹⁷ Plaintiffs argued that the school board “inappropriately relie[d] on gender as a proxy for ‘at risk’ students.”¹¹⁸ The district court in finding for the plaintiffs, held that the school board failed to show how the exclusion of female students from the academies would be necessary to their stated goal of “combat[ing] unemployment, dropout and homicide rates among urban males.”¹¹⁹ The court also found that female students were similarly at risk.¹²⁰ The court then granted a preliminary injunction on the opening of the academies, finding that allowing these schools to open would be a violation of equal protection as it was based on impermissible gender classifications.¹²¹

What is fascinating about the *Garrett* decision is that in the entirety of the analysis, it in no way mentions the all-African-American feature

110 *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004, 1014 (E.D. Mich. 1991).

111 *Id.* at 1006.

112 *Id.* Examples of other programs included a “Rites of Passage” program, career preparation, an emphasis on male responsibility, mentoring, extended weekday classes, Saturday classes, and counseling. *Id.*

113 *Id.* at 1007.

114 *Id.*

115 *Id.*

116 *Id.* at 1005.

117 *Id.* at 1007.

118 *Id.*

119 *Id.* at 1008.

120 *Id.*

121 *Id.* at 1007.

of the academies. It “ignore[s] the significance of race.”¹²² However, the district court was not mistaken in doing so, because “the plaintiffs did not challenge the de facto racial segregation of the [academies],” rather they only challenged the gender-based exclusion.¹²³ The court was able to avoid opening a Pandora’s box of racial issues. But how long would this last?

In the wake of *Garrett*, a number of constitutional law scholars began to consider what the district court did not: the constitutionality of the all-black academies.¹²⁴ More specifically, many pondered what the plaintiffs would look like if there were litigation in the future. Many scholars believe that since the push for a racialized curriculum comes from within African-American communities, it is likely that a constitutional challenge will come from the members of those same communities.¹²⁵ This conclusion is plausible since it was the parents of black female students who brought suit in *Garrett*.

This Comment agrees with the predictions that existing scholarship has made. However, where this perspective differs is the way in which the Supreme Court will come to the conclusion that race-conscious charter schools are unconstitutional. The majority of the legal scholarship on *Garrett* tends to focus on a violation of equal protection under the anti-segregationist view of *Brown*. Several scholars have suggested that race-conscious charter schools are unconstitutional because they create the very stigmatic harm that *Brown v. Board of Education* stood to eradicate.¹²⁶ However, since this early 1990s scholarship, *Parents Involved* has been decided.¹²⁷ Along with it, a third, independent theme has emerged out of the Court’s analytical

122 See Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 827 (2000).

123 *Id.*

124 See, e.g., Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813 (1993); Brown-Nagin, *supra* note 123; Richard Cummings, *All-Male Black Schools: Equal Protection, the New Separatism and Brown v. Board of Education*, 20 HASTINGS CONST. L.Q. 725 (1993); Jarvis, *supra* note 34; Levit, *supra* note 69; Weber, *supra* note 110.

125 See, e.g., Brown, *supra* note 125, at 857; Jarvis, *supra* note 34, at 1300 (predicting that “[c]hallenges to Afrocentric curricula are more likely to come from Black parents” due to the concern that because their children are not getting as good of an education as white children, they are not given an equal chance to succeed in society). Their main concern will be the resurfacing of stigmatic harm that derives from segregation. Another reason might be that the issue of race-conscious charter schools is so controversial that few outside the African-American community would be willing to challenge them. From this perspective it makes sense that the challenge would have to come from those who are most affected by the creation and existence of these alternative public schools.

126 Jarvis, *supra* note 34, at 1299.

127 *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

tool box. As a result, this Comment proposes that if the Supreme Court ever grants a writ of certiorari to a challenge against race-conscious charter schools, it will be analyzed under Justice Kennedy's antibalkanization perspective. One reason is that Justice Kennedy is the median voter. As such, he has the ability to shape the way in which the majority creates the opinion. In addition, Justice Kennedy had the last word in his concurrence in *Parents Involved*—now considered the controlling opinion—in an area of the law that constantly evolves. Therefore, it is likely that the majority of the Court will follow his lead. Another reason is that the antibalkanization perspective has elements that appeal to both the majority members and minority members of the Court. For example, preventing racial classifications even though it may not amount to intentional discrimination by the state is something that anti-classificationists would likely agree with. Likewise, anti-subordinationists can agree with the idea of bringing society together as a way to eliminate racial stratification. For those reasons, the antibalkanization perspective may even emerge as a dominant form of analysis in the future.

CONCLUSION

“Now is the time to rise from the dark and desolate valley of segregation to the sunlit path of racial justice Now is the time to make justice a reality”¹²⁸

It has been fifty years since Dr. Martin Luther King, Jr. gave his “I Have a Dream” speech, but his words are needed today just as much as they were needed in 1963. While America has made many strides away from its tumultuous racial past, it is far from achieving the kind of racial equality that Justice Kennedy spoke of in *Parents Involved*: the kind of equality where race no longer matters.¹²⁹ Unfortunately, we live in an era of resegregation, although the terms are quite different from historical segregation. However, as a matter of constitutional law and as a matter of policy that does *not* make it right.

This Comment has analyzed the school choice movement and the emergence of race-conscious charter schools under a new theme of the Court's equal protection jurisprudence: antibalkanization. The time will come when school districts will be confronted with an Equal Protection Clause challenge. When they are, the Court will not rule

128 Dr. Martin Luther King, Jr., Speech at the March on Washington (Aug. 28, 1963), available at <http://www.archives.gov/press/exhibits/dream-speech.pdf>.

129 *Parents Involved*, 551 U.S. at 782.

in their favor, because a threat to social cohesion is a threat to human dignity and an affront on the Constitution. School districts must, then, surrender to the interpretation of the Constitution and forfeit their efforts at racially-based alternative schooling. However, that does not mean the fight for equality in education must end.

It is the everlasting hope of this author that school districts heed this Comment as a warning but also that they accept it as an encouraging message that there is a practical answer to the questions that plagued the Supreme Court back in 1955. The only way to create equality in education is to meaningfully improve traditional public schools. The power is clearly within the community to do so, for if not, the charter school movement would never have gotten this far. It is up to the members of the community to shift their focus to providing quality education that is fair, equal, and available to all regardless of race or class. If they do, the results will be constitutional and the benefits to the children of this country will be incalculable.