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## Betraying *Brown*: Rule 3535, School Re- Segregation in the Twin Cities, and the Chance to Change Course

Bojan Manojlovic<sup>†</sup>

*“Right now, all sorts of people are trying to rethink and reinvent education, to get poor minority kids performing as well as [W]hite kids. But there’s one thing nobody tries anymore, despite lots of evidence that it works: desegregation.”<sup>1</sup>*

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1. *This American Life: The Problem We All Live With*, CHI. PUB. MEDIA (July 31, 2015), <https://www.thisamericanlife.org/radio-archives/episode/562/the-problem-we-all-live-with>. The title of the podcast episode—“The Problem We All Live With”—is a reference to Norman Rockwell’s iconic painting depicting federal marshals shielding a Black child, Ruby Bridges, from an angry crowd as she attempts to enroll in an all-White school in New Orleans. See *The Problem We All Live With*, NORMAN ROCKWELL MUSEUM, [http://www.nrm.org/2011/05/norman-rockwells-the-problem-we-all-live-with-to-be-exhibited-at-the-white-house/problem\\_web-3/](http://www.nrm.org/2011/05/norman-rockwells-the-problem-we-all-live-with-to-be-exhibited-at-the-white-house/problem_web-3/) (last visited Apr. 13, 2017).

## Introduction

Education has a profound impact on the development of children and communities. A greater level of education tends to reduce crime rates,<sup>2</sup> improve health of citizens,<sup>3</sup> raise income-earning potential,<sup>4</sup> and bolster civic participation.<sup>5</sup> Despite its obvious benefits, education is not a guarantee expressly protected by the United States Constitution, nor by any comprehensive federal statutory scheme.<sup>6</sup> In fact, the Supreme Court has specifically declared that education, though important in many respects, “is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”<sup>7</sup> Establishing a system of

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2. See Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports*, 94(1) AM. ECON. REV. 155, 155 (2004) (finding that “schooling significantly reduces the probability of incarceration and arrest”); David J. Deming, *Better Schools, Less Crime?*, 126(4) Q. J. OF ECON. 2063 (2011) (suggesting that allowing students to attend better schools may decrease crime rates and benefit individual students as well as society as a whole).

3. See Bhashkar Mazumder, *Does Education Improve Health? A Reexamination of the Evidence from Compulsory Schooling Laws*, 32(2) ECON. PERSP. 1 (2008) (asserting that there is a strong positive correlation between education and life expectancy); Gina Kolata, *A Surprising Secret to a Long Life: Stay in School*, N.Y. TIMES (Jan. 3, 2007), [http://www.nytimes.com/2007/01/03/health/03aging.html?\\_r=0](http://www.nytimes.com/2007/01/03/health/03aging.html?_r=0) (finding that the “one social factor that researchers agree is consistently linked to longer lives in every country where it has been studied is education”).

4. See *Employment Projections: Earnings and Unemployment Rate by Educational Attainment, 2016*, BUREAU OF LAB. STAT., [http://www.bls.gov/emp/ep\\_chart\\_001.htm](http://www.bls.gov/emp/ep_chart_001.htm) (last modified Apr. 20, 2017). There is a strong positive correlation between the highest degree attained and median weekly earnings. Conversely, there is a negative correlation between the highest degree attained and the unemployment rate.

5. See Thomas S. Dee, *Are There Civic Returns to Education?*, 88 J. OF PUB. ECON. 1697 (2004) (suggesting that educational attainment has large and independent effects on most measures of civic engagement and attitudes); Kevin Milligana, Enrico Moretti & Philip Oreopoulos, *Does Education Improve Citizenship? Evidence from the United States and the United Kingdom*, 88 J. OF PUB. ECON. 1667, 1692–93 (finding a “strong and robust relationship between education and voting in the United States”).

6. See Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86(3) NW. U. L. REV. 550, 574 (1992) (noting the United States Constitution does not grant a positive and express protection of the right to education); William J. Michael, *When Originalism Fails*, 25 WHITTIER L. REV. 497, 518 (2004) (arguing that the United States Constitution does not guarantee the right to education because it neither mentions education nor includes a clause securing such a right).

7. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

education is thus a matter reserved to the states; to that end, all states have chosen to, in their constitutions, protect the right to an education to some extent.<sup>8</sup>

Perhaps then the United States' failure to secure the right to an education on a federal level is what has led Minnesota—and especially the Twin Cities—to now face an uncomfortable reality for the third time<sup>9</sup> since the Supreme Court decided *Brown v. Board of Education*.<sup>10</sup> Twin Cities' schools, due to their high levels of segregation, continue to fail to provide students of color with an equal opportunity to obtain an excellent education.<sup>11</sup> In the Minneapolis School District in 2015, nearly 78% of White students graduated from high school compared to only 29% of Native American students, 45% of Hispanic students, and 47% of Black students.<sup>12</sup> At the same time, the achievement gap in both math

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8. See Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 (1991) (“Every state constitution contains an education clause that generally requires the state legislature to establish some system of free public schools.”).

9. Eighteen years after *Brown v. Board of Education*, 347 U.S. 483 (1954), in *Booker v. Special School District No. 1*, 351 F. Supp. 799, 802 (D. Minn. 1972), the U.S. District Court found that Minneapolis schools were indeed illegally segregated, in contravention of *Brown*. The court in *Booker* ordered that no more than thirty-five percent of any Minneapolis school be minority students. 351 F. Supp. at 810. The order was little more than an empty promise to Minneapolis students, as it was never fully implemented. *Booker v. Special School District No. 1*, 451 F. Supp. 659, 664 (D. Minn. 1978). Twenty-five years later, following *NAACP v. Metropolitan Council*, 125 F.3d 1171 (8th Cir. 1997), in 1999, the Minnesota Department of Education promulgated Rule 3535 as a compromise aimed at ending school segregation in Minneapolis. Unfortunately, after sixteen years, it appears that Rule 3535 has not achieved its goals.

10. 347 U.S. 483 (1954). *Brown* found that the “separate but equal” doctrine had no place in the context of public education and that it patently violated the Equal Protection Clause of the Fourteenth Amendment; the Court ordered integration of schools across the United States. *Id.* at 495.

11. See, e.g., Beth Hawkins & Cynthia Boyd, *Twin Cities-Area Schools More Segregated Than Ever*, MINNPOST (Nov. 17, 2008), <https://www.minnpost.com/politics-policy/2008/11/twin-cities-area-schools-more-segregated-ever> (noting that Twin Cities' schools are more segregated than ever, seriously affecting four-year, on-time graduation rate for students).

12. *Minnesota Report Card: Graduation Rates*, MINN. DEP'T OF EDUC., [http://rc.education.state.mn.us/#graduation/orgId-30001000000\\_groupType--district\\_graduationYearRate--4\\_\\_p--1/orgId-30001000000\\_groupType--district\\_graduationYearRate--4\\_\\_p--3](http://rc.education.state.mn.us/#graduation/orgId-30001000000_groupType--district_graduationYearRate--4__p--1/orgId-30001000000_groupType--district_graduationYearRate--4__p--3) (last visited Feb. 26, 2017). The 2015 data was utilized because it is closer in time to the filing of *Cruz-Guzman v. Minnesota*, No. 27-CV-15-19917 (Minn. Dist. Ct. Nov. 5, 2015). The 2016 Minneapolis Public School District graduation data shows that nearly 82% of White students graduate from high school, whereas only 36% of Native American students, 57% of Hispanic students, and 52% of Black students do.

and reading is stark,<sup>13</sup> despite the state's explicit goal to reduce the achievement gap between White students and students of color.<sup>14</sup>

A lawsuit filed on November 5, 2015, on behalf of Minneapolis and St. Paul students alleges that the State of Minnesota has both encouraged segregative practices and stood by idly as districts across the metro region engaged in segregative practices.<sup>15</sup> The complaint alleges that these segregative practices have had the effect of stripping students of the opportunity to obtain an adequate, if not excellent, education.<sup>16</sup> The lawsuit contends that state practices and policies—specifically, the exemption of open enrollment policies and charter schools from active desegregation measures<sup>17</sup>—violate the Minnesota Constitution's guarantee of a uniform education system<sup>18</sup> and equal protection under the law.<sup>19</sup>

The state of Minnesota now has an opportunity to right a wrong that has plagued its education system before and since *Brown*. In order for the solution to ultimately be effective, the problem must be addressed as a race issue, a reality many people, especially White people, are not comfortable facing.<sup>20</sup> White

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13. See *District Achievement Gap Data: 2014*, MINN. DEPT OF EDUC., [http://w20.education.state.mn.us/ibi\\_apps/WFServlet?IBIF\\_ex=mdea\\_ddl\\_driver&TOPICID=234&DDL\\_VARS=4&NoCache=11.47.06](http://w20.education.state.mn.us/ibi_apps/WFServlet?IBIF_ex=mdea_ddl_driver&TOPICID=234&DDL_VARS=4&NoCache=11.47.06) (click "List files," then click "xls" under "Data Files") (last visited May 10, 2017) (showing, for example, that nearly 78% of White students were proficient in math, whereas only 46% of Black students were proficient in math; the same chasm exists in reading achievement).

14. See *District Achievement Gap Data*, MINN. DEPT OF EDUC., <http://w20.education.state.mn.us/MDEAnalytics/Data.jsp> (click "District Achievement Gap Data") (last visited May 9, 2017). The Minnesota Department of Education explicitly states that its goal "is to reduce the academic achievement gap by 50 percent by 2017." *Id.*

15. See Class Action Complaint, *Cruz-Guzman v. Minnesota*, No. 27-CV-15-19917 (Minn. Dist. Ct. Nov. 5, 2015); see also Anthony Lonetree & Alejandra Matos, *Lawsuit Claims Minnesota Fails to Educate Poor, Minority Students in Minneapolis, St. Paul*, STAR TRIB. (Nov. 6, 2015), <http://www.startribune.com/lawsuit-claims-minnesota-fails-to-educate-poor-minority-students-in-mpls-st-paul/340843751/> (summarizing the lawsuit and its allegations).

16. Class Action Complaint, *supra* note 15, at 21, 35.

17. *Id.* at 15, 29.

18. *Id.* at 2; see also MINN. CONST. art. XIII, § 1.

19. Class Action Complaint, *supra* note 15, at 2; see MINN. CONST. Art. I, § 2.

20. See BEVERLY DANIEL TATUM, "WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?" AND OTHER CONVERSATIONS ABOUT RACE xii (1997) (arguing that we collectively lack knowledge and the vocabulary to engage in conversations about race and racial inequality: Whites are afraid of being perceived as racist should they use the "wrong" words, while people of color are afraid of exposing themselves and their children to painful racial realities); see also Kris Ex,

support of racial equality, especially in the realm of education reform, cannot be pursued “only when it is in [the] interest [of the White population] to do so.”<sup>21</sup> A recognition that the destruction of racism and segregation is in the best interests of all races and all classes is not only desirable, but also necessary.<sup>22</sup> Minnesota has been given a golden opportunity to do just that: face its problems head on, allow its court to recognize the problem of segregation and actively order true desegregation; and then allow a formulation of a better school desegregation rule that will more effectively integrate Minnesota schools.

It appears that the State has taken some strides towards fixing the problem, namely by undertaking the rewriting<sup>23</sup> of a 1999 desegregation rule.<sup>24</sup> The desegregation rule has, as this Article argues, had the effect of allowing, if not encouraging, segregation of schools in the Twin Cities. Rewriting the desegregation rule aligns with the solution and relief requested by the plaintiffs in the newly-filed lawsuit against the State of Minnesota.<sup>25</sup>

Part I of this Article provides background on the problem. It focuses on the historical movement of the effort to desegregate schools in the United States and Minnesota by providing a brief overview of federal challenges to segregation and efforts to desegregate, taking a look at the current state of Minnesota schools in an effort to show how segregated many of them currently are, and providing an insight into the 1998 compromise

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*Why Are People Suddenly Afraid of Beyoncé’s Black Pride?*, BILLBOARD (Feb. 10, 2016), <http://www.billboard.com/articles/columns/pop/6873899/beyonce-formation-essay> (illustrating an example of White discomfort with race issues, especially when either impliedly or explicitly called to face the uncomfortable reality, and noting that “[t]ellingly, the [W]hite-aggression apologists at *Fox & Friends* [have] no idea what to make of [Beyoncé’s social commentary and proclamation of her Blackness]).”

21. JOE R. FEAGIN & HERNÁN VERA, WHITE RACISM: THE BASICS 191 (1995).

22. *Id.*

23. See *Notice of Hearing: Proposed Rule Amendment to Rules Governing Achievement and Integration*, MINN. DEPT OF EDUC. (Oct. 27, 2015), [http://education.state.mn.us/mdeprod/idcplg?IdcService=GET\\_FILE&dDocName=MDE034352&RevisionSelectionMethod=latestReleased&Rendition=primary](http://education.state.mn.us/mdeprod/idcplg?IdcService=GET_FILE&dDocName=MDE034352&RevisionSelectionMethod=latestReleased&Rendition=primary); *Proposed Permanent Rules Relating to Achievement and Integration*, MINN. DEPT OF EDUC. (Oct. 2, 2015), [http://education.state.mn.us/mdeprod/idcplg?IdcService=GET\\_FILE&dDocName=MDE034275&RevisionSelectionMethod=latestReleased&Rendition=primary](http://education.state.mn.us/mdeprod/idcplg?IdcService=GET_FILE&dDocName=MDE034275&RevisionSelectionMethod=latestReleased&Rendition=primary).

24. MINN. R. 3535.0100–9910 (2015).

25. See Class Action Complaint, *supra* note 15, at 37–38.

embodied in Rule 3535.<sup>26</sup> The section closes with a brief overview of the Minnesota constitutional guarantees alleged to have been violated. Part II argues that Rule 3535 as currently written is an inadequate tool to battle segregation and in fact argues that Rule 3535 has actively encouraged segregation in Minnesota schools. In addition, Part II argues that open enrollment and the charter school exemptions from the desegregation effort, both policy choices made by the Minnesota Department of Education, cause increased segregation of students based on race and socioeconomic background. Further, Part II shows that segregation of students has disastrous outcomes for students both while they are enrolled and after they graduate and that integrated schools help all students, White and students of color, both in the long- and short-runs. Part III outlines proposed solutions to the problem, focusing mainly on the most obvious and likely most effective solution: elimination of the charter school and open enrollment exemptions from the new Rule.

## I. Background

### *a. A Brief History of (Resistance to) School Desegregation in Minnesota and Elsewhere*

Following the declaration in *Brown* that segregation violates the Fourteenth Amendment,<sup>27</sup> many states actively resisted desegregation efforts. In Louisiana, for example, in 1956 a federal court ordered New Orleans schools to integrate.<sup>28</sup> Despite the order, only in 1960 did Ruby Bridges, a Black six-year-old, become the first student to attend a previously all-White primary school.<sup>29</sup> Ruby faced angry mobs of White women shouting obscenities at her<sup>30</sup>—words novelist John Steinbeck called “bestial and filthy and degenerate.”<sup>31</sup>

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26. MINN. R. 3535.0100–9910 (2015).

27. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1953).

28. *Bush v. Orleans Par. Sch. Bd.*, 138 F. Supp. 336 (E.D. La. 1956).

29. See Paul Finkelman, *The Long Road to Dignity: The Wrong of Segregation and What the Civil Rights Act of 1964 Had to Change*, 74 LA. L. REV. 1039, 1089 (2014).

30. See ADAM FAIRCLOUGH, *RACE & DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA, 1915–1972*, 234–64 (1995), for a detailed account of Ruby’s yearlong ordeal, including the devastating effects it had on her family as well as her mental health.

31. *Id.* at 248 (quoting John Steinbeck).

In Alabama, nine years after *Brown*, Governor George Wallace attempted to block two Black students from enrolling at the University of Alabama by, quite literally, standing at the University's entrance.<sup>32</sup> Wallace urged Alabamians to do the same across the State in order to prevent "unwelcomed, unwanted, unwarranted[,] and force-induced intrusion upon the campus of the University of Alabama"<sup>33</sup> by the federal government and, presumably, by the two Black students wishing to study at University of Alabama.

In the summer of 1974, twenty years after *Brown*, federal District Court Judge Wendell Arthur Garrity found the Boston School Committee deliberately created two separate school systems: one for White students and another, unequal system, for Black students.<sup>34</sup> Judge Garrity found the status quo violated *Brown* and the Fourteenth Amendment Equal Protection guarantee and ordered desegregation.<sup>35</sup> To remedy the racial imbalance, Judge Garrity accepted the Massachusetts State Board of Education's busing plan designed to integrate its highly segregated schools in the Boston area.<sup>36</sup> Busing included shuttling 18,000 students from their home neighborhoods to schools outside their home area in order to achieve a greater racial balance.<sup>37</sup> The effort met much resistance: police in riot gear, bricks flying through school bus windows, signs declaring "Nigger Go Home."<sup>38</sup> The Boston busing crisis, as the period came to be known, demonstrated that resistance to integration was not a phenomenon unique to the South.<sup>39</sup>

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32. Governor George C. Wallace, Statement and Proclamation at University of Alabama (June 11, 1963), [http://www.archives.state.al.us/govs\\_list/schooldoor.html](http://www.archives.state.al.us/govs_list/schooldoor.html).

33. *Id.*

34. *Morgan v. Hennigan*, 379 F. Supp. 410, 470 (D. Mass. 1974).

35. *Id.* at 484.

36. See Anne Richardson Oakes, *From Pedagogical Sociology to Constitutional Adjudication: The Meaning of Desegregation in Social Science Research and Law*, 14 MICH. J. RACE & L. 61, 100 (2008) (documenting the Boston busing saga in detail).

37. Bruce Gellerman, *It Was Like a War Zone: Busing in Boston*, WBUR: BOSTON'S NPR NEWS STATION (Sept. 5, 2014), <http://www.wbur.org/2014/09/05/boston-busing-anniversary>.

38. *Id.*

39. See Hon. B. Lynn Winmill, *Brown v. Board of Education: The Legacy and the Promise*, 47 ADVOC.: IDAHO ST. B. 23, 25 (2004) ("[I]t was not only the South that held out against desegregation; parts of the North, too, suffered from racism and many Northerners who had been quick to call the South to account were themselves resistant when faced with segregation in their own backyards.").

Paralleling the resistance to desegregation, both Congress and the Supreme Court remained actively involved in the efforts to realize the promise of *Brown*.<sup>40</sup> Then, Congress passed the Civil Rights Act of 1964.<sup>41</sup> Broadly, the Act prohibits racial discrimination in all federally funded programs,<sup>42</sup> including public schools.<sup>43</sup> In addition, the Act allows both the Attorney General<sup>44</sup> as well as private citizens<sup>45</sup> to file discrimination suits against those not abiding by the law. The Act was seen as a triumph for the Civil Rights Movement and a step in the right direction for scores of people of color.<sup>46</sup>

The Supreme Court did not take a back seat in realizing *Brown*. The Court repeatedly reaffirmed its holding in *Brown* and worked actively to ensure effective desegregation of schools across the country.<sup>47</sup> The Court ruled that school districts must actively and without stalling aim for desegregation in public schools.<sup>48</sup> At the same time, the Court allowed school districts to utilize flexible mathematical ratios as a starting point, but not an end goal, in their efforts to achieve racial integration.<sup>49</sup> Additionally, the Court determined that it could require cross-district integration

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40. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 19 (1958) (noting that *Brown*'s decree stands firm in the face of resistance by school boards and school districts); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968) (finding that in the three years that a freedom-of-choice plan had been in place, virtually no integration had occurred. The Court ordered the Board to adopt steps to convert *promptly* to a system without a segregated school. Further, the Court ordered that any proposed plan must contribute *immediately* and *meaningfully* toward progress in dismantling state-imposed segregation); *Alexander v. Holmes County Bd. of Ed.*, 396 U.S. 19 (1969) (ordering that every school district terminate dual school systems *at once* and operate only unitary schools).

41. See Civil Rights Act of 1964, 42 U.S.C. § 2000a–2000h-6 (2012).

42. *Id.* § 2000d.

43. *Id.* § 2000c-8.

44. *Id.* § 2000a-5.

45. *Id.* § 2000a-3.

46. See Erwin Chemerinsky & Catherine Fisk, *Celebrating the Civil Rights Act of 1964*, AM. CONST. SOC'Y BLOG (July 21, 2014), <http://www.acslaw.org/acsblog/celebrating-the-civil-rights-act-of-1964> (noting that the Act is “a powerful triumph” and has been instrumental in ending discrimination in “crucial areas of society”).

47. See Kevin Brown, *The Supreme Court's Role in the Growing School Choice Movement*, 67 OHIO ST. L.J. 37, 51 (2006) (“The Supreme Court never abandoned the view of the harm of segregation articulated in *Brown I* . . .”).

48. See *Cooper v. Aaron*, 358 U.S. 1, 7 (1958); *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 438 (1968); *Alexander v. Holmes Cty. Bd. of Educ.*, 396 U.S. 19, 21 (1969).

49. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971).

efforts between urban and suburban districts if plaintiffs demonstrated a constitutional violation.<sup>50</sup>

The battle over integration is not a battle of the 1960s and 1970s; courts have continued to hear segregation suits well into the 1990s<sup>51</sup> and 2000s.<sup>52</sup> During this time period, courts went as far as to hold that facially non-segregative practices such as the classification of students to achieve a more heterogeneous student body are illegal if the school district implemented such classification in a blanket, “nonindividualized, mechanical” way so as to affect an entire race or class of students without regard to any desirable effect or goal.<sup>53</sup>

*b. The Minnesota Story*

Clearly then, the Minnesota story of resistance to integration is not unique.<sup>54</sup> Litigation alleging deliberate segregation led to the Minneapolis School District busing nearly 11,000 students to schools outside their neighborhoods to integrate the district in the 1970s.<sup>55</sup> Eighteen years after *Brown*, in *Booker v. Special School District*, a U.S. District Court found that Minneapolis schools were illegally segregated, in direct contravention of the order to integrate.<sup>56</sup> In 1973, in light of *Booker*, the Minnesota State Board of Education adopted a racial balance requirement, known as the

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50. *See* *Milliken v. Bradley*, 418 U.S. 717, 744–45 (1974). The Court in *Milliken* abstained from imposing a cross-district remedy, however, because it ruled that it must first be shown that there had been a constitutional violation within one district that produced a significant segregative effect in another district, such as intentionally drawing school district boundaries to create segregation between the city and the suburbs; *see also* *Keyes v. Sch. Dist.*, 413 U.S. 189 (1973) (holding that a finding of intentionally segregative practices in a large portion of a school system created a presumption that other segregated schooling within the system was not a result of chance but pointed to a more nefarious intent of deliberate segregation).

51. *See, e.g.*, *Sheff v. O’Neill*, 678 A.2d 1267 (Conn. 1996) (holding that the Connecticut Constitution requires an unsegregated learning environment for all children).

52. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (holding that racial classification is unnecessary and not rationally related to the goal of achieving racial balance in public schools).

53. *Id.* at 723 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 280 (2003)).

54. Minnesota’s resistance to desegregation is best characterized as passive. But, if anything, Minnesota’s attempts at integration are more genuine and much less actively and violently resistant than efforts in other states, like Louisiana and Alabama.

55. *School Desegregation in Minneapolis, Minnesota: Staff Report*, U.S. COMM’N ON CIVIL RIGHTS (1977), <https://www.law.umaryland.edu/marshall/usccr/documents/cr12d459.pdf>.

56. 351 F. Supp. 799, 802 (D. Minn. 1972).

“15-percent rule.”<sup>57</sup> The 15-percent rule “prohibited schools from having minority enrollments more than fifteen percentage points higher than the district-wide average of minority students for grade levels served by those schools.”<sup>58</sup> In practice, the “15-percent” rule did little to remedy the situation in the long run as schools remained largely segregated well into the 1990s.<sup>59</sup>

More than twenty years later, in the wake of the filing of *NAACP v. Metropolitan Council*,<sup>60</sup> the Minnesota Department of Education promulgated Rule 3535<sup>61</sup> as an attempt to end school segregation in Minneapolis.<sup>62</sup> In 1994, the Minnesota legislature granted authority to the Minnesota Board of Education to propose new desegregation and integration rules.<sup>63</sup> In 1995, the Minnesota legislature abolished the Department of Education and created the Department of Children, Families, and Learning (DCFL),<sup>64</sup> thus giving both the DCFL and the Board of Education the power to make rules related to education. Following the creation of the DCFL, the Minnesota legislature took a hands-off approach, leaving the rule-writing to the two agencies.<sup>65</sup> Perhaps realizing the futility of its hands-off approach—as neither agency had successfully promulgated a desegregation rule—in 1998, the legislature transferred full authority to create desegregation rules from the Board of Education to the DCFL.<sup>66</sup> At the same time, the legislature gave DCFL a deadline—January 10, 1999—to complete the writing of the new rules.<sup>67</sup> Rule 3535 was adopted in July

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57. *School District Integration Revenue: Evaluation Report*, OFF. OF LEGIS. AUDITOR 3–4 (2005), <http://www.auditor.leg.state.mn.us/ped/pedrep/integrevf.pdf> (explaining the adoption of MINN. R. 3535.0200 (1973)).

58. *Id.* at 4; see also MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* 42 (1997).

59. See Cheryl W. Heilman, *Booker v. Special School District No. 1: A History of School Desegregation in Minneapolis, Minnesota*, 12 LAW & INEQ. 127, 173 (1993) (noting that Minneapolis has experienced “some degree” of integration but that in Minneapolis “students of color . . . make up over half of the public school enrollment”).

60. 125 F.3d 1171 (8th Cir. 1997).

61. MINN. R. 3535.0100–9910 (2015).

62. See MINN. R. 3535.0100 (2015). Section 3535.0100 outlines the purpose of the Rule and 3535.0100(F) explicitly states that the purpose of the Rule is to “prevent segregation . . . in public schools[.]”

63. 1994 Minn. Laws 2628.

64. 1995 Minn. Laws 3437–38.

65. See MINN. STAT. § 121.11 (1994–1998).

66. 1998 Minn. Laws 1701.

67. *Id.*

1999.<sup>68</sup> Unfortunately, after sixteen years, Rule 3535 has not achieved its goals.<sup>69</sup>

The reasons for the general ineffectiveness of Rule 3535 are twofold and will be discussed in more detail in Part II. First, Rule 3535 contains an important exemption: it does not apply to charter schools.<sup>70</sup> Since its passage, the state could not wield Rule 3535 as a sword to fight segregation of charter schools because it expressly forbade Rule 3535 to reach charter schools.<sup>71</sup> Second, Rule 3535 does not affect or apply to open enrollment plans by which students can enroll in districts other than their home districts.<sup>72</sup> As a result of open enrollment policies, schools have become increasingly more segregated as students with means, predominantly White students,<sup>73</sup> transfer out of schools, causing increased segregation in the Twin Cities and increased homogenization in schools across the Twin Cities.<sup>74</sup> Rule 3535 *could be*, but has not been, used as a mechanism to temper the effects of choices made by students across Minnesota; Rule 3535 has been rendered completely ineffective in this battle as well.<sup>75</sup> As a result of increased re-segregation of Twin Cities' schools, the Minnesota Department of Education proposed a rewrite of Rule

68. *Statement of Need and Reasonableness (SONAR): Proposed Rules Governing Achievement and Integration for Minnesota: Minnesota Rules, Chapter 3535*, MINN. DEPT OF EDUC. 5–6 (Oct. 5, 2015), [http://education.state.mn.us/mdeprod/idcplg?IdcService=GET\\_FILE&dDocName=MDE034351&RevisionSelectionMethod=latestReleased&Rendition=primary](http://education.state.mn.us/mdeprod/idcplg?IdcService=GET_FILE&dDocName=MDE034351&RevisionSelectionMethod=latestReleased&Rendition=primary).

69. For an in-depth discussion of the extent of school segregation in the Twin Cities region, see *The Choice Is Ours: Expanding Educational Opportunity for All Twin Cities Children*, INST. ON RACE & POVERTY (2008), <http://www1.law.umn.edu/uploads/95/f8/95f8e76993cffda793eb6da2b99fc072/9-Expanding-Educational-Opportunity-for-all-Twin-Cities-Children.pdf>. See also *School District Integration Revenue: Evaluation Report*, OFF. OF LEG. AUDITOR 23 (2005), <http://www.auditor.leg.state.mn.us/ped/pedrep/integrevf.pdf> (finding that racial concentration, especially of minorities, in Twin Cities' schools has increased despite participation in integration funding programs).

70. MINN. R. 3535.0110 subp. 8(A) (2015).

71. See *Why Are the Twin Cities So Segregated?*, INST. ON METRO. OPPORTUNITY 2 (Feb. 2015), <http://www1.law.umn.edu/uploads/ed/00/ed00c05a000fffeb881655f2e02e9f29/Why-Are-the-Twin-Cities-So-Segregated-2-26-15.pdf> (noting that the charter school and open enrollment exemptions have “undermin[ed] local districts’ ability to pursue integrated education.”).

72. See MINN. STAT. § 124D.03 subd. 4 (2015).

73. See *Open Enrollment and Racial Segregation in the Twin Cities: 2000–2010*, INST. ON METRO. OPPORTUNITY 1 (Dec. 2012), <http://casw.umn.edu/wp-content/uploads/2014/02/Open-Enrollment-and-Racial-Segregation-Final.pdf>.

74. *Id.* at 7.

75. See *Why Are the Twin Cities So Segregated?*, *supra* note 71.

3535 in 2015, seeking, *inter alia*, to remove the charter school exemption from the Rule.<sup>76</sup>

*c. Minnesota's Constitutional Guarantees*

Minnesota's Constitution provides certain protections to its citizens.<sup>77</sup> Article I, § 2 provides that “[n]o member of this state shall be disfranchised or deprived of any of the rights or privileges . . . unless by the law of the land . . .”<sup>78</sup> After *Brown*, there is no doubt that the right to obtain an equal education is the law of the land for all children.<sup>79</sup> Because the Supremacy Clause of Article VI of the United States Constitution establishes that laws made in pursuance of the Constitution are “the supreme Law of the Land”<sup>80</sup> and because the federal judiciary has the authority “to say what the law is,”<sup>81</sup> the Supreme Court's interpretation of the Fourteenth Amendment with regard to discrimination in education<sup>82</sup> binds all states with equal and absolute force. As such, even if Minnesota attempted to restrict the rights of all children to receive an equal education, either intentionally or inadvertently, two provisions forbid such action: its own Constitution as well as the *Brown* decision, which is the supreme law of the land.<sup>83</sup>

More importantly, the Minnesota Constitution guarantees an equal education by mandating that the legislature provide “a thorough and efficient system of public schools throughout the state.”<sup>84</sup> The guarantee is further strengthened by an outright recognition that “[t]he stability of a republican form of government

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76. See *Proposed Permanent Rules Relating to Achievement and Integration*, *supra* note 23.

77. MINN. CONST. art. I, § 1.

78. MINN. CONST. art. I, § 2.

79. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

80. U.S. CONST. art. VI, cl. 2. (providing that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land”).

81. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

82. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

83. See *Legg v. Ill. Fair Emp't Practices Comm'n*, 329 N.E.2d 486, 493 (1975) (holding that the duty to establish a unitary education system mandated by *Brown* is the “supreme law of the land.”).

84. MINN. CONST. art. XIII, § 1. The section provides in full that “[t]he stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.”

depend[s] mainly upon the intelligence of the people.”<sup>85</sup> Moreover, Article XIII, § 1 calls for “a general and *uniform* system of public schools.”<sup>86</sup> The Minnesota Supreme Court recognized the broad nature of the constitutional mandate and affirmed its self-declared importance in 1993 when it decided *Skeen v. State*.<sup>87</sup> In *Skeen*, the court declared that “education *is* a fundamental right under the state constitution, not only because of its overall importance to the state but also because of the explicit language used to describe this constitutional mandate.”<sup>88</sup> Notwithstanding a strong constitutional disposition toward providing an equal education, Minnesota has struggled to implement the promise of *Brown*.

## II. Analysis

### *a. Rule 3535 Has Caused Segregation in Twin Cities’ Schools*

Rule 3535 has arguably led to segregation of Twin Cities’ schools.<sup>89</sup> In 1992, before the promulgation of Rule 3535, only 2% of the Twin Cities’ predominantly non-White schools were racially segregated; by 2002, roughly three years after Rule 3535 went into effect, that percentage increased ten times to 20%.<sup>90</sup> In terms of raw numbers, the percentages translate to an increase from 9 to 109 schools.<sup>91</sup> The rate of increase was much faster than other metropolitan areas of similar size:<sup>92</sup> Portland’s school segregation increased from 2% to 9%; Seattle experienced a segregation increase from 3% to 7%; and in Pittsburgh, segregation swelled from 9% to 14% percent.<sup>93</sup>

The relationship is most accurately described as one of correlation and not causation, of course, but given the lack of other

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85. *Id.*

86. *Id.* (emphasis added).

87. 505 N.W.2d 299 (Minn. 1993).

88. *Id.* at 313 (emphasis added).

89. See MYRON ORFIELD ET AL., REGION: PLANNING THE FUTURE OF THE TWIN CITIES 105–06 (2010); MINN. R. 3535.0100–9910 (2015).

90. See ORFIELD ET AL., *supra* note 89, at 105.

91. *Id.* at 105–107.

92. *Id.* at tbls.B.12 & B.15.

93. See *Data Table of School Types in the 25 Largest Metropolitan Areas*, INST. ON METRO. OPPORTUNITY (2011), <http://www.law.umn.edu/metro/school-studies/integration-and-segregation.html>. The data table is a supporting document for an article on Rule 3535. See Myron Orfield, *Regional Strategies for Racial Integration of Schools and Housing Post-Parents Involved*, 29 LAW & INEQ. 149 (2011).

systemic efforts to change the face of the educational system in Minnesota at around the same time, one can safely assert that Rule 3535 is responsible—at least partly, if not fully—for the shifts just described.<sup>94</sup>

*b. Rule 3535's Charter School Exemption Has Caused Increased Segregation of Charter Schools*

At the time of the drafting of Rule 3535, charter schools were a recent development in the United States and Minnesota<sup>95</sup> and the child of the economic theory of free choice, which took hold in the 1990s.<sup>96</sup> Charter schools were designed to “operate outside the reach of the administrative bureaucracy and politicized big city school boards.”<sup>97</sup> Despite, and perhaps *because of*, its lofty and amorphous goals, the charter school model was poorly understood in its nascent stages.<sup>98</sup> In addition, it was difficult to predict the boom in enrollment that charter schools would experience over the next twenty years.<sup>99</sup> In 1996, fewer than 5,000 students were enrolled in a charter school in the Twin Cities; in just seventeen years, that number increased to 35,000.<sup>100</sup> Nationwide, as of 2014, 2.5 million students attended roughly 6,400 charter schools across the country,<sup>101</sup> compared to 250,000 students in 1,600 charter

94. See Margaret C. Hobday, Geneva Finn & Myron Orfield, *A Missed Opportunity: Minnesota's Failed Experiment with Choice-Based Integration*, 35 WM. MITCHELL L. REV. 936, 940 (2009). The authors note that “Minnesota is moving away from providing a racially integrated education for all of its students. Whether the rules themselves caused the increased racial isolation or merely allowed it to happen, Minnesota’s experience shows the danger of removing integration mandates.”

95. See Myron Orfield & Thomas Luce, *Charters, Choice, and the Constitution*, 2014 U. CHI. LEGAL F. 377, 378 (2014) (asserting that “charter schools . . . were implemented first and with few restraints in Minnesota”).

96. See JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990) (arguing that choice and school competition would promote school autonomy and provide a solid foundation for school improvement and superior student achievement); JEFFREY R. HENIG, *RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR* (1994) (pointing out the limits of the market-choice theory as it relates to school choice, including “shopping” for charter schools).

97. Stan Karp, *Charter Schools and the Future of Public Education*, RETHINKING SCHOOLS (2013), [http://www.rethinkingschools.org/archive/28\\_01/28\\_01\\_karp.shtml](http://www.rethinkingschools.org/archive/28_01/28_01_karp.shtml).

98. CHESTER E. FINN, JR. ET AL., *CHARTER SCHOOLS IN ACTION* 3 (2000).

99. *Charter School Enrollment*, NAT'L CTR. FOR EDUC. STAT. (Apr. 2016), [https://nces.ed.gov/programs/coe/indicator\\_cgb.asp](https://nces.ed.gov/programs/coe/indicator_cgb.asp).

100. See *Charter Schools in the Twin Cities: 2013 Update*, INST. ON METRO. OPPORTUNITY 2 (Oct. 2013), <https://www.law.umn.edu/sites/law.umn.edu/files/newsfiles/579fd7a6/Charter-School-Update-2013-final.pdf>.

101. *Estimated Number of Public Charter Schools & Students: 2013–2014*, NAT'L

schools in 1999.<sup>102</sup> In addition, the composition of the Twin Cities' charter school student body has been changing: charters are now more likely to serve non-White and poor populations<sup>103</sup> and are more likely to be segregated.<sup>104</sup> In fact, "charter school students . . . were much more likely to attend a segregated school than traditional school students."<sup>105</sup> Similar student body composition and segregation trends have been observed across the United States.<sup>106</sup>

The inadequacy of Rule 3535 is especially evident in Twin Cities' charter schools.<sup>107</sup> Twin Cities' charter schools are woefully segregated when compared to traditional public schools.<sup>108</sup> Following the implementation of Rule 3535, segregation in charter schools has increased since 2000 for most racial groups: the proportion of Black students in segregated charters has grown from 81% to 88%; and the percentage of Hispanic students in segregated charters has grown from 69% to 76% in the same period.<sup>109</sup>

Overall, on the school level, only 17% of charter schools are integrated, but more than 50% of charters are segregated.<sup>110</sup> In contrast, about 40% of traditional public schools were integrated in 2013, but only 22% were segregated.<sup>111</sup> Most segregated schools

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ALL. FOR PUB. CHARTER SCH. 1 (Feb. 2014), <http://www.publiccharters.org/wp-content/uploads/2014/02/New-and-Closed-Report-February-20141.pdf>.

102. See OFF. OF EDUC. RES. AND IMPROVEMENT, U.S. DEPT. OF EDUC., *THE STATE OF CHARTER SCHOOLS 2000 7* (Jan. 2000), <http://files.eric.ed.gov/fulltext/ED437724.pdf>.

103. See *Charter Schools in the Twin Cities: 2013 Update*, *supra* note 100, at 2.

104. *Id.* at 3.

105. *Id.* at 1.

106. See Erica Frankenberg, Genevieve Siegel-Hawley & Jia Wang, *Choice Without Equity: Charter School Segregation*, 19(1) EDUC. POL'Y ANALYSIS ARCHIVES 1, 6–8 (2011) (finding segregative trends in Connecticut, the District of Columbia, Illinois, Massachusetts, Michigan, Minnesota, New Jersey, North Carolina, and Texas).

107. See *Failed Promises: Assessing Charter Schools in the Twin Cities*, INST. ON RACE & POVERTY 1–2 (Nov. 2008), <http://www1.law.umn.edu/uploads/5f/ca/5fcac972c2598a7a50423850eed0f6b4/8-Failed-Promises-Assessing-Charter-Schools-in-the-Twin-Cities.pdf>.

108. See *id.* at 2; *Update of "Failed Promises: Assessing Charter Schools in the Twin Cities"*, INST. ON RACE & POVERTY 1 (Jan. 2012), [http://www1.law.umn.edu/uploads/32/40/3240a8492f4c1d738fa87d975a4e5ea5/65\\_2012\\_Update\\_of\\_IRP\\_2008\\_Charter\\_School\\_Study.pdf](http://www1.law.umn.edu/uploads/32/40/3240a8492f4c1d738fa87d975a4e5ea5/65_2012_Update_of_IRP_2008_Charter_School_Study.pdf); *Charter Schools in the Twin Cities: 2013 Update*, *supra* note 100, at 2.

109. *Id.*

110. *Id.* at 3.

111. *Id.*

are located in urban areas of the region and many, if not most, are single-race and usually all-Black schools.<sup>112</sup> Students of color in charter schools were about twice as likely to attend a segregated school than students of color in a traditional public school in 2013: 88% of Black students in charter schools attended a segregated school, whereas only 44% of Black students attended a segregated traditional public school; 76% of Hispanic students in charters schools attended a segregated school, whereas only 38% of Hispanic students attended a segregated traditional public school.<sup>113</sup>

In terms of academic achievement for students, charters significantly underperform public schools, even when controlling for low-income and non-White student demographics in those charter schools.<sup>114</sup> Professor Myron Orfield<sup>115</sup> argues that “[o]ne of the primary justifications for charters schools is the argument that, by engendering competition, they will enhance the performance of the entire school system, including traditional schools forced to respond to charter school competition.”<sup>116</sup> Professor Orfield notes, however, that “[e]very year since the charters started, they have underperformed the public schools. Overall, charters are worse than the public schools, and because of competition with the charters the public schools are weaker than they would otherwise be.”<sup>117</sup>

Emboldened by the Rule 3535 exemptions, the Twin Cities has seen a rise in ethno-centric charter schools, leading to further segregation of students into one-race enclaves.<sup>118</sup> For example, the Hmong-focused charter schools<sup>119</sup> are technically open to *all*

112. *Id.* at 4.

113. *Id.* at 5.

114. *Id.* at 8–10.

115. Professor Orfield has written three books and numerous articles and book chapters on local government law, spatial inequality, fair housing, school desegregation, and charter schools. He is an expert in regional demography and has been deemed “the most influential demographer in America’s burgeoning regional movement” by syndicated columnist Neal Peirce. See *Myron Orfield*, U. OF MINN. L. SCH.: OUR FAC., <https://www.law.umn.edu/profiles/myron-orfield> (last visited May 10, 2017).

116. Orfield & Luce, *Charters, Choice, and the Constitution*, *supra* note 95, at 405.

117. *Id.* at 402.

118. See *Failed Promises: Assessing Charter Schools in the Twin Cities*, *supra* note 107, at 39–42 (arguing that “[c]harter school competition [to provide specific services not provided by traditional schools] in ethnic niches is an example of . . . harmful competition which has detrimental results for students of color.”).

119. As of March 2017, Hmong-focused charters in the Twin Cities are Hmong

students, but, in reality, they are about ninety-five percent Hmong.<sup>120</sup> Such concentration of ethnic groups also tends to concentrate poverty, and “high-poverty schools are associated with a wide range of negative educational and life outcomes, including low test scores, high dropout rates, low college attendance rates, low earnings later in life, and greater risk of being poor as adults.”<sup>121</sup> Ethnic schools and ethnic charters certainly do serve a valid purpose: providing an education setting for a needy population and filling a “service gap” left by traditional schools.<sup>122</sup> However, the sequestration of students into ethnic enclaves raises questions of whether such education is truly best for the students or whether immersion and integration may better accomplish academic goals.

The rise of ethno-centric charters has elicited an interesting response from traditional public schools: increased specialization and public school ethno-centrism in traditional schools.<sup>123</sup> Critics of the movement point out that “[a] key reason [for this development] is the rise of charter schools . . . tailored to a single race or ethnicity”<sup>124</sup> as traditional public schools scramble to compete with charter schools by offering specialized services, all in an attempt to collect the money that follows the students.

Contemporaneously, a rise in all-White charter schools, especially in neighborhoods where public schools are actually integrating more, has been noted,<sup>125</sup> as Whites either flee neighborhoods where integration is on the horizon or attempt to

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College Prep Academy, HOPE Community Academy, Community School of Excellence, Noble Academy, and the New Millennium Academy.

120. *Failed Promises: Assessing Charter Schools in the Twin Cities*, *supra* note 107, at 39.

121. *Id.* at 40.

122. Robert A. Fox & Nina K. Buchanan, *Introduction: The Growth of Ethnocentric Charter Schools*, in *PROUD TO BE DIFFERENT: ETHNOCENTRIC NICHE CHARTER SCHOOLS IN AMERICA* 1–4 (Robert A. Fox & Nina K. Buchanan eds., 2014). In addition, numerous comments received in response to the proposal to amend Rule 3535 have pointed to the high value provided by specialized charters, including ethno-centric charters. See Minnesota Department of Education, Comment Letter from Iain Lempke on Proposed Amendment to Rule 3535 (Jan. 11, 2016), [http://education.state.mn.us/mdeprod/idcplg?IdcService=GET\\_FILE&dDocName=MDE034741&RevisionSelectionMethod=latestReleased&Rendition=primary](http://education.state.mn.us/mdeprod/idcplg?IdcService=GET_FILE&dDocName=MDE034741&RevisionSelectionMethod=latestReleased&Rendition=primary).

123. Beth Hawkins & Cynthia Boyd, *The Rise of Voluntarily Segregated Schools: New Trend, Familiar Problems*, *MINNPOST* (Nov. 19, 2008), <https://www.minnpost.com/politics-policy/2008/11/rise-voluntarily-segregated-schools-new-trend-familiar-problems>.

124. *Id.*

125. *Charter Schools in the Twin Cities: 2013 Update*, *supra* note 100, at 6.

redraw district boundaries, in effect excluding minorities.<sup>126</sup> It is not a stretch to conclude that ethno-centric charters exacerbate the problem of racial segregation in the Twin Cities<sup>127</sup> as Rule 3535 implicitly tolerates this detrimental development. The Minnesota Constitution's guarantee of equal protection and a uniform system of education is thus arguably unrealized and largely ignored.

*c. Rule 3535's Open Enrollment Exemption Has Caused Increased Segregation of Twin Cities' Schools*

Open enrollment's impact on the segregation of Twin Cities' schools has been studied in detail.<sup>128</sup> A 2013 study found that open enrollment's segregative effect is palpable and has grown between 2000 and 2010.<sup>129</sup> Shortly after the implementation of Rule 3535 and its exemption of open enrollment programs from active desegregation efforts, segregative moves<sup>130</sup> of all students between districts increased from 20% in 2000 to 36% in 2010.<sup>131</sup> Segregative moves for White students increased as well: from 20% to 36% in the same period.<sup>132</sup> At the same time, total integrative moves increased by only 8%, from 16% to 24%.<sup>133</sup>

The overall effect of the moves has been to further segregate Twin Cities' schools.<sup>134</sup> Strikingly, and perhaps not surprisingly,

126. See Orfield, *Regional Strategies for Racial Integration of Schools and Housing Post-Parents Involved*, *supra* note 93, at 155–56 (noting such movements and efforts in the Apple Valley-Rosemount school district); see also Frankenberg, Siegel-Hawley & Wang, *supra* note 106, at 29; *A Missed Opportunity*, *supra* note 94, at 965–68.

127. *Failed Promises: Assessing Charter Schools in the Twin Cities*, *supra* note 107, at 39. *Failed Promises* blatantly states that “[t]he proliferation of charter schools offering ‘ethno-centric’ programs directly contributes to the racial segregation of students of color in the Twin Cities public schools.”

128. See *Open Enrollment and Racial Segregation in the Twin Cities: 2000–2010*, *supra* note 73.

129. *Id.*

130. *Id.* at 8. An integrative move is defined as “a move by a White student from a district where the White percentage of students is more than ten percentage points higher than the White share in the receiving district. The equivalent calculation is made for each racial [or] ethnic group.” *Id.* A segregative move is defined as “a move by a White student from a district where the White percentage of students is more than ten percentage points lower than the White share in the receiving district. The equivalent calculation is made for each racial [or] ethnic group.” *Id.*

131. *Id.* at 8 tbl.1 .

132. *Id.*

133. *Id.*

134. *Id.* at 9. The report finds that the effect is regional and does not just affect

“[s]tudents open enrolling out of the [Twin Cities] districts were much more likely to be [W]hite than those remaining behind and virtually all were enrolling in districts with [W]hite shares substantially greater than the district they left.”<sup>135</sup> Relatedly, “open enrollees into Minneapolis and St. Paul were not only much less likely to be [W]hite than a typical student in the districts they left but they were less likely to be [W]hite than resident students in the two city districts.”<sup>136</sup>

The trend is evident in some of the more diverse suburbs and suburbs experiencing dramatic racial change.<sup>137</sup> All of the diverse suburbs are experiencing a net outflow of White students to other predominantly White districts nearby.<sup>138</sup> Some predominantly White districts and suburbs are actively resisting integration plans,<sup>139</sup> and appear to be actively recruiting White students from diverse neighboring districts,<sup>140</sup> while refusing to participate in integration efforts like the Choice Is Yours program by turning away students of color wishing to enroll in its schools.<sup>141</sup> The approaches of such districts seems to be consistent with a continued desire on the part of Whites to avoid mandatory desegregation plans<sup>142</sup> despite the Supreme Court holding that such active resistance is improper.<sup>143</sup>

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the Twin Cities. The report found that “[t]he overall effect of these massive flows was to increase racial differences between the cities, their neighbors and the rest of the region.” *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 13. The report focuses on Anoka-Hennepin, Burnsville, Columbia Heights, Eastern Carver, Osseo, Richfield, Robbinsdale, and White Bear Lake.

138. *Id.* at 14; *see also id.* at 15, Map 4 (showing the percentage of minority students in open enrollment flows in the northwestern Twin Cities’ districts).

139. *See, e.g., id.* at 19–20 (noting that Minnetonka refused to participate in the Choice is Yours program and continues to refuse to admit Minneapolis students under the program).

140. *Id.* at 19–20. The report notes that the Minnetonka District highlights its open enrollment participation in Annual Reports; in addition, the report also notes that the majority of these students also happen to be White. *See* MINNETONKA PUB. SCH., 2009 ANNUAL REPORT 14 (2009), <https://minnetonka.k12.mn.us/newsroom/Annual%20Reports/2009%20Annual%20Report.pdf>; MINNETONKA PUB. SCH., 2015 ANNUAL REPORT 18–19 (2015), <https://www.minnetonka.k12.mn.us/newsroom/Publications/Annual%20Report.pdf>.

141. “The Choice Is Yours’ is an open enrollment program that give [sic] low-income Minneapolis families more options to attend suburban schools. Students who qualify for free or reduced lunch may apply to attend school in another school district and may be eligible for transportation to and from school.” *See “The Choice Is Yours” Minnesota Program*, MINNEAPOLIS PUB. SCH., [https://schoolrequest.mpls.k12.mn.us/the\\_choice\\_is\\_yours\\_minnesota\\_program](https://schoolrequest.mpls.k12.mn.us/the_choice_is_yours_minnesota_program) (last visited Mar. 13, 2017).

142. *See, e.g.,* Gary Orfield, *Metropolitan School Desegregation: Impacts on*

At the same time, social realities function in tandem with the Rule 3535 exemptions to enable flight of White students from diverse neighborhoods to whiter pastures of *de facto* segregated suburbs. White students are more likely to have access to transportation that would allow them to attend a school in a different district than their counterparts of color.<sup>144</sup> White parents are also more likely to be “in the know” as to what districts provide a quality education than their counterparts of color.<sup>145</sup> Students of color are likely less comfortable—and understandably so—with moving to White districts where centuries of racial tensions and inequality work against them.<sup>146</sup> The system as a whole functions to keep students of color in segregated schools while giving White students the choice to move, thus creating two separate—and unequal—systems of education, something that, in 1954, the Supreme Court announced to be unconstitutional,<sup>147</sup> and something that is arguably protected against under the Minnesota Constitution.

*d. Segregation Has Disastrous Outcomes for Students Both While They Are Enrolled and After They Graduate and Integrated Schools Help Students, Both White and Students of Color in the Long- and Short-Run*

Segregation caused by the charter school and open enrollment exemptions in Rule 3535 denies all students—White

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*Metropolitan Society*, 80 MINN. L. REV. 825, 866 (1996) (discussing studies linking declining enrollment of White students to desegregation plans).

143. See *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979).

144. See PAUL TESKE, JODY FITZPATRICK & TRACEY O'BRIEN, CTR. ON REINVENTING PUB. EDUC., DRIVERS OF CHOICE: PARENTS, TRANSPORTATION, AND SCHOOL CHOICE 7 (2009), [http://www.crpe.org/sites/default/files/pub\\_dscr\\_teske\\_jul09\\_0.pdf](http://www.crpe.org/sites/default/files/pub_dscr_teske_jul09_0.pdf) (“While most observers are confident that middle- and upper-income parents have the resources to make good choices for (and with) their children, it is less clear whether that is true for low-income parents and guardians. These families may not only have less information, but they are also more likely to live closest to the lowest-performing schools, without access to the transportation resources required for longer trips to different schools.”).

145. *Id.*

146. See MICHAEL THOMPSON & KATHY SCHULTZ, NAT'L ASS'N. OF INDEP. SCH., THE PSYCHOL. EXPERIENCES OF STUDENTS OF COLOR, <http://www.nais.org/Magazines-Newsletters/ISMagazine/Pages/The-Psychological-Experiences-of-Students-of-Color.aspx> (last visited Mar. 27, 2017) (noting that students of color who attend largely White schools experience feelings of loneliness, racial and social invisibility, and class and cultural discomfort).

147. *Brown v. Bd. of Educ.*, 347 U.S. 483, 483 (1954).

and students of color—the benefits of an integrated education.<sup>148</sup> The Court in *Brown* clearly stated that “in the field of public education the doctrine of ‘separate but equal’ has no place.”<sup>149</sup> To the Court, “[s]eparate education facilities are inherently unequal.”<sup>150</sup> The Court noted the importance of public education to success in life, and the irreparable and undeniable harms of educational segregation.<sup>151</sup>

The Court’s observations are no less true today. Research shows that racial and economic segregation hurts children, while the potential positive effects of integrated schools are wide-ranging and enduring.<sup>152</sup> Children attending segregated schools are more likely to have lower academic achievement,<sup>153</sup> leading to a lifetime of decreased earnings.<sup>154</sup> Decreased earning potential naturally leads to higher rates of poverty for parents with fewer years of education as well as their children.<sup>155</sup> As early as first grade, Black students attending segregated schools experience “constrain[ed] early reading development.”<sup>156</sup> A similar academic

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148. See *Failed Promises*, *supra* note 107, at 2–5; *Open Enrollment and Racial Segregation in the Twin Cities: 2000–2010*, *supra* note 73, at 1–2.

149. *Brown*, 347 U.S. at 495.

150. *Id.*

151. *Id.* at 493–95.

152. See, e.g., Michael A. Boozer et al., *Race and School Quality Since Brown v. Board of Education*, BROOKINGS PAPERS: MICROECON. 302–05 (1992), (finding that the effects of attending integrated schools are well-documented while noting that “it is not clear whether the effects of attending an integrated school stem from greater contact with [W]hite students or from different resources in [integrated] schools”); Janet Ward Schofield, *Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 99 (Gary Orfield ed., 2001) (noting that desegregated schools enhance the academic progress of Black students and that desegregation has positive, long-term effects on Black students).

153. MARGUERITE L. SPENCER & REBECCA RENO, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, THE BENEFITS OF RACIAL AND ECONOMIC INTEGRATION IN OUR EDUCATION SYSTEM: WHY THIS MATTERS FOR OUR DEMOCRACY 10 (Feb. 2009), [http://www.kirwaninstitute.osu.edu/reports/2009/02\\_2009\\_EducationIntegrationBenefitsReport.pdf](http://www.kirwaninstitute.osu.edu/reports/2009/02_2009_EducationIntegrationBenefitsReport.pdf).

154. See BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001) (documenting the difficulties low-wage, unskilled workers, who are often less educated, face in the world that forces them to work for less).

155. See AYANA DOUGLAS-HALL & MICHELLE CHAU, NAT’L. CTR. FOR CHILDREN IN POVERTY AT COLUMBIA UNIV., PARENTS’ LOW EDUCATION LEADS TO LOW INCOME, DESPITE FULL-TIME EMPLOYMENT 1 (Nov. 2007), [http://www.nccp.org/publications/pdf/text\\_786.pdf](http://www.nccp.org/publications/pdf/text_786.pdf) (“Over the past two decades, parents with less education have been losing economic ground.”).

156. See Kirsten Kainz & Yi Pan, *Segregated School Effects on First Grade Reading Gains*, 29 EARLY CHILDHOOD RES. Q. 531, 536 (2014).

under-achievement in math has also been noted.<sup>157</sup> The effects of inadequate reading and math developments follow students through high school.<sup>158</sup> Attending a segregated school, especially one in a low-income neighborhood, has been linked to higher incarceration rates, especially for Black men.<sup>159</sup> Additionally, school segregation and segregation of people, not just students, are symbiotic phenomena that tend to influence and feed into each other, ultimately causing even further segregation,<sup>160</sup> a subject beyond the scope of this Article.

Attending an integrated school, on the other hand, confers significant benefits on both students of color and their White counterparts beyond the classic justification of providing students of color with an equal opportunity to education.<sup>161</sup> Integrated schools, for example, narrow the achievement gap between White students and students of color.<sup>162</sup> Integrated schools experience a

157. See Mark Berends & Roberto Peñaloza, *Increasing Racial Isolation and Test Score Gaps in Mathematics: A 30-year Perspective*, 112 TEACHERS C. REC. 978 (2010) (finding that increases in school segregation corresponded to increases in the Black-White and Latino-White test score gaps in mathematics).

158. See Roslyn A. Mickelson & Damien Heath, *The Effects of Segregation on African American High School Seniors' Academic Achievement*, 68 J. OF NEGRO EDUC. 566, 576 (1999) (examining the effects of segregation through the lens of student "tracking" or slating into either rigorous or non-rigorous academic tracks; the authors found a high correlation between track level and race—the higher the track, the whiter the students body was, and vice versa).

159. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2011). Alexander believes that the problems plaguing Black communities are not passive, collateral side-effects of poverty, limited educational opportunity, or other similar factors, but consequences of intentional government policies designed to discriminate. See also Lochner & Moretti, *supra* note 2, at 155.

160. See Richard Rothstein, *Segregated Housing, Segregated Schools*, EDUC. WEEK (Mar. 26, 2014), [http://www.edweek.org/ew/articles/2014/03/26/26\\_rothstein\\_ep.h33.html](http://www.edweek.org/ew/articles/2014/03/26/26_rothstein_ep.h33.html). Rothstein notes that "[s]chools that most disadvantaged [B]lack children attend today are located in segregated neighborhoods far distant from middle-class suburbs," and are influenced by *de jure* discrimination inherent in racist housing policies, and not merely a result of *de facto*, voluntary segregation.

161. See Willis D. Hawley, *Who Knew? Integrated Schools Can Benefit All Students*, EDUC. WEEK (May 5, 2004), <http://www.edweek.org/ew/articles/2004/05/05/34hawley.h23.html>. Hawley asserts that *all* students who attend genuinely integrated schools have distinct advantages over peers who attend racially homogenous schools.

162. See Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513 (2003) and Russel W. Rumberger & Gregory J. Palardy, *Does Segregation Still Matter? The Impact of Student Composition on Academic Achievement in High School*, 107 TEACHERS C. REC. 1999 (2005) for comprehensive discussions of the narrowing effect of the achievement gap in integrated schools through a variety of

higher level of community involvement, a significant factor influencing students' achievement.<sup>163</sup> Attending an integrated school also “foster[s] higher occupational aspirations and more consistent career planning,”<sup>164</sup> boosts real and potential earnings,<sup>165</sup> and increases the likelihood that Black students will eventually enter professions in which Black workers are historically underrepresented;<sup>166</sup> other studies have confirmed this assertion.<sup>167</sup> In addition, “students [feel] safer in school, [are] less harassed by peers, [feel] less lonely, and [have] higher self-worth the more ethnically diverse their classrooms were.”<sup>168</sup>

Students of color are not the only ones benefitting from integration.<sup>169</sup> Research suggests that White students may become more empathetic, less prejudiced, and may work harder in an integrated classroom.<sup>170</sup> In addition, all students who attend integrated schools benefit from developing interpersonal interactions with individuals of a different race, a skill “more important” today than ever before.<sup>171</sup> Contrary to now-popular assertions and falsities, “White student achievement in schools with the highest Black student density did not differ from White student achievement in schools with the lowest density.”<sup>172</sup> The

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lenses.

163. See Gary Orfield, *Metropolitan School Desegregation*, in *IN PURSUIT OF A DREAM DEFERRED: LINKING HOUSING AND EDUCATION POLICY* 121, 145–46 (John A. Powell, Gavin Kearney & Vina Kay eds., 2001).

164. Schofield, *supra* note 152, at 100.

165. *Id.*

166. *Id.*

167. See, e.g., James E. Rosenbaum et al., *Can the Kerner Commission's Housing Strategy Improve Employment, Education, and Social Integration for Low-Income Blacks?*, 71 N.C. L. REV. 1519, 1555 (1993) (finding that integration leads to statistical improvement in educational achievement and job prospects, among other things).

168. Jaana Juvonen, Adrienne Nishina & Sandra Graham, *Ethnic Diversity and Perceptions of Safety in Urban Middle Schools*, 17 PSYCHOL. SCI. 393, 393 (2006).

169. See Anya Kamenetz, *The Evidence That White Children Benefit from Integrated Schools*, NPRED (Oct. 19, 2015), <http://www.npr.org/sections/ed/2015/10/19/446085513/the-evidence-that-white-children-benefit-from-integrated-schools>.

170. *Id.*

171. See Hawley, *supra* note 161. Hawley points out that “the ability to interact productively with others . . . can only be achieved through practice; that is, in diverse settings, especially schools.”

172. Kamenetz, *supra* note 169 (quoting *School Composition and the Black-White Achievement Gap*, NAT'L CTR. FOR EDUC. STATISTICS 1 (2015), [https://nces.ed.gov/nationsreportcard/subject/studies/pdf/school\\_composition\\_and\\_the\\_bw\\_achievement\\_gap\\_2015.pdf](https://nces.ed.gov/nationsreportcard/subject/studies/pdf/school_composition_and_the_bw_achievement_gap_2015.pdf)); see also Kristina Rizga, *3 Ways White Kids Benefit Most from Racially Diverse Schools*, MOTHER JONES (Jan. 15, 2016), <http://www.motherjones.com/politics/2016/01/white-kids-benefits-diverse-schools>.

contact between and among different races has been confirmed as beneficial for all races and has the palpable effect of reducing racial tension.<sup>173</sup> Students who attend integrated schools are more likely to attend integrated colleges and live in integrated neighborhoods.<sup>174</sup> Finally, integration fosters interracial friendships and increases the likelihood of interracial friendships as adults,<sup>175</sup> two vital ingredients in eliminating reliance on racial stereotypes and fostering better inter-racial understanding and cooperation for the sake of promoting equity.

#### IV. Proposed Solutions

Rule 3535 must be brought into accord with *Brown*, the Minnesota State Constitution, and social realities and scientific studies that clearly demonstrate the benefits of integration for students of all races. More specifically, most palpably, and most effectively, Rule 3535 must be rewritten so as to not exempt charter schools and open enrollment programs—both now mainstays of Minnesota’s educational landscape. Rewriting Rule 3535 to eliminate the now-obvious negative effects of segregated charters and segregative open enrollment policies is the first and arguably the most important step in integrating Minnesota’s schools.<sup>176</sup>

Exemptions from desegregation efforts must not only be very limited, but also well-tailored so as to not stunt progress, especially with respect to charter schools. While a blanket requirement to integrate—and do so quickly—is neither advisable

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173. Lee Sigelman & Susan Welch, *The Contact Hypothesis Revisited: Black-White Interaction and Positive Racial Attitudes*, 71 SOC. FORCES 781, 788 (1993).

174. See Hawley, *supra* note 161.

175. See RICHARD D. KAHLBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 3–5 (2001); Maureen Hallinan & Richard Williams, *The Stability of Students’ Interracial Friendships*, 52 AM. SOC. REV. 653 (1987); see also Hawley, *supra* note 161.

176. Opponents of the rewriting process offer evidence of legislative intent to specifically exempt charter schools from *all* rulemaking not specifically related to charter schools themselves. See Minnesota Department of Education, Comment Letter from Amy Koch, Former State Senator, on Proposed Amendment to Rule 3535 (Jan. 11, 2016), [http://education.state.mn.us/mdeprod/idecplg?IdcService=GET\\_FILE&dDocName=MDE034741&RevisionSelectionMethod=latestReleased&Rendition=primary](http://education.state.mn.us/mdeprod/idecplg?IdcService=GET_FILE&dDocName=MDE034741&RevisionSelectionMethod=latestReleased&Rendition=primary). Many comments specifically point to MINN. STAT. § 124E.03, subd.1 (2015), which provides that “[a] charter school is exempt from all statutes and rules applicable to a school, school board, or school district unless a statute or rule is made specifically applicable to a charter school.” Although the above-referenced provision presumes charter schools are exempt from rules affecting schools, nothing in the provisions seems to suggest that exemption is required.

nor workable, a flexible mechanism by which the schools themselves take the lead in ensuring integration will have the most lasting effect. Requiring charter schools to comply with desegregation plans would thus not mean that integration must be achieved any one way, through any specific means, with a one-size-fits-all approach, in an unrealistic timeframe. On the contrary, tailoring Rule 3535 to the needs of the highly segregated charters by providing for some breathing room is the best route to successful integration. The requirement to integrate coupled with the requisite flexibility will achieve the goals of integration while, at the same time, taking into account the unique needs of over one hundred charter schools in the Twin Cities and thousands of students enrolled in those schools or participating in open enrollment programs. After all, just as charters have a great amount of creative freedom to design curricula to fit varying needs of students, parents, and communities, those same charter schools should be expected to creatively think about solutions to bring about integration. The State of Minnesota, its agencies, charter schools, and other partners must all work collaboratively to implement an amended Rule 3535.

For example, a phase-in period of two years should be allowed, giving charter schools time to adjust to new requirements. After the initial two years, accountability measures should kick in to hold *all* schools accountable for desegregation. The Minnesota Department of Education should establish tailored guidelines and improvement plans for each of the roughly 110 charter schools that would be non-compliant as of 2016. Then, during the two-year phase in and beyond, the Minnesota Department of Education should offer targeted and flexible support to schools not meeting goals. Throughout the process, an independent partner, either a non-profit organization, or a disinterested agency of the state, should monitor progress and assess goals.

Only once the State harmonizes Rule 3535 with the realities of delivering an adequate and equal education to *all* students will all children in Minnesota have the opportunity to obtain such an education. This intentional desegregation via the new Rule would provide all students with an opportunity to attain an excellent education and would begin to dismantle the uncomfortable reality that pervades Minnesota's schools now: where students live determines how much they learn, in direct contravention of established law, common sense, and constitutional guarantees.

As stated above, it does appear that the Minnesota Department of Education has taken steps in the right direction by issuing a notice of proposed rulemaking which includes a draft of a new rule that addresses, in large part, concerns raised by this Article.<sup>177</sup> Hearings on the issue began in early 2016.<sup>178</sup> In March 2016, however, Administrative Law Judge Ann O'Reilly halted the strides towards desegregation.<sup>179</sup> Noting that “the tail does not wag the dog when it comes to lawmaking,” Judge O'Reilly rejected the Minnesota Department of Education's proposed rule—which eliminated the charter school exemption—as an impermissible exercise of power the legislature did not grant to the agency.<sup>180</sup> In addition, O'Reilly's report added that the Department failed to establish requisite need for an overhaul of Rule 3535<sup>181</sup> and that the Department's proposed rule is “unduly vague.”<sup>182</sup>

At this juncture, given the adverse ruling from the administrative law judge, the Minnesota Department of Education has two choices: start over and propose new rules, or appeal O'Reilly's report. Practically, however, because of the stance the administrative court seems to take and the highly deferential standard of review,<sup>183</sup> the only way the Department will be able to wipe the charter school exemption and similar exemptions (such as the open enrollment policy) from the books is to challenge the O'Reilly report in the Minnesota Court of Appeals.<sup>184</sup> A re-write will functionally be a repeat of the already-failed process as there

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177. See *Proposed Permanent Rules Relating to Achievement and Integration*, *supra* note 23..

178. See *Integration Rules*, MINN. DEP'T OF EDUC., <http://education.state.mn.us/MDE/about/rule/rule/deseg/index.htm> (last visited May 10, 2017).

179. See *In the Matter of the Proposed Rules of the Department of Education Governing Achievement and Integration, Minnesota Rules Chapter 3535*, OAH 65-1300-32227 at 3 (Mar. 11, 2016) [hereinafter *O'Reilly Report*]. See Beth Hawkins, *The Desegregation War in Minnesota Heats Up, as State Judge Hands Charter School Advocates Key Win*, 74 MILLION (Mar. 28, 2016), <https://www.the74million.org/article/the-desegregation-war-in-minnesota-heats-up-as-state-judge-hands-charter-school-advocates-key-win>.

180. *O'Reilly Report*, *supra* note 179, at 62–64, 91. See also Hawkins, *supra* note 179; Beena Raghavendran, *Judge Rejects Minnesota Department of Education Integration Plan That Included Charters*, STAR TRIB. (Mar. 22, 2016, 8:13 PM), <http://www.startribune.com/administrative-law-judge-strikes-down-plan-to-desegregate-schools-including-charters/373152401/>.

181. See *O'Reilly Report*, *supra* note 179, at 76, 92.

182. *Id.* at 90–91.

183. See *id.* at 57–60.

184. See Hawkins, *supra* note 179.

is no way to effectively eliminate the charter school exemption without calling it a charter school exemption.

In light of the conundrum in which the Department of Education finds itself, the class action lawsuit against the State of Minnesota thus takes on new meaning and new life, and becomes even more important in the fight against the educational disparity between White and minority students. The court hearing the class action suit has the opportunity to decide the case on state constitutional grounds, a different basis for reaching the correct conclusion: the charter school and open enrollment exemptions harm students all across the Twin Cities' metro area. The court that ultimately hears the class action lawsuit must order the rewriting of Rule 3535. A hearing to decide whether to dismiss the lawsuit was held on April 14, 2016.<sup>185</sup> The Education Commissioner Brenda Cassellius, the Minnesota Senate, and the Minnesota House of Representatives moved to dismiss the case, arguing that the plaintiffs could not prove intentional discrimination by the State.<sup>186</sup> A group of charter schools and parents joined the motion to dismiss, arguing that charter schools are not required to follow desegregation rules set by the State.<sup>187</sup> In July 2016, Hennepin County District Judge Susan M. Robiner ruled that the lawsuit "had enough legal grounds to continue."<sup>188</sup> In effect, Judge Robiner "refused a move by the state and a group of charter schools and parents to dismiss the case."<sup>189</sup>

If the Department of Education chooses to challenge Judge O'Reilly's decision and does not succeed on appeal, much of the remaining hope for a solution will rest on the shoulders of the class of plaintiffs in *Cruz-Guzman v. State of Minnesota*.<sup>190</sup> Two

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185. *Id.*

186. The lawsuit filings are not available as of May 10, 2017. See Beena Raghavendran, *Judge Refuses to Dismiss Minnesota Desegregation Suit*, STAR TRIB. (July 13, 2016), <http://www.startribune.com/judge-refuses-to-dismiss-minnesota-desegregation-suit/386712411/>; see also Susan Du, *Lawsuit to Forcibly Desegregate Twin Cities Schools Moves Closer to Trial*, CITY PAGES (July 14, 2016), <http://www.citypages.com/news/lawsuit-to-forcibly-desegregate-twin-cities-schools-moves-closer-to-trial-8431864>.

187. See Raghavendran, *supra* note 186. The group of parents and charter schools effectively argued for exemption as provided by Rule 3535. As this Article outlines, the parents and charter schools did make a viable argument for exemption as the Rule does, in fact, exempt charters from desegregation efforts. Judge Robiner, however, refused to exempt the schools from the lawsuit.

188. *Id.*

189. *Id.*

190. In March 2017, the Minnesota Court of Appeals dismissed the action as a nonjusticiable political question. Effectively, the three judge panel concluded that

outcomes are now possible: either the court hearing the case will order a rewriting of Rule 3535, or the State and the plaintiffs will engage in either settlement talks or mediation to resolve the lawsuit. Ultimately, the plaintiffs will likely engage in mediation and settlement talks with the State of Minnesota, especially now that the motions to dismiss the suit and the summary judgment motions have been denied. The mediation is an opportunity to address the shortcomings of the current Rule and realize the potential and promise of a better rule, one that conforms to *Brown v. Board of Education*. The settlement talks would also provide an opportunity for *all* stakeholders to have a voice in the negotiations: the State of Minnesota and its agencies, parents, charter schools, traditional schools, teachers, lawyers, policymakers, etc. An inclusive mediation process would produce a rule most reflective of community concerns, thus ultimately serving students across the State more effectively. The settlement talks must rewrite Rule 3535 in much the same way as the Minnesota Department of Education would have so as to close the gaping loophole and end the charter school and open enrollment exemptions from desegregation efforts. Alternatively, and perhaps more easily, the court can order the comprehensive rewriting of the Rule itself. It is unlikely, however, that the State of Minnesota will allow the class action to go that far without at least attempting to engage in settlement talks or mediation with the plaintiffs.

### Conclusion

Minnesota's schools are on a destructive path to increased segregation. Segregation could have continued devastating effects on Minnesota's children unless Rule 3535 is amended to reflect reality and common sense. An administrative rewriting was a viable option the Minnesota Department of Education pursued. Unfortunately, the Department's efforts have been short-circuited. In light of the Department's setback, the newly-filed lawsuit

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it could not decide the questions without making determinations best left to other branches of government. See Josh Verges, *Appeals Court Dismisses Twin Cities School Segregation Lawsuit*, TWIN CITIES PIONEER PRESS (Mar. 13, 2017), <http://www.twincities.com/2017/03/13/appeals-court-dismisses-twin-cities-school-segregation-lawsuit/>. On April 26, 2017, the Minnesota Supreme Court reversed the dismissal order by the Court of Appeals and agreed to review the case. See Beena Raghavendran, *Minnesota Supreme Court to Hear School Integration Lawsuit*, STAR TRIB. (Apr. 26, 2017), <http://m.startribune.com/minn-supreme-court-to-hear-school-integration-lawsuit/420517503/>.

provides the State of Minnesota not only with an opportunity to face the effects of its segregative policies but also an impetus to fix a still-correctable problem before it is too late.<sup>191</sup> Rule 3535 as currently written is inadequate in the fight against segregation. In fact, it may even have contributed to increased segregation in Minnesota schools.<sup>192</sup> The lawsuit should—and could—be the catalyst for spurring immediate and concrete change in how the State of Minnesota treats charter schools and open enrollment programs, especially given the Minnesota Department of Education’s so-far futile, albeit not yet exhausted, effort to rewrite the rules through executive action.

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191. See Class Action Complaint, *supra* note 15.

192. See *supra*, Part II.