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Sector Agnosticism and the Coming Transformation of Education Law

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Over the past two decades, the landscape of elementary and secondary education in the United States has shifted dramatically, due to the emergence and expansion of privately provided, but publicly funded, schooling options (including both charter schools and private school choice devices like vouchers, tax credits, and educational savings accounts). This transformation in the delivery of K12 education is the result of a confluence of factors—discussed in detail below—that increasingly lead education reformers to support efforts to increase the number of high quality schools serving disadvantaged students across all three educational sectors, instead of focusing exclusively on reforming urban public schools. As a result, millions of American children now attend privately operated, publicly funded schools. This rise in a “sector agnostic” education policy has profound implications for the state and federal constitutional law of education because it blurs the distinction between charter and private schools. This Article explores three of the most significant of these implications.

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INTRODUCTION

In May 2014, the Louisiana Recovery School District closed the last of its traditional public schools in New Orleans and announced that it would, henceforth, no longer operate any schools in the city, but instead will authorize and regulate privately operated charter schools.¹

1. The district, a statewide entity, operates a handful of schools outside of New Orleans and Orleans Parish School District, but has a stated policy of doing so only until a high-performing charter operator can be recruited to assume control of them. *Direct-Run Schools*, RECOVERY SCH. DISTRICT, http://www.rsdl.net/apps/pages/index.jsp?uREC_ID=195276&type=d&termREC_ID=&pREC_ID=396825 (last visited Sept. 12, 2016) [<https://perma.cc/J2MR-6VLY>]. The Orleans Parish School Board, which operated the public school system in New Orleans before Katrina, currently runs six traditional public schools in the city; it also serves as an authorizer of charter schools. *Our Schools*, ORLEANS PARISH SCH. BOARD, <http://opsb.us/about/our-schools/> (last visited Sept. 12, 2016) [<https://perma.cc/3RS5-38U4>]. Prior to the hurricane, the Orleans Parish School Board operated over 125 traditional public schools in the city, and the district was widely regarded as one of the worst performing school districts in the United States. *Transforming Public*

Parents living in New Orleans today have the option of sending their children to a charter school or one of the five traditional public schools operated by the Orleans Parish School Board. Families under a certain income threshold also can receive a publicly funded scholarship to attend a private school.² The New Orleans situation is, in many respects, *sui generis*, since the Recovery School District resolved to operate an “all charter” district in the city in the wake of Hurricane Katrina.³ In other respects, the Recovery School District’s decision is emblematic of a much broader trend in education reform. A major shift is occurring in K12 education in the United States, especially in urban centers. Frustrated with the pace and prospect of efforts to improve urban public schools, reformers are increasingly focusing on growing the supply of high quality educational options outside the traditional public school sector.⁴ As a result, millions of American children now attend privately operated, but publicly funded, schools: approximately three million attend privately operated charter schools, and at least four hundred thousand attend a private school with funds provided by a publicly funded school choice program.⁵

Education in New Orleans: The Recovery School District 2003–2011, COWEN INST. 3–7 (2011), <http://www.coweninstitute.com/wp-content/uploads/2011/12/History-of-the-RSD-Report-2011.pdf> [<https://perma.cc/2XUY-ZSNY>]. In May, the state enacted legislation transferring supervision of the charter schools in the Recovery School District to the Orleans Parish School Board by 2019. See Danielle Dreilinger, *New Orleans’ Katrina School Takeover to End, Legislature Decides*, TIMES-PICAYUNE (May 5, 2016, 5:19 PM), http://www.nola.com/education/index.ssf/2016/05/new_orleans_schools_reunify.html [<https://perma.cc/2PNA-QCWB>].

2. Danielle Dreilinger, *Louisiana School Voucher Enrollment Opens for Fall 2014*, TIMES-PICAYUNE (Jan. 15, 2014, 5:16 PM), http://www.nola.com/education/index.ssf/2014/01/louisiana_school_voucher_enrol.html [<https://perma.cc/4U24-YDNP>]; Lyndsey Layton, *In New Orleans, Major School District Closes Traditional Public Schools for Good*, WASH. POST (May 28, 2014), https://www.washingtonpost.com/local/education/in-new-orleans-traditional-public-schools-close-for-good/2014/05/28/ae4f5724-e5de-11e3-8f90-73e071f3d637_story.html [<https://perma.cc/U58F-VL8A>]. Louisiana operates a statewide parental choice program, known as the Louisiana Scholarship Program, which provides low-income families with resources to attend participating private schools. Information about that program is available at *Louisiana Scholarship Program*, DEP’T EDUC., <http://www.louisianabelieves.com/schools/louisiana-scholarship-program> (last visited Sept. 25, 2016) [<https://perma.cc/T7YH-M9J7>]. Information about the New Orleans Recovery School District’s charter-enrollment options is available at *New Orleans Public School Enrollment*, RECOVERY SCH. DISTRICT, enrollnola.org [<https://perma.cc/5YEH-CUXV>].

3. See, e.g., *Transforming Public Education in New Orleans*, *supra* note 1, at 1–2 (discussing the impact of the Recovery School District on education in New Orleans).

4. James A. Peyser, *Boston and the Charter School Cap*, EDUC. NEXT 14, 15 (2014), http://educationnext.org/files/ednext_XIV_1_peyser.pdf [<https://perma.cc/9F3B-A7RD>] (noting that over the past several years the Gates Foundation has brokered fifteen “district-charter collaboration compacts” between urban school districts and charter schools, each of which commits the district to making charter schools an integral part of a broader school-reform strategy).

5. *Estimated Number of Public Charter Schools & Students, 2014–2015*, NAT’L ALLIANCE FOR PUB. CHARTER SCHS. 1 (Feb. 2015), http://www.publiccharters.org/wp-content/uploads/2015/02/open_closed_FINAL.pdf [<https://perma.cc/BAR9-3HKH>]; *School Choice*

In the education policy world, “portfolio” has become a popular buzzword. Education “portfolio” models theoretically shift the role of public education officials from public school *operators* to the *regulators* of schools across multiple educational sectors.⁶ Portfolio strategies combine continued efforts to improve urban public schools with efforts to increase the supply of high quality schools accessible to low-income students in the charter sector, and, in states with publicly funded private school choice, the private sector as well. As a practical matter, however, even the most vigorous proponents of “portfolio” reforms face serious institutional impediments to implementing them. The reality is that the diffusion of authority over K12 education usually means there is no (and there is often no realistic possibility of) a portfolio *manager*. Except where a state has assumed control of a local school district and vested operational authority in the hands of a mayor (as in New York City, Newark, and Chicago) or a state-controlled entity (as in Philadelphia and New Orleans), local elected officials lack the legal authority to implement education reforms directly, but rather must assume the roles of cheerleader and talent recruiter.⁷ Even where the local school district has been divested of operational authority, state education law generally distributes control over core components of the “portfolio” across a variety of actors.⁸ State laws frequently determine the extent of parental choice (if any) by establishing the baseline conditions under which charter schools are permitted to operate and determining whether (and to what extent) private schools are included in the menu of publicly funded parental choice options. The accountability rules for public, private, and charter schools also are generally a matter of state and federal law, and are sometimes supplemented by even more rigorous expectations of private philanthropists.⁹ Federal education policy further complicates the

in America, EDCHOICE, <http://www.edchoice.org/school-choice/school-choice-in-america/> (last visited Sept. 13, 2016) [<https://perma.cc/Y92S-JX4N>].

6. See, e.g., BETWEEN PUBLIC AND PRIVATE: POLITICS, GOVERNANCE AND THE NEW PORTFOLIO MODELS FOR URBAN SCHOOL REFORM (Katrina E. Bulkley et al. eds., 2010); PAUL T. HILL ET AL., STRIFE AND PROGRESS: PORTFOLIO STRATEGIES FOR MANAGING URBAN SCHOOLS 31 (2012) (explaining details of the portfolio strategy).

7. See generally KENNETH K. WONG ET AL., THE EDUCATION MAYOR: IMPROVING AMERICA'S SCHOOLS (2007) (discussing mayoral control in urban education); Kenneth K. Wong & Francis X. Shen, *Mayoral Governance and Student Achievement*, CTR. FOR AM. PROGRESS (Mar. 22, 2013), <https://www.americanprogress.org/issues/education/report/2013/03/22/56934/mayoral-governance-and-student-achievement/> [<https://perma.cc/8Z97-8AP3>] (discussing the benefits of mayoral governance of education).

8. See, e.g., Aaron Jay Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 912 (2006) (arguing that states can maintain power through mayoral control).

9. See, e.g., Dale Russakoff, Schooled: Cory Booker, Chris Christie, and Mark Zuckerberg Had a Plan to Reform Newark's Schools. They Got an Education, NEW YORKER (May 19, 2014),

picture by effectively forcing states to implement favored policies (such as the elimination of caps on charter schools and value-added teacher evaluation practices).¹⁰

A more accurate description of the rapidly evolving landscape of urban K12 education—and the one employed throughout this Article—is what Andy Smarick dubbed “sector agnosticism.”¹¹ That is to say, education reformers and urban leaders alike are coming to embrace a child-focused, rather than a sector-focused, reform agenda. This agenda has as its central goal maximizing the number of high quality educational options for disadvantaged children *now* across all three education sectors (charter, private, and traditional public), in addition to pursuing longer-term solutions to seemingly intractable academic struggles of urban public schools. While this agenda remains deeply contested, it is driving both the demand-side and supply-side of education reform.¹² Sector agnosticism seeks to pair increased educational options for parents with increased supply of high-performing schools, especially schools serving disadvantaged urban students. The extent of these reforms varies dramatically from city to city: in some cities, urban leaders not only actively recruit charter school operators to open new schools, but also enlist them to “convert” and manage failing public schools as charter schools. These charter-centric efforts are combined in some states with private school choice programs, although thus far the effects of these programs have been (at least outside of Milwaukee) quite modest.¹³ In other cities, urban

<http://www.newyorker.com/magazine/2014/05/19/schooled> [https://perma.cc/U9SK-CX9W] (discussing an effort to reform education in poor communities).

10. See *infra* notes 120–133 and accompanying text.

11. ANDY SMARICK, *THE URBAN SCHOOL SYSTEM OF THE FUTURE* (2012); see also Michael Q. McShane, *Moving from a School System to a System of Schools*, EDUC. NEXT (Nov. 9, 2012), <http://educationnext.org/moving-from-a-school-system-to-a-system-of-schools/> [https://perma.cc/VLD4-WA8M] (reviewing Smarick’s book and the idea of sector agnosticism).

12. Diane Ravitch, *Are Charter Schools Public Schools?*, EDUC. WK. (May. 9, 2012, 9:09 AM), http://blogs.edweek.org/edweek/Bridging-Differences/2012/05/are_charter_schools_public_sch.html [https://perma.cc/JNE2-SQEQ]; Richard Whitmire, *Charter School War Could Go National*, USA TODAY (Apr. 14, 2014, 3:44 PM), <http://www.usatoday.com/story/opinion/2014/04/01/bill-de-blasio-cuomo-charter-schools-new-york-column/7158071/> [https://perma.cc/27K6-Z25G].

13. In 2013–2014, over 2.5 million students attended a charter school, and just over three hundred thousand students participated in private school choice programs. In Milwaukee, the balance is quite different: more students are currently enrolled in the Milwaukee Parental Choice Program (approximately twenty-five thousand) than in charter schools (eighteen thousand) in the city. *A Growing Movement: America’s Largest Charter School Communities*, NAT’L ALLIANCE FOR PUB. CHARTER SCHS. 7 (Dec. 2014), http://www.publiccharters.org/wp-content/uploads/2014/12/2014_Enrollment_Share_FINAL.pdf [https://perma.cc/TV5K-CMSF]; *Hope, Action, Results: Yearbook 2013–14*, ALLIANCE FOR SCH. CHOICE 15 (2014), http://allianceforschoolchoice.org/wp-content/uploads/2014/01/AFC_2013-14_Yearbook.pdf?82497a [https://perma.cc/N5RB-PBCQ]. This school year, over seventy-six thousand students are enrolled in Milwaukee Public Schools. *District Fact Sheet*, MILWAUKEE PUB.

education officials use the language of “portfolio” but eschew many of its core components, including an expansion of educational options and accountability for academic performance.¹⁴

The emergence of this “child-centered” (rather than sector-centered) approach to education reform is the result of a number of factors. The first is the rise and dramatic expansion of parental choice, especially the exponential growth of charter schools and, more recently, an expansion in the number of programs enabling parents to send their children to private schools with public funds. The second is the failure of, and massive resistance to, accountability policies imposed by the deeply unpopular No Child Left Behind Act (“NCLB”), many of which Congress eliminated in December 2015 in the new federal education legislation, called the Every Student Succeeds Act (“ESSA”).¹⁵ Somewhat ironically, the public sector’s resistance—and inability—to comply with these standards arguably fueled the transition to a sector-agnostic, child-centered education policy. NCLB’s testing and reporting requirements laid bare the persistent academic struggles of traditional public schools, especially those serving disadvantaged children. These struggles have not only stimulated efforts to increase the supply of high-performing charter schools but have also led state and local education leaders to favor enlisting charter operators to assume control of failing public schools rather than seeking to reform them from within the traditional public sector.¹⁶ Moreover, prior to the enactment of the ESSA, the Obama administration granted forty-three state regulatory waivers from complying with the most onerous of NCLB’s accountability requirements, each of which was conditioned upon an

SCHS., <http://mps.milwaukee.k12.wi.us/en/District/About-MPS/District-Fact-Sheet.htm> (last visited Dec. 27, 2016) [<https://perma.cc/QQX4-7GN5>].

14. See *Portfolio Implementation Snapshot*, CTR. FOR REINVENTING PUB. EDUC., <http://www.crpe.org/research/portfolio/tools/snapshot> (last visited Dec. 27, 2016) [<https://perma.cc/3XAL-4MKW>] (comparing several districts’ progress across several categories in implementing the portfolio model).

15. Alyson Klein, *ESEA Reauthorization: The Every Student Succeeds Act Explained*, EDUC. WK. (Dec. 10, 2015, 10:59 AM), http://blogs.edweek.org/edweek/campaign-k-12/2015/11/esea_reauthorization_the_every.html [<https://perma.cc/V2FV-C8CC>].

16. See Andy Smarick, *The Turnaround Fallacy: Stop Trying to Fix Failing Schools. Close Them and Start Fresh*, EDUC. NEXT 20–26 (2010), <http://educationnext.org/the-turnaround-fallacy/> [<https://perma.cc/2XP3-Y3D5>] (arguing that turnarounds have failed and that schools should instead follow the charter model).

agreement to implement certain policies,¹⁷ including an expansion of charter schools.¹⁸

The shift toward a sector-agnostic education policy has profound implications for education law. This Article discusses three of the most significant, all of which flow from the blurring of the public-private distinction between charter and private schools. The accepted view (which is universally reflected in charter school statutes) is that charter schools are privately operated public schools, rather than publicly funded private ones. As originally conceived, charter school laws authorize the creation of new public schools through an agreement (“the charter”) between a government-authorized chartering authority and a private individual or organization. These schools would be freed of the obligation to comply with many government regulations and would add diversity to the public educational landscape. The charter school market, however, has evolved away from this model. Many developments, including the emergence of a relatively “hands-off” laissez faire charter school regulatory regime, arguably have led to a convergence between charter schools and private schools, especially private schools participating in parental choice programs. A case can be made (and is being made with some success in both state and federal courts) that charter schools are, in many legally significant respects, publicly funded private schools—not privately operated public ones.¹⁹

The conclusion that charter schools are private entities has at least three important legal implications for the constitutional law of education. The first is the possibility of religious charter schools. Conventional wisdom holds that, while private religious schools can participate in voucher or tax-credit programs without running afoul of the Federal Establishment Clause, charter schools must be secular schools. There are two reasons why: First, charter schools are presumed to be public schools (and universally designated as such by state charter laws), and the U.S. Supreme Court has made clear that public schools must be secular. Second, in its Establishment Clause decisions, the U.S. Supreme Court has distinguished between educational programs that provide financial assistance directly to schools (which must be secular) and those that provide assistance to parents and students but that

17. Alyson Klein & Andrew Ujifusa, *States Gaining a Say on School Accountability*, EDUC. WK. (Aug. 18, 2015), <http://www.edweek.org/ew/articles/2015/08/19/states-gaining-a-say-on-school-accountability.html> [<https://perma.cc/SW48-LLMJ>].

18. See Brian Montopoli, *Obama's Remarks on Education*, CBS NEWS (Mar. 10, 2009, 10:14 AM), <http://www.cbsnews.com/news/obamas-remarks-on-education/> [<https://perma.cc/4K6R-PRH8>] (“Provided this greater accountability, I call on states to reform their charter rules, and lift caps on the number of allowable charter schools, wherever such caps are in place.”).

19. See *infra* notes 193–218 and accompanying text.

indirectly benefit schools (which can be religious). It is widely assumed that charter school programs fall on the “direct assistance” side of that equation, but vouchers and tax credits are “indirect” aid programs. As a result of the evolution in K12 education policy described in this Article, however, the distinctions between charter schools and private schools have eroded to the point where religious charter schools ought to be constitutionally permissible, at least in many states.²⁰

The implications for both state and federal constitutional law of characterizing charter schools as private rather than public, however, extend beyond the Establishment Clause. In the *federal* context, the U.S. Constitution only binds governmental actors (including public schools). Therefore, if charter schools are private schools—that is, as several federal courts have held, if they are *not* “state actors”—then they are not bound by the constitutional norms that govern the relationship between public schools and their students and teachers.²¹ Finally, in the *state* context, many state constitutions contain provisions that explicitly or impliedly limit the government’s ability to enlist private schools to assist in the task of public education. Presumably, if charter schools are private schools, then they ought to be bound by these state constitutional restrictions as well. In other words, as charter school opponents have begun to argue, the public funding of charter schools ought to be legally impermissible to the same extent (if any) as the public funding of private schools.²² This once seemingly far-fetched argument carried the day in September 2015, when the Washington Supreme Court became the first state supreme court to hold that charter schools were insufficiently “public” to receive public funds. In *League of Women Voters v. State of Washington*, the court held that the Washington Constitution reserved public education funds to “common schools,” and charter schools did not satisfy the definition of common schools.²³

This Article proceeds in two parts. Part One outlines the factors that have led to the emergence of sector-agnostic education policies, including the rise of parental choice, the emergence and failure of public school accountability policies, and the more recent convergence of these trends. Part Two discusses three legal implications of sector

20. See *infra* notes 163–196 and accompanying text.

21. See *infra* notes 205–212, 224–228 and accompanying text.

22. See *infra* notes 245–255 and accompanying text.

23. *League of Women Voters v. State*, 355 P.3d 1131, 401–05 (Wash. 2015). Previously, the Georgia Supreme Court had invalidated the establishment of a state charter school commission, reasoning that the state constitution required closer local supervision of all public schools, but the state constitution was subsequently amended to permit charter schools. *Gwinnett Cty. Sch. Dist. v. Cox*, 710 S.E.2d 773, 775 (Ga. 2011).

agnosticism. The first implication is that the federal Establishment Clause may not preclude faith-based charter schools; the second is that charter schools may be, for purposes of federal constitutional law, private rather than public actors; and the third is that charter schools may be subject to state constitutional provisions that restrict the funding of private schools. The Article concludes by briefly reflecting on the factors that may determine—and the significant institutional and public choice impediments to—further transition to sector agnosticism.

I. THE PATH TO SECTOR AGNOSTICISM

The shift toward a sector-agnostic education policy results from the confluence of two very different policy responses to the persistent academic struggles of urban public schools. While these responses—parental choice and accountability—proceeded on separate tracks for decades, they have converged in recent years. This Section briefly outlines the emergence of sector-agnostic, child-focused education policies, including the emergence and expansion of parental choice in education, the imposition of accountability requirements for public school performance, and the shift in many cities from school “turn around” efforts to “turn over” strategies characterized by the conversion of failing public schools into charter schools. The feedback effects between each of these developments, combined with a sense of urgency about the need to narrow the achievement gap, have led—perhaps inevitably but certainly unpredictably—to a focus on increasing the number of high quality educational options for low-income kids outside of traditional public schools.²⁴ In other words, these factors lead toward sector-agnostic education policy.

A. *The Parental Choice Revolution*

All efforts to increase the number of high quality options available to parents is dependent, to some extent, upon parental choice

24. See generally NEW AND BETTER SCHOOLS: THE SUPPLY SIDE OF SCHOOL CHOICE (Michael McShane ed., 2014) (describing supply-side problems in private school choice); Christine Campbell, *Growing Great Schools in Every Neighborhood: The Promise of the Portfolio Strategy*, CATALYST (Jan.–Mar. 2014), http://www.brac.org/docs/catalyst/Catalyst_Jan-Mar2014_Schools.pdf [<https://perma.cc/QHF2-9TEJ>] (discussing the decrease of low performance schools and increase of “high-quality seats”); James H. Lytle, *An Enrollment Policy Built on Shaky Ground*, NOTEBOOK (Feb. 3, 2014, 3:35 PM), <http://thenotebook.org/blog/146843/high-quality-seats-school-choice-strategy-built-on-shaky-ground> [<https://perma.cc/X9AH-C3RX>] (criticizing the Philadelphia School Reform Commission “high quality seats” strategy”); NEWSCHOOLS VENTURE FUND (2016), <http://www.newschoools.org> [<https://perma.cc/F75H-G4H3>] (describing venture philanthropy efforts to foster creation of new high quality charter schools).

in education. Sector-agnostic education policy necessarily requires that those options be spread across multiple education sectors. Today, most states offer parents an array—and in some jurisdictions a dizzying array—of educational options: many districts offer “magnet schools” and/or “public school choice”;²⁵ forty-three states and the District of Columbia authorize charter schools;²⁶ and more than half of all states and the District of Columbia have publicly funded private school choice programs. This smorgasbord approach to delivery of public education represents a dramatic—indeed seismic—shift away from the historical status quo in the United States. The idea of publicly funded school choice is a deeply contested one in American history, dating at least to the mid-nineteenth century battles over the public funding of Catholic schools.²⁷ Education policies that funded parents’ decisions to select *any* school other than the public school assigned to them by either geography or—in the post-desegregation world—federal court order²⁸ were rare until recent decades, although parents with the financial means to do so have long chosen their children’s schools, either by moving to districts with high-performing schools or by financing private education.²⁹

1. The Public School Roots of Parental Choice

The road to sector agnosticism arguably began in an unexpected place and time—suburban Detroit, Michigan. In 1971, a federal district court ruled that the Detroit Public Schools had unconstitutionally discriminated against African American students in various ways, including the drawing of attendance zones, assignment of teachers, and

25. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2045, 2063–73 (2002) (describing the different varieties of school choice plans).

26. *Alabama Enacts a Public Charter School Law; Joins 42 States and D.C.*, NAT’L ALLIANCE FOR PUB. CHARTER SCHS. (Mar. 18, 2015), <http://www.publiccharters.org/press/al-legislature-passes-bill/> [<https://perma.cc/4Q9U-CMG9>].

27. See, e.g., MARGARET F. BRINIG & NICOLE S. GARNETT, LOST CLASSROOM, LOST COMMUNITY 16–18 (2014) (discussing “the funding question” in Catholic schools); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 221–29 (2002) (documenting the conflict between those desiring an alliance between church and state and those desiring separation); JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM 111–21 (2003) (discussing the controversy surrounding the state’s power over education).

28. In the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954), and especially *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), federal courts routinely ordered “busing” as a remedy for past discriminatory student assignment.

29. See Nicole Stelle Garnett, *Affordable Private Education and the Middle Class City*, 77 U. CHI. L. REV. 201, 212–14 (2010) (reviewing data on private school enrollment and moving to opt into public school systems). In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Supreme Court held that parents had a constitutional right to send their children to private school, invalidating an Oregon law that mandated public school attendance.

allocation of public resources. The district court further ruled that the State of Michigan had violated the Equal Protection Clause by failing to adequately supervise the Detroit public school system to prevent this discrimination.³⁰ A year later, the district court granted a sweeping multi-district busing remedy, which required the compulsory transfer of students between the Detroit public schools and fifty-three surrounding suburban districts.³¹ A divided Court of Appeals for the Sixth Circuit affirmed, reasoning that “any less comprehensive a solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems.”³² In *Milliken v. Bradley*, the Supreme Court reversed, holding that the district court had exceeded its equitable powers by imposing the multi-district remedy because there was no evidence that the suburban school districts included in the remedy had engaged in intentional race discrimination. “Boundary lines may be bridged where there has been a constitutional violation calling for inter-district relief,” Chief Justice Burger wrote for the majority, “but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country.”³³

By effectively limiting the scope of desegregation remedies to urban school districts, many of which were, or were fast becoming, majority-minority, *Milliken* dealt a tremendous blow to integration proponents.³⁴ But, the decision also prompted districts to experiment with strategies that sought to achieve integration by other means, including magnet schools and public school choice programs that allowed students to choose to attend a traditional public school other than one geographically assigned to them. In the 1977 *Milliken II* decision,³⁵ the Supreme Court approved these “compensatory” strategies, and, since then, magnet schools and public school choice has

30. *Bradley v. Milliken*, 338 F. Supp. 582, 587–90 (E.D. Mich. 1971).

31. *Bradley v. Milliken*, 345 F. Supp. 914, 918 (E.D. Mich. 1972).

32. *Bradley v. Milliken*, 484 F.2d 215, 245 (6th Cir. 1973).

33. *Milliken v. Bradley*, 418 U.S. 717, 742 (1974).

34. See, e.g., KEVIN BROWN, RACE, LAW AND EDUCATION IN THE POST-DESEGREGATION ERA 210–12 (2005) (explaining that limiting the *Milliken* decision to urban school districts dramatically limited desegregation and contributed to “white flight” to suburban school districts); CHARLES T. CLOTFELTER, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 45 (2004) (arguing that after *Milliken*, “racial disparities between districts tended to widen”); GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 143 (1996) (discussing the difficulty of how to integrate schools and courts’ attempts to find a solution in *Milliken*); JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 91–108 (2010) (discussing the *Milliken* case and its consequences).

35. *Milliken v. Bradley*, 433 U.S. 267 (1977).

proliferated. While attendance at a traditional, geographically assigned public school remains the norm in many communities,³⁶ the number of students attending a chosen public school continues to rise steadily. In 2007, over fifteen percent of all public school students reported attending a school other than the one geographically assigned to them, and forty-six percent of parents reported that public school choice was an option for them.³⁷ The availability of public school choice options is even higher in urban districts, many of which offer (in theory) universal public school choice.³⁸ A number of states also permit inter-district school choice, although the extent of choices available for low-income urban students is often dramatically constrained by available space and the public-choice reality that more affluent, higher-performing public schools are often not particularly welcoming of transfers.³⁹

Magnet schools arguably represented the first portfolio management effort in public education policy. As themed (and sometimes semi-autonomous) public school choice options, magnet schools also arguably paved the way for later experimentation with charter schools—the creation and exponential growth of which has been the primary factor fueling the movement toward sector-agnostic education policy.⁴⁰ Magnet schools remain important component parts of the menu of options available to parents in many cities. The enrollment in magnet schools in 2013–2014, the last year for which data is available from the U.S. Department of Education, was approximately

36. In 2007, the parents of twenty-seven percent of public school children reported that they moved to their current neighborhood so that their child could attend his or her school. *Fast Facts: Public School Choice Programs*, NAT'L CTR. FOR EDUC. STATS., <http://nces.ed.gov/fastfacts/display.asp?id=6> (last visited Sept. 14, 2016) [<https://perma.cc/Y27M-CGRK>]. This kind of residential sorting increases as parents' educational attainment rises. Jack Buckley & Mark Schneider, *School Choice, Parental Information, and Tiebout Sorting: Evidence from Washington, DC*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATS 101, 104* (William A. Fischel ed., 2006).

37. *Fast Facts: Public School Choice Programs*, *supra* note 36.

38. In practice, non-magnet schools frequently are permitted to favor residents of their geographic attendance zones, leaving limited space in high-performing schools for nonresident students. See Ryan & Heise, *supra* note 25, at 2064–65 (explaining that magnet schools fault to assigning students to neighborhood schools). Most seats in magnet schools are allotted by lottery, test scores, or both. See *Magnet Schools: By the Numbers*, SMART CHOICE TECHS., https://smarthoicetech.com/wp-content/uploads/2013/07/MSA_Infographic.pdf (last visited Sept. 14, 2016) [<https://perma.cc/PZ5K-ENU6>] (showing that preference lottery or blind lottery accounts for seventy-four percent of student selection, and academic criteria accounts for seventeen percent of student selection).

39. Ryan & Heise, *supra* note 25, at 2066–73.

40. See CHESTER E. FINN, JR. ET AL., *CHARTER SCHOOLS IN ACTION: RENEWING PUBLIC EDUCATION 17* (2000) (“[C]harter schools have cousins in the in the K–12 family. Their DNA looks much the same under the education microscope as that of lab schools, magnet schools, site-managed schools, and special focus schools . . .”).

the same as the number of students enrolled in charter schools (around 2.5 million), although there were nearly twice as many charter schools (6,079) as magnet schools (3,151).⁴¹ Given the exponential growth in charter school market share in many jurisdictions, however, magnet school enrollment is being eclipsed by charter school enrollment.

2. The Surprising Revolution: Charter Schools

If *Milliken II* opened the door for parental choice, the enactment of the nation's first charter school law by Minnesota in 1991 opened the floodgates.⁴² The implications of Minnesota's reform were not immediately apparent. At their inception, charter schools were perceived as a relatively modest reform that offered a more moderate alternative to private school voucher programs. As they have evolved, however, charter schools have become conceptually and operationally quite distinct from their traditional public school progenitors. Importantly, unlike magnet schools, they are not operated by the government. Charter schools are privately operated schools that are technically "created" by an agreement—"the charter"—between a charter operator (usually a nonprofit, but, in some cases, a for-profit entity) and a charter authorizer (which, depending upon the state, can include a range of governmental, educational, and nonprofit private entities). Charter schools resemble public schools in that they are tuition free, secular, and are open to all who wish to attend—generally, oversubscribed charter schools must admit applicants by lottery, although some are permitted to prefer neighborhood students and/or to test applicants for admission.⁴³ Charter schools also have many attributes of private schools. Importantly, they are privately operated—increasingly by "charter management organizations," which operate multiple schools within and across jurisdictions.⁴⁴ They also have wide-

41. *Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STATS. tbl.216.20 (Jan. 2015), https://nces.ed.gov/programs/digest/d14/tables/dt14_216.20.asp [<https://perma.cc/T3VT-JEFL>] (noting number and enrollment of public elementary and secondary schools).

42. See Richard D. Kahlenberg, *The Charter School Idea Turns 20*, EDUC. WK. (Mar. 25, 2008), http://www.edweek.org/ew/articles/2008/03/26/29kahlenberg_ep.h27.html [<https://perma.cc/6Y88-LS3G>] (discussing the origin of the idea for charter schools and the first charter school legislation).

43. Nicole Stelle Garnett, *Disparate Impact, School Closures, and Parental Choice*, 2014 U. CHI. LEGAL F. 289, 338; Valerie Strauss, *How Charter Schools Choose Desirable Students*, WASH. POST (Feb. 16, 2013), <https://www.washingtonpost.com/news/answer-sheet/wp/2013/02/16/how-charter-schools-choose-desirable-students/> [<https://perma.cc/PEP9-9ZFK>].

44. Technically, "charter management organizations" are nonprofit entities that manage two or more charter schools, and "educational management organizations" are for-profit entities that do the same. Some states prohibit for-profit entities from operating charter schools. See *CMO and EMO Public Charter Schools: A Growing Phenomenon in the Charter School Sector*, NAT'L

ranging autonomy over staffing, curriculum, budget, internal organization, and many other matters (although the extent of the autonomy varies by jurisdiction). And, like private schools, they are schools of choice—that is, parents select them for their children, and public funding “follows the child” to the school, as with students participating in private school choice programs.⁴⁵

The term “charter school” is attributed to the late Albert Shanker, the longtime president of the American Federation of Teachers, the nation’s second largest teachers’ union. In a 1988 speech, Shanker urged America to develop a “fundamentally different model of schooling” that would “enable any school or any group of teachers . . . within a school to develop a proposal for how they could better educate youngsters and then give them a ‘charter’ to implement that proposal[.]”⁴⁶ In 1991, Minnesota enacted the first charter school law, but the legislation fundamentally altered Shanker’s proposal. The Minnesota legislation envisioned charter schools authorized by agencies independent from local education authorities, operated by private entrepreneurs, and staffed with non-unionized teachers. These changes led Shanker to reject the charter schools as a “gimmick” and later to condemn the charter movement for “corporatizing” public education and embracing “quick fixes that won’t fix anything.”⁴⁷ But the Minnesota model, characterized by private operators and independence from local school authorities, rather than the Shanker model, which envisioned experimentation within the traditional public school sector, led the expansion of charter schools to other states over time.

The charter school concept expanded rapidly. Nineteen states had enacted charter school statutes by 1995.⁴⁸ Today, charter schools are

ALLIANCE FOR PUB. CHARTER SCHS., http://www.publiccharters.org/wp-content/uploads/2014/01/NAPCS-CMO-EMO-DASHBOARD-DETAILS_20111103T102812.pdf (last visited Sept. 15, 2016) [<https://perma.cc/M77S-7UBQ>] (describing and providing statistics on CMO and EMO public charter schools).

45. FINN, JR. ET AL., *supra* note 40, at 134–38.

46. Albert Shanker, *Restructuring Our Schools*, 65 PEABODY J. EDUC. 88, 97–98 (1988). Ray Budde, an education professor at the University of Massachusetts, apparently suggested the concept—and used the term—over a decade earlier. Susan Saulny, *Ray Budde, 82, First to Propose Charter Schools, Dies*, N.Y. TIMES (June 21, 2005), http://www.nytimes.com/2005/06/21/us/ray-budde-82-first-to-propose-charter-schools-dies.html?_r=0 [<https://perma.cc/KWR2-RFLT>].

47. DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* 122–24 (2010); Paul E. Peterson, *No, Al Shanker Did Not Invent the Charter School*, EDUC. NEXT (July 21, 2010), <http://educationnext.org/no-al-shanker-did-not-invent-the-charter-school/> [<https://perma.cc/6KTN-9TGD>].

48. See *Charter School FAQ*, PBS: CLOSING ACHIEVEMENT GAP (2004), <http://www.pbs.org/closingtheachievementgap/faq.html> [<https://perma.cc/B2B3-KXGA>] (stating when and where the first charter school opened).

authorized in forty-three states and the District of Columbia.⁴⁹ The number of charter schools and students enrolled in them rose quickly as well. In the first decade of their existence, nearly thirteen hundred charter schools opened; during the 2014–2015 school year, there were over sixty-five hundred schools serving more than 2.5 million students. Charter school enrollment continues to grow exponentially: in the past decade, the number of students enrolled in charter schools has increased by 255 percent. In 2013–2014 alone, six hundred charter schools opened, and an additional 288,000 students enrolled in charter schools—a thirteen percent increase over the previous school year.⁵⁰ A substantial and increasing percentage of students in many urban school districts is enrolled in charter schools, including (in 2015–2016) ninety-two percent in New Orleans, Louisiana, fifty-three percent in Detroit and Flint, Michigan, and forty-five percent in Washington, D.C.⁵¹ (See Figure 1.) During the 2015–2016 school year, charter schools enrolled more than thirty percent of public schools students in seventeen districts and more than ten percent in 190 districts.⁵² Additionally, many districts are projecting (and indeed encouraging) substantial increases in charter school enrollment in coming years, as discussed in more detail below.⁵³

49. *The Public Charter Schools Dashboard*, NAT'L ALLIANCE FOR PUB. CHARTER SCHS. (2015), <http://dashboard.publiccharters.org/dashboard/schools/year/2014> [https://perma.cc/D7VU-V48C]. Two states, Washington and Alabama, have enacted charter school legislation since 2014. See *Alabama Enacts a Public Charter School Law; Joins 42 States and D.C.*, *supra* note 26; Donna Gordon Blankinship, *Washington High Court to Hear Charter-Schools Case*, SEATTLE TIMES (Oct. 26, 2014), <http://www.seattletimes.com/seattle-news/washington-high-court-to-hear-charter-schools-case/> [https://perma.cc/MNU7-8RFF] (stating that Washington's first charter school opened in fall 2014).

50. See *Charter School Enrollment Up 13 Percent This Year*, NAT'L ALLIANCE FOR PUB. CHARTER SCHS. (Feb. 2, 2014), <http://www.publiccharters.org/press/charter-school-enrollment-13-percent-year/> [https://perma.cc/TM8E-KSUS] (discussing statistics regarding the increase in public charter school enrollment).

51. See *A Growing Movement: America's Largest Charter Public School Communities, and Their Impact on Student Outcomes*, NAT'L ALLIANCE FOR PUB. CHARTER SCHS. 3 (Nov. 2016), <http://www.publiccharters.org/wp-content/uploads/2016/11/CharterSchoolEnrollmentShareReport2016.pdf> [https://perma.cc/BV2A-5ZBR] (presenting statistics of charter school enrollment).

52. *Id.* at 2.

53. For example, a 2012 report commissioned from the Boston Consulting Group by the Philadelphia School Reform Commission (the entity that has operated the Philadelphia public school system since the Commonwealth of Pennsylvania assumed control of the district over a decade ago) predicted that, in the next five years, total charter school enrollment in Philadelphia would grow from roughly a quarter to forty percent of all public school students. See *Transforming Philadelphia's Public Schools*, BOS. CONSULTING GROUP 6–9 (2012), http://webgui.phila.k12.pa.us/uploads/v_IF/v_IFJYOr72CBKdpRrGAAQ/BCG-Summary-Findings-and-Recommendations_August_2012.pdf [https://perma.cc/2PVF-2FTJ].

**FIGURE 1: CHARTER SCHOOL MARKET SHARE BY SCHOOL DISTRICT
THE HIGHEST PERCENTAGE OF PUBLIC CHARTER SCHOOL
STUDENTS BY SCHOOL DISTRICT, 2015–2016**

Rank	School District	State	Charter Enrollment Share	Charter Enrollment	Traditional Public Enrollment	Total Enrollment	Rank and Enrollment Share in 2012–2013
1	New Orleans Public School System	LA	92%	44,190	3,690	47,880	#1 and 79%
2	Detroit City School District	MI	53%	51,240	46,100	97,340	#2 and 51%
	School District of the City of Flint	MI	53%	5,940	5,360	11,300	#4 and 36%
3	District of Columbia Public Schools	DC	45%	38,910	48,440	87,340	#3 and 43%
4	Gary Community School Corporation	IN	43%	4,950	6,480	11,430	#5 and 35%
5	Kansas City Public Schools	MO	40%	10,570	15,580	26,150	#4 and 36%
6	Camden City School District	NJ	34%	4,880	9,290	14,180	Not in top 10 and 22%
7	Philadelphia City School District	PA	32%	63,520	132,180	195,700	#8 and 28%
8	Indianapolis Public Schools	IN	31%	13,580	29,580	43,160	#8 and 28%
	Dayton City School District	OH	31%	6,300	13,970	20,270	#8 and 28%
	Cleveland Municipal School District	OH	31%	16,920	37,750	54,670	#7 and 29%
	Grand Rapids Public Schools	MI	31%	6,890	15,590	22,480	#10 and 26%
	Victor Valley Union High School District	CA	31%	4,220	9,590	13,810	Not in top 10 and 10%
9	San Antonio Independent School District	TX	30%	18,710	42,750	61,460	#10 and 26%
	Natomas Unified School District	CA	30%	4,270	10,020	14,290	Not in top 10 and 15%
	Newark City School District	NJ	30%	15,020	35,330	50,350	Not in top 10 and 21%
	St. Louis Public Schools	MO	30%	10,380	24,500	34,870	Not in top 10 and 24%

(Source: National Alliance for Public Charter Schools)

State regulation of charter schools differs across a number of variables, including the total number of charter schools permitted,⁵⁴ the number and types of entities empowered to act as charter authorizers (e.g., some states limit this function to public school districts while

others have special government commissions and still others allow universities and even private nonprofit entities to authorize charter schools), accountability for academic performance, and, importantly for present purposes, the extent of autonomy from various public education regulations.⁵⁵ Since sector-agnostic reform strategies focusing on increasing the supply of “high performing seats,” charter school performance (and accountability for performance) has become a major issue in education reform debates.⁵⁶ It is widely accepted that there is tremendous variation in quality among charter schools. As a recent article in *Slate* observed, “There are some great ones but also some real duds.”⁵⁷ The question of whether charter schools, on average, outperform traditional public schools remains deeply contested. Critics suggest that reformers are excessively starry-eyed about charter school performance, when there is little evidence that the charter schools perform better than traditional public schools.⁵⁸ Some high-profile

54. The Obama Administration has taken steps to eliminate numerical limits on charter schools, including conditioning access to federal Race to the Top funds and the approval of No Child Left Behind waivers on states agreeing to lift charter school “caps.” See *infra* notes 135–143 and accompanying text.

55. The Center for Education Reform maintains a comprehensive database of charter regulations by states and “grades” based upon the regulatory landscape, with less regulation earning states higher grades. See *Choice and Charter Schools: Laws and Legislation*, CTR. FOR EDUC. REFORM (2016), <https://www.edreform.com/issues/choice-charter-schools/laws-legislation/> [<https://perma.cc/H9SV-JPW3>]; see also *Public Accountability for Charter Schools: Standards and Policy Recommendations for Effective Oversight*, ANNENBERG INST. FOR SCH. REFORM (2014), <http://annenberginstitute.org/sites/default/files/CharterAccountabilityStds.pdf> [<https://perma.cc/FZJ2-77G2>] (analyzing current charter laws and regulations).

56. This view is reflected in the Center for Education Reform’s rating system for state charter school laws, which rates state’s on an A–F scale across a variety of factors, such as “autonomy” from state education rules—including academic accountability regulations. *Charter School Law Rankings and Scorecard*, CTR. FOR EDUC. REFORM (2014), <https://www.edreform.com/wp-content/uploads/2014/03/2014CharterSchoolLawScorecardLink.pdf> [<https://perma.cc/5B8F-VM76>]. Some evidence suggests that parents overestimate the academic performance of the children’s charter school, and there is uncontroverted evidence that parents value factors other than academic performance when choosing among educational options. These are obviously not the same thing. The fact that parents prioritize factors other than school performance—for example, discipline and safety—does not necessarily make them poor consumers of charter schools. See JACK BUCKLEY & MARK SCHNEIDER, CHARTER SCHOOLS: HOPE OR HYPE? 115–70 (2007) (analyzing parental choice of schools).

57. Ray Fisman, *Do Charter Schools Work? Yes, but Not Always for Everyone*, SLATE (May 22, 2013, 8:30 AM), http://www.slate.com/articles/news_and_politics/the_dismal_science/2013/05/do_charter_schools_work_a_new_study_of_boston_schools_says_yes.html [<https://perma.cc/AG52-BT7A>].

58. See William J. Mathis, *NCLB’s Ultimate Restructuring Alternatives: Do They Improve the Quality of Education?* GREAT LAKES CTR. FOR EDUC. RES. & PRAC. (Apr. 2009), http://greatlakescenter.org/docs/Policy_Briefs/Mathis_Restructuring.pdf [<https://perma.cc/J52E-E5MK>]; see also Eileen M. O’Brien & Charles J. Dervarics, *Which Way Up? What Research Says About School Turnaround Strategies*, CTR. FOR PUB. EDUC. 11–13 (May 2013), <http://www>

studies, including a very influential study conducted in 2009 by Stanford University's Center for Research on Educational Outcomes ("CREDO"), have found that charter schools do not outperform their public school counterparts.⁵⁹ More recent studies, however, including the 2013 update to the earlier CREDO study, have found that charter schools do perform better than public schools, at least in certain age ranges and subject areas.⁶⁰ The emerging consensus among education scholars is that even if charter schools do not perform better *overall* than traditional public schools, they do, on average, a better job—in some cases, a *much better* job—at educating disadvantaged urban students, especially minority students and English language learners. While tremendous regional variations persist, a growing body of evidence confirms that, on average, disadvantaged minority students perform significantly better across a range of measures when enrolled in charter rather than traditional public schools.⁶¹ This is particularly

.centerforpubliceducation.org/Main-Menu/Policies/Which-Way-Up-At-a-glance/Which-Way-Up-Full-Report.pdf [https://perma.cc/84GB-X27D].

59. The 2009 CREDO study of sixteen states found charter school students gained seven fewer days in reading and twenty-two fewer days in math than public school students. The study also found that charter performance varied across state policy environments. For example, student performance was lower in states that capped the number of charter schools and higher in states that limited the number of charter authorizers. *Multiple Choice: Charter School Performance in 16 States*, CTR. FOR RES. ON EDUC. OUTCOMES 38, http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf [https://perma.cc/8RW5-G48F].

60. The 2013 CREDO study of twenty-six states and the District of Columbia found that charter schools had closed the performance gap with public schools. The researchers found that charter students were now outperforming public school students reading (gaining an additional eight days of learning each year) and were on par with public school students in terms of math gains. The researchers also found that students in poverty, minority students, and English language learners gain significantly more days of learning each year in both reading and math compared to their traditional public school peers. *See National Charter School Study 2013*, CTR. FOR RES. ON EDUC. OUTCOMES (2013), <http://credo.stanford.edu/documents/NCSS%202013%20Final%20Draft.pdf> [https://perma.cc/8NBJ-6CRB]; *see also, e.g.*, Julian R. Betts & Y. Emily Tang, *The Effect of Charter Schools on Student Achievement: A Meta-Analysis of the Literature*, CTR. ON REINVENTING PUB. EDUC. (Oct. 2011), http://www.crpe.org/sites/default/files/pub_NCSR_P_BettsTang_Oct11_0.pdf [https://perma.cc/FV4W-AW8N] (analyzing randomized assignment studies and concluding that charter elementary schools outperform traditional public schools in both reading and math, but charter high schools have no effects and that urban charter schools perform better than suburban and rural charter schools).

61. *See* Joshua D. Angrist et al., *Student Achievement in Massachusetts' Charter Schools*, HARVARD UNIV. CTR. FOR EDUC. POLY RES. (Jan. 2011), <http://economics.mit.edu/files/6493> [https://perma.cc/5SRF-HYV6]; Fisman, *supra* note 57 ("Charters in rural or suburban areas don't do any better than public schools, while in urban areas they are associated with greater test score improvements . . ."); Caroline M. Hoxby, Sonali Murarka & Jenny Kang, *How New York City's Charter Schools Affect Achievement*, N.Y.C. CHARTER SCH. EVALUATION PROJECT, (Sept. 2009), http://users.nber.org/~schools/charterschoolseval/how_NYC_charter_schools_affect_achievement_sept2009.pdf [https://perma.cc/46NN-LQP3]; *National Charter School Study 2013*, *supra* note 60; *NCEE Study Snapshot: The Evaluation of Charter School Impacts*, NAT'L CTR. FOR EDUC.

heartening in light of the fact that a majority of charter schools are located in urban areas and serve minority students.⁶²

At least three related factors may explain the divergence in charter school performance between urban and suburban/rural communities (where charter schools arguably perform *worse* than their public school competitors):⁶³ The first is that the baseline academic performance of traditional public schools is higher in suburban/rural areas than in urban areas. The second is the emergence and growth of high-performing charter management organizations (“CMOs”) operating multiple charter schools, which have fueled the rapid expansion of charter schools over the last decade.⁶⁴ Many of the most successful CMOs operate networks of charter schools that focus intentionally on educating disadvantaged urban populations,⁶⁵ such as the Knowledge is Power Program (“KIPP”) network of schools, which has grown since the early 1990s from two to two hundred schools serving eighty thousand students.⁶⁶ The third is that efforts to replicate successful charter schools have gained steam, including most recently in the ESSA, which specifically earmarks funds for high-performing charter-school replication efforts.⁶⁷

EVALUATION & REGIONAL ASSISTANCE (June 2010), <http://ies.ed.gov/ncee/pubs/20104029/pdf/20104031.pdf> [<https://perma.cc/6YU9-LJP2>].

62. In 2011–2012, fifty-two percent of charter schools were located in urban areas, and nearly sixty percent of charter school students were racial minorities. *The Public Charter Schools Dashboard: Schools by Geographic Locale*, NAT’L ALLIANCE FOR PUB. CHARTER SCHS., <http://www.publiccharters.org/dashboard/schools/page/locale/year/2014> [<https://perma.cc/BAP3-SER9>]; *The Public Charter Schools Dashboard: Students by Race and Ethnicity*, NAT’L ALLIANCE FOR PUB. CHARTER SCHS., <http://www.publiccharters.org/dashboard/students/page/race/year/2014> [<https://perma.cc/RBB5-L98N>].

63. See *National Charter School Study 2013*, *supra* note 60.

64. See Gary Miron & Charisse Gulosino, *Profiles of For-Profit and Nonprofit Education Management Organizations*, NAT’L EDUC. POL’Y CTR. (14th ed. Nov. 2013), <http://nepc.colorado.edu/files/emo-profiles-11-12.pdf> [<https://perma.cc/LU9L-UHD4>].

65. *The Public Charter Schools Dashboard: Students by Race and Ethnicity*, *supra* note 62.

66. *National Results: How We Measure Success*, KIPP (2016), <http://www.kipp.org/results/national-results> [<https://perma.cc/N7D8-6DX2>]. There are other high-performing charter school networks serving disadvantaged students. See *Achievement First Network Overview*, ACHIEVEMENT FIRST PUB. CHARTER SCHS. (2016), <http://www.achievementfirst.org/schools/network-overview/> [<https://perma.cc/JQ2Y-BETL>] (11,500 students in thirty-two schools); *The History of Aspire*, ASPIRE PUB. SCHS. (2016), <http://aspirepublicschools.org/about/history/> [<https://perma.cc/92KE-J8R6>] (fourteen thousand students in forty schools); *Charter Schools by City*, UNCOMMON SCHS., <http://www.uncommonschools.org/our-schools/uncommon-cities> [<https://perma.cc/U7KW-XE46>] (13,900 students in forty-nine schools); *Our Model*, YES PREP PUB. SCH., <http://www.yesprep.org/our-model> (last visited Sept. 25, 2016) [<https://perma.cc/74HJ-SPYZ>] (11,600 students in sixteen campuses).

67. Arianna Prothero, *Federal Charter School Grant Program Gets Big Boosts From Budget*, ESSA, EDUC. WK. (Dec. 22, 2015, 3:29 PM), http://blogs.edweek.org/edweek/charterschoice/2015/12/federal_charter_school_grant_program_gets_big_boosts_in_budget_essa.html [<https://perma.cc/A8PP-CJ5B>].

Early charter school proponents did not anticipate the emergence of CMOs but expected (and hoped) that charter schools would be freestanding schools operated by community organizations or groups of parents and teachers. The emergence of successful CMOs, however, arguably has driven improvement in charter schools, especially in urban areas. Although there is a slight, but statistically significant, difference in the overall performance of CMO-operated charter schools vis-à-vis independent charter schools, the evidence suggests that CMO-operated charter schools produce strong academic gains for minority students as compared to minority students enrolled in traditional public schools or independent charter schools.⁶⁸ A growing body of research suggests that certain features of successful CMOs are replicable, and this research—together with the success of a number of school networks like KIPP—has fueled charter school replication efforts.⁶⁹ Tremendous resources, both public and private, have been and are being expended to replicate and grow high-performing charter school networks. Two “venture philanthropy” organizations—the New Schools Venture Fund and the Charter School Growth Fund—have collectively invested \$335 million in growth and replication efforts.⁷⁰ Major charitable foundations, including the Gates Foundation, the Broad Foundation, and the Walton Family Foundation, have invested hundreds of millions more.⁷¹ In recent years, the federal government has begun to focus charter school funding initiatives on efforts to

68. *Charter School Growth and Replication: Executive Summary*, CTR FOR RES. EDUC. OUTCOMES 6 (Jan. 30, 2013), <https://credo.stanford.edu/pdfs/CGAR%20Growth%20Executive%20Summary.pdf> [<https://perma.cc/7QWX-NT3V>].

69. See Robin Lake et al., *Learning from Charter School Management Organizations: Strategies for Student Behavior and Teacher Coaching*, CTR. ON REINVENTING PUB. EDUC. & MATHEMATICA POL'Y RES. (Mar. 2012), http://www.crpe.org/sites/default/files/pub_CMO_Strategies_mar12_0.pdf [<https://perma.cc/PR92-SVQN>]; *Replicating Quality: Policy Recommendations to Support the Replication and Growth of High-performing Charter Schools and Networks*, NAT'L ASS'N CHARTER SCH. AUTHORIZERS (Jan. 2014), http://www.qualitycharters.org/wp-content/uploads/2016/01/ReplicatingQuality_Report.2014.01.pdf [<https://perma.cc/Y7LU-AE9K>].

70. *About Us*, CHARTER SCH. GROWTH FUND (2016), <http://chartergrowthfund.org/about/> [<https://perma.cc/65B7-HCH3>]; Tony Wan, *New Schools Spins Off New, For-Profit Venture Fund*, EDSURGE (Jan. 26, 2015), <https://www.edsurge.com/n/2015-01-26-newschools-spins-off-new-for-profit-venture-fund> [<https://perma.cc/DX67-6D9U>].

71. *2009-2010 Foundation Report*, BROAD FOUND. (2010), <http://broadfoundation.org/reports/2009-10foundationreportreport.pdf> [<https://perma.cc/QFW9-BZEQ>]; *Investment to Accelerate Creation of Strong Charter Schools*, BILL & MELINDA GATES FOUND. (2016), <http://www.gatesfoundation.org/Media-Center/Press-Releases/2003/06/Investing-in-HighQuality-Charter-Schools> [<https://perma.cc/67BP-BMAS>]; Luisa Kroll, *Sam Walton's Granddaughter Has Plans to Fix Public Education in America*, FORBES (Dec. 1, 2014, 7:16 AM), <http://www.forbes.com/sites/luisakroll/2014/12/01/sam-waltons-granddaughter-has-plans-to-fix-public-education-in-america/#75c7dc5c5b76> [<https://perma.cc/XWA4-R6PQ>].

replicate high-performing charter schools,⁷² states have intensified efforts to hold charter schools accountable for academic performance,⁷³ and local leaders have increasingly proactively recruited high-performing CMOs to open schools in their communities.⁷⁴ The early evidence suggests that these efforts are working. Not only has the overall performance of charter schools improved, but the percent of charter school students enrolled in higher-performing charter schools is on the rise.⁷⁵

3. A Quieter Revolution: The Growth of Private School Choice

While now substantially eclipsed by charter schools, private school choice has a much older historical pedigree. The argument that parents should be given the option of spending public education funds to enroll their children in private schools usually is attributed to Nobel laureate economist Milton Friedman. In a 1955 article, Friedman argued that the injection of competition into the market for K12 education enabled by what he called “vouchers” would improve overall academic performance across educational sectors.⁷⁶ The case for private school choice, however, predates Friedman. During the nineteenth century, Catholic bishops vigorously but unsuccessfully demanded public funds for students enrolled in Catholic schools on equality grounds, arguing that the public schools of the time were effectively

72. See, e.g., *U.S. Department of Education Awards \$39.7 Million in Grants to Expand High Quality Charter Schools*, U.S. DEP’T EDUC. (Oct. 8, 2014), <http://www.ed.gov/news/press-releases/us-department-education-awards-397-million-grants-expand-high-quality-charter-schools> [<https://perma.cc/UW2V-NZEQ>].

73. See, e.g., *Public Accountability for Charter Schools: Standards and Policy Recommendations for Effective Oversight*, ANNENBERG INST. FOR SCH. REFORM BROWN UNIV., <http://annenberginstitute.org/sites/default/files/CharterAccountabilityStds.pdf> (last visited Sept. 18, 2016) [<https://perma.cc/8QLM-FKYM>].

74. See, e.g., Joe Ableidinger & Lucy Steiner, *Incubating High-Quality Charter Schools: Innovations in City Organizations*, NAT’L CHARTER SCH. RES. CTR. (2011), https://www.charterschoolcenter.org/sites/default/files/files/field_publication_attachment/1043%20NCS%20WPaper_Incubating%20final_0_0.pdf [<https://perma.cc/D37L-JDDH>].

75. Michael Alison Chandler, *More D.C. Students Are Attending Highest-Performing Charter Schools, Ratings Show*, WASH. POST (Nov. 14, 2014), https://www.washingtonpost.com/local/education/more-dc-students-are-attending-highest-performing-charter-schools-ratings-show/2014/11/13/3d0a4cf0-6b57-11e4-a31c-77759fc1eacc_story.html [<https://perma.cc/F9YH-NU25>] (noting that the number of students enrolled in the highest of three charter school performance tiers in Washington, D.C. increased by nine percent between 2013–2014).

76. See Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 123, 127, 132 (Robert A. Solo ed., 1955); *What is School Choice?*, FRIEDMAN FOUND. FOR SCH. CHOICE, <https://www.edchoice.org/school-choice/what-is-school-choice/> (last visited Sept. 24, 2016) [<https://perma.cc/VEM5-4SCE>] (“In 1955, Dr. Milton Friedman proposed the idea of school vouchers, which would separate the financing and administration of schools, effectively jumpstarting the modern school choice movement.”).

Protestant schools that were either unwelcoming of Catholic students, determined to evangelize them, or both.⁷⁷ And James Forman, Jr. has traced the roots of parental choice to the Reconstruction era, when freed slaves established independent private schools, and, in some cases, continued to prefer them even after government-established schools for African American children emerged.⁷⁸

President Ronald Reagan and his education secretary, William Bennett, promoted school vouchers during the early 1980s, urging Congress to give low-income children the option of attending private schools as an alternative to the federal funding of remedial instruction in both public and private schools, which has been available since the 1960s.⁷⁹ The idea languished, however, until two events in 1990 ignited the modern parental choice movement. The first was the publication of John Chubb and Terry Moe's enormously influential book, *Politics, Markets, and America's Schools*. Chubb and Moe, like Friedman, saw parental choice in education as a means of igniting competition with public schools. "Choice," they asserted, "has the capacity *all by itself* to bring about the kind of transformation that, for years, reformers have been seeking to engineer in myriad other ways."⁸⁰ The second was the emergence of a successful if unusual political coalition in Wisconsin. African American activists in Milwaukee—led by former Milwaukee school superintendent Howard Fuller and a state legislator named Polly Williams—combined forces with Republican Governor Tommy Thompson to secure the passage of the nation's first modern school voucher program.⁸¹ Initially, the Milwaukee Parental Choice Program entitled poor public school children in the city of Milwaukee to spend a portion of their public education funds at secular private schools; the program was expanded to include religious schools in 1995.⁸² Ohio followed suit in 1995, enacting a private school choice program for

77. See BRINIG & GARNETT, *supra* note 27, at 15–17.

78. James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287, 1293–95 (2005).

79. Robert Pear, *Reagan Proposes Vouchers to Give Poor a Choice of Schools*, N.Y. TIMES (Nov. 14, 1985), <http://www.nytimes.com/1985/11/14/us/reagan-proposes-vouchers-to-give-poor-a-choice-of-schools.html> [<https://perma.cc/C6VP-WKJZ>].

80. JOHN E. CHUBB & TERRY MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 217 (1990).

81. Since the mid-nineteenth century, Maine and Vermont both have maintained "town tuitioning" programs, which permit students in towns without public high schools to use public dollars to attend other public or private, secular schools. Illinois and Minnesota have very modest nonrefundable parental tax credit programs. See *The ABCs of School Choice: The Comprehensive Guide to Every Private School Choice Program in America*, FRIEDMAN FOUND. FOR EDUC. CHOICE 33–34, 55–60, 95–97 (2015), <https://www.edchoice.org/wp-content/uploads/2015/09/The-ABCs-of-School-Choice-2015.pdf> [<https://perma.cc/7UNY-DPSK>] [hereinafter *The ABCs of School Choice*].

82. See Jackson v. Benson, 578 N.W.2d 602, 607–10 (Wis. 1998) (summarizing history of Milwaukee Parental Choice Program).

disadvantaged children in Cleveland, most of whom opted to attend religious schools. The U.S. Supreme Court rejected an Establishment Clause challenge to the Cleveland program in the 2002 *Zelman v. Simmons-Harris* decision, thus clearing the federal constitutional path for the expansion of private school choice.⁸³

The fact that charter schools, rather than private school choice, would drive the parental choice revolution arguably is one of the most unexpected domestic policy developments in recent history. In contrast to charter school policies, which were in 1991 little more than an amorphous idea that required the establishment of new schools out of whole cloth, voucher policies had an older, more refined intellectual pedigree, a committed ideological base of support, and promised to enlist existing schools with a proven track record of educating disadvantaged kids, especially urban Catholic schools.⁸⁴ Private school choice proponents have long drawn upon this record to build the case for parental choice in education. Indeed, prior to the emergence of charter schools, urban Catholic schools effectively *were* the case for parental choice in education.⁸⁵

That said, private school choice faced major legal and political obstacles. The constitutionality of permitting parents to expend public resources at private religious schools was not settled until more than a decade after the Wisconsin program was enacted. This was problematic because the vast majority of private schools in the United States, especially affordable ones, are religiously affiliated. The 2002 *Zelman* decision put an end to speculation about whether vouchers violated the First Amendment's Establishment Clause, but significant state constitutional hurdles to parental choice remained. Specifically, thirty-seven state constitutions contain provisions that prohibit the public funding of private "sectarian" schools. Many of these are the direct result of an anti-Catholic backlash against prior generation's battles over parental choice in education. These provisions are often called

83. 536 U.S. 639, 643–62 (2002).

84. Beginning with the groundbreaking research of James Coleman and Andrew Greeley, numerous scholars have found that Catholic school students—especially poor, minority students—tend to outperform their public school counterparts. See JAMES S. COLEMAN, THOMAS HOFFER & SALLY KILGORE, *HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED* (1982); ANDREW GREELEY, *CATHOLIC HIGH SCHOOLS AND MINORITY STUDENTS* 105–07 (1st ed. 1982); see also Derek Neal, *The Effects of Catholic Secondary Schooling on Educational Achievement*, 15 J. LAB. ECON. 98, 100 (1997) (finding that Catholic school attendance increased the likelihood that a minority student would graduate from high school from sixty-two percent to eighty-eight percent, and more than doubled the likelihood that a similar student would graduate from college).

85. See, e.g., Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301, 344–52 (2000).

“Blaine Amendments,” after James Blaine of Maine, who attempted as Speaker of the House in 1875 to amend the federal constitution to prohibit the public funding of sectarian schools. Blaine’s proposal narrowly failed, but states were thereafter required to adopt similar constitutional provisions as a condition of statehood.⁸⁶

Following *Zelman*, many commentators predicted that state constitutional limits on the public funding of private and faith-based schools would remain major impediments to the expansion of private school choice.⁸⁷ Contrary to post-*Zelman* predictions, however, these provisions have not proven to be an insurmountable obstacle to the expansion of parental choice. Blaine Amendment challenges to private school choice programs have been rejected by a number of state supreme courts, including Indiana, Wisconsin, Ohio, Alabama, and, most recently, North Carolina.⁸⁸ While a number of lower state courts have relied upon Blaine Amendments to invalidate private school choice programs, only two state supreme courts have done so. In 2009, the Arizona Supreme Court invalidated programs that provided publicly funded scholarships that enabled children with disabilities and children in foster care to attend private schools, holding that they violated a provision of the state constitution that provided, “No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school.”⁸⁹ And, in June 2015, the Colorado Supreme Court invalidated a voucher program in Douglas County, Colorado, on Blaine Amendment grounds.⁹⁰ In January 2015, the Supreme Court agreed to hear arguments in *Trinity Lutheran Church of Columbia v. Pauley*,⁹¹ a case alleging that the application of a Blaine Amendment to exclude a Lutheran preschool from a public program that provided recycled rubber tires for its playground violated the Federal Free Exercise, Establishment, and Equal Protection Clauses. The case may have

86. Richard D. Komer & Clark Neily, *School Choice and State Constitutions: A Guide to Designing School Choice Programs*, INST. FOR JUST. & AM. LEGIS. EXCH. COUNCIL (Apr. 2007), <http://ij.org/wp-content/uploads/2015/03/50stateSCreport.pdf> [<https://perma.cc/G27D-YENM>].

87. See, e.g., Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151 (2003); Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 FIRST AMEND. L. REV. 45 (2004); Ira C. Lupu & Robert W. Tuttle, *Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917 (2003).

88. *Magee v. Boyd*, 175 So. 3d 79 (Ala. 2015); *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); *Hart v. State*, 774 S.E.2d 281 (N.C. 2015); *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998).

89. *Cain v. Horne*, 202 P.3d 1178, 1180 (Ariz. 2009) (quoting ARIZ. CONST. art. 2, § 10).

90. *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461 (Colo. 2015).

91. 788 F.3d 779, 781–91 (8th Cir. 2015), *cert. granted* 136 S. Ct. 891 (Jan. 15, 2016).

significant implications for the future Blaine Amendment litigation in the parental choice context.⁹²

Even after the Supreme Court cleared the legal path for private school choice, the political hurdles to its expansion were significant. At least until recently, private school choice has been the proverbial “third rail” in education policy for a variety of reasons—the opposition of teachers’ unions being the most significant one.⁹³ One challenge facing private school choice proponents has been a sharp divergence between the historical base of support for (conservative Republicans), and intended beneficiaries of (disadvantaged minority children). Politically conservative Republicans championed school choice at the national level, but defection by state legislators has been a perennial impediment to program implementation. Opposition among suburban Republicans, who are, generally speaking, happy with their public schools and unhappy about the prospect of poor urban students enrolling in them, has impeded efforts to enact parental choice programs in a number of states.⁹⁴ Suburban voters, on the other hand, may feel less threatened by charter schools because charter schools tend to be concentrated in urban areas, not suburban ones. As a result, the decision of a charter operator to open a school will only indirectly affect the operations of suburban public schools.⁹⁵

Fear of the potentially destabilizing effects of private school choice arguably fueled the movement to enact charter laws, which in turn took the wind out of the sails of the private school choice movement. At least until recently, a tacit political truce existed between supporters of traditional public schools and proponents of charter schools, since charter schools historically have been perceived as a “safer” and more “constrained” version of parental choice—one that is both “public” and “secular.”⁹⁶ As a result, and in contrast to private

92. See Greg Stohr, *Church Playground Funding Case Accepted by U.S. Supreme Court*, BLOOMBERG POLITICS (Jan. 15, 2016, 2:58 PM), <http://www.bloomberg.com/politics/articles/2016-01-15/church-playground-funding-case-accepted-by-u-s-supreme-court> [https://perma.cc/XH5K-WV95].

93. See, e.g., TERRY M. MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA’S PUBLIC SCHOOLS 327–29 (2011) (discussing teacher union opposition to private school choice); Michael Heise, *Law and Policy Entrepreneurs: Empirical Evidence on the Expansion of School Choice Policy*, 87 NOTRE DAME L. REV. 1917, 1932 (2012) (“Understandably, and with considerable justification, school choice supporters reflexively blamed teachers unions for school voucher initiative losses . . .”).

94. Ryan & Heise, *supra* note 25, at 2088–90.

95. *Id.*

96. The truce has unraveled as charter school market share has grown. See, e.g., Richard D. Kahlenberg & Halley Potter, *Restoring Shanker’s Vision for Charter Schools*, 38 AM. EDUCATOR 4, 5 (Winter 2014–2015) (“Proposed to empower teachers, desegregate students, and allow innovation from which the traditional public schools could learn, many charter schools instead prized

school choice, charter schools have historically enjoyed broad, bipartisan political support.⁹⁷ Within debates about educational finance, many moderate reformers traditionally advocated for charter schools as an alternative to private school choice programs such as tax credits or vouchers.⁹⁸ For example, Michael Heise has demonstrated that the likelihood that a state enacted or expanded a charter program increased along with the “threat” of publicly funded private school choice.⁹⁹ Heise hypothesizes that opponents believed that the appetite for private school choice would decrease as the range of public school choice options increased. Heise labels this reality as “ironic.”¹⁰⁰ School-voucher proponents often intentionally established private voucher programs in order to fuel demand for publicly funded vouchers, but their efforts backfired and instead fueled the political support for charters, which in turn decreased demand for private school choice.¹⁰¹

The jury is out on whether Heise’s prediction will prove correct over the long term. After languishing for years in state legislatures, private school choice has gained significant momentum in recent years. Today, more than half of states and the District of Columbia have publicly funded private school choice programs.¹⁰² Although most of these programs serve a relatively small, targeted group of students

management control, reduced teacher voice, further segregated students, and became competitors, rather than allies, of regular public schools.”); Whitmire, *supra* note 12.

97. During the 2008 presidential election cycle, for example, both John McCain and Barack Obama expressed strong support for charter schools. Soon after his election, President Obama made charter schools a centerpiece of his education policy, pledging five billion in federal funds to help create new charter schools and urging states without charter school laws to adopt them and states with caps on the number of charter schools to eliminate them. *Obama’s Charter Stimulus*, WALL ST. J. (June 12, 2009), <http://www.wsj.com/articles/SB124476693275708519> [<https://perma.cc/67XQ-2K96>].

98. BUCKLEY & SCHNEIDER, *supra* note 56, at 3. The pro-charter/anti-voucher position has been echoed in Democratic Party platforms in each of the last three presidential election cycles. As the 2004 Democratic Party Platform provided, “Instead of pushing private school vouchers that funnel scarce dollars away from the public schools, we will support public school choice, including charter schools and magnet schools that meet the same high standards as other schools.” *Strong at Home, Respected in the World: The 2004 Democratic National Platform for America*, DEMOCRATIC NAT’L COMM. 34 (2004), http://www.presidency.ucsb.edu/papers_pdf/29613.pdf [<https://perma.cc/89GG-GX94>].

99. Heise, *supra* note 93, at 1929–30.

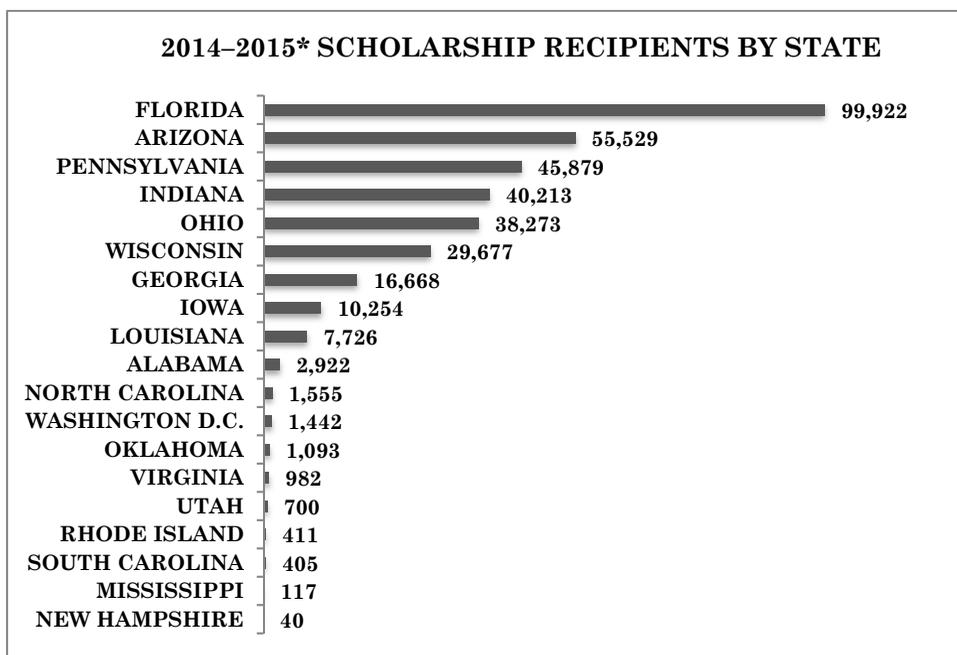
100. *Id.* at 1931.

101. *Id.* at 1929–30.

102. Additionally, Maine and Vermont have “tuitioning” programs that date to the mid-nineteenth century, which permit students in towns without a public high school to enroll in private, non-sectarian schools, and Minnesota and Illinois have modest programs that permit parents to claim up to \$500 for educational expenses, including tuition. See *The ABCs of School Choice*, *supra* note 81, at 33, 55, 57–59, 95; Nicole Stelle Garnett, *The Legal Landscape of Parental Choice Policy*, AM. ENTER. INST. 4–15 (Nov. 5, 2015), <https://www.aei.org/wp-content/uploads/2015/11/The-legal-landscape-of-parental-choice-policy.pdf> [<https://perma.cc/537S-PN5S>].

(usually low-income and/or disabled students), participation in private school choice programs has more than tripled in the last decade to 350,000 students in 2014–2015.¹⁰³ And, there are reasons to believe that the private school choice footprint will increase dramatically in the years to come: four states' programs (including Nevada's universal education savings account program) launch in the 2015–2016 school year; many other programs have no participation limits and continue to grow (for example, Indiana's Choice Scholarship Program); others automatically expand capacity each year (for example, the Florida Corporate Scholarship Tax Credit Program); and a number of states without private school choice seem poised to adopt new programs.¹⁰⁴

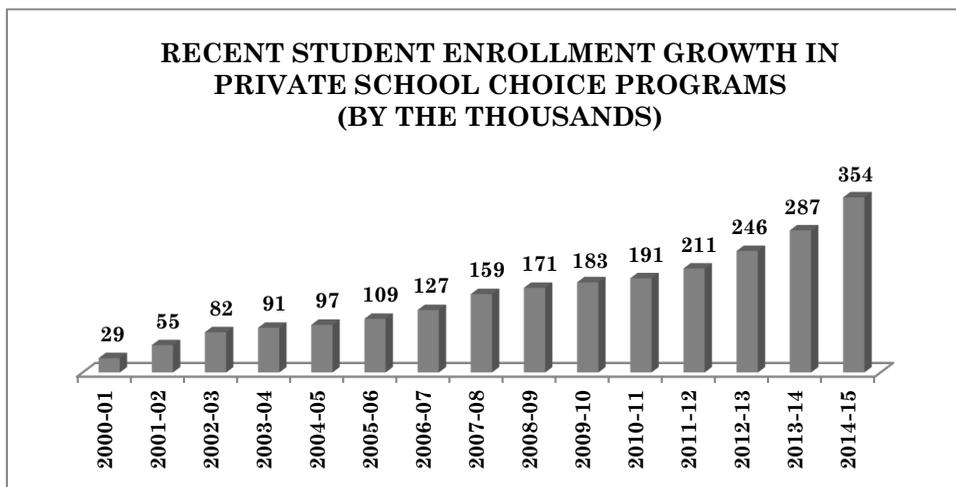
FIGURE 2: PRIVATE SCHOOL CHOICE: ENROLLMENT, 2014–2015



* Arkansas, Kansas, Montana, and Nevada have enacted new programs since September 2014. (Source: Alliance for School Choice, *2014–2015 School Choice Yearbook*)

103. See Matt Frendewey et al., *School Choice Yearbook 2014–2015*, ALLIANCE FOR SCH. CHOICE 14–15 (2015), http://afcgrowthfund.org/wp-content/uploads/2015/04/AFC_2014-15_Yearbook.pdf [https://perma.cc/SG25-R76B].

104. See generally, e.g., *The ABCs of School Choice*, supra note 81.

FIGURE 3: PRIVATE SCHOOL CHOICE: GROWTH

(Source: Alliance for School Choice, *2014–2015 School Choice Yearbook*)

There are several reasons why the movement for private school choice may be gaining momentum. First, at least from the perspective of public school proponents, the “charter compromise” may have backfired by opening the doors to a dramatic expansion in parental choice. Not only have charter schools drawn millions of students away from public schools, but by acculturating parents to a school choice environment, the explosion in charter schools may have delegitimized arguments against private school choice. Second, in contrast to years past, teachers’ unions often have more immediate and higher-priority battles to fight than private school choice, including the rapid expansion of charter schools and the increasing focus on accountability and value-added teacher evaluation practices in the traditional public school sector.¹⁰⁵ Third, beginning with Arizona in 1997, more than a dozen states have adopted a new, and arguably more politically palatable, private school choice device.¹⁰⁶ Known as “scholarship tax credits,”

105. See, e.g., Emma Brown, *Contentious Teacher-Related Policies Moving From Legislature to Courts*, WASH. POST (Feb. 28, 2015), https://www.washingtonpost.com/local/education/contentious-teacher-related-policies-moving-from-legislatures-to-the-courts/2015/02/28/6ec1f31e-b83d-11e4-aa05-1ce812b3fdd2_story.html [https://perma.cc/3UTB-5HCU].

106. A 2014 poll conducted by Education Next found that support for supporting school choice through tax credits was actually higher than support for charter schools, with sixty percent of respondents supporting tax credit policies but only fifty-four percent supporting charter schools. Michael B. Henderson, Paul E. Peterson & Martin R. West, *No Common Opinion on the Common Core*, 15 EDUC. NEXT 9, 15 (Winter 2015), <http://educationnext.org/2014-ednext-poll-no-common-opinion-on-the-common-core/> [https://perma.cc/ZY9M-3PFG].

these programs do not directly fund private school scholarships, but rather incentivize donations to private scholarship organizations.¹⁰⁷ Scholarship tax credits also may offer a way around the state constitutional restrictions discussed above. For example, while the Arizona Supreme Court relied on the state's Blaine Amendment to invalidate a voucher program, it had previously rejected a Blaine Amendment challenge to the state's scholarship tax credit program, suggesting that tax credits may be an option even in states with restrictive Blaine Amendments.¹⁰⁸ In *Arizona Christian School Tuition Organization v. Winn*, the Court held that the plaintiffs in the case lacked standing to challenge the program because the funds at issue—private donations incentivized by the tax credit program—were not governmental, effectively immunizing them from federal Establishment Clause challenges.¹⁰⁹ Several state courts have followed suit, holding that taxpayers lack standing to challenge scholarship tax credit programs.¹¹⁰ More recently, three states—Arizona, Florida, Nevada—have adopted an innovative school choice device known as “education savings accounts,” which empowers parents to spend state education funds on a range of educational expenses, including private school tuition, and/or “bank” it for later use.¹¹¹

Finally, two decades after parental choice was first introduced into the American educational landscape, the political coalition supporting private school choice has expanded and diversified. Although public opinion polls suggest that support for parental choice is today highest among disadvantaged and minority parents, the primary political proponents have traditionally been white and

107. The nation's three largest private school choice programs (in terms of enrollment)—in Arizona, Florida, and Pennsylvania—are all scholarship tax credit programs, although the scholarships awarded through these programs tends to be smaller than traditional “voucher” programs. Frendewey et al., *supra* note 103, at 10.

108. *Kotterman v. Killian*, 972 P.2d 606, 609–25 (Ariz. 1999).

109. 563 U.S. 125, 129–46 (2010).

110. See, e.g., Travis Pillow, *Judge Dismisses Lawsuit Challenging Florida Tax Credit Scholarships*, REDEFINED (May 18, 2015), <https://www.redefinedonline.org/2015/05/judge-plaintiffs-lack-standing-to-challenge-florida-tax-credit-scholarships/> [<https://perma.cc/5GRR-59U2>].

111. See *Empowerment Scholarship Account Program*, ARIZ. DEPT EDUC., <http://www.azed.gov/esa/> (last visited Sept. 18, 2016) [<https://perma.cc/G6U9-V9W6>]; Stephanie Linn, *Florida Governor Signs Nation's Second ESAs, Expands Tax-Credit Scholarships*, EDCHOICE (June 20, 2014), <https://www.edchoice.org/blog/florida-governor-signs-nations-second-esas-expands-tax-credit-scholarships/> [<https://perma.cc/Y987-S2RM>]; *Welcome to the Nevada Education Savings Account Program*, NEV. STATE TREASURER, <http://www.nevadatreasurer.gov/SchoolChoice/Home/> (last visited Sept. 18, 2016) [<https://perma.cc/H38R-LQPL>].

conservative.¹¹² In recent years, fueled in part by a shift in messaging, away from a discussion of “markets” and toward the imperative of giving poor parents options for their children, support among elected leaders for private school choice has begun to cross party and demographic lines.¹¹³ In this important sense, the historical evolution of American education policy described above has led to the point where once-disparate arguments for charter schools and private school choice have converged on a single, sector-agnostic argument for high quality educational options. As Terry Moe has observed:

The modern arguments for vouchers have less to do with free markets than with social equity. They also have less to do with theory than with the commonsense notion that disadvantaged kids should never be forced to attend failing schools and that they should be given as many attractive educational opportunities as possible.¹¹⁴

It remains to be seen whether the private school choice footprint will expand to the point of contributing meaningfully to sector agnostic education reform. At present, the number of children enrolled in private schools as a result of a publicly funded private school choice program (approximately 350,000 in 2014–2015) pales in comparison to the number of students enrolled in charter schools (2.9 million during the same year).¹¹⁵ Moreover, the universe of affordable urban private schools has been shrinking, a trend fueled in large part by the closure of thousands of urban Catholic schools over the past several decades.¹¹⁶ And, as with charter schools, questions remain as to whether private school choice programs produce their promised academic gains. The effects of private school choice on standardized test scores appear to be positive but marginal, although the longer-term effects on non-cognitive variables like high school graduation rates is significant.¹¹⁷ Given these realities, rhetoric about the need to increase educational options across multiple educational sectors may ultimately simply fuel more growth in

112. See, e.g., Katie Ash, *Black Parents in South Favor Increased School Choice, Says New Survey*, EDUC. WK. (July 24, 2013, 5:40 PM), http://blogs.edweek.org/edweek/charterschoice/2013/07/black_parents_want_more_school_choices_says_new_survey.html [https://perma.cc/RL7T-KCS4]; Diana Jean Schemo, *Program on Vouchers Draws Minority Support*, N.Y. TIMES (Apr. 6, 2006), http://www.nytimes.com/2006/04/06/education/06voucher.html?_r=0 [https://perma.cc/A7WD-7KMY].

113. See MOE, *supra*, note 93, at 329.

114. *Id.*

115. See Matt Frendewey et al., *supra* note 103, at 14–15; *Estimated Number of Public Charter Schools & Students, 2014–2015*, *supra* note 5, at 1.

116. See BRINIG & GARNETT, *supra* note 27, at ix.

117. See, e.g., Cecilia Elena Rouse & Lisa Barrow, *School Vouchers and Student Achievement: Recent Evidence, Remaining Questions*, (Fed. Res. Bank of Chi., WP-2008-08, Aug. 6, 2008), http://www.chicagofed.org/digital_assets/publications/working_papers/2008/wp2008_08.pdf [https://perma.cc/4PV9-D5GH].

the charter school sector rather than a movement toward genuine educational pluralism in our urban areas.

B. Education Accountability Policies

If the rise in parental choice options *outside* the traditional public school sector represented the first step on the path toward sector agnosticism, the second step began *within it*, a decade after parental choice took hold in Wisconsin (with vouchers) and Minnesota (with charters), when Congress enacted NCLB in 2001.¹¹⁸ Now widely condemned and dramatically overhauled in the recent ESSA, NCLB enjoyed widespread bipartisan support at the time of its enactment. Championed by President George W. Bush and Senator Ted Kennedy, NCLB was an expansive and dramatic update to the 1965 Elementary and Secondary Education Act of 1965 (“ESEA”), which originally focused primarily on providing supplemental resources for schools serving disadvantaged children.¹¹⁹ Through a series of amendments, the focus of the ESEA had evolved from solely supporting low-income students in disadvantaged communities to improving schools,¹²⁰ but the 2002 NCLB amendment to ESEA expanded the focus on school improvement even further.¹²¹ In a 2000 speech to the NAACP, President George W. Bush had vowed to overcome the “soft bigotry of low

118. The No Child Left Behind Act of 2001 is a federal Spending Clause statute. 20 U.S.C. § 6319 (repealed Dec. 10, 2015).

119. Janet T. Thomas & Kevin P. Brady, *The Elementary and Secondary Education Act at 40: Equity, Accountability, and the Evolving Federal Role in Public Education*, 29 REV. RES. EDUC. 51, 51 (2005) (arguing that the ESEA was “[e]nacted to offer equitable educational opportunities to the nation’s disadvantaged” and “provide[d] financial resources to schools to enhance the learning experiences of underprivileged children”). As originally enacted, the main provision of the ESEA was Title I, “Financial Assistance to Local Educational Agencies for the Education of Low-Income Families.” Title I provides public block grants to states to distribute these funds to local education agencies to support disadvantaged students. Title II, which was at issue in the *Mitchell v. Helms* decision discussed *infra* at notes 185 and 190–193, provides grant opportunities to states “for the acquisition of school library resources, textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools.” Title III provides federal dollars through grants “for supplementary educational centers and services, to stimulate and assist in the provision of vitally needed educational services not available in sufficient quantity or quality.” Title IV provides support for “Educational Research and Training”—that is, grants to research institutions, including colleges and universities, to enhance educational research efforts. These title programs continue to provide resources to schools serving disadvantaged students. Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 (amended 2001).

120. Andrea Boyle & Katelyn Lee, *Title I at 50: A Retrospective*, AM. INSTS. FOR RES. 5–7 (2015), <http://www.air.org/sites/default/files/downloads/report/Title-I-at-50-A-Retrospective-July-2015.pdf> [<https://perma.cc/AZP5-2KP6>].

121. *Id.* at 7.

expectations.”¹²² In championing NCLB, Bush made clear that he intended to do so by holding public schools accountable for student academic performance. In his speech celebrating the signing of the landmark legislation, Bush declared:

The fundamental principle of this bill is that every child can learn, we expect every child to learn, and you must show us whether or not every child is learning And now it's up to you, the local citizens of our great land, the compassionate, decent citizens of America, to stand up and demand high standards, and to demand that no child—not one single child in America—is left behind.¹²³

At the core of NCLB were a number of measures designed to improve student achievement by holding states and schools more accountable for student progress: NCLB required states to administer standardized tests aligned with state academic standards in reading and mathematics and to bring all students—one hundred percent—up to the “proficient” level on these tests by the 2013–2014 school year. NCLB also required states to ensure that school districts and individual schools make “adequate yearly progress” toward this goal for both their student populations as a whole and for certain demographic subgroups.¹²⁴ Beginning in the 2002–2003 school year, NCLB required annual report cards including student-achievement data broken down by subgroup for both schools and school districts. Schools and school districts were held accountable for student test scores on state administered standardized achievement tests, graduation rates, and other measurable objectives set by individual states.¹²⁵ Originally, President Bush proposed that students enrolled in persistently failing schools be given vouchers to attend a private school, but the controversial private school choice provision eventually was replaced with a requirement that students enrolled in persistently failing schools be permitted to transfer to other higher-performing *public* schools.¹²⁶

Beginning in 2007, the Department of Education’s School Improvement Grant (“SIG”) program provided unprecedented amounts

122. President George W. Bush, Address at the NAACP’s 91st Convention (July 10, 2000), <http://www.washingtonpost.com/wp-srv/onpolitics/elections/bushtext071000.html> [https://perma.cc/29A9-228R].

123. Press Release, The White House Office of the Press Sec’y, President Signs Landmark No Child Left Behind Education Bill (Jan. 8, 2002), <http://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020108-1.html> [https://perma.cc/LQE9-5UEZ].

124. 20 U.S.C. § 6311(b)(2)(F) (2006) (repealed Dec. 10, 2015) (“Each State shall establish a timeline for adequate yearly progress. The timeline shall ensure that not later than 12 years after the end of the 2001–2002 school year, all students . . . will meet or exceed the State’s proficient level of academic achievement on the State assessments . . .”).

125. *No Child Left Behind*, EDUC. WK. (Aug. 4, 2004), <http://www.edweek.org/ew/issues/no-child-left-behind/> [https://perma.cc/G3GF-QYUZ].

126. Elementary and Secondary Education Act of 1965 § 1116(b)(5), 20 U.S.C. § 6316(b)(5) (repealed Dec. 10, 2015).

of federal dollars to improve the nation’s lowest performing schools.¹²⁷ The SIG program—eliminated in the ESSA, which provides other sources of school turn around funds¹²⁸—provided grants to states to fund school district interventions to turn around low-achieving schools identified under the NCLB accountability system. The SIG program required districts to divide their schools into four academic “tiers” and conditioned federal funding on the implementation of one of four intervention methods in the lowest performing schools: *turnaround* (all teachers and the principal are fired and a new staff hired, although the new principal can rehire up to fifty percent of the original teachers); *transformation* (the school principal is fired and the new principal required to implement various accountability and professional development strategies); *restart* (the school is closed and reopened as a charter school or privately managed public school); or *closure* (the school is closed and its students transferred to higher-achieving schools in the district).¹²⁹ However, the law also allowed districts to take “[a]ny other major restructuring that makes fundamental reforms.”¹³⁰

By the time that President Obama was elected in 2008, the support for NCLB had entirely evaporated. The goal of one hundred percent proficiency was unrealistic. In 2014—the established deadline for achieving universal proficiency—the National Assessment of Educational Progress, which is administered annually to a subset of

127. Christy Wolfe, *Using School Improvement Grant Funds to Increase Access to High-Quality Public Schools*, NAT’L ALLIANCE FOR PUB. CHARTER SCHS. 1, 1 (Sept. 2014), <http://www.publiccharters.org/wp-content/uploads/2014/09/NAPCS-PolicySnapshot-SIG-r1.pdf> [<https://perma.cc/QYC5-PXZK>].

128. Klein, *supra* note 15.

129. Elementary and Secondary Education Act of 1965 § 1003, 20 U.S.C. § 6303(b)(5) (amended Dec. 10, 2015); *see also Guidance on Fiscal Year 2010 School Improvement Grants*, U.S. DEP’T EDUC. (Nov. 1, 2010), <http://www2.ed.gov/programs/sif/sigguidance11012010.pdf> [<https://perma.cc/XPY3-J4LH>] (clarifying intervention requirements to receive SIG funds); Tina Trujillio & Michelle Renee, *Democratic School Turnarounds: Pursuing Equity and Learning from Evidence*, NAT’L EDUC. POL’Y CTR. 1, 3 (Oct. 2012), http://nepc.colorado.edu/files/pb-turnaroundequity_0.pdf [<https://perma.cc/WN6W-88WV>] (summarizing NCLB penalties).

130. Elementary and Secondary Education Act of 1965 § 1116(b)(8)(B)(v) (repealed Dec. 10, 2015). Although accurate data is difficult to obtain, these legal requirements apparently have not directly triggered many school closures. In 2007–2008, the Center on Education Policy found that 3,500 schools were “in” or “planning” restructuring as a result of NCLB. Unfortunately, a high percentage of districts opting to employ “other” restructuring options, rather than the four set forth in NCLB, makes it difficult to determine what, exactly, “restructuring” meant in any given context. Caitlin Scott, *A Call to Restructure Restructuring: Lessons from the NCLB Act in Five States*, CTR. ON EDUC. POL’Y 1, 1 (Sept. 2008), <http://www.cep-dc.org/displayDocument.cfm?DocumentID=175> [<https://perma.cc/Q98H-7AL5>]. A more recent report found that only fourteen states reported using the “closure” model and twelve reported using the “restart” model (usually the conversion to a charter school) to address failing schools. Sarah Yatsko et al., *Tinkering Toward Transformation*, CTR. ON REINVENTING PUB. EDUC. 1, 3 (Mar. 2012), <http://files.eric.ed.gov/fulltext/ED532630.pdf> [<https://perma.cc/JF3J-AFND>].

fourth and eighth graders, found that “proficiency” rates were below fifty percent in both reading and math in 4th and 8th grade. The only exceptions were for Asians in all subjects and whites in 4th grade math.¹³¹ NCLB also fueled a widespread backlash against standardized testing, as states, districts, and schools chafed at the embarrassment of reporting their failure to make the required adequate yearly progress toward proficiency.¹³²

When President Obama entered office, he and his Secretary of Education, Arne Duncan, made clear their intention to move away from the NCLB accountability model toward other reform measures that they believed would more effectively promote academic gains and address the achievement gap. Their first opportunity to do so came with the enactment of the American Recovery and Reinvestment Act (the “ARRA,” more commonly known as the “Stimulus Act”), which appropriated funds to promote school improvement and directed that the funds be distributed by the Secretary of Education.¹³³ The Act required states to request ARRA funds,¹³⁴ referring to provisions of NCLB as guiding principles when determining when a state must support “struggling schools.”¹³⁵ The program devised by the Obama administration to distribute these funds, dubbed “Race to the Top,” went further. The Race to the Top program established a competitive process, which distributed the funds based upon certain criteria. Implementing the school intervention tactics specified in NCLB was one of the criteria used for rating state proposals, but it was prioritized relative to the others, which included “articulating a comprehensive and coherent reform agenda”; developing and adopting “common” standards and assessments (a tacit reference to the development of the Common Core State Standards);¹³⁶ using data to support classroom instruction; implementing data-driven, value-added teacher evaluation and compensation procedures; and “ensuring successful conditions for high-performing charter schools and other innovative schools.” The final criteria in particular represented a signal that the Department of Education was willing to use its funding authority to move states

131. Anya Kamenetz, *It's 2014. All Children Are Supposed To Be Proficient. What Happened?*, NPR ED. (Oct. 11, 2014), <http://www.npr.org/blogs/ed/2014/10/11/354931351/it-s-2014-all-children-are-supposed-to-be-proficient-under-federal-law> [<https://perma.cc/XTJ6-7W7F>].

132. See RAVITCH, *supra* note 47.

133. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 14001, 123 Stat. 115, 279 (2012).

134. American Recovery and Reinvestment Act of 2009 § 14005(a); see § 14006(b) (stipulating that the Secretary will determine which states receive funding based on their applications).

135. American Recovery and Reinvestment Act of 2009 § 14005(d)(5).

136. COMMON CORE STATE STANDARDS INITIATIVE (2016), <http://www.corestandards.org/> (last visited Sept. 19, 2016) [<https://perma.cc/7NTC-L4R4>].

toward sector-agnostic education policies: states were encouraged to eliminate numerical caps upon the number of charter schools or total charter school enrollment, to hold charter schools accountable for academic performance and close underperforming schools, to provide capital funding—in addition to per-pupil funding—for charter schools, and to equalize the funding between traditional public schools and charter schools.¹³⁷

In 2011, the Department of Education invited states to request waivers from ten of NCLB's school-accountability requirements.¹³⁸ The Department of Education justified this departure from NCLB as a way of recognizing and rewarding states for initiating “ground breaking reforms and innovations” that “were not anticipated when the No Child Left Behind Act of 2001 was enacted.”¹³⁹ States seeking a waiver submitted a lengthy application containing evidence of at least three core areas of reform. First, the state must have made plans to assess student growth against “college- and career-ready standards that are common to a number of states,” e.g., the Common Core State Standards.¹⁴⁰ Second, the state must have implemented a “differentiated recognition, accountability, and support system” that is “designed to improve student achievement and school performance, close achievement gaps, and increase the quality of instruction for students.” The waiver policy required states to divide public schools into three categories: high-performing “reward schools,” lower performing “focus schools,” and the lowest-performing “priority schools.” With respect to the bottom two categories, states were required to just specify a plan of action for improving student achievement and holding districts accountable for school turnarounds. Third, as with *Race to the Top*, the waiver policy required the implementation of a data-driven system of principal and teacher evaluation.¹⁴¹

137. *See Race to the Top Program: Executive Summary*, U.S. DEP'T EDUC. 1, 11 (Nov. 2009), <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf> [https://perma.cc/CAL8-UB4U].

138. Section 9401 of the ESEA permits the federal government to waive certain provisions, although there is some dispute as to whether the Obama administration's waiver practices exceed this waiver authority by effectively overhauling NCLB altogether. 20 U.S.C. § 7861 (2006).

139. Letter from Arne Duncan, Sec'y of Educ., to Chief State Sch. Officers (Sept. 23, 2011), <http://www2.ed.gov/policy/gen/guid/sectletter/110923.html> [https://perma.cc/X7YA-4TK9].

140. The Department of Education expressly disavows “requiring” the adoption of the Common Core as a condition of receiving a waiver. *See ESEA Flexibility*, U.S. DEP'T EDUC. (May 5, 2016), <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> [https://perma.cc/7YJB-VQVY] (explaining that states may request flexibility regarding ESEA requirements in exchange for “rigorous and comprehensive State-developed plans”).

141. *ESEA Flexibility Request*, U.S. DEP'T EDUC. (Feb. 10, 2012), <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> [https://perma.cc/7YJB-VQVY].

The future of accountability as a pillar of federal education policy is currently in flux. As previously noted, in December 2015—eight years after the date of NCLB’s expiration—Congress signed the ESSA. The ESSA (which, like NCLB, was a reauthorization of the Elementary and Secondary Education Act of 1965) eliminated many of NCLB’s most onerous and unpopular accountability requirements, including the requirement that schools and districts make “adequate yearly progress” toward proficiency. While the ESSA continues to require that schools test students annually and make public information about school performance, the law gives states more latitude to shape standardized tests and mandates the inclusion of at least one non-cognitive measure of school quality.¹⁴² The legislation also eliminates all ESEA waivers, which were phased out by August 1, 2016.¹⁴³

*C. The Convergence of Choice and Accountability:
From Turn-Arounds to Turn-Overs*

No Child Left Behind ushered in an era of school-level accountability for academic performance. But NCLB’s accountability regime is considered a failure. Most commentators agree that many provisions of NCLB, especially the demand for adequate yearly progress and aspiration for one hundred percent proficiency by 2014, were a disaster. The story, on its face, seems a simple one. The institutional and demographic realities on the ground in traditional public schools (especially those serving disadvantaged children) rendered the task of improving public school performance through NCLB’s “carrot and stick” approach impossible. Thus, with efforts to revamp the law stalled in Congress, the Obama administration necessarily stepped in to waive its onerous, unrealistic requirements.¹⁴⁴ By eliminating these requirements in the ESSA, Congress effectively acknowledged the veracity of this story.

While this account captures the fate of NCLB itself, it is not clear that the demise of NCLB should be equated with the demise of school accountability policies. The failure of NCLB highlighted in a particular

142. See Klein, *supra* note 15.

143. See Dear Colleague Letter from Ann Whalen, Assistant Sec’y for Elementary & Secondary Educ., on the Transition, to ESSA (Dec. 18, 2015), <http://www2.ed.gov/policy/elsec/leg/essa/transition-dcl.pdf> [<https://perma.cc/4BG9-VZQ4>] (discussing the Department of Education’s expectations for ESSA implementation).

144. The U.S. Department of Education maintains a useful database on ESEA waivers. *ESEA Flexibility*, U.S. DEP’T EDUC., <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> (last visited Sept. 19, 2016) [<https://perma.cc/7YJB-VQVY>].

way the problem of persistent underperformance in America's public schools. In so doing, NCLB surfaced and activated deep undercurrents in the education-reform world—currents that are now fueling the demand for a child-centered sector-agnostic “high-quality seats” approach to education reform. For all of the frustration generated by the NCLB accountability process, the law was always more carrot than stick. NCLB gave states and school districts a series of options (described above), and state and local officials opted almost universally for school reform models and eschewed more draconian measures, such as closing and/or “restarting” persistently failing schools. While it is true that closure of public schools for underperformance has been on the rise since NCLB, the available data suggests that forces other than NCLB—in particular, the economic and demographic realities facing many urban districts—are driving school closures.¹⁴⁵ In fact, under the

145. On public school closure trends, see generally Garnett, *supra* note 43. In the 2010–2011 school year, 1,069 public schools were closed in the United States, up from 717 a decade earlier. *Id.* at 290–91. The trend lines are clear. For example, in 2014, the School Reform Commission of Philadelphia, which has operated the city's schools since a state takeover in 2001, announced plans to shutter ten percent of the district's schools (twenty-three total) at the end of this school year. See Jon Hurdle, *Philadelphia Officials Vote to Close 23 Schools*, N.Y. TIMES (Mar. 7, 2013), <http://www.nytimes.com/2013/03/08/education/philadelphia-officials-vote-to-close-23-schools.html> [https://perma.cc/BT2W-2V9W]; see also Emily Dowdall & Susan Warner, *Shuttered Public Schools: The Struggle to Bring Old Buildings to New Life*, PEW CHARITABLE TRS. (Feb. 11, 2013), http://www.pewtrusts.org/~media/assets/2013/02/11/philadelphia_school_closings_report.pdf [https://perma.cc/GW5Y-MDL7] (showing that Philadelphia school closings are part of a countrywide trend). The Kansas City, Missouri, school district closed half its public schools in 2010. *Half of Kansas City Public Schools to Close*, USA TODAY (Mar. 11, 2010), http://usatoday30.usatoday.com/news/nation/2010-03-10-Kansas-City_N.htm [http://perma.cc/6WHN-Z8ML]; Susan Saulny, *Board's Decision to Close 28 Kansas City Schools Follows Years of Inaction*, N.Y. TIMES (Mar. 11, 2010), http://www.nytimes.com/2010/03/12/us/12schools.html?_r=0 [https://perma.cc/7FDM-QYKH]. In New York City, Mayor Michael Bloomberg has closed over 150 public schools during his tenure; Chicago closed eighty-two schools between 2001 and 2009 and an additional fifty in the spring of 2013. See Noreem S. Ahmed-Ullah & John Chase, *Anxiety Grows as CPS Releases Preliminary School Closings List*, CHI. TRIB. (Feb. 14, 2013), http://articles.chicagotribune.com/2013-02-14/news/chi-129-on-new-chicago-schools-closing-list-20130213_1_commission-on-school-utilization-barbara-byrd-bennett-dwayne-truss [https://perma.cc/T8VU-QC88]; Marisa de la Torre & Julia Gwynne, *When Schools Close: Effects on Displaced Students in Chicago Public Schools*, CONSORTIUM ON CHI. SCH. RES. UNIV. CHI. 1, 1 (Oct. 2009), <http://consortium.uchicago.edu/sites/default/files/publications/CCSRSchoolClosings-Final.pdf> [https://perma.cc/LRE7-VEXS]; Ben Jorvasky, *The Chicago Manual of School Closings: A Look at How Chicago Officials Shutter Public Schools*, CHI. READER (Jan. 22, 2013), <http://www.chicagoreader.com/chicago/how-officials-close-public-schools-cps/Content?oid=8556450> [https://perma.cc/4L3V-GRMA]; Mary Wisniewski, *Chicago School Closings: CPS CEO Proposes 5-Year Moratorium on Closings Post 2013*, HUFFINGTON POST (Nov. 26, 2012), http://www.huffingtonpost.com/2012/11/26/chicago-school-closings_n_2193277.html [https://perma.cc/XPY7-CXY3]. On March 6, 2013, the Chicago Commission on School Utilization issued its final recommendations to CPS officials. The report suggests that the district can “safely” close eighty schools in the fall of 2013 (that is, guarantee that students can be safely transferred to higher-performing schools). See *Final Report*, CHI. COMM'N ON SCH. UTILIZATION 1, 1 (Mar. 6, 2013), <https://docs.google.com/a/schoolutilization.com/>

NCLB regime, school closures and restarts were by far the *least popular* method of addressing failing schools, and the option of taking measures other than those specified in the law was the *most popular*.¹⁴⁶

When viewed as a measuring stick for the possibility of reforming failing public schools, the optics of NCLB's failure are bad. Arguably, public officials at all levels of government have drawn the following lesson from the NCLB debacle: public school reform is ultimately a Sisyphean task. The burden is too heavy and the hill too steep. As a result, a case can be made that public school "reform exhaustion" has set in, an exhaustion which is deeply unfavorable to traditional public schools. While public schools have been by-and-large freed from the burden and embarrassment of failing to meet NCLB's adequate yearly progress requirement, the persistent struggles of public schools are (to varying degrees) now being addressed from outside, rather than inside, the public school sector—both by an infusion of competition, and, in some jurisdictions, by the ultimate accountability device: rather than attempting to fix public schools, public education officials are opting to close and convert them to charter schools.¹⁴⁷

Enlisting a CMO to operate failing schools is attractive to public officials as a means of addressing a dysfunctional institutional culture. When a school is closed and converted to a charter school, the leadership and teaching staff are generally dismissed and offered the opportunity to reapply—but to the charter operator, rather than the school district.

viewer?a=v&pid=sites&srcid=c2Nob29sdXRpbGl6YXRpb24uY29tfGNvbW1pc3Npb24tb24tc2Nob29sLXV0aWxpemF0aW9ufGd4OjRiNzFjMWEyNGIxZWU0YmU [https://perma.cc/LBU3-U3JL].

146. Eileen M. O'Brien & Charles J. Dervarics, *Which Way Up? What Research Says About School Turnaround Strategies*, *CTR. FOR PUB. EDUC.* 1, 8 (May 2013, 2012), <http://www.centerforpubliceducation.org/Main-Menu/Policies/Which-Way-Up-At-a-glance/Which-Way-Up-Full-Report.pdf> [https://perma.cc/8A97-EKV6].

147. *State Legislation: Accountability—Sanctions/Interventions*, *EDUC. COMMISSION STATES* (May 23, 2016), <http://www.ecs.org/ecs/ecscat.nsf/WebTopicView?OpenView&count=1&RestrictToCategory=Accountability--Sanctions/Interventions> [https://perma.cc/L4NX-K87D] (compiling state laws that give states the ability to close failing schools and turn them over to charter organizations); *see also, e.g.*, *FLA. STAT.* § 1008.33(4)(b)(1)–(5) (2012), (allowing a school district to either take over the school, "[r]eassign students to another school," close and reopen the school as a charter school, contract with a private management company, or any other model "that [has] a demonstrated record of effectiveness"); *ILL. ADMIN. CODE* tit. 23, § 1.85(e)(1)–(4) (2012) ("Each school restructuring plan shall indicate that the district is undertaking one or more of the following actions in the affected school . . . reopening the school as a public charter school . . ."); *MASS. GEN. LAWS* ch. 69, § 1J(o) (2012) (listing sixteen possible actions that a superintendent may take with respect to a persistently low performing school); *MICH. COMP. LAWS* § 380.1280c(2) (2011) ("[T]he redesign plan shall require implementation of [one] of the [four] school intervention models that are provided for the lowest achieving schools under the federal incentive grant program . . . known as the 'race to the top' grant program."); *N.C. GEN. STAT.* § 115C-105.37B(a) (2012) (stating that "the State Board of Education may authorize [a] local board of education to adopt" the transformation, restart, turnaround, or closure model).

Charter school teachers are rarely unionized, and even where they are, charter schools are generally not bound by the requirements of collective bargaining agreements between the local teachers' union and the public school district. This phenomenon has manifested itself most dramatically in New Orleans, where almost all traditional public schools have been closed or converted to charter schools,¹⁴⁸ but charter conversions are being used as an accountability device in many urban districts.¹⁴⁹ For example, Robert Bobb, the state-appointed emergency manager of the Detroit Public Schools, announced plans in 2011 to convert forty-one of the district's 142 public schools into charter schools.¹⁵⁰ In New York City, former Mayor Michael Bloomberg boasted at the end of his term that he had opened five hundred new schools, including nearly 150 new charter schools, many of which are small schools "co-located" in buildings that once housed now-defunct traditional public schools. Bloomberg had also promised to convert large traditional public schools into at least one hundred new small schools, including charter schools.¹⁵¹ However, his successor, Bill DeBlasio, sought to reverse this policy and instead demand (ultimately unsuccessfully) that charter schools pay market rents for space in closed public schools.¹⁵² And former Washington, D.C. school

148. John White, *A Fresh Turn in the New Orleans Charter School Miracle*, WALL ST. J. (May 27, 2016), <http://www.wsj.com/articles/a-fresh-turn-in-the-new-orleans-charter-school-miracle-1464387732> [https://perma.cc/LXD6-3DYC].

149. Smarick, *supra* note 16, at 21; de la Torre & Gwynne, *supra* note 145, at 1 (noting that between 2001 and 2009, Chicago had closed forty-four schools because of either "poor academic performance or underutilization").

150. *DPS Presents Renaissance Plan 2012 to Radically Restructure Academically-Failing Schools, Significantly Reduce Operating Costs Under Model to Seek Charter Proposals for 41 Schools*, DETROIT PUB. SCHS. COMMUNITY DISTRICT (Mar. 12, 2011), <http://detroitk12.org/content/2011/03/12/dps-presents-renaissance-plan-2012-to-radically-restructure-academically-failing-schools-significantly-reduce-operating-costs-under-model-to-seek-charter-proposals-for-41-schools/> [https://perma.cc/Q7CU-RUEG].

151. Mary Frost, *Bloomberg Promises More Charter Schools, Pushes Teacher Evaluation Plan*, BROOKLYN EAGLE (Feb. 20, 2013), <http://www.brooklyneagle.com/articles/bloomberg-promises-more-charter-schools-pushes-teacher-evaluation-plan> [https://perma.cc/824N-A5NN]; *see also* Michael Bloomberg, Mayor of New York, 2013 State of the City Address (Feb. 14, 2013), <http://www.mikebloomberg.com/index.cfm?objectid=D46D1B83-C29C-7CA2-FEF9341031963FE9> [https://perma.cc/ZNQ5-MHDE]:

We've opened 576 new schools over the past 11 years, and we're on track to have added 100,000 new classroom seats by the end of this year. 149 of those new schools have been charters and yet there are still more than 50,000 children who are still on charter school waiting lists. Those children and their parents have waited long enough. This September, we'll open 26 new charters and we'll work to approve many more for 2014. Some of them will be located within existing public school buildings even though there are special interests who want to prohibit that from happening.

152. *See, e.g.*, Gerard Robinson, *An Uncivil Civil War*, U.S. NEWS & WORLD REP. (Oct. 14, 2015, 4:15 PM), <http://www.usnews.com/opinion/knowledge-bank/2015/10/14/new-york-citys-uncivil-war-over-charter-schools> [https://perma.cc/5HYW-RBCP]; Whitmire, *supra* note 12.

superintendent, Michelle Rhee, sparked a maelstrom of controversy when she engaged charter operators to run several of her district's most troubled schools.¹⁵³

There are hints in both state and federal education policy that this charter “conversion” trend may accelerate in the next few years. Several states have created state “turn around” or “achievement” school districts, which have as their primary goal the assumption of control of failing public schools and their conversion to charter schools.¹⁵⁴ Furthermore, increasing numbers of urban districts are opting to close under-enrolled and underperforming schools. As I have previously written, academic performance is only one of the factors fueling the rise in public school closures (and their conversion to charter schools), but it is a powerful and persistent one.¹⁵⁵ And, even when school officials choose not to close schools *because* of underperformance, academically struggling schools are almost always selected for closure over successful ones when enrollment or financial considerations necessitate closures. For example, in the fall of 2012, the Chicago Public Schools announced that school closure decisions would henceforth be based upon enrollment, not academic performance.¹⁵⁶ However, on March 6, 2013, the Chicago Commission on School Utilization issued final recommendations about which under-enrolled schools the struggling district should close. One of two criteria driving the recommendations was a guarantee that displaced students could be transferred to a *higher-performing* school.¹⁵⁷ Finally, proposals for “parent-trigger”

153. See RICHARD WHITMIRE, *THE BEE EATER* (2001); *Quality Schools: Every Child, Every School, Every Neighborhood*, WASH. POST (2012), https://www.washingtonpost.com/t/2010-2019/WashingtonPost/2012/01/26/Education/Graphics/IFF_Final_Report.pdf [<https://perma.cc/FQ5A-94KB>] (recommending further conversions of failing public schools to charter schools, especially in D.C.'s poorer neighborhoods where quality schools are in short supply). Less dramatically, in Chicago, Mayor Rahm Emanuel has asked charter operators to consider engaging school turnarounds rather than opening new schools. Becky Vevea, *Public School Closures to be Based on Enrollment, Not Performance*, WBEZ NEWS (Nov. 1, 2012), <http://www.wbez.org/news/public-school-closures-be-based-enrollment-not-performance-103583> [<https://perma.cc/SP6J-6JE7>]. According to the California Charter School Association, there were 139 conversion charter schools in California as of 2011. *Conversion Charter Schools: A Closer Look*, CAL. CHARTER SChS. ASS'N (Apr. 2012), <http://www.ccsa.org/2012/04/conversion-charter-schools-a-closer-look.html> [<https://perma.cc/N8F9-48M2>].

154. See Daarel Burnette, *Chris Barbic, Founding Superintendent of State-Run Achievement School District, to Exit*, CHALKBEAT TENN. (July 17, 2015), <http://www.chalkbeat.org/posts/tn/2015/07/17/chris-barbic-founding-superintendent-of-achievement-school-district-to-exit/#.V-DPDZMrJZ1> [<https://perma.cc/6UPH-VHGS>] (describing Barbic's plan to have charter operators take over twenty-two public schools in Memphis).

155. Garnett, *supra* note 43, at 301–08.

156. Vevea, *supra* note 153.

157. See *Final Report*, *supra* note 145, at 6 (discussing preliminary recommendations, including “don't close any . . . high performing schools”).

laws, which give parents the option of intervening in the management of their children's public schools (including demanding their conversion to charter schools), are gaining momentum. As of 2012, seven states had passed a "parent trigger" law, six of which give parents the option of converting their children's schools to a charter school.¹⁵⁸ The provisions received the unanimous endorsement of the bipartisan U.S. Conference of Mayors in June 2012. Former Los Angeles Mayor (and Conference of Mayors Chairman) Antonio Villaraigosa said of the decision, "Parent Trigger empowers parents to turn failing schools into high-achieving schools."¹⁵⁹ At the federal level, while neither NCLB nor the Race to the Top program directly triggered many school closures,¹⁶⁰ President Obama and Secretary of Education Arne Duncan provided financial support for charter conversions and encouraged them through the waiver process. At least twenty of the forty-five successful applications for NCLB waivers included some meaningful mention of either turning failing public schools over to outside management or restarting them as charter schools.¹⁶¹ While the waivers were eliminated by the ESSA, the new law increases funding for charter schools and authorizes (but does not require) states to use these funds to convert failing public schools to

158. *Parent Trigger Laws in the States*, NAT'L CONF. STATE LEGISLATURES (Oct. 15, 2013), <http://www.ncsl.org/issues-research/educ/state-parent-trigger-laws.aspx> [<https://perma.cc/QAP6-TXV9>].

159. Josh Eidelson, "Parent Trigger": *The Latest Tactic for Fighting Teachers' Unions*, SALON (June 30, 2012), http://www.salon.com/2012/06/30/parent_trigger_the_latest_tactic_for_fighting_teachers_unions/ [<https://perma.cc/2BGD-XSLZ>]; see also Memorandum from Tom Cochran, CEO and Exec. Dir. of U.S. Conf. of Mayors, to Member Mayors (May 29, 2012), <http://www.usmayors.org/80thAnnualMeeting/media/proposedresolutions2012.pdf> [<https://perma.cc/YT58-JSE4>] (supporting the creation of parent trigger mechanisms).

160. Jennifer McMurrer & Shelby McIntosh, *State Implementation and Perceptions of Title I School Improvement Grants Under the Recovery Act: One Year Later*, CTR. ON EDUC. POL'Y 1, 2 (Mar. 2012), <http://files.eric.ed.gov/fulltext/ED532794.pdf> [<https://perma.cc/29YE-PZ9K>] (describing a study of forty-six states, forty-five of which had a school using the transformation model); James Taylor et al., *State and Local Implementation of the No Child Left Behind Act: Volume IX—Accountability Under NCLB: Final Report*, U.S. DEP'T EDUC. 149 (Jan. 2010), <https://www2.ed.gov/rschstat/eval/disadv/nclb-accountability/nclb-accountability-final.pdf> [<https://perma.cc/5DUT-DVA2>]; Patricia Troppe et al., *State, District and School Implementation of Reforms Promoted Under the Recovery Act: 2009–10 through 2011–12*, U.S. DEP'T EDUC. xxviii, 103, 113 (Sept. 2015), <http://ies.ed.gov/ncee/pubs/20154016/pdf/20154016.pdf> [<https://perma.cc/ZSX9-HDAS>].

161. Melissa Lazarin, *Charting New Territory: Tapping Charter Schools to Turn Around the Nation's Dropout Factories*, CTR. FOR AM. PROGRESS 1, 1 (June 2011), http://www.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/charter_schools.pdf [<https://perma.cc/7GC2-FKXX>] ("The president and U.S. Secretary of Education Arne Duncan have set their sights on turning around the nation's 5,000 lowest-performing schools, and they are hoping charter school operators will help shoulder part of the effort."); see also James Cersonsky, *A Lesson for Arne Duncan*, NATION (Sept. 26, 2012), <https://www.thenation.com/article/lesson-arne-duncan/> [<https://perma.cc/AV9D-5NJC>].

charter schools.¹⁶² How states respond to the increased freedom to structure education policies provided by the ESSA likely will be a determinative factor in the pace of any future transition to sector agnosticism.

II. THE COMING TRANSFORMATION OF EDUCATION LAW

The rise of sector-agnostic education policies has profound implications not only for the delivery of K12 education in the United States, but also for the constitutional law of education at both the state and federal levels. This Section discusses perhaps the most significant implication of sector agnosticism for education law—the blurring of the public-private distinction between charter schools and private schools participating in private school choice programs. As a number of courts have already held, the case can be made that charter schools are, at least in some states, legally private schools, not public ones. Three major shifts in education law flow from this conclusion, each of which is discussed in turn below. First, if charter schools are publicly funded private schools rather than privately operated public schools, then the federal constitutional case for prohibiting authentically religious charter schools evaporates. Second, if charter schools are private schools for federal-law purposes—that is to say, if they are not “state actors”—then the federal constitutional protections governing public schools do not apply to them. Third, if charter schools are private schools for state-law purposes, then state constitutional restrictions on the public funding of private schools may apply to charter schools as well.

A. The Religious Charter School Question

The first legal implication in the rise of sector agnosticism is the possibility, as a matter of federal constitutional law, of the erosion of the assumption that all charter schools must be secular schools. This assumption may be incorrect for two related reasons: First, it is not clear whether charter schools should be considered, for federal constitutional purposes, public or private schools. Second, contrary to conventional wisdom, a case can be made that public funds flow to charter schools only indirectly, as the result of numerous parents’

162. See Gina Mahony et al., *Charter Schools and the Every Student Succeeds Act*, NAT’L ASS’N PUB. CHARTER SCH. (Jan. 7, 2016), <http://www.publiccharters.org/wp-content/uploads/2016/01/V3-NAPCS-ESSA-Charter-Overview-Webinar-01.07.15-updated.pdf> [<https://perma.cc/YYW3-8EAU>].

private choices, rather than directly, as the result of a state's decision to charter a school.

The charter school sector is characterized by a remarkable degree of institutional diversity. While the high-performing “no-excuses” charter schools, which emphasize traditional academics, high student expectations, and strict discipline, serving disadvantaged urban students are probably the best-known,¹⁶³ many charter schools depart dramatically from this back-to-basics model. Some charter schools focus on a particular curricular theme—for example, STEM, Afrocentrism, international studies, fine arts, or classical education. Some charter schools do not exist in the formal, “bricks-and-mortar” sense at all. As of 2012, there were 228 “virtual” charter schools in twenty-six states. There also are a growing number of single-sex charter schools: for example, Urban Prep Academies operate three all-male college preparatory high schools serving disadvantaged, primarily African-American students in Chicago,¹⁶⁴ and the Young Women's Leadership Network is comprised of all-girls public charter schools in six states, which also serve disadvantaged urban students.¹⁶⁵

There is, however, one hard-and-fast limit on charter schools' institutional diversity—they must be secular schools. State laws express this prohibition in various ways. The majority approach is to simply require that charter schools be “nonsectarian.” Seven states (and the federal government) additionally prohibit charter schools from being “affiliated” with religious institutions, and two others (Maine and New Hampshire) prohibit such affiliation to the extent that it is prohibited by the U.S. Constitution. Others (for example, New York) prohibit charter schools from being “under the control” of a religious institution. Still others (for example, Georgia) explicitly *permit* religious institutions to operate charter schools, so long as the charter schools that they operate are secular schools. Some states laws are silent on the question, although the accepted view is that the First Amendment's Establishment Clause prohibits religious charter schools.¹⁶⁶

163. See Alexander Boyd, Robert Maranto, & Caleb Rose, *The Softer Side of “No Excuses,”* EDUC. NEXT (2014), http://educationnext.org/files/ednext_XIV_1_maranto.pdf [<https://perma.cc/KZW8-BPP7>]; Michael Q. McShane & Jen Hatfield, *Measuring Diversity in Charter School Offerings*, AM. ENTER. INST. 1, 3 (July 2015), <https://www.aei.org/wp-content/uploads/2015/07/Measuring-Diversity-in-Charter-School-Offerings.pdf> [<https://perma.cc/RQS5-6W6N>].

164. *About Urban Prep*, URBAN PREP ACAD. (2012), <http://www.urbanprep.org/about> [<https://perma.cc/5XHT-WUL3>].

165. *Who We Are*, YOUNG WOMEN'S LEADERSHIP NETWORK (2016), <http://www.ywln.org/who-we-are> [<https://perma.cc/TPE4-CTAL>].

166. See Note, *Church, Choice, and Charters: A New Wrinkle for Public Education*, 122 HARV. L. REV. 1750, 1765 (2009).

There are debates about the extent to which charter schools can incorporate themes with religious connotations, such as cultural or moral education, into their programs. “Character-based” or “morals-based” curricular themes pervade the world of charter schools, although, to be sure, some schools’ character-education curricula fall closer to the “religion” line than others. For example, in *Daugherty v. Vanguard Charter School Academy*, a federal court rejected an Establishment Clause challenge to a “morals-based” curriculum, which stressed the classical Greek virtues of prudence, temperance, fortitude, and justice and taught students that “mercy,” “compassion,” “kindness,” “forgiveness,” “grace,” “moral strength,” “conscience,” “faith,” and “self-sacrifice.” were associated with these virtues. The court reasoned that “[t]he fact that the curriculum employs words and concepts in service of character development that happen to coincide or harmonize with the tenets of some or all religions, does not necessarily betoken endorsement” of religion.¹⁶⁷

Some charter schools also are structured around cultural themes with strong religious overtones. For example, the now-defunct Tarek Ibn Ziyad Academy (“TiZA”) in Minnesota was named for the Muslim general who conquered Spain, and the school was founded and directed by an imam. The school required a course in Arabic language, scheduled vacations around Muslim holidays, permitted “voluntary and student-led prayer,” and promised to “help students integrate into American society, while retaining their identity” as Middle Easterners. Following a settlement between the ACLU and the state of Minnesota, TiZA was forced to close.¹⁶⁸ The Hebrew-themed Ben Gamla Charter School in Hollywood, Florida, is named for a historical figure who established Jewish schools throughout ancient Israel, was founded by a rabbi, and

167. *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897, 913 (W.D. Mich. 2000). The school at issue in the case, the Vanguard Charter Academy, is one of over eighty charter schools operated by the National Heritage Academies, each of which employs the curricular model challenged in the case. Collectively, in 2014–2015, the National Heritage Academies educated more than fifty-one thousand children. *At a Glance*, NAT’L HERITAGE ACADS., <http://www.nhaschools.com/About-Us/Pages/At-a-Glance.aspx> (last visited Sept. 20, 2016) [<https://perma.cc/DA78-J2V7>]; *Frequently Asked Questions*, NAT’L HERITAGE ACADS., <http://www.nhaschools.com/About-Us/Pages/Frequently-Asked-Questions.aspx> (last visited Sept. 20, 2016) [<https://perma.cc/2VHE-9NK5>].

168. Katherine Kersten, a writer with the Center of the American Experiment, wrote extensively about the school for several years, leading to a state investigation of the school and instigating the ACLU lawsuit. *Teacher Questions Muslim Practices at Charter School*, STAR TRIB. (May 19, 2008), <http://www.startribune.com/aclu-settles-with-state-school-sponsor/115533274/> [<https://perma.cc/5SMX-35FK>]; see also Sarah Lemagie, *ACLU Settles with School, Sponsor*, STAR TRIB. (Feb. 7, 2008), <http://www.startribune.com/aclu-settles-with-state-school-sponsor/115533274/> [<https://perma.cc/T7FW-CKNU>]; Sarah Lemagie, *State Orders Charter School to Correct Two Areas Tied to Islam*, STAR TRIB. (May 20, 2008), <http://pluralism.org/news/state-orders-charter-school-to-correct-2-areas-tied-to-islam/> [<https://perma.cc/3VAE-XQLV>].

initially was directed by a former Jewish day school director. The school serves only kosher food and requires that one period each day be dedicated to teaching Hebrew and that a second period to be taught in a mix of English and Hebrew.¹⁶⁹ Due to ACLU threats of litigation, the school was forced to “scrub” its curricula of religious references three times and—at one point—required to freeze Hebrew instruction.¹⁷⁰ Since then, the school, which seems to have resolved its differences with the local school board and placated the ACLU, has come to be considered a model for Hebrew charter schools across the United States.¹⁷¹ In 2015, the nation’s first charter school focusing on Chaldean culture—a minority Christian sect in Iraq and Syria—opened in suburban Detroit. The school will require all students to become fluent in modern Aramaic, the language spoken by Chaldean Christians, and will offer a course on Mesopotamian history.¹⁷²

Since charter funding comes at the cost of secularizing the curriculum, similar disputes arise when private religious schools “convert” to charter schools. The conversion of religious schools to charter schools is not uncommon.¹⁷³ For example, in 2001, NBA superstar David Robinson founded a private Christian school for disadvantaged students in San Antonio, the George W. Carver Academy. In 2012, Robinson decided to enlist a secular charter provider, IDEA Public Schools, to operate the school as a charter school in order secure access to public funds.¹⁷⁴ Catholic bishops in a number of dioceses, including Brooklyn, Washington, D.C., Miami, and Indianapolis, have opted—usually with encouragement of local political

169. Abby Goodnough, *Hebrew Charter School Spurs Dispute in Florida*, N.Y. TIMES (Aug. 24, 2007), http://www.nytimes.com/2007/08/24/education/24charter.html?pagewanted=print&_r=1 [https://perma.cc/J37K-WE5P].

170. *School Can Resume Lessons in Hebrew*, N.Y. TIMES (Sept. 12, 2007), http://www.nytimes.com/2007/09/12/us/12charter.html?_r=0 [https://perma.cc/BQ76-F839].

171. Elissa Gootman, *State Weighs Approval of School Dedicated to Hebrew*, N.Y. TIMES (Jan. 11, 2009), http://www.nytimes.com/2009/01/12/nyregion/12hebrew.html?_r=1&pagewanted=1&ref=education [https://perma.cc/S2D5-4TEJ].

172. Lori Higgins, *New Charter School Boosts Chaldean, Assyrian Cultures*, DETROIT FREE PRESS (Aug. 19, 2015, 9:38 AM), <http://www.freep.com/story/news/local/michigan/oakland/2015/08/19/chaldean-charter-school-opens-madison-heights/31237333/> [https://perma.cc/8TBE-D58Y].

173. Twelve states expressly forbid the conversion of private schools to charter schools, although, in practice, conversions can be structured so as to easily avoid offending such statutes. *Charter Schools*, NAT’L EDUC. ASS’N (2015), <http://www.nea.org/home/16332.htm> [https://perma.cc/XQ3J-DZ9Q].

174. Maria Luisa Cesar, *Carver Going the Charter Route*, SAN ANTONIO EXPRESS-NEWS (Feb. 28 2012, 11:32 PM), <http://www.mysanantonio.com/news/education/article/Carver-going-charter-route-3368119.php> [https://perma.cc/XAP6-CTRD].

leaders—to convert struggling urban Catholic schools to secular charter schools rather than closing them.¹⁷⁵

1. The “Publicness” of Charter Schools

There are two related reasons why it is broadly assumed that charter schools cannot be religious schools. The first is the universal assumption that charter schools are public schools, not private schools. The second is the assumption that public schools flow directly to charter schools as a result of the government’s decision to open a school, rather than indirectly as the result of parents’ enrollment decisions. While the Supreme Court Establishment Clause canon is riddled with confusion and inconsistencies, the Court’s opinions make abundantly clear that *public* schools must be *secular*.¹⁷⁶ That is to say, that public schools may not teach religion as the truth of the matter. Charter schools are considered public schools for two overlapping reasons. The first reason is that charter school proponents and operators generally benefit from that categorization and routinely refer to the “publicness” of charter schools. As Aaron Saiger has observed, “Uninterrogated claims that charter schools are public schools are routine if not ubiquitous The publicness of the charter school has become central to the self-understanding of many funders, advocates, legislators, politicians, unions, scholars and ordinary folk involved in or supportive of the charter movement.”¹⁷⁷ For example, the largest association of charter schools in the United States is the “National Alliance for Public Charter Schools.”¹⁷⁸

The second reason that charter schools are considered public is that state laws universally characterize charter schools as public schools. Indeed, most state statutes call them “public charter schools.” The logic of this characterization flows from the fact that, at least theoretically, charter school laws do more than permit charter schools to operate. They enable the creation of charter schools through the authorization process. Theoretically, charter schools do not exist before they are granted a “charter” by a government-authorized charter-school

175. See BRINIG & GARNETT, *supra* note 27, at 45–56.

176. See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992) (invalidating prayer before public school graduation); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (invalidating Louisiana law mandating the teaching of “creation science” in public schools); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (invalidating moment of silence statute); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (invalidating bible reading and school prayer as violation of the Establishment Clause).

177. Aaron Saiger, *Charter Schools, the Establishment Clause, and the Neoliberal Turn in Public Education*, 34 CARDOZO L. REV. 1163, 1179–80 (2013).

178. NAT’L ALLIANCE FOR PUB. CHARTER SCHS., <http://www.publiccharters.org/> (last visited Nov. 14, 2016) [<https://perma.cc/4DCC-8EHQ>].

authorizer (most frequently state boards of education and local school boards, and, in some states, special public commissions, universities, and not-for-profit entities).¹⁷⁹ But, the “creation” of a new school through a chartering process does not necessarily make it “public” for Establishment Clause purposes. After all, private schools generally cannot operate without government approval. Moreover, most private schools—including those participating in private school choice programs—are *private* corporations, also created by a state’s decision to grant a “charter.”

Even if the “creation” of a school by government act made it a public entity for Establishment Clause purposes, the reality on the ground in most states is that charter schools are not being “created” when they are granted a charter. The charter market has evolved away from early expectations that the chartering process would create new schools. More and more charter schools are franchises or branches of a CMO. The CMO, in seeking a charter, is seeking permission to expand to a new market (or within an existing one). The CMO, not the state, creates the school, which is privately operated largely independently from the public educational authorities. In fact, with the expansion of CMO-managed schools, private schools participating in parental choice programs may be more likely to be “created” by state law (through the incorporation process) than charter schools. Moreover, in some states, private as well as public entities can be charter authorizers. For example, several states authorize nongovernmental entities—including private universities and nonprofit organizations—to authorize the creation of charter schools, subject to ratification by the state’s department of education. During the 2009–2010 school year, 109 out of Minnesota’s 149 charter schools were authorized by private entities, including twenty-six authorized by religious institutions. Currently in Ohio, private, not-for-profit corporations authorize more than forty percent of the state’s charter schools, including the St. Aloysius Orphanage, which alone authorizes forty-four schools.¹⁸⁰ Put differently, in some states, many charter schools are not authorized by the government at all, but by private (including religious) entities.

179. See *Overview of the State of Charter Authorizing*, NAT’L ASS’N CHARTER SCH. AUTHORIZERS (2014), http://www.qualitycharters.org/wp-content/uploads/2015/08/NACSA_2014-SOCA.pdf [<https://perma.cc/46KY-AJUF>].

180. See *Membership*, OHIO ASS’N CHARTER SCH. AUTHORIZERS, <http://www.oacsa.org/pages/membership.aspx> (last visited Sept. 25, 2016) [<https://perma.cc/G2KD-MWXW>]; *St. Aloysius Sponsorship, Call for New Community Schools to Open in FY2018*, CHARTER SCH. SPECIALISTS (Sept. 9, 2016), <http://www.charterschoolspec.com/data/CSS-Call-for-New-Schools-Final-September-9-2016.pdf> [<https://perma.cc/2XVS-WSWF>].

2. The Erosion of the Direct-Indirect Aid Distinction

The second reason that it is commonly assumed that the Establishment Clause prohibits religious charter schools is what is known as the “direct-indirect” funding distinction in the Supreme Court’s Establishment Clause jurisprudence. As the Court observed in *Zelman*, “[O]ur decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals.”¹⁸¹ In the *indirect* aid context, the Court has held that the Establishment Clause does not prohibit religious institutions from receiving public funds, since the relevant decisionmaker is the private recipient of the funds (or, in the case of school-aged children, the recipients’ parents), not the government. In *Zelman*, for example, the Court reasoned that private religious schools were but one among a wide range of educational options available to Cleveland school children and the program was one of “true private choice.” This remained the case even though ninety-six percent of the children participating in the program chose to attend religious schools.¹⁸²

In contrast, the Court has held that the government may not *directly* fund religious activities or instruction. As a result, the Court has limited direct government assistance to secular aspects of a religious organization’s activities. This rule extends through a long line of cases addressing the constitutionality of programs providing secular aid to religious institutions—for example, transportation for religious-school students,¹⁸³ secular textbooks,¹⁸⁴ educational materials including computers,¹⁸⁵ tutors for secular remedial instruction,¹⁸⁶ and capital expenditures for the construction of secular buildings at religious colleges.¹⁸⁷ In large part because the Court has assumed that most religiously affiliated elementary and secondary schools, especially Catholic ones, are “pervasively sectarian”—that is, that religion pervades all aspects of instruction—direct financial assistance to

181. *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002).

182. *Id.* at 639.

183. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

184. *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968).

185. *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion). *Mitchell v. Helms* overruled two previous cases suggesting that the Establishment Clause prohibited direct aid—in both cases, instructional materials—that might be adapted for religious purposes. See *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975).

186. *Agostini v. Felton*, 521 U.S. 203 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1997)).

187. *Tilton v. Richardson*, 403 U.S. 672 (1971).

“sectarian” elementary and secondary schools has long been considered a constitutional taboo.¹⁸⁸ The prevailing wisdom is that the funding of charter schools is direct aid, made by virtue of the government’s decision to authorize a charter school to operate, unlike the funding of private school choice, which is indirect.¹⁸⁹

The Court has been divided about what constitutes a program of “private choice.” For example, in *Mitchell v. Helms*, the Court considered an Establishment Clause challenge to the use of federal funds to purchase instructional equipment for religious schools.¹⁹⁰ The Court had previously rejected nearly identical expenditures, in large part because it characterized them as providing “direct” rather than “indirect” aid to religious schools.¹⁹¹ In approving the expenditures at issue in *Mitchell*, a plurality of the Court characterized the program at issue as one of private choice since private schools benefited only because parents enrolled eligible children in them.¹⁹² Justice O’Connor, joined by Justice Breyer, rejected this characterization, however, expressing discomfort with the plurality’s “approval of actual diversion of government aid to religious indoctrination.”¹⁹³

The plurality’s characterization of “indirect aid” in *Mitchell* might command a majority in a future case. Until that time, however, the Establishment Clause question in the charter school context turns on whether funds flow *directly* to the schools as a result of the government’s decision to authorize it to operate or *indirectly* as a result of parents’ decisions to enroll their children in it. The prevailing assumption that charter schools are an example of “direct” funding, however, is arguably incorrect since charter schools receive funding on

188. *Bowen v. Kendrick*, 487 U.S. 589, 621–22 (1988) (observing that the Court has held “parochial schools” to be “pervasively sectarian”); *Meek*, 421 U.S. at 363 (“[I]t would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania’s church-related elementary and secondary schools . . .”); *Lemon v. Kurtzman*, 403 U.S. 602, 636–37 (1971) (“A school which operates to commingle religion with other instruction plainly cannot completely secularize its instruction. Parochial schools, in large measure, do not accept the assumption that secular subjects should be unrelated to religious teaching.”).

189. Tellingly, a year after the Archdiocese of Indianapolis announced its decision to convert two inner-city Catholic schools into charter schools, Indiana adopted a private school choice program. Two years later, the Archdiocese decided to “reconvert” the charter schools into Catholic schools, which would participate in the state’s voucher program as authentically religious schools. See Steve Hinnefeld, *Indy’s Catholic-to-Charter School Experiment Comes to an End*, SCH. MATTERS: K-12 EDUC. IN IND. (Aug. 27, 2014), <https://inschoolmatters.wordpress.com/2014/08/27/indys-catholic-to-charter-school-experiment-comes-to-an-end/> [<https://perma.cc/G3Y9-4B78>].

190. *Mitchell*, 530 U.S. 793.

191. *Wolman v. Walter*, 433 U.S. 229, 250 (1977); *Meek*, 421 U.S. at 362–63.

192. *Mitchell*, 530 U.S. at 816–17.

193. *Id.* at 837.

a per-pupil basis as a result of a parent's enrollment decision. Consider New Orleans, where parents of modest means have two choices for their children: enroll them in a charter school, a decision which results in the state of Louisiana directing per-pupil allocation of funds to the charter school according to a formula based upon the amount of state and local funding that a public school would receive to educate that child,¹⁹⁴ or enroll them in a private school, which results in the State of Louisiana directing a public "scholarship" to the private school based upon a similar formula.¹⁹⁵ Arguably, the per-pupil allocation of charter school funds and the "scholarship" provided by the Louisiana Scholarship Program is a distinction without a difference. Indeed, the charter school funds and the scholarship funds initially were drawn from the same state funding source, which is known as the Minimum Foundation Program.¹⁹⁶

* * *

All of this said, the fact that religious charter schools may be constitutionally permissible does not itself mean that they are legally permitted. State law requirements that charter schools be "secular" are ubiquitous, and the political impediments to removing statutory prohibitions on religious charter schools substantial.¹⁹⁷ As a result, litigation asserting that prohibitions on religious charter schools themselves violate the First Amendment may be the only short-term strategy for eliminating statutory mandates that charter schools be "secular." The Supreme Court has repeatedly asserted that both the Free Exercise and Establishment Clauses prohibit the government from either favoring or disfavoring religious individuals or institutions,¹⁹⁸ and the United States Court of Appeals for the Tenth Circuit has relied upon this rule to invalidate the exclusion of religious

194. LA. STAT. ANN. §§ 17:3971–4001 (2016); Stephen Sugarman, *Is It Unconstitutional to Prevent Faith Based Schools from Becoming Charter Schools?* (July 6, 2015) (unpublished manuscript) (on file with author).

195. LA. STAT. ANN. §§ 17:4011–25 (2016).

196. In 2013, the Louisiana Supreme Court ruled on grounds unrelated to religion that the funds distributed from the Minimum Foundation Program could not go to private schools. *See* La. Fed'n of Teachers v. State, 118 So. 3d 1033 (La. 2013).

197. To begin, such a legislative move would invite costly and controversial litigation with an uncertain outcome. Moreover, the political opposition to lifting the ban on religious charter schools would presumably be at least as fierce as opposition to private school choice (perhaps more so because there is more money at stake) and the political support tepid, since religious organizations might well, for a host of reasons (including anxiety about a loss of autonomy), prefer that states enact private school choice laws.

198. *See, e.g.,* *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

schools from a public scholarship program.¹⁹⁹ On the other hand, the Court of Appeals for the First Circuit has twice rejected the claim that the exclusion of religious high schools from a statewide private school choice program violated the First Amendment and Equal Protection Clause. Both cases involved a unique “tuitioning” program in Maine, which provided public funds to enable children residing in school districts without public high schools to attend private, but not religious, schools. The first, *Strout v. Albanese*, reasoned that permitting parents to use public funds to send their children to religious schools would violate the Establishment Clause, a result foreclosed three years later in *Zelman*.²⁰⁰ The second, *Eulitt v. Maine Department of Education*, was decided after *Zelman*, but reasoned that the State of Maine could, without running afoul of the Equal Protection or Free Exercise Clauses, opt not to provide funding for religious education even if such funding would be constitutionally permissible.²⁰¹ The *Eulitt* court relied heavily on the Supreme Court’s decision in *Locke v. Davey*, which upheld a Washington program that provided college scholarships but prohibited the recipient from pursuing a devotional theology degree.²⁰² In *Davey*, the State of Washington asserted that this exclusion was required by the state constitution’s Blaine Amendment, which was more restrictive than the Establishment Clause. The Court reasoned that compliance with the state constitution was a substantial interest and the burden on the plaintiff’s exercise of religion minimal.²⁰³ Since the majority opinion emphasized the unique “antiestablishment interests” at stake when state funds are used to support members of the clergy, *Locke* does not foreclose a challenge to state laws prohibiting religious charter schools, but it certainly complicates such a claim. The Supreme Court’s forthcoming decision in *Trinity Lutheran Church v. Pauley*, which asks whether a state may exclude a religious school from a public subsidy program *because it is religious*, promises to shed further light on the question.²⁰⁴

199. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245 (10th Cir. 2008).

200. *Strout v. Albanese*, 178 F.3d 57, 63–64 (1st Cir. 1999) (rejecting federal constitutional challenge to the exclusion of religious schools from Maine’s “tuitioning” program); *see also* Bagley v. Raymond Sch. Dep’t, 728 A.2d 127 (Me. 1999) (rejecting similar challenge on state constitutional grounds).

201. 386 F.3d 344 (1st Cir. 2004).

202. *Id.* at 354–55.

203. *Locke v. Davey*, 540 U.S. 712, 724–25 (2004).

204. *See* Eugene Volokh, *The Supreme Court Will Consider: When Does Government Discrimination Against Churches Violate the First Amendment?*, WASH. POST (Jan. 15, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/15/the-supreme-court-will-consider-when-does-government-discrimination-against-churches-violate-the-first-amendment/> [https://perma.cc/42AC-QARQ].

B. Charter Schools and the State Action Doctrine

The implications of categorizing charter schools for federal constitutional purposes as “private” schools extend beyond the realm of the Establishment Clause. The legal implications of the conclusion that charter schools may not be “public” are enormous, since it would mean that millions of students are now attending—and thousands of teachers employed by—schools where they are not afforded constitutional rights. These include the constitutional norms that govern the relationships between traditional public schools and their teachers and students, such as the First Amendment’s protection of free expression,²⁰⁵ the Fourth Amendment’s prohibition of unreasonable searches and seizures,²⁰⁶ and the Due Process Clause’s substantive and procedural protections when students and teachers are disciplined or suspended.²⁰⁷ The question of whether the charter schools are state actors for these purposes has received some limited scholarly attention. For example, Aaron Saiger argues that charter schools are “private” for Establishment Clause purposes, but otherwise should be considered state actors.²⁰⁸ Gillian Metzger asserts that “charter schools most likely would be found part of the government for constitutional purposes, given that they are officially denominated public schools, often are created by the state, and operate subject to the state’s direct oversight.”²⁰⁹ Robert O’Neil wrote in 1999 that charter schools were an “easy case” of state action, given the states’ close regulation of their operations. However, O’Neil suggested, without predicting, that the more laissez faire regulatory approach assumed by most states since he wrote would alter his analysis.²¹⁰ More recently, Preston Green, Bruce

205. See *Morse v. Frederick*, 551 U.S. 393 (2007) (rejecting First Amendment challenge to student suspension for displaying a sign that said “BONG HiTS 4 JESUS”); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (rejecting First Amendment challenge to high school’s decision to exclude controversial articles from student newspaper); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (holding that student suspension for wearing a black arm band to protest the Vietnam War violated First Amendment).

206. *Safford Unified Sch. Dist. # 1 v. Redding*, 557 U.S. 364 (2009) (holding that strip search of teenage student violated Fourth Amendment); *Bd. of Educ. of Indep. Sch. Dist. 92 v. Earls*, 536 U.S. 822 (2002) (rejecting Fourth Amendment challenge to school policy of suspicionless drug testing of student athletes); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding that search of student purse did not violate Fourth Amendment).

207. *Goss v. Lopez*, 419 U.S. 565 (1975) (holding that Due Process Clause required hearing before student suspended for more than ten days).

208. Saiger, *supra* note 177, at 1181.

209. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1495–96 (2003).

210. Robert M. O’Neil, *School Choice and State Action*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 215, 220 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).

Baker, and Joseph Oluwole have argued that charter schools are problematic precisely because they *cannot* properly be characterized as state actors.²¹¹ And a handful of student notes have addressed the issue, reaching various conclusions, including the suggestion that the current state action doctrine is ill-equipped to deal with the public-private hybrids like charter schools.²¹²

The Supreme Court has articulated a number of factors to determine whether an institution should be considered a state actor for federal constitutional purposes²¹³—that is to say when there is a “sufficiently close nexus between the state and the challenged action” to attribute the action to the government.²¹⁴ These factors include whether the private party is performing a “governmental” function;²¹⁵ whether the government compelled or significantly encouraged the challenged action;²¹⁶ whether the government controls the private actor to such an extent that the private actor is appropriately characterized as a governmental agent;²¹⁷ and the degree of interdependence between the government and the private actor.²¹⁸ The cases make clear that neither government regulation nor government funding necessarily transforms a private entity into a public one. For example, in *Rendall-Baker v. Kuhn*, the Supreme Court held that a heavily regulated private school for special-needs students that received more than ninety percent of its funds from the state was not a state actor.²¹⁹ “The school,”

211. Preston C. Green et al., *Having It Both Ways: How Charter Schools Try to Obtain Funding of the Public Schools and the Autonomy of Private Schools*, 63 EMORY L.J. 303 (2013); see also Preston C. Green et al., *Charter Schools, Students of Color and the State Action Doctrine: Are the Rights of Students of Color Sufficiently Protected?*, 18 WASH. & LEE J. CIV. RTS. & SOC. JUST. 253 (2012).

212. Justin M. Goldstein, Note, *Exploring “Unchartered” Territory: An Analysis of Charter Schools and the Applicability of the U.S. Constitution*, 7 S. CAL. INTERDISC. L.J. 133 (1998); Maren Hulden, Note, *Charting a Course to State Action: Charter Schools and § 1983*, 111 COLUM. L. REV. 1244 (2011); Catherine LoTempio, Comment, *It’s Time to Try Something New: Why Old Precedent Does Not Suit Charter Schools in the Search for State Actor Status*, 47 WAKE FOREST L. REV. 435 (2012); Jason Lance Wren, Note, *Charter Schools: Public or Private? An Application of the Fourteenth Amendment’s State Action Doctrine to These Innovative Schools*, 19 REV. LITIG. 135 (2000).

213. See Metzger, *supra* note 209, at 1495–96 (listing factors).

214. See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

215. See *NCAA v. Tarkanian*, 488 U.S. 179, 197 (1988).

216. See *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (“[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”).

217. See *id.*

218. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 299–301 (2001).

219. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

the Court observed, “is not fundamentally different from many private corporations whose business depends on [government] contracts. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.”²²⁰ And, importantly for the purposes of analyzing the status of charter schools, the Supreme Court has ruled that entities created by government action (e.g., the United States Olympic Committee) are not necessarily state actors.²²¹ It has also held that the legal characterization of an entity as “private” is not dispositive of the state action determination. Presumably, the opposite is also true: if a law designating an entity as “private” does not control the state action question, then presumably a law designating an entity as “public” should not either.²²²

The development of the state action doctrine has—to be sure—not been linear, although it has tended to proceed toward a more formalistic analysis of the extent that the private entity in question is either controlled by or controls governmental actors or, as most recently articulated, is “entwined” with them.²²³ As a result, the application of the state action doctrine to charter schools may vary from state to state, along with the extent of state control over charter school operations.²²⁴ For example, despite substantial prodding by the federal government,²²⁵ a number of states continue to limit the number of charter schools. The details of these caps vary dramatically—some states cap the number of new charters per year, others limit the total number of charter schools in the state (with the caps ranging from forty-two to 850 schools). Still others limit charter schools’ geographic

220. *Id.* at 840–41; *see also* *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974) (holding that government regulation of a utility that possessed a state-granted monopoly did not make the utility a state actor); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (holding that state grant of a liquor license to a private club was not sufficient entanglement to make the club a state actor).

221. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm’n*, 483 U.S. 522, 542–47 (1987).

222. *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374 (1995) (holding that Amtrak was a governmental entity, regardless of its congressional designation as private).

223. *See Metzger, supra* note 209, at 1413; *see also Brentwood Acad.*, 531 U.S. 288 (holding that nonprofit entity organized to regulate high school athletics in Tennessee was a state actor because of its substantial “entwinement” with public schools).

224. Despite substantial prodding by the federal government, a number of states continue to cap the number of charter schools. The details of these caps vary dramatically—some states cap the number of new charters per year, others limit the total number of charter schools in the state (with the caps ranging from forty-two to 850 schools), still others limit charter schools’ geographic location. *See Education Opportunity Index*, CTR. FOR EDUC. REFORM, <http://parentpowerindex.edreform.com/> (last visited Sept. 12, 2016) [<https://perma.cc/K84H-AX2P>].

225. For example, the U.S. Department of Education has sought to condition access to certain federal education funds on states eliminating charter school caps. *See Press Release: States Open to Charters Start Fast in ‘Race to Top,’* U.S. DEP’T EDUC. (June 8, 2009), <http://www2.ed.gov/news/pressreleases/2009/06/06082009a.html> [<https://perma.cc/E7ZH-W5W6>].

locations.²²⁶ The extent to which charter schools are exempt from regulations governing traditional public schools, such as mandatory curriculum requirements, also varies by state. And some states have been more aggressive about closing charter schools for academic underperformance than others.²²⁷ Even in states with substantial government regulation, however, the line between public and private can be blurred. Like charter schools, all states regulate private schools to some extent, for example, by requiring standardized testing, minimum instructional hours, and curricular content. Many also place conditions on the “approval” to operate, usually in the form of private accreditation. States with private school choice programs often place additional regulatory requirements on participating schools, including excluding persistently underperforming schools from parental choice programs.²²⁸ And, as the discussion above illustrates, the Supreme Court has made clear that neither comprehensive regulation (including licensing) nor public funding has the effect of transforming a private entity into a public one.

Federal courts have divided over the question of whether (and when) charter schools should be treated as state actors. In *Caviness v. Horizon Community Learning Center, Inc.*, the Court of Appeals for the Ninth Circuit answered that question in the negative.²²⁹ The case arose after an Arizona charter school teacher was dismissed following a complaint by a female student. The teacher sued, alleging that his dismissal violated the Fourteenth Amendment’s Due Process Clause. The district court dismissed the claim, finding that the charter school was not a state actor.²³⁰ The Ninth Circuit affirmed, rejecting the teacher’s assertion that Arizona law’s designation of charter schools as “public schools” that provide “public education service” controlled the question.²³¹ It also rejected the claim that the school was a state actor because it was performing a traditional state function (public

226. See Julie D. Bell, *Charter School Caps*, NAT’L CONF. STATE LEGISLATURES 1 (Dec. 2011), <http://www.ncsl.org/documents/educ/CharterSchoolCaps.pdf> [<https://perma.cc/LRZ7-7JZV>]; *Charter School Laws Across the States: 2015 Rankings and Scorecard*, CTR. FOR EDUC. REFORM 2 (2015), <https://www.edreform.com/wp-content/uploads/2015/07/CharterLaws2015.pdf> [<https://perma.cc/KGN7-GQ8Y>].

227. See *50-State Comparison: Charter School Policies*, EDUC. COMM’N STATES (Jan. 25, 2016), http://www.ecs.org/html/offsite.asp?document=educationIssues/CharterSchools/CHDB_intro.asp [<https://perma.cc/8GPJ-MT4J>].

228. See *The ABCs of School Choice*, *supra* note 81 (collecting and summarizing regulations).

229. 590 F.3d 806, 808 (9th Cir. 2010) (finding that charter school was not a state actor and therefore rejecting teacher’s § 1983 due process claim).

230. See *id.* at 810–12.

231. *Id.* at 812–14.

education).²³² The court reasoned that, whatever the legal designation of the charter school (which was, under state law, also a private corporation), the state action determination turned on whether a sufficiently close “nexus” between the state and the challenged action existed such that the school’s action could fairly be said to be the action of the state.²³³ The court rejected the argument that this nexus was established when Arizona initially reviewed and approved the school’s charter, which included the school’s self-created personnel policies. Instead, citing *Rendall-Baker*, the court concluded the termination decision was in no way related to the actions of the state but was the purely private action of a private corporation following privately created termination procedures.²³⁴ Relying on *Caviness*, a federal district court similarly dismissed a teacher’s First Amendment claim against a charter school in *Sufi v. Leadership High School*.²³⁵ The judge reasoned that, although the charter school’s dismissal of a teacher (allegedly for speaking out about the unfair distribution of health benefits) was enabled in some way by the state law authorizing the creation of charter schools, the connection between the decision to authorize the school and the school’s dismissal decision was too attenuated to be fairly classified as “state action.”²³⁶

In other decisions, federal courts have taken a more formalistic approach, holding that charter schools are state actors because they are designated as public schools by state law and/or because public education is a traditional function of state governments. For example, in *Nampa Classical Academy v. Goesling*, the Ninth Circuit concluded that a charter school could not sue the state of Idaho for violating the First Amendment by imposing certain curricular requirements because Idaho law established that charter schools were political subdivisions of the state.²³⁷ Federal district courts in Illinois, Ohio, and New York similarly have relied upon the state law designations of charter schools as “public schools” to conclude that they are state actors subject to § 1983 liability.²³⁸ In *Riester v. Riverside Community School*, for example, the United States District Court for the Southern District of

232. *See id.* at 814–16.

233. *Id.* at 812.

234. *See id.* at 815–18.

235. No. C-13-01598 (EDL), 2013 WL 3339441, at *9 (N.D. Cal. July 1, 2013).

236. *See id.* at *6–9.

237. 447 F. App’x 776, 778 (9th Cir. 2011).

238. *See* *Jordan v. N. Kane Educ. Corp.*, No. 08 C 4477, 2009 WL 509744, at *3 (N.D. Ill. Mar. 2, 2009) (holding that dismissed teacher could sue charter school for alleged due process violation); *Matwijko v. Bd. of Trs. of Glob. Concepts Charter Sch.*, No. 04-CV-663A, 2006 WL 2466868, at *1 (W.D.N.Y. Aug. 24, 2006) (recommending that dismissed teacher be allowed to sue a charter school for alleged First Amendment violation).

Ohio held that Ohio law’s designation of charter and community schools as public “ends the inquiry” into the state action question.²³⁹ At least one district court relied on the fact that charter schools perform a traditional state function (public education) in holding that they are state actors—despite the obvious circularity in concluding that the education provided by charter schools is “public” education.²⁴⁰

While the legal implications of the conclusion that charter schools may not be state actors are enormous, the practical implications of the state action question may be less dramatic, for a number of related reasons. First, legislatures and administrative agencies (both state and federal) retain the ability to regulate most aspects of charter school operations, even if they are not state actors.²⁴¹ All states, in fact, regulate both private and charter schools to varying degrees. Second, under both state and federal law, charter schools may be government actors for some purposes (e.g., their relationships with their students) and private actors for others (e.g., their contractual relationships with their employees).²⁴² Third, a finding that charter schools are *not* public would not necessarily foreclose liability for misconduct. On the contrary, state courts are divided on whether charter schools are sufficiently “governmental” to enjoy the protection of state statutes immunizing government actors from tort liability.²⁴³ In these cases, the plaintiffs—students, teachers, and parents—argue that charter schools are private in order to circumvent government immunity. Given the trend in federal constitutional law toward greater deference to public school actors, state tort law may ultimately provide a more effective mechanism for policing charter school malfeasance than the federal constitution. Finally, unlike in traditional public schools, charter school parents have greater recourse to police charter schools through the exercise of what Alfred Hirschman famously termed “exit, voice, and

239. 257 F. Supp. 2d 968, 972 (2002).

240. See *Scaggs v. N.Y. State Dep’t of Educ.*, No. 06-CV-0799 (JFB) (VVP), 2007 WL 1456221, at *13–14 (E.D.N.Y. May 16, 2007) (holding that the charter school was a state actor because public education was traditionally the exclusive prerogative of the state).

241. For example, regulations promulgated pursuant to the Individuals with Disabilities Education Act mandate that charter schools serve disabled students unless state law has assigned that responsibility to another entity. 34 C.F.R. § 300.209 (2006).

242. See *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812–13 (9th Cir. 2010) (“It is important to identify the function at issue because an entity may be a State actor for some purposes, but not for others.” (quoting *Lee v. Katz*, 276 F.3d 550, 555 n.5 (9th Cir. 2002))); *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 550 (5th Cir. 2005) (noting that in a suit by terminated employee of private prison contractor, the question is “whether [defendant] acted under color of state law in terminating [plaintiff’s] employment, *not* whether its providing juvenile corrections services was state action”).

243. See *Preston C. Green, III et al., The Legal Status of Charter Schools in State Statutory Law*, 10 UMass. L. REV. 240, 240–76 (2015).

loyalty.”²⁴⁴ That is to say that parents are empowered to withdraw their children and place them in another school if their demands for change are unsatisfied. This kind of choice—and the parental autonomy and authority that it enables—is at the heart of sector-agnostic education policy.

C. Charter Schools and State Constitutions

If, for purposes of federal law, characterizing charter schools as “private” actors has the effect of immunizing them from constitutional scrutiny, for purposes of state law, such a characterization may have the opposite effect. This is because, in contrast to the federal constitution, most state constitutions have a variety of provisions that directly address both public and private education. These provisions fall into two categories: The first category includes the Blaine Amendments and other provisions that place explicit limitations on the public funding of private schools. The second category addresses the establishment, structure, and funding of public schools. Constitutional provisions falling into both categories have been held to restrict private school choice programs in several states. For example, as discussed above, the Arizona and Colorado Supreme Courts have invalidated voucher programs on Blaine Amendment grounds.²⁴⁵ In 2006, the Florida Supreme Court surprised many by holding that a statewide “failing schools” voucher law ran afoul of a provision falling in the second category, which mandated the establishment of a “uniform, efficient, safe, secure and high quality system of public schools.”²⁴⁶ The justices reasoned that the use of public funds to send children to private schools undermined the “uniformity” of the Florida public schools system. More recently, in 2012, the Louisiana Supreme Court ruled in *Louisiana Federation of Teachers v. State* that the state constitution prohibited funds reserved for public schools, known as the “Minimum Foundation Program,” from being used for private school choice.²⁴⁷ Not surprisingly, given the developments in the charter school market described above, opponents have begun to file lawsuits alleging that charter schools violate both types of provisions *because they are effectively private schools*. This Section discusses the possibility that

244. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 21–44 (1970).

245. See *Cain v. Horne*, 202 P.3d 1178, 1184 (Ariz. 2009); *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461, 471 (Colo. 2015).

246. *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006).

247. 118 So. 3d 1033, 1051 (La. 2013).

state constitutional provisions limiting the funding of private schools may also limit the funding of charter schools.

1. Charter Schools and Public-Funding Restrictions

In September 2014, nearly a year after hearing oral arguments, the Washington Supreme Court became the first state supreme court to invalidate a charter school law on the grounds that charter schools were insufficiently public to receive public education funds.²⁴⁸ The case, *League of Women Voters v. State of Washington*, resolved a challenge to a law enacted by referendum in 2012 that empowered two governmental agencies—a new state charter school commission and the Washington State Board of Education—to authorize the creation of charter schools in the state. The law designated charter schools as “common schools” and required them to comply with certain baseline academic and curricular expectations (and required the authorizing agencies to monitor their performance), but also guaranteed them substantial autonomy and relieved them of oversight by local school boards.²⁴⁹ The law further directed that charter schools be funded in the same manner as traditional public schools.²⁵⁰

The plaintiffs alleged that the charter school law violated Article IX, § 2 of the Washington Constitution, which requires the establishment of “a general and uniform system of public schools,”²⁵¹ including “common schools” (among others). That provision further provides that “the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.”²⁵² The majority in *League of Women Voters* concluded that charter schools were not common schools, since the court had previously held—in a 1909 opinion called *School Dist. No.*

248. See *League of Women Voters v. State*, 355 P.3d 1131, 1137–40 (Wash. 2015) (explaining that charter schools do not qualify as “common schools,” and thus the “Charter School Act’s provisions authorizing diversion of . . . restricted funds are unconstitutional”).

249. See WASH. REV. CODE ANN. § 28A.710.005(1)(g) (West 2016) (stating that that the charter school statutes “free teachers and principals from burdensome regulations that limit other public schools,” thereby giving charter schools “the flexibility to innovate” regarding staffing and curriculum), *invalidated by League of Women Voters*, 355 P.3d 1131; WASH. REV. CODE ANN. § 28A.710.040(3) (West 2016):

For the purpose of allowing flexibility to innovate in areas such as scheduling, personnel, funding, and educational programs to improve student outcomes and academic achievement, charter schools are not subject to, and are exempt from, all other state statutes and rules applicable to school districts and school district boards of directors.

250. See WASH. REV. CODE ANN. §§ 28A.710.220, 230(1) (West 2016).

251. WASH. CONST. art. IX, § 2.

252. *Id.*

*20 v. Bryan*²⁵³—that common schools must be controlled by local school boards. Therefore, the court reasoned, the law, which directed that charter schools be funded in the same manner as other public schools, was unconstitutional.²⁵⁴ The court rejected the argument that charter schools could be financed from the general fund, reasoning that all revenue raised for the purpose of education were common school funds and that the funding provisions were not severable from the substantive provisions of the charter school law since the law did not segregate the funding of common schools and other educational options.²⁵⁵

The dissenting justices agreed with the conclusion that charter schools were not common schools but disagreed with the conclusion that the funding provisions in the law rendered them unconstitutional. On the contrary, the dissent argued that, although the statute directed that funding for charter schools parallels funding for traditional public schools, the source of the funds was the state's general fund, not the "common school fund" (constitutional term of art). In fact, the dissent pointed out that, taken to its logical extreme, the majority's opinion would prohibit any educational expenditures except for common schools, when, in fact, millions of dollars are allocated for education-related expenditures other than the common schools each year. The dissenting justices further argued that any constitutionally flawed provisions of the law dealing with funding were severable from the provisions establishing charter schools.²⁵⁶

The Washington decision closely parallels the Louisiana Supreme Court's decision in *Louisiana Federation of Teachers*, discussed previously, which invalidated the use of certain funds to finance the state's voucher program.²⁵⁷ As discussed below, the Louisiana Association of Educators has also challenged the use of this fund for certain kinds of charter schools—specifically those not authorized and regulated by local school boards—arguing, in essence, that charter schools should be treated, for state constitutional purposes,

253. 51 Wash. 498, 502 (Wash. 1909).

254. See *League of Women Voters*, 355 P.3d at 1137–40.

255. *Id.* at 1140–41.

256. *Id.* at 1141–48 (Fairhurst, J., concurring in part and dissenting in part).

257. See Danielle Dreilinger, *Louisiana Supreme Court Rules Voucher Funding Violates the State Constitution*, TIMES-PICAYUNE (May 7, 2013, 10:29 AM), http://www.nola.com/education/index.ssf/2013/05/breaking_louisiana_supreme_cou.html [https://perma.cc/6CNE-6JAR]. Scholarships are now funded from other sources of state funds. See Julia O'Donoghue, *Over \$3.37 Million for Louisiana's School Voucher Program Goes Unused*, TIMES-PICAYUNE (Nov. 25, 2014, 11:59 AM), http://www.nola.com/politics/index.ssf/2014/11/louisiana_private_voucher_prog.html [https://perma.cc/U8JP-GPLU].

as private schools, not public ones.²⁵⁸ Both decisions leave open the possibility that alternate sources of public funds may be constitutionally directed to the funding of private and charter schools. Indeed, following *Louisiana Federation of Teachers*, the state did find another way to fund the voucher program. However, in Washington, as the dissent highlights, the constitutional path to legally funding charter schools is a narrow one at best, requiring the careful segregation of public education funds for use by traditional public schools only.²⁵⁹

Neither *League of Women Voters* nor *Louisiana Federation of Teachers* turned on the interpretation of the state Blaine Amendment. They could not, by definition, have done so, because Louisiana does not have a Blaine Amendment and Washington's Blaine Amendment only prohibits public funding of religious schools by providing that "[a]ll schools maintained wholly or in part by the public funds shall be forever free of sectarian control."²⁶⁰ Nevertheless, the Washington case arguably has opened the door to future challenges to charter schools that rely on a range of state constitutional restrictions of public expenditures in the education context, including on Blaine Amendments that encompass both private and secular schools.

A number of such lawsuits have been filed, thus far unsuccessfully. For example, in *Council of Organizations & Others for Education About Parochial, Inc. v. Engler*,²⁶¹ the plaintiffs alleged that Michigan's fledgling charter school law, enacted in 1993, ran afoul of the state's sweeping prohibition on the funding of private schools, known as the "Parochial" Amendment, which provides:

No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students.²⁶²

258. Sharon Brooks Hodge, *Lawsuit Threatens Public Funding for Charter Schools in Louisiana*, LA. RECORD (Mar. 27, 2016), <http://louisianarecord.com/stories/510703957-lawsuit-threatens-public-funding-for-charter-schools-in-louisiana> [<https://perma.cc/G5S8-7KKP>]; Danielle Dreilinger, *Teachers Union Sues Louisiana to Defund Some Charter Schools*, TIMES-PICAYUNE (Sept. 24, 2014, 1:04 PM), http://www.nola.com/education/index.ssf/2014/09/teachers_union_sues_louisiana.html [<https://perma.cc/4YS2-4DSU>].

259. See *League of Women Voters*, 355 P.3d at 1146 (Fairhurst, J., concurring in part and dissenting in part).

260. WASH. CONST. art. IX, § 4.

261. 566 N.W.2d 208, 211 (Mich. 1997).

262. MICH. CONST. art. 8, § 2.

The trial court and court of appeals agreed with the plaintiffs. The courts reasoned that, because charter schools could be authorized by both community colleges and public universities, the statute authorized the funding of schools that were not under the control of the state.²⁶³ A divided Supreme Court of Michigan reversed. The justices emphasized that the lawsuit presented a facial challenge to the constitutionality of the statute and that the court must therefore satisfy itself that the statute was unconstitutional in all of its applications. Given the comprehensive regulation of charter schools, which Michigan law describes as “public school academies,” the fact that all the authorizing bodies in the state were public entities, and the duty to defer afforded to the legislature in defining the term “public schools,” the court concluded that charter schools should not be considered “private” schools subject to the Parochial amendment. Rather, the justices concluded that the state had simply enabled the establishment of a new kind of public schools, albeit ones that happened to be privately operated.²⁶⁴ The dissent in the *Engler* decision arguably presaged debates about the public versus private nature of charter schools that are currently playing out in state-action cases in federal courts. In his spirited dissent, Justice Boyle argued that the level of public control over charter schools was insufficient to support a conclusion that they were public rather than private schools. He concluded, “[T]he Legislature . . . cannot make what is private, public, simply by declaring it so.”²⁶⁵

While it is certainly the case that a school might be “private” for federal constitutional purposes and “public” for state constitutional purposes (or vice versa), the market and regulatory developments that further erode the legal and factual bases for concluding that charter schools are state actors also reopen the question posed by Justice Boyle: Should state constitutions prohibit the funding of charter schools to the same extent that they prohibit private school choice? In most states, the question is moot. Some Blaine Amendments only prohibit the funding of “sectarian” schools, and—thus far—charter schools must be secular. (Others limit the funding of all private schools.) Moreover, a majority of state supreme courts to have considered this issue have concluded that their Blaine provisions do not preclude private school choice because they incorporate the distinction between the “direct” and “indirect” funding of religious schools embraced in the U.S. Supreme Court’s Establishment Clause decisions. In states that have rejected (or might

263. *Council of Organizations*, 566 N.W.2d at 212–13.

264. *Id.* at 213–22.

265. *Id.* at 223–25 (Boyle, J., dissenting).

reject) this direct-indirect funding dichotomy, decisions concluding that charter schools are private schools presumably would limit charter school funding to the same extent that they limit private school funding.

2. Charter Schools and “Uniformity” Requirements

At least since the Florida Supreme Court’s decision in *Bush v. Holmes*,²⁶⁶ litigation challenging private school choice programs routinely features claims that the funding, even indirectly, of private schools is inconsistent with state constitutional provisions requiring the maintenance of public schools.²⁶⁷ Virtually all state constitutions contain such a provision, generally called “uniformity” provisions, although the contours of the mandate vary significantly across jurisdictions, with the text of state education guarantees spanning a range from open ended and general to quite specific.²⁶⁸ Generally, state constitutions require the establishment of a system of public schools, with provisions using a range of adjectives to describe the required system (e.g., “uniform,” “efficient,” “suitable,” “adequate,” “thorough”).²⁶⁹ Florida’s constitution is perhaps the most elaborate, demanding that “[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education.”²⁷⁰ Thus far, these “uniformity” challenges to private school choice have not been met with success outside of Florida.

Charter school opponents nevertheless have begun to mimic the tactic in litigation arguing that charter schools also run afoul of uniformity provisions. These suits allege that charter schools are unconstitutional because they undermine the quality and uniformity of public school systems. For example, in *State ex rel Ohio Congress of Parents & Teachers v. State Board of Education*, a closely divided Ohio Supreme Court rejected a uniformity challenge to the state law establishing and authorizing “community schools” (as charter schools are called in Ohio).²⁷¹ The plaintiffs alleged that charter schools unconstitutionally inhibited the state’s ability to provide for a thorough and efficient system of public schools by diverting funding away from

266. 919 So. 2d 392 (Fla. 2006).

267. See Aaron Jay Saiger, *School Choice and States’ Duty to Support “Public” Schools*, 48 B.C. L. REV. 909, 924–44 (2007).

268. See Lupu & Tuttle, *supra* note 87, at 958–62.

269. See Molly A. Hunter, *State Constitution Education Clause Language*, EDUC. LAW CTR. (2011), <http://pabararc.org/pdf/Molly%20Hunter%20Article.pdf> [https://perma.cc/U3N5-87PQ].

270. FLA. CONST. art. IX, § 1(a).

271. 857 N.E.2d 1148, 1166 (Ohio 2006).

traditional public schools. They further argued that the state law provisions freeing charter schools from many of the education regulations governing traditional public schools violated the state constitutional provision mandating a “thorough and efficient” system of public schools.²⁷² In rejecting these claims, the majority concluded that charter schools were a constitutionally appropriate means of reforming public education and increasing educational options in Ohio, which were subject to many of the same baseline regulations guaranteeing school quality as traditional public schools.²⁷³ The majority further concluded that nothing in the Ohio constitution prohibits the reduction in funding of traditional public schools when students exit for other options.²⁷⁴ The dissenting justices argued, as would the majority in the Washington charter school decision, that charter schools not only undermine the public education system but—because they were privately operated and freed from local board control—could not be considered common schools entitled to public funds.²⁷⁵

In other cases, the plaintiffs have alleged that charter school laws run afoul of state uniformity clauses because they divest local school boards of control over public education. These claims are conceptually distinct from the issue presented in cases like *League of Women Voters v. Washington* and *Ohio Congress of Parents & Teachers*, in which the plaintiffs alleged that charter schools are unconstitutional because they are effectively publicly funded *private schools*. In the second version of uniformity claims, the plaintiffs allege that charter schools must be supervised in a particular way (i.e., by local school boards) because they are *public schools*. In 2011, the Georgia Supreme Court endorsed this claim in *Gwinnett County School District v. Cox*. The court invalidated the state statute establishing the Georgia Charter School Commission as inconsistent with a state constitutional provision vesting control of public schools in local boards of education.²⁷⁶ (The state subsequently amended its constitution to allow for the authorization of charter schools by bodies other than local school districts.²⁷⁷)

272. *Id.* at 1154.

273. *Id.* at 1157–59.

274. *Id.* at 1160.

275. *Id.* at 1166–71 (Resnick, J., dissenting).

276. *See Gwinnett Cty. Sch. Dist. v. Cox*, 710 S.E. 2d 773, 775 (Ga. 2011).

277. *See* Motoko Rich, *Georgia's Voters Will Decide on Future of Charter Schools*, N.Y. TIMES (Nov. 5, 2012), <http://www.nytimes.com/2012/11/06/education/future-of-georgias-charter-schools-on-ballot.html> [<https://perma.cc/3MAL-ZLDZ>]; Motoko Rich, *Charter Schools Win Support in Georgia Vote*, N.Y. TIMES (Nov. 7, 2012), http://www.nytimes.com/2012/11/08/us/politics/georgia-approves-charter-school-measure-washington-state-still-counting.html?_r=0 [<https://perma.cc/>

Other courts have rejected these claims, reasoning that the legislature has significant latitude to experiment with restructuring the mechanisms for delivering K12 education.²⁷⁸ For example, in 2002, the Utah Supreme Court rejected a claim similar to that which would later be endorsed by the Georgia Supreme Court. The plaintiffs in the case alleged that the state’s charter school act was unconstitutional because it vested the authorization and supervision of charter schools with the Utah State Board of Education, rather than local school boards.²⁷⁹ The Utah Supreme Court concluded that the Utah Constitution gave the legislature plenary power to structure the state’s educational system to advance the goals of an educated populace, including by establishing nontraditional public schools like charter schools.²⁸⁰

As with the Blaine Amendment challenges to charter school statutes discussed previously, litigants seeking to use uniformity provisions to challenge charter schools face substantial hurdles. With the exception of *Bush v. Holmes*, successful uniformity challenges have targeted disparities within the public school system, not alternatives to it. More than half of all state courts have relied on these provisions to invalidate the state funding mechanisms for traditional public school, with courts holding that overreliance on local property taxes to fund public schools results in unconstitutional disparities in resources and educational opportunities between rich and poor districts. Efforts by proponents of parental choice to argue that the logic of the “funding equity” suits to demand an expansion of educational options, including lawsuits seeking public funding portability as a remedy for these unconstitutional disparities, have failed. More recently, charter school proponents have begun to argue that the pervasive funding disparities between traditional public schools and charter schools run afoul of state uniformity challenges. Again, these lawsuits have—thus far—been unsuccessful.

43CJ-NUJS]; see also Regina Umpstead et al., *Charter Schools and the Law: Current Issues in U.S. Courts and Legislatures*, 298 EDUC. L. REP. 657, 672 (2014).

278. See *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745, 751 (Cal. Ct. App. 1999) (“[O]ur constitution vests the Legislature with sweeping and comprehensive powers in relation to our public schools”); *Boulder Valley Sch. Dist. RE-2 v. Colo. State Bd. of Educ.*, 217 P.3d 918, 930 (Colo. App. 2009) (explaining that Colorado’s Charter Schools Act was constitutional because “[u]nder existing case law, the State may apportion the state-controlled Public School Fund in any manner that is not unreasonable”); *State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ.*, 857 N.E.2d 1148, 1159 (Ohio 2006) (holding that the Ohio legislature did not exceed its powers in setting standards and requirements for common school systems).

279. See *Utah Sch. Bds. Ass’n v. Utah State Bd. of Educ.*, 17 P.3d 1125, 1127 (Utah 2001).

280. *Id.* at 1128–31.

CONCLUSION: EDUCATION LAW IN A SECTOR-AGNOSTIC FUTURE

In both the federal and state context, the legal implications of sector agnosticism depend on empirical realities that currently vary by state, such as the extent of parental choice (in both the private and charter school sectors) and the level of control exercised by regulators over these choices. They also depend on the confluence of a number of political, legal, and market forces any one of which may impede or accelerate the further transition to sector agnosticism. The more that charter schools and private school choice converge, the more the courts will be asked to resolve the legal questions flagged above. That convergence is already occurring in many American cities, where charter schools look more and more like a private school choice device, and increasing numbers of students are spending public funds to attend “true” private schools.

Whether this convergence will continue or even accelerate is difficult to predict. For example, while the new federal education statute *permits* states to use federal funds to convert failing public schools into charter schools and encourages the elimination of several barriers to further charter expansion, federal law no longer (contra the waiver policy) directly incentivizes these actions.²⁸¹ Moreover, while the footprint of private school choice continues to expand, most state’s programs are small and funded at levels far below traditional public schools and charter schools (which themselves receive far less funding than their district counterparts). Moreover, any further transition to sector agnosticism (and future evolution of education law resulting from that transition) likely depends on a host of other factors, including the ability of the charter and private school sectors to continue to secure legislative victories in the face of political opposition growing more determined by the day to halt the expansion of the parental choice footprint; to live up to the promise of delivering educational excellence outside of the traditional public school sector; and to recruit and attract sufficient talent and resources to replicate, build, and staff excellent schools serving disadvantaged children. The answer to these questions, which are by-and-large beyond the scope of this Article, will determine the shape of education policy and education law for decades to come.

281. See *Charter Schools One Step Closer to Big Win with Senate Passage of ESSA*, NAT’L ALLIANCE FOR PUB. CHARTER SCHS. (Dec. 9, 2015), <http://www.publiccharters.org/press/charter-schools-step-closer-big-win-senate-passage-essa/> [<https://perma.cc/GBE4-KKAQ>].