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Andrew Broy

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COMMENT

Charter Schools and Education Reform: How State Constitutional Challenges Will Alter Charter School Legislation

“[S]ince the whole city has one end, it is manifest that education should be one and the same for all, and that it should be public, and not private.”

Aristotle¹

“No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.”

*San Antonio Independent School District v. Rodriguez*²

INTRODUCTION

Foreshadowing the debate that would dominate education reform in the 1990s,³ the Supreme Court, in *San Antonio Independent School District v. Rodriguez*, stated that education could benefit from a “diversity” of viewpoints.⁴ Nowhere has this diversity been more evident than in the expansion of charter schools across the public education landscape.⁵ With unprecedented speed and breadth,

1. ARISTOTLE, *Politics*, in 2 THE COMPLETE WORKS OF ARISTOTLE 1986, 2121 (Jonathan Barnes ed., Princeton Univ. Press 1984).

2. 411 U.S. 1, 50 (1973).

3. Charter schools and voucher programs were the two most visible and controversial reforms to emerge in the 1990s. See BRYAN C. HASSEL, THE CHARTER SCHOOL CHALLENGE 1 (1999) (calling “the emergence and spread of charter schools in the United States . . . one of the most significant developments in public education in the 1990s”); Lisa Graham Keegan, *The Empowerment of Market-Based School Reform*, in SCHOOL CHOICE IN THE REAL WORLD 189, 189–93 (Robert Maranto et al. eds., 1999) (noting that because of the use of charter schools, Arizona is at the “forefront of national education reform”). See generally Note, *The Hazards of Making Public Schooling a Private Business*, 112 HARV. L. REV. 695 (1999) (describing the privatization of public schooling through vouchers and charter schools).

4. *Rodriguez*, 411 U.S. at 50.

5. From 1991 to 1998, charter school legislation swept the nation. See HASSEL, *supra* note 3, at 1 (documenting the rapid spread of charter schools); Jodi Wilgoren, *New Curriculum in Bronx is Built on an Ideal*, N.Y. TIMES, Aug. 23, 2000, at A1 (profiling the success of a New York charter school and describing charter schools as “[a] movement that began with three schools in Minnesota and California in 1992 [and] now stretches across 34 states and the District of Columbia, with nearly 520,000 students—1 percent of

charter schools have become a part of the public education system of more than thirty-five states. The expansion of charter schools has caused considerable controversy,⁶ and charter schools have taken center stage in the contentious debate over educational reform.⁷ This controversy is marked by closely-held convictions and beliefs,⁸ and stems from the common understanding, reflected by our nation's highest court⁹ and most powerful legislative body¹⁰—that one of government's most vital functions is the provision of education to its citizens. Charter schools stand out as one of the most recent approaches the government has used to accomplish this goal.

Charter schools are publicly funded, locally controlled educational institutions free from most governmental constraint.¹¹

the nation's schoolchildren—enrolled in 2,069 schools”).

6. See *infra* note 7.

7. See CHESTER E. FINN, JR. ET AL., CHARTER SCHOOL ACCOUNTABILITY: FINDINGS AND PROSPECTS 21–24 (Phi Delta Kappa Educ. Found., No. 425, 1997) [hereinafter FINN ET AL., CHARTER SCHOOL ACCOUNTABILITY] (listing policy problems affecting charter schools, including controversy over fiscal policies, regulatory hurdles, and special education issues); HASSEL, *supra* note 3, at 21–30 (examining the controversy surrounding charter schools and noting the power of teachers' organizations and politicians in shaping the dialogue over charter schools); Robert Maranto, *The Death of One Best Way: Charter Schools as Reinventing Government*, in SCHOOL CHOICE IN THE REAL WORLD, *supra* note 3, at 39, 47–48 (describing the charter school movement as a recent example of the general trend toward reinventing government and noting that “the charter school system allows innovation to take place even though the goals and technologies of education are highly controversial”).

8. See, e.g., Maranto, *supra* note 7, at 54 (reviewing Arizona's charter school program and concluding that “charter schools have increased the capacity of the state education system as a whole”); Wilgoren, *supra* note 5 (profiling the success and dedication of Kristen Jordan, director of a charter school in New York).

9. Supreme Court pronouncements on the importance of education are manifold. See, e.g., Plyler v. Doe, 457 U.S. 202, 221 (1982) (“[P]ublic schools [are] a most vital civic institution for the preservation of a democratic system of government . . .” (quoting Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring))); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments.”).

10. The United States Congress has expressed a similar conviction: “Congress declares it to be the policy of the United States that a high-quality education for all individuals and a fair and equal opportunity to obtain that education . . . are a *moral imperative* . . . because the quality of our individual lives ultimately depends on the quality of the lives of others.” 20 U.S.C.A. § 6301(a)(1) (1999) (emphasis added). The inclusion of such strong language seems to indicate a willingness to provide (1) a high quality education and (2) a fair and equal opportunity to obtain that education. The next question becomes by what qualitative standard should quality and fairness be measured. Although this question remains unanswered, *Rodriguez* provides at least a partial answer. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33–37 (1973) (holding that there is no fundamental right to a qualitatively adequate education under the United States Constitution).

11. LORI A. MULHOLLAND & LOUANN A. BIERLEIN, UNDERSTANDING CHARTER

They are created by statute and are run by private bodies.¹² They were originally envisioned as educational laboratories that could test new methods of instruction and provide a much-needed complement to traditional public education.¹³ As such, the progenitors of the charter school movement emphasized the importance of giving individuals and local institutions great flexibility in determining the organization and operation of charter schools.¹⁴ Beyond a basic functional definition, however, describing charter schools in a way that is consistent and wholly representative is difficult.¹⁵ Because charter schools' primary appeal is their freedom from traditional state controls,¹⁶ individual charter schools vary widely.¹⁷ This variance, however, should not overshadow the considerable structural similarities of charter schools.¹⁸

At the most basic level, charter schools intend to accomplish the same goal as public schools generally—to educate students well. The methods used to accomplish this goal, however, depend upon a multitude of factors, and usually focus on educational approach. The

SCHOOLS 7–11 (Phi Delta Kappa Educ. Found., No. 383, 1995) (defining charter schools and describing the appeal of allowing decentralization in education).

12. *Id.*

13. See CHESTER E. FINN JR. ET AL., CHARTER SCHOOLS IN ACTION: WHAT HAVE WE LEARNED? 18–19 (1996) [hereinafter FINN ET AL., CHARTER SCHOOLS IN ACTION] (crediting dedicated groups of teachers who sought to avoid the “stifling bureaucracy” of conventional schools as an impetus for the charter school movement).

14. See MULHOLLAND & BIERLEIN, *supra* note 11, at 9 (arguing that the charter approach to decentralization is a key component of the movement's appeal and provides a measure of freedom lacking in traditional site-based management).

15. See Maranto, *supra* note 7, at 49 (“The charter universe includes Montessori schools, Waldorf schools, Core Knowledge schools, multiple intelligence schools, back-to-basics schools, trade schools, arts schools, schools for at-risk students, and schools with ethnic based themes.”). See generally FINN ET AL., CHARTER SCHOOLS IN ACTION, *supra* note 13, at 18–29 (providing a comprehensive overview of charter school characteristics).

16. See MULHOLLAND & BIERLEIN, *supra* note 11, at 9 (“As autonomous legal entities, charter schools are free to make all their own administrative and instructional decisions.”). But see *infra* note 122 and accompanying text (listing state regulations applicable to charter schools).

17. See *supra* note 15 (listing different types of charter schools); see also, e.g., Manya A. Branchear, *Charters Often Face Rocky Start*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 17, 1999, at 10N (profiling the Magellan Charter School, which operates with only one administrator and a five member directing board); Ray Quintanilla, *Tech Charter School Seeks Inner-City Girls*, CHI. TRIB., Dec. 10, 1999, § 1, at 1 (describing an all-girl, technology-based charter school planning to offer a “rigorous curriculum in math and science”). See generally FINN ET AL., CHARTER SCHOOL ACCOUNTABILITY, *supra* note 7, at 14–17 (describing the considerable differences among charter schools).

18. See MULHOLLAND & BIERLEIN, *supra* note 11, at 9–11 (examining the appeal of charter schools and citing educational choice, decentralization, results, public status, professional opportunities, and market influences as benefits common to all charter schools).

basic methods of educational approach may be broadly grouped into two categories: the classical production model or the classical liberal model.¹⁹ The classical production model describes the process of education as predominantly one of socialization, acculturation, and recreation of the prevailing status quo.²⁰ The production model focuses primarily on outcomes and seeks to ensure societal stability through the education process.²¹ This model assumes that substantial societal agreement exists concerning the type of knowledge that is good and valuable.²² As a practical matter, production theorists often, though not exclusively, prefer a “basics” approach to education, exalting the basic skills—reading, writing, math, and science—while minimizing so-called “electives.”²³ The production model seeks to provide students with the basic skills necessary for proper societal functioning and values stable and predictable results.²⁴ In addition, the production model emphasizes education as a means of socializing behavior and teaching children to conform to societal norms.²⁵

19. The production model generally refers to an educational approach that emphasizes basic skills acquisition, certain core competencies, and standardized testing to measure academic achievement. The liberal model, by contrast, seeks to develop underlying academic competencies in order to foster critical thinking skills and generally views standardized tests as only one valid means to measure success. This Comment recognizes this distinction as overbroad to the extent that both models share certain overlapping goals but uses the distinction to frame the theories driving current educational reform initiatives, including charter schools.

20. This production model is illustrated by what Amy Gutmann calls the “family state.” AMY GUTMANN, *DEMOCRATIC EDUCATION* 22–28 (1987).

21. See *infra* notes 67–70 and accompanying text (identifying social stability as one of the goals of production-based education).

22. GUTMANN, *supra* note 20, at 27. The terms “good” and “valuable,” of course, are indeterminate and have little self-evident relation to educational principles and objectives. The goal here, however, is to create a normative framework for production-based education without providing substantive definitions of what is good or valuable. Nevertheless, the identification of what is “good” varies based on the educational framework employed. See *infra* notes 71–78 (discussing the production model of education and its pedagogic emphasis on identifying a core body of knowledge).

23. See GUTMANN, *supra* note 20, at 22–28 (arguing that a discrete body of knowledge must be established before production-based education can succeed); Maranto, *supra* note 7, at 49 (noting that some charter schools offer a basics approach to education). But see GEOFF WHITTY ET AL., *DEVOLUTION & CHOICE IN EDUCATION: THE SCHOOL, THE STATE AND THE MARKET* 86–87 (1998) (using a production perspective to challenge the establishment of standardized assessment).

24. See DWIGHT W. ALLEN, *SCHOOLS FOR A NEW CENTURY: A CONSERVATIVE APPROACH TO RADICAL SCHOOL REFORM* 24–27 (1992) (using a production model to discuss the difficulty in defining a basics approach and arguing that the approach must “develop shared definitions of fundamentals”).

25. See ANITA E. WOOLFOLK, *EDUCATIONAL PSYCHOLOGY* 208–11 (6th ed. 1995) (describing the educational concept of applied behavior analysis as a method of pedagogic

By contrast, the main purpose of the classical liberal model of education is the creation of educated citizens who are competent, functional members of a dynamic society.²⁶ Unlike the production model, the liberal model focuses on the process of education (inputs), rather than on outcomes, and aims to give students the ability to reason for themselves.²⁷ The model is premised on the idea that through education, children will discern what is true and noble;²⁸ the ultimate goal is to enable students to make informed decisions about the world, rather than merely to reproduce existing social structures among children.²⁹ The liberal model tends to view education as a nuanced and unpredictable process³⁰ and is concerned with outcomes mainly as an indication of the success of the educational process.³¹ The successful student following the liberal approach will be able to apply what she has learned to a variety of situations and adapt, rather than conform, to social mores.³² To the extent the model is concerned with socialization, the liberal approach emphasizes the type of knowledge (i.e., the skills required to process ideas and form conclusions) that will equip students with the freedom to make decisions and to confront challenges rather than conditioning students

approach).

26. See FINN ET AL., CHARTER SCHOOLS IN ACTION, *supra* note 13, at 18–22 (documenting the successes of charter schools employing a liberal approach). While placing emphasis on the production-liberal, dual-model approach to educational purpose is somewhat limiting as a theoretical tool, it helps frame a significant tension that underlies current notions of education and provides a starting point to help grapple with complex ideas of educational purpose.

27. See ALLEN, *supra* note 24, at 26 (criticizing the basics approach as focusing solely on the acquisition of basic academic skills, to the detriment of critical thinking skills designed to produce independent thinkers).

28. Cf. GUTMANN, *supra* note 20, at 33–34 (explaining the “state of individuals” and the relative importance that John Stuart Mill placed on the idea of allowing children to help define what is true).

29. See ALLEN, *supra* note 24, at 26–27 (noting the importance of critical thinking skills).

30. See *id.* at 33–34.

31. See *infra* notes 94–95 and accompanying text (describing the significance of process to liberal thinkers).

32. Defining the liberal model by reference to the conformist nature of the production model is not meant to unfairly impugn the production model. Conformity of a sort occurs with equal frequency within the liberal model, in that certain of its ideals—the pursuit of knowledge through reason and independent thinking—require one to conform to the process. More significantly, in the context of basic skills, the significance of process becomes much less important than the eventual results, in that student acquisition of basic literacy is more meaningful than any specific approach used to achieve this literacy. Nevertheless, this Comment is concerned with using the liberal and production models to place charter schools in theoretical perspective, and for that purpose, the distinctions between the approaches deserve note.

merely to conform.³³

Today's debate over charter schools, while at first glance seemingly disconnected from this dual-model classical approach, resonates in the basic structural debate. Charter schools, as educational laboratories, may implement a production model,³⁴ a liberal model,³⁵ or a combination of both.³⁶ The possibility of a combination is illustrated by North Carolina's chartering statute, which seeks to maximize local flexibility, while retaining a basic threshold of state-mandated skills.³⁷ While it is tempting to characterize contemporary struggles over charter schools as simply theoretical, they reflect a deeper, more fundamental challenge to define the true purpose of education.

By positing this dual-method approach, this Comment does not suggest that the two models are mutually exclusive. Indeed, both schools of thought aim to educate our youth and produce competent, intelligent citizens.³⁸ Furthermore, this Comment does not suggest that this dual-model approach is unique or innovative because the basic distinction has been proffered before.³⁹ What is distinctive about this framework is that it has never been applied specifically to charter schools and to their operation within the educational and legal superstructure. Applying this framework reveals how the American political and legal processes interact with these methods to produce a fluid approach to educational reform.⁴⁰ This fluidity,

33. See *infra* note 81 and accompanying text (noting the liberal model's emphasis on educating students so that they can make informed decisions).

34. See, e.g., MULHOLLAND & BIERLEIN, *supra* note 11, at 9 (noting that some charter schools focus on results rather than inputs).

35. See, e.g., *id.* (citing innovation in education and "philosophical approaches" as a benefit of charter schools).

36. North Carolina statutorily favors a combination of liberal and production-based educational goals. For instance, North Carolina allows charter schools substantial autonomy while requiring a base level of achievement. See *infra* note 155 and accompanying text (discussing North Carolina's statutory scheme that grants charter schools functional autonomy while requiring them to employ certain state assessments).

37. See *infra* note 155 and accompanying text.

38. Compare ALLEN, *supra* note 24, at 1-2 (using a production approach to call for "the establishment of a national experimental schools network" to improve education), with FINN ET AL., CHARTER SCHOOLS IN ACTION, *supra* note 13, at 79-80 (using a liberal approach to recommend the expansion of current, local charter programs).

39. See DONALD ARNSTINE, DEMOCRACY AND THE ARTS OF SCHOOLING 4-16 (1995) (describing the difference between viewing schools as agents of socialization and viewing schools as institutions committed to educating for the quality of individual experience).

40. See HASSEL, *supra* note 3, at 31-71 (presenting case studies of charter school statutes in four states and concluding that each state passed chartering statutes through "compromise").

however, frustrates the true purpose of the initiatives because, ironically, the legislative approach that created the charter school has been forced to modify the legislation authorizing such schools in response to legal challenge,⁴¹ eventually making the accomplishment of the stated goal—improved education—extremely difficult, if not impossible.

The purpose of this Comment is to compare the similarities between current charter school programs and classical ideas and to demonstrate that the current legal climate will permit new charter school reforms begrudgingly, if at all.⁴² The role of the democratic process in shaping our country's view of education will be explored, with an emphasis on charter schools as contemporary examples of older notions of egalitarian and locally controlled educational processes.⁴³ This Comment concludes that charter schools, which combine aspects of both the production and liberal approaches to education, exist in a legal climate that inhibits their intended function.⁴⁴ The discussion will be divided into three sections. Part I provides a brief overview of the classical notions of educational purpose and its relation to current educational reform, focusing on charter school legislation.⁴⁵ Part II describes North Carolina's approach to educational reform as a case study, focusing on its chartering statute, and highlights specific charter school provisions of other states to create a theoretical framework for understanding the commonalities of chartering statutes.⁴⁶ Finally, Part III analyzes whether the intent of charter school legislation will be frustrated by recent legal developments and the very political process that helped create it.⁴⁷

Before addressing the legal and policy implications of classical educational theory and corresponding modern initiatives, a threshold determination must be made regarding the governmental purpose in allowing reform and initiative in education. While the stated purpose

41. Michigan, the state that experienced the most direct challenge to its charter school statute, amended its statute to comply with a judicial decision. *Council of Orgs. & Others for Educ. About Parochial, Inc. v. Governor*, 566 N.W.2d 208, 213 (Mich. 1997) (noting that Michigan's charter school statute was amended in response to a trial court's ruling).

42. *See id.* at 221–22 (holding that the Michigan charter schools statute is constitutional but suggesting that a charter school must be sufficiently public to withstand challenge).

43. *See infra* notes 51–65 and accompanying text.

44. *See infra* notes 355–58 and accompanying text.

45. *See infra* notes 51–102 and accompanying text.

46. *See infra* notes 103–240 and accompanying text.

47. *See infra* notes 241–354 and accompanying text.

of reform is invariably cloaked in the language of increased student performance and overall school improvement,⁴⁸ the true purpose is much more complex.⁴⁹ This Comment accepts the basic premise that reform is meant to improve the education provided to our youth, and the proceeding analysis assumes a good faith educational purpose on the part of policymakers and legal theorists.⁵⁰

I. THE CLASSICAL EDUCATIONAL IDEAL AND ITS MODERN RELATIVE: CHARTER SCHOOLS

Educational reform movements are often met with skepticism in both the legal and educational communities.⁵¹ Very often, this skepticism is warranted as new ideas displace earlier reforms that were never truly given a chance to prove their efficacy.⁵² At other times, however, this skepticism is fueled by a weary and disgruntled public that often views the public school system as a bureaucratic morass unworthy of salvage.⁵³ This notion is partially captured by the

48. See, e.g., N.C. GEN. STAT. § 115C-238.29A (1999) (stating that the purpose of the Charter Schools Act is to “improve student learning,” “increase learning opportunities,” “encourage innovative teaching methods,” and other related goals). Most chartering statutes contain similar language. See, e.g., MINN. STAT. ANN. § 124D.10(1)(a) (2000) (citing improved student learning, establishment of school accountability, and encouragement of innovation as purposes of the legislation).

49. See ALLEN, *supra* note 24, at 23–41 (examining education reform movements and concluding that many reform efforts were motivated principally by social changes); *infra* notes 103–07 and accompanying text (discussing education reform initiatives in North Carolina).

50. This assumption may be limiting. Education’s purpose will always be multifaceted, depending as much on societal desire as on pedagogic doctrine. Admitting that education is intended to accomplish many objectives, rather than detracting from the significance of a dual-model approach, however, reveals why the two models are useful. Someone who approaches a given question with the premise that education’s role in a democracy is to indoctrinate and reproduce majoritarian views will view the question much differently than someone who approaches the same question with a personal belief that education is intended to liberate and produce informed citizens. While these varying approaches may or may not produce different conclusions, they reveal much about the process itself.

51. See generally SEYMOUR B. SARASON, CHARTER SCHOOLS: ANOTHER FLAWED EDUCATIONAL REFORM? 64–65 (1998) (noting the tendency to view educational reform as a continual process with very little comprehensive review of whether the initiatives chosen accomplished the stated goal).

52. See ALLEN, *supra* note 24, at 23 (noting that “[w]ithout a systematic, wholehearted research and development process, [educational reformers] have been left to swing between extremes, never fully exploring the potentials of any of these reforms); see also Maranto, *supra* note 7, at 45 (reviewing the prevalence of reform movements in education).

53. See ALLEN, *supra* note 24, at 27 (“[M]any American educators still truly believe that our current system can be salvaged or repaired . . . if our children can only master the ‘fundamentals.’ But the fundamentals have changed, and they continue to change rapidly.

current voucher initiatives being considered by school districts across the country.⁵⁴ While the legality of vouchers is unclear,⁵⁵ especially vouchers that can be used at private academic institutions, certain states are pursuing state-wide initiatives.⁵⁶ For individuals more

We can no longer afford to look backward, blinding ourselves to the new social, cultural and, yes, economic realities.”); HASSEL, *supra* note 3, at 2 (describing the difficulty of making educational reform work in the public school context); Editorial, *Turning Schools Right Side Up*, WALL ST. J., Nov. 16, 1999, at A30 (noting the public sense that “largely mediocre public schools” are driving educational reform measures).

54. As part of the burgeoning school-choice movement, vouchers provide public funding for students who attend private schools. See, e.g., WIS. STAT. § 119.23 (1999) (detailing the procedures of one voucher program). To the extent that these voucher programs reflect a belief that public schools are undesirable, they indicate an increasing willingness to look outside of, and provide decreasing funds to, the public school system. See also Note, *The Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality*, 109 HARV. L. REV. 2002, 2002–03 (1996) (discussing the effect of voucher programs on existing public school systems).

55. While a complete discussion of school vouchers is beyond the scope of this Comment, certain legal analyses applicable to charter schools also apply to vouchers. Although both charter schools and voucher programs act with similar intent—giving individual families a role in deciding which school their child should attend and providing competition for local schools in the hopes of improving local schools—there are significant differences between the two reform approaches. First, charter schools are generally not allowed to maintain any religious affiliation, see, e.g., N.C. GEN. STAT. § 115C-238.29E(e) (1999) (stating that there are to be “no religious artifacts, symbols, iconography, or materials on display in the charter school’s entrance, classrooms, or hallways”), while at least some voucher programs allow the vouchers to be used at religious academies. See Gary Mozer, Note, *The Crumbling Wall Between Church and State: Agostini v. Felton, Aid to Parochial Schools, and the Establishment Clause in the Twenty-first Century*, 31 CONN. L. REV. 337, 380–85 (1998) (discussing the increasing use of voucher programs in connection with religious schools). Cf. Jodi Wilgoren, *Court Ruling Fuels Debate on Vouchers for Education*, N.Y. TIMES, June 29, 2000, at A27 (discussing the degree to which courts will allow the use of public funds for the support of private and parochial schools). Second, if a charter school receives more applications than available openings, the school must select its students by lottery. See, e.g., N.C. GEN. STAT. § 115C-238.29F(g)(6) (1999) (mandating that charter schools enroll all eligible students who submit timely applications, unless the number of applications exceeds the capacity of the program, in which case students must be selected “by lot”). By contrast, private schools may agree to accept or reject students with vouchers without using a “neutral” system of selection. See, e.g., N.C. GEN. STAT. § 115C-238.29F(g)(6) (1999) (limiting the random, lottery selection requirements to charter schools). For a more thorough discussion of the constitutionality of school voucher programs, see generally Frank R. Kemerer, *The Constitutionality of School Vouchers*, 101 EDUC. L. REP. 17 (1995) (reviewing various constitutional challenges to voucher programs).

56. See Joan Biskupic, *A Time for Momentous Decisions: The Supreme Court’s Term Promises to Have an Impact on Politics as Well as Social Policy*, WASH. POST NAT’L WKLY. ED., Oct. 11, 1999, at 29 (describing the importance of the Supreme Court’s current docket generally and detailing the significance of Florida’s adoption of a statewide voucher program specifically); L. Elaine Halchin, *And This Parent Went to Market: Education as Public Versus Private Good*, in SCHOOL CHOICE IN THE REAL WORLD, *supra* note 3, at 19, 19 (describing publicly funded voucher programs in Milwaukee and Cleveland).

hopeful about public schools, magnet schools appear to be a viable route to school reform, although they also face pointed criticism from many skeptics.⁵⁷ Frustration with current educational programs is not solely centered on curriculum and instruction, however. Much of the concern stems from the general perception of schools as unpredictable, violent places where students cannot be controlled.⁵⁸ Despite quantitative evidence to the contrary,⁵⁹ this perception persists and helps drive current initiatives.⁶⁰

These various initiatives—voucher programs, charter schools, and magnet schools—assume a governmental role in public education. Their relevant differences are those of degree rather than kind, because they all presume that the government should play a role in education. Indeed, among the functions of modern American government, the education of its citizens stands out as an essential structural device—the educational system is charged with the responsibility of creating stability, transmitting values, and enabling

57. Magnet schools are also easily distinguished from charter schools. They were created, in large measure, to keep high-achieving students in failing districts or at least staunch the number of students fleeing the public system. See Robert Maranto et al., *Real World School Choice: Arizona Charter Schools*, in *SCHOOL CHOICE IN THE REAL WORLD*, *supra* note 3, at 1, 6-7 (noting that magnet schools, in contrast to charter schools, often restrict admission to a small number of select students). Magnet schools also use selective admissions criteria for a significant portion of their student body, thus ensuring that their pupil population will be more accomplished academically than that of the surrounding schools. See *id.* For a discussion of equity issues in magnet schools, see generally Thomas Toch et al., *Schools That Work: Magnet Schools That Limit Admissions are a Proven Way to Educational Excellence, but They Raise Some Difficult Questions About Equity*, U.S. NEWS & WORLD REP., May 27, 1991, at 58 (reviewing the growth of magnet schools across the country and highlighting equity issues related to admission).

58. See Dana Hawkins, *When Cookies and Hair Dye Cause Alarm*, U.S. NEWS & WORLD REP., May 31, 1999, at 72, 72 (noting the recent trend to treat any arguably violent statement by a student with utmost seriousness). While school districts have an obviously legitimate desire to keep our nation's school hallways safe, many districts have implemented new dress and behavior codes which verge on the draconian. See *id.* (describing restrictive disciplinary codes implemented in response to school violence); Catherine Hinman, *Schools Crack Down on Violence*, ORLANDO SENTINEL, June 16, 1999, at D1, 1999 WL 2814647 (reviewing a school board policy requiring student dress codes and identification badges). From suspensions for seemingly innocuous comments to mandatory bookbag bans, the scope of many of these new policies is far-reaching. *Id.*

59. E.g., Craig Savoye, *Violence Dips in Nation's Schools*, CHRISTIAN SCI. MONITOR, June 13, 2000, at 1 ("Federal Figures show that the total number of reported school crimes declined by almost one-third . . . between 1993 and 1997."); Edward Walsh, *Schools Are Becoming Safer: The Education Department Reports a Dramatic Drop in Expulsions for Firearms*, WASH. POST NAT'L WKLY. ED., Aug. 16, 1999, at 34 (quoting a report from the Education Department that showed a thirty-one percent decrease in the number of students expelled for carrying a firearm in school).

60. See *supra* note 58 (describing schools' responses to the threat of student violence).

individuals to participate actively in the governing process.⁶¹ The actual process of education is exceedingly complex, and there is no general agreement about what the purposes and goals of education should be.⁶² Educational and legal innovators reinvent these goals each generation,⁶³ much to the consternation of traditionalists who believe that the fundamentals of educational approaches should not change, even as they admit that specific pedagogic techniques should adapt to the contemporary climate.⁶⁴ Among contemporary movements, the ascendance of charter schools exemplifies this historical tendency to “reinvent” education. This reinvention, however, has more ancient roots, as evidenced by the incorporation of both production and liberal models into charter schools’ statutory framework.⁶⁵

A. *Production-Based Education*

While many contemporary educational reformers may not frame their concerns in terms of classical notions of education, theoretical similarities exist between today’s reform initiatives and antiquity’s general approach to education as a means of producing competent citizens. An educational precept common to ancient thinkers is that education is a utilitarian device, designed to produce the greatest

61. See *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (“Providing public schools ranks at the very apex of the function of a State.”); GUTMANN, *supra* note 20, at 19–41 (arguing that the intersection of student, parental, and societal concerns makes education a nuanced process and ultimately promotes social stability).

62. Compare GUTMANN, *supra* note 20, at 22–33 (contrasting the “family state,” which gives the state more influence over the educational process, with the “state of families,” which gives parents full control over the education of their children), with WHITTY ET AL., *supra* note 23, at 3–4 (discussing various goals of education reform, including deregulation, market reform, efficient management, and enhanced professionalism).

63. See WHITTY ET AL., *supra* note 23, at 3 (arguing that the deregulation of public schools, the increasing scope of parental choice, and the movement towards educational self-governance are the most recent trends in educational reform); Note, *The Hazards of Making Public Schooling a Private Business*, 112 HARV. L. REV. 695, 695 (1999) (calling reform a “favored mantra in public education”).

64. See, e.g., Rob Hotakainen, *Urban League Chief to Call for Broader State Role in Education*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 10, 1999, at 8A (reporting that the President of the National Urban League argued that the states should determine educational standards, even if those standards vary from state to state); Thomas Toch & Warren Cohen, *Public Education: A Monopoly No Longer*, U.S. NEWS & WORLD REP., Nov. 23, 1998, at 25, 25 (describing the recent legal success of educational innovations, including the school voucher movement, as modern versions of market-based educational reform).

65. See *infra* notes 140–73 and accompanying text.

good for the government that provides it.⁶⁶ Under this paradigm, education is production-based: the ultimate goal is the production of citizens who can live compatibly with their government.⁶⁷ This argument has had tremendous tenacity through the ages, resurfacing frequently among educational theorists.⁶⁸ Indeed, just as John Dewey argued that “what the best and wisest parent wants for his own child, that must the community want for all its children,”⁶⁹ the production-model educator views today’s debates over charter schools primarily through the prism of net societal gain.⁷⁰

While individual states implement the production model differently, there are several common touchstones. First, the production model identifies a body of requisite knowledge that each child must learn.⁷¹ Second, it emphasizes the importance of core courses—normally science, mathematics, English, and history—in transmitting this body of requisite knowledge to the students.⁷² Third, the production model uses some evaluative tool, normally a mandatory standardized test, to measure certain minimum competencies, to assess whether each individual student has attained

66. See, e.g., *supra* note 1 and accompanying text (quoting Aristotle’s view that education should be uniform because governments have the same basic goals).

67. See generally ALLEN, *supra* note 24, at 57 (calling for a national consensus on education that focuses on utilitarian outcomes).

68. See generally *supra* note 20 and accompanying text (discussing production theory views); *supra* note 21 and accompanying text (introducing production theory as a method of developing shared societal views). The ubiquity of such theories emphasizes the production model’s lasting influence. While these thinkers certainly do not share identical beliefs, an examination of their writings on education reveals their philosophical similarities and provides a framework to analyze modern educational reform.

69. GUTMANN, *supra* note 20, at 13 (quoting John Dewey, *The School and Society*, in *THE CHILD & THE CURRICULUM AND THE SCHOOL & SOCIETY* 7 (University of Chicago, 1956)).

70. See generally, FINN ET AL., *CHARTER SCHOOLS IN ACTION*, *supra* note 13, at 18–29 (discussing characteristics of charter schools that will ultimately benefit society as a whole by improving the education process in schools).

71. See ALLEN, *supra* note 24, at 25 (noting that the definition of what is fundamental is needed before a production-based program may be initiated). In the modern context, this frequently takes the form of documenting the failings of public education generally. See *infra* note 142 and accompanying text (noting a national study concluding that public education is in a perilous state). From the seemingly ubiquitous, though no doubt overstated, existence of illiterate high school graduates to the general decline in the level of achievement relative to other developed countries, the failings of American public schools are well-documented. See generally Jonathan B. Cleveland, *School Choice: American Elementary and Secondary Education Enter the “Adapt or Die” Environment of a Competitive Marketplace*, 29 J. MARSHALL L. REV. 75, 83–85 (1995) (describing the general negative perception of public schools as a driving force behind various school choice proposals).

72. See ALLEN, *supra* note 24, at 25 (using a basics approach to accomplish production goals).

the desired knowledge.⁷³

This tripartite approach echoes the classical concern with discerning the body of knowledge that is most valuable to the student. While individuals differ over which disciplines should be given the most weight, there is general agreement that some disciplines should be emphasized over others.⁷⁴ The relative importance given to discrete fields often varies through the years, with each generation advancing its own preferences.⁷⁵ For Aristotle, the core subjects could be gleaned from the four basic branches of education: “reading and writing, gymnastic exercises, and music, to which is sometimes added drawing. Of these, reading and writing and drawing are regarded as useful for the purposes of life . . . and gymnastic exercises are thought to infuse courage.”⁷⁶

Given the declining significance of physical education and fine arts in today’s educational climate, the inclusion of physical activity and music in Aristotle’s list may surprise many modern theorists.⁷⁷ Regardless, today’s production theorists and Aristotle share a common concern that certain lesser academic fields, however defined, ought to be subordinated to more useful fields.⁷⁸ The apparent goal of this subordination is to educate children for maximum social efficacy.

B. Liberal Education

In contrast with the production model, the liberal approach emphasizes the importance of reason independent of, even if resonant

73. Thus, the production model has the following distinct components: (1) the identification of a body of socially useful knowledge, (2) a curriculum oriented to impart this knowledge, and (3) a diagnostic measure (almost universally an objective test) to determine whether the method used achieved the stated objective with respect to individual students.

74. See ALLEN, *supra* note 24, at 25–26 (discussing various definitions of what should comprise a production-based basics program); FINN ET AL., CHARTER SCHOOL ACCOUNTABILITY, *supra* note 7, at 25–26 (describing the direct accountability for academic results that distinguishes charter schools from traditional public schools).

75. See ALLEN, *supra* note 24, at 26 (noting that art and music were basics in Greek education, but today are largely considered non-essential, even though recent research suggests there is a “synergism between the arts and sciences in stimulating creativity”).

76. ARISTOTLE, *supra* note 1, at 2122.

77. See *supra* note 75 and accompanying text (describing how notions of core curricula have changed over time). See generally WHITTY ET AL., *supra* note 23, at 51–54 (noting the rise of “educational management studies” as an example of market-based reform which prizes core curricula and a “customer-oriented ethos”).

78. ALLEN, *supra* note 24, at 26 (“Once we can decide what is basic for our children to learn, we may be able to decide how to go about accomplishing that task and realistically hold ourselves accountable for our results.”).

with, majority views.⁷⁹ Like the production model, the liberal model shares theoretical grounding with older notions of educational achievement.⁸⁰ Unlike the production approach, however, the ultimate goal of the liberal model is the creation of a class of individuals sufficiently educated to make intelligent and informed decisions about the world around them.⁸¹ This approach, in its most simplistic terms, views education as a means of teaching students how to think rather than what to think. It does not consider the production of a core set of values an unmitigated good;⁸² rather, it uses a dialectical approach to learning, hoping that through questioning, individual students will develop the reasoning skills to confront life's difficult and exacting questions.⁸³

As a general rule, the liberal model views societal influences suspiciously. It is concerned that the views of parents and the community will be given unquestioned credibility, especially in the minds of young, impressionable students eager to please those around them.⁸⁴ This was a concern of Plato, who when writing about the construction of the state, commented: "[T]ake over the children, remove them from the manners and habits of their parents, and bring them up in their own customs and laws which . . . we have described.

79. See, e.g., GUTMANN, *supra* note 20, at 34 (describing the necessity of sheltering students from societal and parental prejudice in the hope that they will be able to make independent assessments of the world around them); see also ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 47-54 (1st ed. 1987) (discussing the notion of students as "clean slates" and bemoaning the lack of independent thinking among contemporary students).

80. See GUTMANN, *supra* note 20, at 33-38 (noting that modern notions of liberal education reform can be traced back to the ideas of John Stuart Mill and Immanuel Kant, among others).

81. See *id.* at 34-36.

82. A resulting core set of values may, in this framework, indicate a flaw in the process. See generally DIANE RAVITCH, *THE SCHOOLS WE DESERVE: REFLECTIONS ON THE EDUCATIONAL CRISES OF OUR TIMES* 82-83 (1st ed. 1985) (detailing the shift in educational approach away from teaching methods that seek to maximize individual thought and reason). Diane Ravitch notes a distinction similar to the production and liberal approaches to educational reform, citing the "traditionalist" and "progressive" approaches as examples of philosophies underlying educational reform. *Id.* at 80.

83. See *id.* at 89 ("Suppose it were possible to agree that all children need to study history, literature, and language, in order to understand themselves, their society, and the world in which they live."). In addition to identifying the importance of reasoning skills, Diane Ravitch suggests that educational reform should focus on basic notions of quality teaching and a commitment to student learning. *Id.* at 89.

84. This is the precise concern that motivated John Stuart Mill. See JOHN STUART MILL, *ON LIBERTY* 104-06 (Elizabeth Rapaport ed., Hackett Pub. Co., Inc. 1978) (1859) (positing that the state should compel education, up to a certain standard, but that such education should be well-rounded); see also GUTMANN, *supra* note 20, at 33-34 (examining Mill's ideas within the framework of liberal education reform).

This is the speediest and easiest way in which such a city and constitution . . . could be established and prosper.”⁸⁵

Plato viewed the entrenched “manners and habits” of parents with distrust, and worried that the children would absorb these manners without thought or introspection.⁸⁶ This specific concern should not be overstated, however, especially in the charter school context, which is ostensibly a movement to give local institutions and community groups *more* control over school processes.⁸⁷ One may rightly ask whether the charter school model of giving parents or their functional equivalent, the charter director, more, not less, control contradicts Plato’s desire to remove children from their parents in order to educate them. This, however, confuses the general theoretical principle—a determination of the best method of educating—with its practical application. The Platonian concern over “societal” influences, when understood in the context of contemporary political challenges, reveals a similarity between the liberal model and Plato’s approach. Removing the children from their parents as a means of allowing them to think freely, and without domineering provincial restraint, is the first goal. Once accomplished, the focus then turns to the construction of a system that fosters introspection, and that system may or may not be informed by the parents’ will.

Once the will of the parents is removed as a barrier to primary instruction, the student may come to understand and comply with the parental will. The liberal model is not concerned with what, in effect, is the reproduction of values and mores, because it views the process as more important than the ultimate result.⁸⁸ Similarly, the larger concern for many supporters of charter schools is not that local forces may exert too great an influence on the individual school; rather, they are concerned that removed and insular politicians or state officials

85. PLATO, *THE REPUBLIC*, in *THE COLLECTED DIALOGUES OF PLATO* 575, 772 (Edith Hamilton & Huntington Cairns eds., 1961).

86. *Id.*

87. Priscilla Wohlstetter, *Education by Charter*, in *SCHOOL-BASED MANAGEMENT: ORGANIZING FOR HIGH PERFORMANCE* 139 (Susan Albers Mohrman et al. eds., 1994) (“The charter is, in effect, a declaration of independence that enables schools to try to become more effective, free of the restrictions of many local or state regulations.”); Wilgoren, *supra* note 5 (defining charter schools as public schools run without regulation from the school district).

88. See RAVITCH, *supra* note 82, at 82–89 (describing the process of education as the proper focus for reformers). For a discussion of the practical freedom given charter schools and how this impacts the process of education delivery, see Tim Simmons, *Reform Without Rules: Why Charter Schools Are All Over the Map*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 15, 1998, at 1A.

who wish to stamp the school system with their own particular brand of reform may dictate school policies.⁸⁹ In order to compensate for this possibility, the liberal model of reform considers it vastly safer to allow local institutions more control over educative functions⁹⁰ because local groups are deemed more directly connected to the students and therefore better able to make decisions in the students' best interests.⁹¹

The perceived danger to pure liberal theorists is that local officials may adopt an educational approach that seeks to reproduce social norms, much like the production model.⁹² Indeed, there are particular charter schools and charter directors that seek to institute a very production-based approach.⁹³ The key difference is that a locally controlled liberal model rests on a different theory altogether, even if the end result is qualitatively identical to the result under the production model.⁹⁴ It is one thing to say that the production model is valuable simply because it reproduces majoritarian views; it is entirely another to say that a production model is valuable because it was chosen by those most connected with the students. From this perspective, the latter is actually a form of the liberal model, even though the educative result may echo that of the classic production theory.⁹⁵

89. See David Osborne, *Make 'Em All Charter Schools*, WASH. POST, Nov. 14, 1999, at B3 (arguing that charter schools need freedom from governmental constraint to succeed).

90. See Wohlstetter, *supra* note 87, at 139 (emphasizing that charter schools grant wide discretion to local institutions). The importance of allowing local institutions increased control over education is reflected in North Carolina's charter statute. N.C. GEN. STAT. § 115C-238.29A (1999) (listing the encouragement of educational innovation and the provision of expanded choice for parents as purposes of charter school legislation).

91. See Wohlstetter, *supra* note 87, at 139 (stating that granting freedom to local charter schools will "allow teachers and administrators to deploy resources and tailor curriculum and instructional strategies to better educate students and improve school performance").

92. See GUTMANN, *supra* note 20, at 39-41 (arguing that social reproduction through education raises concerns about the extent to which students will be equipped to challenge conventional ideas).

93. HASSEL, *supra* note 3, at 88 (charting the curricular approach of charter schools in three states and demonstrating the prevalence of both basics and vocational approaches).

94. The difference is that process, as opposed to results, is given more weight in the liberal school. See *supra* note 83 and accompanying text. See generally William Haft, *Charter Schools and the Nineteenth Century Corporation: A Match Made in the Public Interest*, 30 ARIZ. ST. L.J. 1023 (1998).

95. See Haft, *supra* note 94, at 1036-42 (noting that while charter schools may be seen as "laboratory" schools and use innovative educational methods, the state still has a strong incentive to monitor the schools' achievements).

Plato is not alone in his disdain for education aimed primarily at the reproduction of shared values. Rousseau too cautioned against allowing prevailing custom to dictate the substance of education: "Nations, like men, are teachable only in their youth; with age they become incorrigible. Once customs are established and prejudices rooted, reform is a dangerous and fruitless enterprise; a people cannot bear to see its evils touched, even if only to be eradicated."⁹⁶ As with other liberal theorists, Rousseau was skeptical of the premise that education should be intended merely to recreate a class of individuals comfortable with contemporary convention.⁹⁷ Rousseau did not consider society's tendency to reproduce itself evil. Rather, Rousseau considered reproduction tolerable, as long as that reproduction came from an educated and informed citizenry capable of making independent decisions without ultimate reference to a prevailing will.⁹⁸ Indeed, Rousseau's writings indicate that he valued political stability as much as production-based thinkers.⁹⁹

The *process* of cultivating shared values constitutes the substance of education according to Rousseau.¹⁰⁰ Individuals may quibble over which beliefs should hold sway, just as Aristotle viewed the constituent branches of education much differently than other thinkers, but that dispute is beside the point. The individual who comes to conclusions of his own accord, reasoned Rousseau, is more educated in a normative sense than the individual who comes to the exact same conclusion through indoctrination.¹⁰¹ Charter schools capture this notion by viewing education as a process in need of change. According to charter school advocates, an alternative to the

96. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 88–89 (Maurice Cranston trans., E.V. Rieu ed., Penguin Books 1968) (16th prtg. 1984). Somewhat curiously, four years after Rousseau's death in 1782, an alteration to this quotation was made, substituting "Most nations" for "Nations." *Id.* Although one may attach significance to the timing of the alteration and the impending French Revolution, which suggests perhaps that France had reached the age of incorrigibility, such theorizing is speculative. *Id.*

97. *See id.* at 88–90.

98. *See, e.g., id.* at 89 (noting that individuals must reach maturity through education before they can be profitably subject to law); GUTMANN, *supra* note 20, at 257 (describing Rousseau's view that democratic states depend on a cultured and independent citizenry).

99. *See* ROUSSEAU, *supra* note 96, at 130 (noting that the "protection and prosperity" of citizens should form the basis of effective government). *See generally* JEAN STAROBINSKI, *JEAN-JACQUES ROUSSEAU* (Arthur Goldhammer trans., 1988) (examining Rousseau's political writings).

100. *See, e.g.,* STAROBINSKI, *supra* note 99, at 31 (providing a general overview of Rousseau's views of education and citing *Émile* and *The Social Contract* as examples of Rousseau's position).

101. *Id.*

traditional public school is needed.¹⁰² Ultimately, however, this change will prove unworkable because the political and legal processes will limit implementation of the liberal model in several important ways.

II. NORTH CAROLINA'S APPROACH TO EDUCATIONAL REFORM

North Carolina provides an almost ideal laboratory in which to test the theories underlying the charter school movement. Beginning in the early 1990s, North Carolina instituted a comprehensive series of educational reforms, leading to the ratification of a charter school statute in 1996¹⁰³ and the adoption of the Excellent Schools Act in 1997.¹⁰⁴ In addition, North Carolina enacted a statutory scheme that forced all charter schools to be evaluated using standard student performance measures.¹⁰⁵ This legislation has created a sort of educational reform hybrid, with charter schools in North Carolina embracing elements of both the production and liberal models to educational reform.¹⁰⁶ This hybrid has helped produce dramatic increases in student achievement, and North Carolina has recently been recognized by national leaders, including the president of the National Education Association, as at the forefront of educational innovation.¹⁰⁷ North Carolina's combination of the liberal and

102. See, e.g., N.C. GEN. STAT. § 115C-238.29A (1999) (listing educational innovation as one of the purposes of charter school legislation).

103. N.C. GEN. STAT. § 115C-238.29A-F (1999).

104. The Excellent Schools Act, ch. 221, § 1, 1997 N.C. Sess. Laws 427 (codified at N.C. GEN. STAT. § 115C-105.40 (1999)). The Excellent Schools Act continued the general trend in North Carolina toward emphasizing performance-based models for evaluating school performance. N.C. GEN. STAT. § 115C-105.40 (1999) (mandating the development of "rigorous student academic performance standards"); see also N.C. GEN. STAT. § 115C-105.35 (1999) (establishing the School-Based Management and Accountability Program to "hold schools accountable for the educational growth of their students").

105. See N.C. GEN. STAT. § 115C-238.29F(d)(3) (1999) (requiring charter schools to conduct the standard student assessments mandated by the State Board of Education).

106. See *infra* notes 140-73 and accompanying text.

107. See Bob Chase, Advertisement, *A Tale of Two States: The Best Way To Bolster Low-Performing Schools*, WASH. POST NAT'L WKLY. ED., Oct. 11, 1999, at 20 (citing North Carolina's "[s]tunning results" from implementation of the ABCs of Education program, and noting that "[t]he percentage of low-performing schools in the state has dropped steadily and dramatically from 7.5 percent the first year [of the program] to 1.4 percent the second year to .7 percent in 98-99"). This praise is somewhat contextual, as the National Education Association (NEA) is generally opposed to charter schools. See HASSEL, *supra* note 3, at 22-23 (noting that in "many places, teachers' unions have led the fight against charter school laws"). Cf. *id.* at 27-28 (recognizing the political power of the NEA, but concluding that "the prevalence of teachers' organizations in states [bears] little relation to charter school policymaking outcomes"); FINN ET AL., CHARTER SCHOOLS IN ACTION, *supra* note 13, at 59 (admitting that "major teachers' unions are now voicing mild

production models affords the legal technician a unique context in which to study the intersection between social reform, the legislative process that created this reform, and the judicial reaction that will interpret the reform's effect on the substantive rights of individuals, states, and other entities with identifiable rights.¹⁰⁸ While North Carolina will be highlighted, the charter school movement has struck with resounding force across the educational landscape,¹⁰⁹ making the lessons of North Carolina applicable to the majority of the fifty states.

A. *Charter Schools' General Framework*

Charter schools, by definition, are statutorily created public schools run by private parties.¹¹⁰ To receive a charter, interested parties must petition a statutorily authorized chartering entity.¹¹¹ The vast majority of chartering statutes recognize multiple chartering authorities,¹¹² and normally these authorities are affiliated with the

endorsement of the charter concept, but they are hedging it with . . . many restrictions”).

108. One commentator identified a gap between the conceptual approach of charter schools and the judicial application of disability law. Jay P. Heubert, *Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation*, 32 HARV. C.R.-C.L. L. REV. 301, 309 (1997).

109. Charter school legislation has expanded dramatically during the past few years. Since Minnesota passed the first charter school statute in 1991, thirty-five other states, the District of Columbia, and Puerto Rico have signed into law charter school legislation. See *infra* note 152 (listing charter school legislation by state). In addition, many other states have “on-going legislative efforts to pass charter school laws.” See U.S. Charter Schools: state information and contacts, available at http://www.uscharterschools.org/chrt_exch/exlist.htm (last modified Oct. 8, 1999) (on file with the North Carolina Law Review). More than half of all charter schools are located in six states—Arizona, California, Florida, Michigan, North Carolina, and Texas. See Ctr. for Educ. Reform, About Charter Schools, <http://www.edreform.com/press/000817cs.htm> (last visited Nov. 20, 2000) (on file with the North Carolina Law Review). Thus, the relative impact of North Carolina's lessons will be felt most heavily in a small concentration of states. Of the 2069 charter schools that were operating as of August 2000, 1117 (54%) were located in these six states. See *id.* Charter schools' concentration in high-population states such as California, Texas, and Florida may actually increase their national influence beyond their actual numbers.

110. See *supra* note 11 and accompanying text.

111. See Wohlstetter, *supra* note 87, at 139 (“Charter schools operate under a written agreement . . . between a group of individuals and the charter-granting authority, usually a school district or the state.”); see also, e.g., N.C. GEN. STAT. § 115C-238.29B(c) (1999) (listing three authorized chartering bodies). The statute setting forth the approval process addresses three issues: (1) who is statutorily authorized to apply, (2) what entity may approve the application, and (3) the length of a charter. N.C. GEN. STAT. § 115C-238.29B (1999). Other relevant considerations include the nature of the appeal process in the event of a rejected application, the types of schools that qualify for a charter (e.g., converted public schools, home-based schools), and the level of support (if any) the applicant must demonstrate for approval. *Id.*

112. See *Charter School Legislation: State Rankings, Winter, 1999* (Ctr. for Educ.

public school system in the state.¹¹³ If the charter is granted, it remains in force for a specified term of years.¹¹⁴ To the degree that the length of the charter term correlates with a legislative desire to allow charter schools freedom from state oversight, allowing a longer initial charter is more liberal because it minimizes state regulation.¹¹⁵

Common chartering entities include: (1) the local school board or administrative unit in which the proposed school is to be located, (2) the state board of education, and (3) a constituent university in the state's public university system or a locally-based community college.¹¹⁶ North Carolina's chartering statute, for example, follows this model closely, authorizing as chartering bodies local boards of education, the board of trustees of the University of North Carolina system, and the State Board of Education.¹¹⁷ In addition, the statute gives the State Board of Education final approval power, regardless of which institution initially approved the charter.¹¹⁸

As with public schools, the state directly funds charter schools.¹¹⁹ The state determines the amount of money spent annually on each student within the public school system and then calculates the charter school's budget by multiplying that figure by the number of students enrolled in the charter school.¹²⁰ If, for example, the state

Reform), available at <http://www.edreform.com/law/lawrank.htm> (last visited Nov. 11, 2000) (on file with the North Carolina Law Review). The ranking system designed by the Center for Education Reform classifies laws that allow multiple chartering authorities as "strong" on a qualitative, five-point scale. Most states in the rankings are well above two, denoting multiple chartering bodies. Some notable exceptions include Florida, Arkansas, and Nevada. *See id.*

113. *See supra* note 111.

114. *See, e.g.*, N.C. GEN. STAT. § 115C-238.29D(d) (1999 & Supp. 2000) (specifying that a charter term of up to five years may be granted upon approval of the charter application).

115. *See, e.g.*, N.C. GEN. STAT. § 115C-238.29E(f) (1999) (exempting charter schools from statutes and rules applicable to local boards of education or local school administrative units). While longer initial charter terms may insulate charter schools from many state regulations, charter revocation measures constrain this freedom, especially when charters can be terminated for a wide array of reasons. *See, e.g.*, N.C. GEN. STAT. § 115C-238.29G(a)(1)-(6) (1999) (enumerating six grounds for termination or non-renewal of a charter, including the legally amorphous "other good cause identified").

116. *See e.g.*, N.C. GEN. STAT. § 115C-238.29B(c)(1)-(3) (1999). This approach affords individual applicants a strategic choice. They may choose to apply to the local board if they feel a favorable decision is likely or they may choose to apply to a more state-controlled institution.

117. *Id.*

118. *Id.*

119. N.C. GEN. STAT. § 115C-238.29H(a) (1999) (listing a per pupil funding procedure for charter schools).

120. Ctr. For Educ. Reform, Answers to Frequently Asked Questions About Charter Schools, at http://www.edreform.com/school_reform_faq/charter_schools.htm (last visited

appropriates \$4000 per pupil to a school in a specified district, a charter school in that same district would normally receive equal per pupil funding based on its enrollment.¹²¹

Charter schools are also subject to certain limited state regulations, frequently in the areas of curriculum, admissions, and budgeting.¹²² The primary distinction between charter schools and traditional public schools, however, is the greater degree of autonomy and relative freedom from state regulations afforded charter

Dec. 3, 2000) (on file with the North Carolina Law Review) [hereinafter Ctr. for Educ. Reform, Frequently Asked Questions] (explaining that “[l]ike district public schools, [charter schools] are funded according to enrollment . . . and receive funding from the district and the state according to the number of students attending). North Carolina mandates equal per pupil funding for traditional public school students and charter school students, *see* N.C. GEN. STAT. § 115C-238.29H(a) (stating that the State Board of Education must fund charter schools and traditional public schools equally within each school district); other states provide an acceptable range. *See* Ctr. for Educ. Reform, Frequently Asked Questions, *supra*. In Illinois, for example, the amount of funding provided by the state to the charter school may be negotiated in the charter itself, provided it is not less than 75% or greater than 125% of the funding received by traditional public schools. *See* 105 ILL. COMP. STAT. ANN. 5/27A-11 (West 1998 & Supp. 2000). In Minnesota, by contrast, charter schools only receive the state portion of funding, amounting to about seventy-five percent of per-pupil funding. Ctr. for Educ. Reform, Frequently Asked Questions, *supra*.

121. *See, e.g.*, N.C. GEN. STAT. § 115C-238.29H(a)(1) (1999) (allocating to each charter school “an amount equal to the average per pupil allocation for average daily membership from the local school administrative unit allotments in which the charter school is located”). Funding patterns allowing charter schools equal per pupil allotments have generated controversy among those who see such funding as a drain on traditional public schools. *See Speaking for District Students*, WASH. POST, Dec. 23, 1999, at A20 (noting the difficulty of funding traditional public schools and charter schools on a per pupil basis when other costs, such as transportation and special education, are considered). *But see* Greg Richmond, *It’s All About Choice: Dispelling the Charter School Myths*, CHI. TRIB., Aug. 13, 1999, § 1, at 19 (arguing that it makes “no sense” to suggest that charter schools take money from traditional public schools, because both schools are “rightly funded based on . . . enrollment”).

122. 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, 133 (1998) (listing areas in which states are likely to impose regulations on charter schools); *see, e.g.*, N.C. GEN. STAT. § 115C-238.29F(a) (1999) (subjecting charter schools to the same health and safety requirements as other public schools); *id.* § 115C-238.29F(f)(1) (subjecting charter schools to the audit requirements of the State Board of Education). Other significant areas of control include teacher accreditation and racial composition of charter schools. *See id.* § 115C-238.29F(e)(1) (1999) (requiring that seventy-five percent of charter school teachers in grades kindergarten through five, and fifty percent of charter school teachers in grades six through twelve be accredited); *id.* § 115C-238.29F(g)(5) (1999) (prohibiting discrimination in student selection and requiring, after one year of enrollment, that the “population of the school shall reasonably reflect the racial and ethnic composition of the general population residing within the local school administrative unit”).

schools.¹²³

Charter school advocates view this separation and freedom from state regulation as advantageous in several ways.¹²⁴ First, freedom from curricular control allows charter schools more flexibility to determine the substance of its students' education.¹²⁵ Charter schools are not required to follow state-mandated unit plans or to coordinate their textbooks with the state department of public instruction.¹²⁶ Second, charter schools can generally hire teachers without regard to professional certification or educational background.¹²⁷ Some have characterized this flexibility as a way to circumvent traditional certification requirements that keep many highly motivated, competent instructors out of the classroom.¹²⁸ Third, a certain level of financial freedom accompanies the block grant appropriated to charter schools based on pupil enrollment.¹²⁹ The considerable start-up costs associated with charter schools, however, limit this financial freedom.¹³⁰ In fact, a lack of capital funding is a major obstacle to

123. See Wohlstetter, *supra* note 87, at 139 (calling the charter a "declaration of independence" that allows schools to operate free from state and local regulations).

124. See *id.* at 139 (noting that the freedom of charters enables schools to increase their effectiveness).

125. See MULHOLLAND & BIERLEIN, *supra* note 11, at 9-10 (highlighting curricular innovation as one of the benefits of charter schooling).

126. See N.C. GEN. STAT. § 115C-238.29E(f) (1999) (exempting charter schools from statutes and rules applicable to a local board of education); Wohlstetter, *supra* note 87, at 147 (stating that charter schools can set their own goals, but must comply with certain curriculum requirements). This freedom is not unbridled, as charter school teachers must still prepare students for state assessments. N.C. GEN. STAT. § 115C-238.29F(d)(3) (1999).

127. See N.C. GEN. STAT. § 115C-238.29F(e)(1) (1999) (listing minimal certification requirements for charter schools). Quite predictably, this element of charter school freedom has concerned many in the educational community. See FINN ET AL., *CHARTER SCHOOLS IN ACTION*, *supra* note 13, at 28 (reciting the findings from a comprehensive study of charter schools and concluding that charter schools hire many unconventional teachers). One of the structural difficulties of charter schools is that the freedom to innovate, the hallmark of chartering legislation, also leads to the freedom to corrupt, and anecdotal examples of woefully inadequate instructors have led many states to backtrack on chartering provisions giving the schools complete freedom to hire. See Thomas Toch, *The New Education Bazaar: Charter Schools Represent the Free Market in Action—With All Its Problems*, U.S. NEWS & WORLD. REP., Apr. 27, 1998, at 34, 34 (detailing some of the struggles charter schools face when hiring and listing examples of poor teaching methods in charter schools). North Carolina, for example, provides that seventy-five percent of the teachers in elementary charter schools and fifty percent of teachers in secondary charter schools must be certified according to state guidelines. N.C. GEN. STAT. § 115C-238.29F(e)(1) (1999).

128. See FINN ET AL., *CHARTER SCHOOLS IN ACTION*, *supra* note 13, at 28 (concluding that many "excellent and often unconventional teachers are flocking to charter schools").

129. See N.C. GEN. STAT. § 115C-238.29E(c) (1999) (limiting the conditions that may be imposed on charter schools for receipt of local funding).

130. See FINN ET AL., *CHARTER SCHOOLS IN ACTION*, *supra* note 13, at 34-35 (naming

charter school formation.¹³¹ Predictably, this has led many charter directors to be creative when seeking a location for their charter schools. Schools have opened in shopping malls, motels, warehouses, and other unlikely locales.¹³² While individual charter schools vary across literally hundreds of factors, the charter approval process, which is not for the easily discouraged, tends to attract people excited about the possibilities of education and charged with a notion that schools can improve.¹³³

Conceptually, charter schools may be properly viewed as hybrid institutions, combining the basic necessities and regulations of public schools with the curricular innovation and autonomy of private schools.¹³⁴ While they are publicly funded and must adhere to a certain threshold of state regulation, such as testing, limited teacher credential requirements, and open enrollment,¹³⁵ charter directors have great flexibility when creating their schools,¹³⁶ much like private schools.¹³⁷ The nexus between this public function and private

capital funding as one of the greatest challenges facing charter schools). Probably the most unpredictable aspect of capital funding is tied to facilities use. *See id.*

131. *Id.* at 33–36 (listing some of the financial hurdles charter schools face, including initial funding, capital funding, operating funds, and cash flow difficulties).

132. The physical location of charter schools varies tremendously, from public school property, to old warehouses, to leased office buildings. *See* Manya A. Brachear, *Parents Hoping to Oust Educator*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 17, 1999, at 1N (describing the opening of a charter school in a shopping mall); Milton Shinberg, *Opening Doors to Scholastic Success: Help Charter Schools Find Inexpensive Homes*, WASH. POST, Dec. 5, 1999, at B8 (noting the tendency of charter schools to implement “adaptive reuse” of former malls, motels, and convents). The financial health of charter schools varies tremendously and largely depends on the procurement of proper facilities. *See* Shinberg, *supra*. Schools fortunate enough to operate in donated facilities may have a considerable degree of financial flexibility relative to other charters whose per pupil funding is not sufficient to cover the considerable start-up costs charter schools face and the acquisition of facilities. *See Speaking for District Students*, *supra* note 121 (detailing difficulties in adequately funding charter schools because of high start-up costs). In any event, charter school personnel often assume more responsibilities for physical upkeep and maintenance than traditional public school personnel. *See* FINN ET AL., CHARTER SCHOOLS IN ACTION, *supra* note 13, at 45 (noting that charter teachers “perform a great many tasks not found in the job descriptions of conventional teachers”).

133. *See* Toch, *supra* note 128, at 34, 36 (“High-quality charter schools share one trait: They have brought new participants who care about children’s welfare into public education.”); *supra* note 17 and accompanying text (discussing different types of charter schools).

134. *See supra* notes 122–23.

135. *See, e.g.*, N.C. GEN. STAT. § 115C-238.29F (1999) (imposing certain general requirements on charter schools); Wohlstetter, *supra* note 87, at 139 (explaining that charter schools have considerable freedom from state and local regulations).

136. *See* Wohlstetter, *supra* note 87, at 139.

137. GUTMANN, *supra* note 20, at 118 (stating that “private schools [are] considerably freer than public ones to provide religious training and to experiment with methods of

operation is critical when considering the legal implications of charter schools because conflicting legal theories may lead to different determinations regarding the legal status of charter schools.¹³⁸

A full understanding of North Carolina's chartering statute is essential to understanding how and why charter schools embrace elements of both the liberal and production approaches. As noted earlier, because North Carolina's chartering statute mirrors those of many other states, the lessons of North Carolina are applicable in a wide variety of state contexts.¹³⁹ What follows is a summary of North Carolina's chartering statute, focusing on: (1) legislative intent and the specifics of the Act, and (2) a description of what these specifics reveal about the educational theories—liberal and production—underlying them.

B. *North Carolina's Chartering Statute—The Liberal and Production Models*

North Carolina's decision to pass charter legislation was influenced greatly by earlier states' experiments with education reform.¹⁴⁰ A proper understanding of North Carolina's statute, therefore, depends in large degree on discerning the motivations behind the original statutes. For nearly three decades, school choice activists have argued that allowing individual choice will stimulate competition among public schools and eventually result in a general improvement of those schools.¹⁴¹ Spurred by news of declining student achievement and organizational reports with compelling (some would say alarmist) titles like "A Nation At Risk," the public cry for school choice accelerated in the 1980s.¹⁴² Whatever the reality

education unavailable within public schools").

138. See *infra* notes 254–322 and accompanying text (discussing the public versus private determination of charter schools).

139. The precise relevance of North Carolina's experiences will vary depending upon the specifics of each state's chartering statute. Those differences, and their attendant implications, are considered in Part III.

140. Compare the stated purposes of North Carolina's charter statute, N.C. GEN. STAT. § 115C-238.29A (1999), with the first statute passed in Minnesota, MINN. STAT. ANN. § 124D.10 (West 2000). Curricular innovation, increased student opportunities for learning, and expanded professional opportunities for teachers are listed as intended goals of both statutes.

141. See, e.g., Cleveland, *supra* note 71, at 95–99 (detailing the development of school choice proposals).

142. NAT'L COMM. ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATION REFORM 5* (1983) (Sup. Docs. No. ED1.2:N21) (stating that "a rising tide of mediocrity" in public education threatens the future of our nation). Cf. James W. Guthrie, *The Challenge of Being an Education President*, N.Y. TIMES, Aug. 6, 2000, § 4A (Education Life), at 40 (noting that *A Nation at Risk* has driven many

of public education in America in the 1980s, a groundswell of popular support formed, creating the critical mass needed for implementation of reform.

One of the most cited reforms were school vouchers, or government-funded certificates which allow public school students to enroll in private institutions.¹⁴³ Predictably, political forces, lead by the American Federation of Teachers (AFT) and the National Education Association (NEA), characterized vouchers as an attempt to abandon public schools,¹⁴⁴ and used their considerable political clout to defeat vouchers in most jurisdictions.¹⁴⁵ Many members of the educational establishment, including Albert Shanker, then president of the AFT, however, viewed charter statutes as a promising alternative in the battle for school choice.¹⁴⁶ Today, the initial AFT support for charter schools seems ironic at best given the union's general disdain for charter schools.¹⁴⁷ Nevertheless, the level of public support, coupled with reluctant approval by some teachers' unions,¹⁴⁸ created a climate favorable to charter schools.

A few years later, Minnesota took the first tentative steps by enacting the nation's first chartering statute.¹⁴⁹ Minnesota's statutory enactment authorizing charter schools "was intended to allow groups of motivated parents and teachers to create their own innovative, results-driven schools that would be free from some of the

current reform movements and has also been used to "browbeat education officials into setting higher standards").

143. See Toch, *supra* note 127, at 34 (detailing legislative support for vouchers in Florida, Pennsylvania, and Texas); *supra* note 55 and accompanying text (describing the differences between voucher programs and charter schools).

144. Carol Innerst, *AFT Sues Cleveland to Stop New School-Voucher Program*, WASH. TIMES, Jan. 11, 1996, at A5 (detailing the attempts of the American Federation of Teachers to limit the spread of a voucher program in Cleveland, Ohio).

145. See *id.* Interestingly, one commentator has concluded that the proponents of school choice were able to press charter statutes on the states precisely because the fight over vouchers was so heated, leaving those with a stake in traditional public schools battle weary. See Priscilla Wohlstetter et al., *Charter Schools in the United States: The Question of Autonomy*, 9 EDUC. POL'Y 331, 348 (1995).

146. See Wohlstetter, *supra* note 87, at 139, 145 (describing a report by Ray Budde, a Massachusetts education consultant). Ray Budde, who is generally cited as the founder of the modern charter movement, thought charter schools could empower teachers by breaking down the centralization of learning programs, thus giving each school an amount of individual control. *Id.*

147. See HASSEL, *supra* note 3, at 22-23 (describing "teachers' unions nationwide mobilizing to block charter school laws"). But see *supra* note 107 (describing teachers' unions contextual support of charter schools).

148. See *supra* note 107 and accompanying text.

149. Act of June 4, 1991, ch. 265, art. 9, § 3, 1991 Minn. Laws 1123 (codified as amended at MINN. STAT. ANN. § 124.D10 (West 1998)).

regulations to which other schools must adhere.’¹⁵⁰ Never one to be behind the curve in political innovation, California passed a charter school statute a few years later;¹⁵¹ subsequently, legislatures across the country followed suit. Today, thirty-six states, Puerto Rico and the District of Columbia, have some form of chartering legislation.¹⁵² Chartering legislation adopted by different states after 1996 is remarkably similar. North Carolina’s statute is indicative of this trend, closely paralleling many other states’ statutes.¹⁵³

Significantly, when North Carolina passed its charter school statute in 1996, it implemented a hybrid system that combined local autonomy with general state accountability.¹⁵⁴ North Carolina placed

150. Jennifer J. Ridley, Note, *Chartering a New Course for Public Education in Michigan—Charter Schools: A Significant Step Toward Meaningful Education Reform*, 76 U. DET. MERCY L. REV. 607, 615 (1999) (quoting Arne H. Carlson, *Help Charter Schools to Flourish: A Bold Step on the Road to Educational Reform*, STAR-TRIB. (Minneapolis), Feb. 16, 1997, at 31A).

151. Charter Schools Act of 1992, ch. 781, § 1, 1992 Cal. Adv. Leg. Serv. 3756 (Deering) (codified as amended at CAL. EDUC. CODE §§ 47600–47625 (West 1993 & Supp. 2000)).

152. See, e.g., ALASKA STAT. § 14.03.250 (Michie 1998); ARIZ. REV. STAT. ANN. § 15-181 (West Supp. 2000); ARK. CODE ANN. § 6-23-101 (Michie 1999); CAL. EDUC. CODE § 47600 (West 1993); COLO. REV. STAT. § 22-30.5-101 (2000); CONN. GEN. STAT. ANN. § 10-66a (West 1996); DEL. CODE ANN. tit. 14, § 501 (1999); D.C. CODE ANN. § 31-2801 (1998); FLA. STAT. ANN. § 228.056 (West 1998); GA. CODE ANN. § 20-2-255 (1996); HAW. REV. STAT. § 302A-1182 (Supp. 1999); IDAHO CODE § 33-5201 (Michie Supp. 2000); 105 ILL. COMP. STAT. ANN. 5/27A-5 (West 1998); KAN. STAT. ANN. § 72-1903 (Supp. 1999); LA. REV. STAT. ANN. § 17:3971 (West Supp. 2000); MASS. ANN. LAWS ch. 71, § 89 (Law Co-op. Supp. 2000); MICH. STAT. ANN. § 15.4501 (Michie 1996); MINN. STAT. ANN. § 124D.10 (West 2000); MISS. CODE ANN. § 37-28-1 (1999); MO. ANN. STAT. § 160.400 (West 2000); NEV. REV. STAT. ANN. § 386.500 (Michie 2000); N.H. REV. STAT. ANN. § 194-B:1 (1999); N.J. STAT. ANN. § 18A:36A-1 (West 1999); N.M. STAT. ANN. § 22-8B-1 (Michie Supp. 1999); N.Y. EDUC. LAW § 2850 (McKinney 2000); N.C. GEN. STAT. § 115C-238.29A (1999); OHIO REV. CODE ANN. § 3314.01 (Anderson 1999); OKLA. STAT. ANN. tit. 70, § 3-130 (2001); OR. REV. STAT. § 338.015 (1999); PA. STAT. ANN. tit. 24, § 17-1701-A (2000); 18 P.R. LAWS ANN. § 2511 (1997); R.I. GEN. LAWS § 16-77-1 (1996); S.C. CODE ANN. § 59-40-10 (Law Co-op. 1999); TEX. EDUC. CODE ANN. § 12.101 (Vernon 1996 & Supp. 2000); UTAH CODE ANN. § 53A-1a-501 (2000); VA. CODE ANN. § 22.1-212.5 (Michie 2000); WIS. STAT. ANN. § 118.40 (West 1999 & Supp. 2000); WYO. STAT. ANN. § 21-3-201 (Michie 1999).

153. For a comparative analysis of states with charter statutes, see Ctr. for Educ. Reform, *Charter School Legislation: State Rankings*, at http://www.edreform.com/charter_schools/laws/ranking_2000.htm (last visited Nov. 20, 2000) (on file with the North Carolina Law Review). This comparison is particularly useful because it measures the strength of different states’ approaches and ranks them on a number of common chartering factors, such as the number of schools allowed, fiscal autonomy, operational autonomy, and automatic waiver of district laws.

154. Compare N.C. GEN. STAT. § 115C-238.29E(f) (1999) (exempting charter schools from many statutes and rules applicable to local boards of education), with *id.* § 115C-238.29E(a) (holding charter schools accountable to the local board of education for purposes of ensuring compliance with applicable laws) and *id.* § 115C-238.29F(d)

the power to implement change in the hands of local educators while ensuring a certain level of accountability to the State Board of Education, usually in the form of standardized evaluative measures.¹⁵⁵ Although local control and state accountability are not necessarily at odds, they have different theoretical underpinnings.¹⁵⁶ Local control gives parents, educators, and the local school board the power to make most functional decisions,¹⁵⁷ while accountability seeks to ensure that all students meet a threshold level of educational attainment.¹⁵⁸ Moreover, allowing local control over curriculum

(requiring charter schools to design programs to meet the State Board's student performance standards). At a minimum, inclusion of exemption language in the chartering statute is an anecdotal demonstration of a legislative intent to make charter schools free from many types of regulatory control. The degree of freedom afforded charter schools, however, varies considerably from state to state. *Compare* N.C. GEN. STAT. § 115C-238.29F(e)(4) (1999) (demanding full accountability from charter schools and giving the State authority to "grant, supervise, and revoke charters"), *with* MINN. STAT. ANN. § 124D.10(7) (West 1999) (stating that charter schools are exempt from all statutes and rules applicable to a school, a board, or a district) *and id.* § 124D.10(8) (West 1999) (mandating that charter schools meet numerous state and local requirements including health and safety codes, admission policies, employment practices, suspension systems, and financial reviews).

155. Local control is evidenced by the degree of autonomy granted to charter school boards. *See* N.C. GEN. STAT. § 115C-238.29E(d) (1999) (giving the charter school board of directors the power to make budgeting, curriculum, and operational decisions). Accountability is evidenced by the state reporting requirements. *See id.* § 115C-238.29F(d)(3), (f) (1999) (requiring charter schools to comply with state assessment and general reporting requirements). These are not the only state controls placed on charter schools, however. *See id.* § 115-238.29F(a) (1999) (requiring charter schools to comply with the same health and safety requirements required of local schools); *id.* § 115-238.29F(b) (1999) (stating that charter schools must be nonsectarian); *id.* § 115-239.29E(e) (1999) (prohibiting religious "artifacts, symbols, iconography, or materials" in charter schools' entrances, classrooms, or hallways); *id.* § 115-239.29F(d)(1)-(4) (1999) (providing that charter schools must comply with state instructional limits, student performance requirements, student assessments, and the education of students with special needs); *id.* § 115-239.29F(d)(5) (1999) (stating that charter schools are subject to the state statute regarding student suspension and expulsion); *id.* § 115-239.29F(f) (1999) (explaining that charter schools are subject to the audit procedures and reporting requirements established by the state); *id.* § 115-239.29F(g) (1999) (detailing the admission requirements that charter schools must employ).

156. *See generally* FINN ET AL., CHARTER SCHOOL ACCOUNTABILITY, *supra* note 7, at 25 ("This approach to judging educational quality—according to what students actually achieve, what they know and can do—diverges sharply from the decades-old conventional wisdom that quality is properly gauged by inputs, services, resources and intentions.").

157. *See generally* SCHOOL-BASED MANAGEMENT: ORGANIZING FOR HIGH PERFORMANCE, *supra* note 87 (reviewing techniques designed to increase school performance through local control of educational processes).

158. *See* Wohlstetter, *supra* note 87, at 146-47 (observing that many charter schools stress the importance of accountability). The required North Carolina Basic Education Program is an example of an accountability model. *See* N.C. GEN. STAT. § 115C-12(9) (1999) (empowering the State Board of Education to adopt rules requiring all local boards

decisions frequently leads to a departure from traditional state subject matter.¹⁵⁹ In contrast, accountability, which is almost universally measured through standardized testing, tends to focus on core curricula such as math, science, and English—often to the exclusion of electives such as art, music, and social science courses.¹⁶⁰ By implementing its charter school statute, North Carolina sought to bring these two concepts together.¹⁶¹ Many anecdotal examples indicate that this approach is succeeding.¹⁶²

Charter schools' incorporation of these two theories of education is illustrative, both in connecting charter school theory to older notions of education and in discerning whether the purpose of charter schools can be fulfilled within the contemporary legal climate. Both local control and accountability seek to accomplish the same goal, educational improvement, but differ in methodology.¹⁶³

of education to implement a basics program).

159. See N.C. GEN. STAT. § 115C-238.29A(3) (1999) (citing innovation as one of the goals of charter schools); MULHOLLAND & BIERLEIN, *supra* note 11, at 9 (explaining that charter schools “offer teachers a chance to work in more innovative, autonomous schools that use new or alternative teaching methods, philosophical approaches, and assessments”). This innovation also gives parents and students expanded educational choices, many of which vary from opportunities available at traditional public schools. See N.C. GEN. STAT. § 115C-238.29A(5); *supra* notes 15 & 17 (listing various types of charter schools that have structured their curricula around some organizational theme, such as technology, fine arts, or specific trades).

160. See *supra* notes 71–78 and accompanying text. Many charter schools use their freedom to implement a curriculum focusing on student acquisition of basic skills. See, e.g., Courtney Hardee, *Charter School Excites Parents*, NEWS & RECORD (Greensboro, N.C.), Aug. 9, 1999, at B1 (noting the “back-to-basics” curriculum of the Greensboro Academy charter school). This return-to-basics curriculum, which emphasizes core curricula in an attempt to staunch the perceived erosion of basic skills among public school students, is often aligned with the accountability model. See ALLEN, *supra* note 24, at 25–27 (noting that a basics curriculum typically uses standardized tests to measure accountability).

161. See Hardee, *supra* note 160 (noting that “[a]ll charter schools are required to follow state testing guidelines unless they provide a suitable alternative”).

162. See, e.g., Courtney Hardee, *Charters Appear to Pass Test*, NEWS & RECORD (Greensboro, N.C.), Sept. 5, 1999, at A1 (announcing the general success of charter schools in North Carolina); Tim Simmons, *Black Parents Seek a Better Choice: Many Choosing Charter Schools Early to Ensure Child's Success*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 23, 1999, at 1A (describing charter school students' success on the Iowa Test of Basic Skills).

163. The conflict between local control and accountability is not new. Indeed, the attempt to describe the process by which states may best educate their citizens has been the subject of speculation since antiquity. See GUTMANN, *supra* note 20, at 19 (observing that Aristotle, Rousseau, and Montesquieu all sought to answer this vexing question). Aristotle understood the significance of this question well, writing in *Politics*: “That education should be regulated by law and should be an affair of state is not to be denied, but what should be the character of this public education, and how young persons should be educated, are questions which remain to be considered.” ARISTOTLE, *supra* note 1, at

North Carolina's Charter Schools Act (the "Act") begins with a statement of purpose:¹⁶⁴ "[T]o authorize a system of charter schools to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently of existing schools."¹⁶⁵ Within this framework, charter schools are intended to accomplish six specified goals: (1) improve student learning; (2) increase students' opportunities for learning, especially among at-risk students and gifted students; (3) encourage innovation in teaching methods; (4) create professional opportunities for teachers; (5) expand educational choices for parents and students; and (6) measure charter school students' achievement and hold charter schools accountable for that achievement.¹⁶⁶

The Act's purpose evinces an approach to educational reform that incorporates elements of both the liberal and production models of education. The focus on innovative teaching methods and the corresponding encouragement of different teaching approaches relates to the liberal ideal that prizes learning as a liberating process best experienced after removing common prejudice and presumption.¹⁶⁷ The Act's commitment to basic academic achievement, presumably according to current standards, attempts to raise students to a predetermined minimum standard of competence, an idea that underlies the production model.¹⁶⁸

A second goal, providing increased educational choice, similarly implicates both approaches. This portion of the Act attempts to reconcile two competing notions of the liberal and production approaches, namely the reproduction of parental and community ideals (production) and the expansion of educational choice (liberal).¹⁶⁹ The Act's attempt to expand students' educational

2121.

164. N.C. GEN STAT. § 115C-238.29A (1999).

165. *Id.*

166. *Id.*

167. *See id.* The states' goal of innovation in teaching is related to the liberal approach because it seeks new, more useful ways to assist students in thinking. *See supra* notes 81-83 and accompanying text (listing independent thinking and insulation from untoward influences as hallmarks of a liberal education).

168. *See* N.C. GEN STAT. § 115C-238.29A (1999) (referring to "student achievement results" and the accountability of schools as goals in creating performance-based charter schools).

169. This reconciliation is precisely why North Carolina's chartering statute is so instructive. It brings the liberal and production models together without placing them at odds. Increasingly, other states' statutes reflect this approach, embracing elements of both models in their statutes. *See, e.g.*, KAN. STAT. ANN. §§ 72-1903 to -1910 (Supp. 1999); MASS. GEN. LAWS ANN. ch. 71, § 89 (Supp. 2000); NEV. REV. STAT. §§ 386.500-386.610 (2000); WIS. STAT. ANN. § 118.40 (West 1999).

choices fits neatly within the construct of the liberal model (assuming the choices available vary from the current system), and its endeavor to allow parents to determine the course of their child's education resonates with the production model.¹⁷⁰ While this result may have been unintended, the democratic process, which by definition elevates the importance of compromise,¹⁷¹ has created an approach to educational reform that preserves the best of the liberal model with the best of the production model. This compromise aptly underscores how and why charter school legislation has been so successful. By appealing to fundamental desires on both sides of the ideological divide, the legislation allows for a mixture of innovation and traditionalism that is palatable to the majority of the electorate.¹⁷² Unfortunately, this very mix has engendered increasingly severe criticism from legislators,¹⁷³ who will likely act to restrict the reach of the chartering statutes.

C. *North Carolina's Charter Statute: Specific Provisions*

After an initial statement of purpose, the Act prescribes the essentials for the creation, maintenance, and operation of charter schools.¹⁷⁴ In sometimes limited detail, the Act describes the various processes by which a charter application may be approved,¹⁷⁵

170. See *supra* notes 66–102 and accompanying text (examining the liberal and production models in relation to educational choice and parental control).

171. See generally HASSEL, *supra* note 3, at 31–33 (explaining the development of charter school laws in four states as a process of “reaching compromise”).

172. Americans Willing to Pay for Improving Schools, at <http://www.npr.org/programs/specials/poll/education/education.front.html> (last visited Dec. 3, 2000) (on file with the North Carolina Law Review) (reporting that a majority of those polled favored charter schools).

173. North Carolina legislators limited the scope of the charter school statute by placing a cap of one hundred schools statewide and by allowing no more than five charter schools per year in any one district. N.C. GEN. STAT. § 115C-238.29D(b) (1999 & Supp. 2000). This limit has generated fierce controversy, both from charter school advocates and opponents. See *Knowing Limitations*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 29, 1999, at 10A (arguing that the one hundred-school cap should be maintained because expanding the allowed number of charter schools “would be akin to pronouncing an open heart surgery a success before the last valve had been sutured”). *But see* Todd Silberman, *Cap on Charter Schools Is Near*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 25, 1999, at 1B (Wake & Durham County editions) (noting that North Carolina is close to the one hundred school limit and interviewing advocates who favor removing the limit). As the number of approved charter schools reaches the limit of one hundred, the legislative response should be instructive. The legislature may choose to increase the limit, tacitly approving the movement, or to maintain the current limit. In any event, its decision will be indicative of the legislature's sentiment regarding charter schools.

174. N.C. GEN. STAT. §§ 115C-238.29B to 238.29E (1999).

175. See *id.* §§ 115C-238.29C to -238.29D (1999 & Supp. 2000).

catalogues general requirements that apply to all charter schools,¹⁷⁶ suggests operating principles to guide individual directors,¹⁷⁷ details the distribution of public funds,¹⁷⁸ and outlines the process by which the educational effectiveness of charter schools will be assessed.¹⁷⁹

A full description of each section is not useful in examining the liberal and production-based components of the legislation. Several significant statutory stipulations deserve attention, however, especially as they relate to the tension between local control over the charter schools and state oversight. This tension proves vital in determining the degree to which the Act combines the models.¹⁸⁰ A description of the portions of the Act that most directly involve these two perspectives follows.

1. Charter Approval Process

One particularly useful method of highlighting the struggle between state superintendence and local control over charter schools is to trace a typical application through the chartering process. This procedure exposes how the competing notions of local and state control inform the creation and maintenance of charter schools. Initially, any person or group wishing to establish a charter school must complete an application describing the school's purpose, mission, financial plan, and evaluation system.¹⁸¹ The applicant then must apply to one of the three listed chartering entities—a local board of education, a board of trustees of an institution within the University of North Carolina system, or the State Board of Education.¹⁸²

176. *Id.* § 115C-238.29F (1999).

177. *Id.* § 115C-238.29E (1999).

178. *Id.* § 115C-238.29H (1999).

179. *Id.* § 115C-238.29I ((1999 & Supp. 2000).

180. *See supra* notes 164–79 and accompanying text (describing educational choice and minimum competency standards as two examples of the Act's theoretical bases).

181. N.C. GEN. STAT. § 115C-238.29B(b) (1999). This portion of the Act lists thirteen separate subjects that must be addressed in the initial application, including admissions policies, procedures, and bonding insurance. *Id.*

182. *Id.* § 115C-238.29B(c) (listing approved chartering entities). An initial application to the State Board of Education may seem the most efficacious route to approval because the State Board ultimately must approve all charters; thus applying to the State Board initially might save a step. *Id.* This assumption appears unwarranted, however. The Act gives the State Board, on approval, the power to deny a previously-approved application in only the following two situations: (1) if the application does not meet the minimum requirements set forth in the statute, or (2) if the State Board determines the application would not achieve *any* of the purposes set forth in the Act. *Id.* § 115C-238.29D(a) (1999 & Supp. 2000). In contrast, section 115C-238.29C(b) of the North Carolina General Statutes provides that the State Board may initially reject an application for more subjective

To obtain a charter under the Act, then, an applicant must apply to an organization with a clear stake in the public education system of the state.¹⁸³ Perhaps anticipating the difficulties this could create, the drafters crafted language which suggests that preliminary approval should be relatively easy in practice. Section 115C-238.29C of the North Carolina General Statutes provides that the chartering entity shall give preliminary approval to the application if the following three conditions are met: (1) the application satisfies the Act's requirements, (2) the applicant "has the ability to operate the school and would be likely to operate the school in an educationally and economically sound manner," and (3) "granting the application would improve student learning and [accomplish] one of the other purposes" of the Act.¹⁸⁴

The third condition is the most significant requirement of the preliminary approval process. The first condition is a procedural safeguard, ensuring that only applications complying with stated form be approved.¹⁸⁵ The second and third provisions, with the exception of the economic reasonableness clause, likely merge because determining that the charter school would improve student learning requires a finding that the school is likely to operate in an educationally sound manner. Moreover, accomplishing one purpose of the Act should not prove difficult given the broad construction of the Act's purposes.¹⁸⁶ Thus, if an applicant demonstrates that she is able to improve student learning and meets the standards for economic viability, then preliminary approval presumably would follow.¹⁸⁷

reasons: if the applicant would not be likely to operate the school in an "educationally and economically sound manner" or if granting the application would not "improve student learning." *Id.* § 115C-238.29C(b) (1999). Given the limited instances under which the State may disapprove a previously-approved application (compared to its wide-ranging ability to disapprove a preliminary application), an initial filing with a local board is the most effective method of approval.

183. *See* N.C. GEN. STAT. § 115C-238.29B(c).

184. *Id.* § 115C-238.29C(b).

185. *See id.*

186. Recall that the six stated purposes for the Act listed in section 115C-238.29A focus on innovation and student learning. *See supra* note 166 and accompanying text. Given the broad nature of these goals, the applicant would not be particularly challenged to demonstrate that the charter school could "[c]reate new professional opportunities for teachers" or "[p]rovide parents and students with expanded choices in types of educational opportunities that are available within the public school system." N.C. GEN. STAT. § 115C-238.29A (1999).

187. If an entity other than the State Board of Education rejects the application for preliminary approval, the appeals process gives extreme deference to the initial rejection. *See* N.C. GEN. STAT. § 115C-238.29C(c) (1999). The rejected applicant may appeal to the

After preliminary approval of the application, a curious limit on local autonomy emerges. Under Section D of the Act, the State Board is given the ultimate power to approve all applications.¹⁸⁸ In theory, the State Board of Education is the ultimate guardian, empowered to approve or disapprove any application. This oversight allays production-based thinkers' concern that charter schools will give wide-ranging freedom to local educators, who may or may not be able to implement an effective educational system.¹⁸⁹ Granting the state final approval over all applications appeases production thinkers by ensuring that the new schools are sufficiently aligned with the formal state system.

Although giving the state final authority appears to vest the ultimate decision-making power in the institution most closely associated with a traditional educational approach, the functional approval method seems to be little more than a rubber stamp.¹⁹⁰ A state *must* grant final approval if the application meets the stated requirements and if granting the application would achieve one or more of the purposes set out in the Act.¹⁹¹ Because any application reaching the Board must have already been approved by a similar public body (the local board of education or the board of trustees of a university),¹⁹² and because that approval required a finding that at

State Board, but the Board will only overturn the original decision and grant approval if it finds that the chartering entity (1) "acted in an arbitrary or capricious manner," (2) "failed to consider appropriately the application," or (3) "failed to act within the time" frame specified by the Act. *Id.* Under this framework, the rejected applicant has little hope for a reversal, and the most prudent course of action would likely be to modify the application and reapply the following year.

188. *Id.* § 115-238.29D (1999 & Supp. 2000).

189. *See id.* (leaving final approval power in the hands of a centralized body, a typical production approach). The freedom to innovate is also frequently characterized as the freedom to corrupt and abuse. *See, e.g.,* Brachear, *supra* note 132 (chronicling fiscal mismanagement of a charter school in Raleigh, North Carolina, and describing parents' efforts to "oust the school's executive director"). While innovative power in the hands of the capable and industrious may lead to positive reform, that same control in the hands of the less competent may lead to a decline in the quality of education. *See id.* This is perhaps the central structural flaw in the charter method. While few dispute the good intentions of charter directors, many question their ability to operate a school effectively. *See, e.g.,* Kirk Ross, *Failed School's Founder Angrily Sounds Off*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 27, 1999, at 3B (describing the closing of a charter school in Chapel Hill, North Carolina, due to charter directors who allegedly "misrepresented their capabilities"). The specter of well-meaning but ill-equipped parents, who hire largely uncertified teachers for a school designed to implement "nontraditional methods" is understandably troubling.

190. *See* N.C. GEN. STAT. § 115C-238.29D(a) (1999 & Supp. 2000).

191. *Id.*

192. *Id.* § 115C-238.29B(c).

least one of the purposes of the Act was met,¹⁹³ final Board approval is virtually assured.¹⁹⁴ This result should comfort liberal thinkers who are inherently suspicious of state control of schools.¹⁹⁵ The friction between the production and liberal methods thereby plays out again—this time in the context of final approval for charter schools, where the State Board maintains titular power while substantive power remains in the hands of the body responsible for preliminary approval.

This final approval process strips the State Board of any real power to review charter applications.¹⁹⁶ This likely angers production thinkers who maintain that the State Board should be given substantive, not merely symbolic, power over charter applications. An additional provision, however, gives the State Board unilateral power over the length of the charter.¹⁹⁷ This authority cannot be reviewed and is subject only to a five year cap.¹⁹⁸ In a pattern that recurs throughout the Act, a nod to the liberal model is balanced by a countervailing provision aligned with the production model.¹⁹⁹

2. Charter School Operation

Section E of the Act evinces a similar balancing of the liberal and production models, but in reverse order—it defers to the production approach and then backtracks to allow the liberal approach some sway. The first provision of the section provides that a charter school “shall be accountable to the local board of education if it applied for and received preliminary approval from that local board”²⁰⁰ All other charter schools are accountable to the State Board.²⁰¹ Later in the same section, the liberal approach gains ascendance. Section E

193. *Id.* § 115C-238.29D(a) (“The State Board shall grant final approval of an application if it finds that . . . granting the application would achieve one or more of the purposes [of the Act].”).

194. Even if the initial application is submitted to the State Board rather than to a local school board or a board of trustees, preliminary approval would likely act as final approval because the same body would presumably not reasonably reject an application it approved months earlier.

195. See GUTMANN, *supra* note 20, at 28–33.

196. See *supra* note 191 and accompanying text (describing the limited circumstances in which the State Board may reject a previously-approved application).

197. See N.C. GEN. STAT. § 115C-238.29D(d) (1999 & Supp. 2000) (allowing the State Board to grant initial charters for a five year period and renew the charters annually thereafter).

198. See *id.*

199. See *infra* notes 200–05, 224–27 & 237–40 and accompanying text (describing portions of the Act that combine liberal and production perspectives).

200. N.C. GEN. STAT. § 115C-238.29E(a) (1999).

201. *Id.* § 115C-238.29E(a).

exempts charter schools “from statutes and rules applicable to a local board of education or local school administrative unit”²⁰² except to the extent that the charter school is accountable, pursuant to Section E or to the charter.²⁰³ Section E forbids the imposition of additional conditions not stated in the charter for receipt of funds.²⁰⁴ “Matters related to the operation of the school, including budgeting, curriculum, and operating procedures” are solely within the purview of a charter school’s board of directors.²⁰⁵

Some view this as a form of legislative schizophrenia,²⁰⁶ but it is better understood as the rational outcome of an approach which seeks to please two masters. Legislators struggled to reconcile competing notions—the retention of State control over education and the reinvention of education as a more local process. The result is a statute that initially grants broad authority to one group but then reigns in that authority through enumerated prophylactic checks.²⁰⁷ One of the problems with this statutory approach is its *seeming* illogic. Statutes that forge compromise by embracing contradictory approaches are not, by themselves, necessarily illogical, but when the judiciary considers the statutes as a whole in the context of litigation, the contradictory positions provide persuasive grounds on which to argue that one approach should be abandoned in favor of the other.²⁰⁸

Similar to Section E of the Act, Section F tilts toward the production side and details the methods the State may use to dictate certain charter school operations. Under this section, the State requires charter schools to comply with health and safety codes,²⁰⁹ minimum lengths of instruction,²¹⁰ mandated student assessments,²¹¹

202. *Id.* § 115C-238.29E(f).

203. *Id.*

204. *Id.* § 115C-238.29E(c).

205. *Id.* § 115C-238.29E(d).

206. *See, e.g., SARASON, supra* note 51, at 89–90 (1998) (explaining the experience of one charter school which attempted to create a more engaging curriculum by blending the vocational and academic approaches).

207. *See supra* notes 154–55 and accompanying text.

208. This phenomenon will become much more significant as the number of lawsuits involving charter schools increases. Preliminary indicators suggest that some questions, such as whether charter schools use public money to support essentially private institutions, will turn on more than mere legislative intent and will view the operation of the statute as a whole. *See, e.g., Council of Orgs. & Others for Educ. About Parochial, Inc. v. Governor*, 566 N.W.2d 208, 209 (Mich. 1997) (holding that Michigan’s charter school legislation does not violate the state constitutional proscription against using public monies for non-public schools).

209. N.C. GEN. STAT. § 115C-238.29F(a) (1999).

210. *Id.* § 115C-238.29F(d)(1).

211. *Id.* § 115C-238.29F(d)(3).

financial audit procedures,²¹² and anti-discrimination policy.²¹³ Within Sections E and F, the requirements that have the most direct significance in a discussion of the liberal and production approaches are the required student assessments, the oversight of the State Board, and the modified certification procedures for teachers.²¹⁴

a. Required Student Assessments

North Carolina's State Board of Education implemented a basics program in 1995.²¹⁵ Through this program, the Board intended to improve the acquisition of basic skills among the state's public school children by focusing on specified subjects.²¹⁶ The program primarily emphasizes the assessment system, requiring standardized tests for all students in grades three through twelve.²¹⁷ The requirement that charter schools comport with state-devised standardized testing procedures gives more credibility to the production model by minimizing the common criticism that charter schools lack a reliable method to measure student achievement.²¹⁸ Like other provisions,

212. *Id.* § 115C-238.29F(f)(1).

213. *Id.* § 115C-238.29F(g)(5).

214. *See infra* notes 215–33 and accompanying text. Student selection procedure is another potential area that deserves note, even if it does little to implicate the two competing educational theories. North Carolina mandates a lottery selection system if a charter school has more applicants than openings. N.C. GEN. STAT. § 115C-238.29F(g)(6). This lottery system ensures a random selection of students and arguably cures the “skimming” effect—the attraction of the most motivated and talented students away from the traditional public system—that is often used to criticize voucher programs. *See* Kevin S. Huffman, Note, *Charter Schools, Equal Protection Litigation, and the New School Reform Movement*, 73 N.Y.U. L. REV. 1290, 1321–25 (1998).

215. *See* N.C. GEN. STAT. § 115C-81a (1999). *Cf. id.* § 115C-17 (describing the conditions for implementation of North Carolina's ABCs of Education program).

216. *See id.* § 115C-81a. This emphasis on basics has concerned many educators, parents, and others who fear that a “downward pressure” is being exerted on younger and younger students. *See* Amy Dickinson, *Kindergrind*, TIME, Nov. 8, 1999, at 61 (describing how kindergarten teachers are beginning to deemphasize student play, discovery, and other traditional kindergarten methods in favor of a curriculum heavy on basic skills acquisition). As school systems require standardized tests at younger ages, instructors in the early grades feel more pressure to prepare their students. *Id.*

217. *See* State Bd. of Educ.: North Carolina Statewide Testing Program, available at http://www.dpi.state.nc.us/abc_plan/abc_testing_program.html (last modified Nov. 11, 1999) (on file with the North Carolina Law Review). North Carolina requires an end-of-grade assessment in the following subjects: (1) math and reading in grades three through ten; (2) writing in grades four, seven, and ten; (3) science in grades nine, ten, eleven, and twelve; (4) social studies in grades nine and eleven. In addition, the state requires less frequent testing in other areas, including computer competency, and open-ended language. *Id.* This distribution is intended to focus on core subjects at the heart of the production model.

218. *See* Toch, *supra* note 127, at 34 (claiming that curricula and teaching are weak in many charter schools).

however, this compromise comes with a cost; in tying student assessment to the traditional standardized method, the Act loses a degree of liberal method appeal.

The liberal method assumes that innovation in both curriculum and assessment is a fundamental way to improve schools and to discover new approaches to learning.²¹⁹ To many liberal thinkers, traditional schools that focus on standardized tests to the exclusion of more creative assessment methods lack the ability to measure multiple intelligences within students.²²⁰ To support the theory, liberal thinkers repeat a mantra now fully incorporated into the educational mainstream: learning styles vary across the student population and individual students may acquire knowledge in different ways.²²¹ Herein lies the irony. Legislators enact charter legislation to spark innovation in education. Legislators then require charter schools to administer standardized tests to ensure that basic skills are not lost in the rush to innovate. Consequently, teachers adopt curriculum and plan lessons aimed at preparing students for standardized tests and thus innovation is constrained by state regulations. The initial purpose of chartering statutes—the encouragement of innovation—is thus frustrated. Moreover, because judges must consider objective indicia of “publicness” when examining charter statutes,²²² legislators have additional incentives to make the schools resemble traditional public schools. A contrary finding may deem the legislation vulnerable to a challenge on the ground that public monies are being appropriated for private purposes.²²³

219. See *supra* notes 26–33 and accompanying text.

220. Susan Moore Johnson & Katherine C. Boles, *The Role of Teachers in School Reform*, in *SCHOOL-BASED MANAGEMENT: ORGANIZING FOR HIGH PERFORMANCE*, *supra* note 87, at 109, 128 (questioning the impact of standardized testing on a school’s ability to become “self-directed”); see also DANIEL P. HALLAHAN & JAMES M. KAUFFMAN, *EXCEPTIONAL CHILDREN: INTRODUCTION TO SPECIAL EDUCATION* 119 (6th ed. 1994) (describing conceptual intelligence, practical intelligence, and social intelligence as distinct types of measurable intelligence); WOOLFOLK, *supra* note 25, at 110–14 (reviewing the competing theories of multiple intelligences).

221. See, e.g., WOOLFOLK, *supra* note 25, at 126–28 (describing differences in cognitive and learning styles and suggesting that individual students have “learning-style preferences” that must be considered in constructing an educational program). See generally LOUISA MELTON ET AL., *IMPROVING K-8 READING USING MULTIPLE INTELLIGENCES* (Phi Delta Kappa Educ. Found., No. 448, 1999) (discussing various theories of multiple intelligences and applying them to the improvement of reading skills).

222. See Council of Orgs. & Others for Educ. About Parochial, Inc. v. Governor, 566 N.W.2d 208, 216 (Mich. 1997) (discussing factors that qualify the Michigan charter schools as public schools).

223. See *id.*

b. State Board of Education Oversight

Section F of the Act provides the most direct evidence of state control over charter schools. It grants the State Board of Education the authority to “provide[] funds to charter schools, approve[] the original members of the boards of directors of the charter schools, . . . grant, supervise, and revoke charters, and demand full accountability from charter schools for school finances and student performance.”²²⁴ This plain statutory language seems to vest almost complete control over the charter school in the State. The rest of the Act, however, particularly its stated purposes, clearly expresses a desire to grant charter schools a substantial measure of autonomy.²²⁵ One plausible reason for such curious construction is philosophical—the framers truly struggled with balancing competing notions of state versus local control, with the end result being somewhat ambiguous. More likely, however, the legislators were solipsistic with regard to theory while contemplating probable future legal challenges. The most obvious concern to legislators is the Act’s survival in the face of ideologically-driven challenges.²²⁶ The legislators were aware that entrenched opposition was likely from teachers’ unions, special interest groups, and voucher opponents, all of whom could raise credible challenges to the Act.²²⁷ Again the production approach (exemplified by state control) clashes with the liberal approach (exemplified by local autonomy), and the result is another grouping of provisions that vacillates in both substance and operation.

c. Teacher Certification Procedures in Charter Schools

The requirement that a specified number of charter school instructors be certified is the least controversial of the Act’s provisions that implicate the production and liberal models.²²⁸

224. N.C. GEN. STAT. § 115C-238.29F(e)(4) (1999).

225. See *supra* notes 164–66 and accompanying text.

226. See, e.g., *Council of Orgs.*, 566 N.W.2d at 216 (challenging a state charter school statute on several grounds, including misappropriation of public funds for private purposes).

227. Several plausible challenges exist: (1) the Act violates the North Carolina Constitution by giving control over public education to a private board of directors, (2) the Act is unconstitutional because it divests the State Board of Education of its duty to lead and exercise general supervision over public education, and (3) the Act violates federal constitutional notions of separation of church and state because it allows (although to a limited degree) religious schools to donate facilities for the establishment of a charter school. While many other challenges to the Act are possible, they tend to be variations on one of these basic themes.

228. See N.C. GEN. STAT. § 115C-238.29F(e)(1).

Seventy-five percent of the primary instructors in charter schools and fifty percent of the secondary instructors must be certified.²²⁹ Because the state devises the requirements for accreditation,²³⁰ the state retains control over the academic preparation of most charter school instructors. To the extent accreditation corresponds with instructional competence, few individuals disagree with this mandate.²³¹ Significantly, while the state offers alternative certification programs,²³² there are currently many teachers, particularly in high-demand subjects like math, science, and foreign language, teaching without certification.²³³ The statutory attempt to encourage charter schools to maximize their percentage of certified instructors therefore seems disingenuous. The fifty percent requirement at the secondary level, however, gives a liberal-leaning charter school director ample room to innovate in hiring practices.

3. Revocation Procedure

The most direct appeal to a state-based production model appears in the revocation provision of the Act.²³⁴ Effectively, despite its somewhat perfunctory mediation clause, which appeals to liberal thinkers, this provision tips the balance of the Act in favor of the

229. *See id.* In this context, secondary refers to middle and high schools, while primary refers to elementary schools.

230. *See* N.C. GEN. STAT. § 115C-295.2 (1999) (giving the North Carolina Teaching Standards Commission the authority to develop professional standards for teachers and to evaluate certification procedures).

231. *See* FINNET AL., CHARTER SCHOOLS IN ACTION, *supra* note 13, at 52–53 (arguing that states should allow charter schools substantial personnel flexibility in the selection of teachers while maintaining some minimum credential requirements); MULHOLLAND & BIERLEIN, *supra* note 11, at 34 (noting that many supporters of the charter school movement condition their support on the use of certified teachers in schools).

232. *See* N.C. DEP'T OF PUB. INSTRUCTION, PERFORMANCE-BASED LICENSURE MANUAL *passim* (2000), <http://www.ncpublicschools.org/pbl> (last visited Jan. 9, 2001) (on file with the North Carolina Law Review).

233. Todd Silverman, *In Search of Certified Teachers*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 13, 2000, at 1A (noting that “across North Carolina, an increasing number of classrooms are being led by teachers who are not fully certified in the subjects they are teaching”); *see also* Ned Glascock, *Foreign Teachers Fill a Need in North Carolina*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 21, 2000, at 1A (profiling the Visiting International Faculty program, which brings foreign teachers to the United States and places many of them in math, science, and special education positions). The Teach for America organization, which places uncertified recent college graduates in under-resourced schools across the nation, has a strong presence in North Carolina. *See* Teach for America Web site, North Carolina page, at http://www.tfanetwork.org/tfa2/join_our_corps/north_carolina.asp (last visited Jan. 8, 2001) (on file with the North Carolina Law Review).

234. *See* N.C. GEN. STAT. § 115C-238.29G(a)(1)–(6) (1999).

production model.²³⁵ Section six of the Act grants the State Board the ability to terminate (or refuse to renew) a charter for any of the following reasons: (1) failure to meet student performance requirements, (2) fiscal failure, (3) violation of law, (4) material violation of the charter's conditions, standards, or procedures, (5) faculty request, or (6) other good cause.²³⁶ The Act's sweeping language suggests that the State is given prominent and substantive control over the fate of charter schools.²³⁷ With the exception of revocation for violation of law, which is merely an example of question-begging,²³⁸ all the revocation provisions vest substantial power in the State Board. As with other sections of the Act, a countervailing provision encourages the State Board and the charter school to make good-faith attempts to resolve any differences before revocation of the charter.²³⁹ Compared with other sections of the Act, the weakness of this "encouragement" is plain.²⁴⁰

235. *See id.* § 115C-238.29G(c). This mediation clause appeals to advocates of the liberal approach precisely because it limits the state's ability to revoke the charter. *See id.* This limit seems cosmetic, however, especially when considered in light of the broad authority of the State to revoke a charter. *Id.* § 115C-238.29G(a)(1)-(6)(b) (allowing revocation for multiple reasons, including "good cause").

236. *Id.* § 115C-238.29G(a)(1)-(6).

237. Entrusting the State with such power is highly rational in one sense. Because the very existence of charter schools depends on the ratification of the enabling statute, the State may credibly contend that it bears the ultimate responsibility for what occurs in such schools and thus needs the power to revoke the charter to counter abuse. The counter-argument reiterates the Act's purpose—to improve schools by authorizing charter schools with a threshold level of freedom from state control—which cannot be accomplished when the State is given such oversight.

238. *See* N.C. GEN. STAT. § 115C-238.29G(a)(3). This section is slightly paradoxical: it authorizes revocation for vague "violations of law," while purporting to define the applicable law. *Id.* A determination that the law was "violated" is likely possible only by defining the meaning of the Act itself, something squarely within the power of the legislature.

239. *See id.* § 115C-238.29G(c).

240. The vast majority of other sections reveal a real balancing between state oversight and local control, whereas this section merely *encourages* mediation. *See id.* § 115C-238.29A (1999) (detailing purposes which focus on innovation on the one hand and basics on the other); *id.* § 115C-238.29D (giving the State Board final approval but limiting the grounds upon which they may reject a charter); *id.* § 115C-238.29E (1999) (making a charter school generally accountable to the state, but restricting the kinds of terms that may be imposed on the school). By contrast, section 115C-238.29G of the North Carolina General Statutes merely suggests a mediation process. *Id.* § 115C-238.29G (1999). In so doing, the statute provides the individual charter school with little power vis-à-vis the State.

III. RECENT LEGAL DEVELOPMENTS CONCERNING CHARTER SCHOOLS AND THE LEGISLATIVE REACTION TO CASE LAW

Because the charter movement is in its infancy, the number of lawsuits involving charter schools is minimal.²⁴¹ While North Carolina's Act has not been challenged, many other states have experienced substantive charter school litigation²⁴² and can thus add to North Carolina's understanding of the legal status of charter schools. Still, the small amount of case law renders predictions speculative. Nevertheless, the growing body of jurisprudence suggests that charter school legislation will face serious challenges in the near future.²⁴³ As a result, legislatures will likely have to adjust some of the fundamental tenets of chartering statutes if the statutes are to survive judicial scrutiny.²⁴⁴

Multiple challenges to charter school statutes are possible at both the federal and state level.²⁴⁵ Given the federal courts' general

241. The dearth of case law concerning charter school statutes makes analysis in this area difficult. While there have been many cases tangentially related to charter schools, very few suits have addressed charter school legislation directly. For cases concerning charter schools, see *Thompson v. Board of Special School District No. 1*, 144 F.3d 574, 581 (8th Cir. 1998) (holding that the school district was not required to provide a student with a hearing to challenge the student's individualized education plan after the student left the district to attend a charter school); *Villanueva v. Carere*, 85 F.3d 481, 489 (10th Cir. 1996) (denying a motion for a permanent injunction against the opening of a charter school); *Megan C. v. Independent School District No. 625*, 57 F. Supp. 2d 776, 791 (D. Minn. 1999) (granting summary judgment to the defendant after a charter school student brought an action against the school district, school board, and superintendent for attorney's fees and costs under the Individuals with Disabilities in Education Act); *King v. United States*, 53 F. Supp. 2d 1056, 1061 (D. Colo. 1999) (concerning a lawsuit against a charter school after charter students allegedly caused a forest fire which destroyed plaintiff's property). For cases specifically addressing charter statutes, see *Keyes v. School District No. 1*, 119 F.3d 1437, 1440-41 (10th Cir. 1997) (addressing the constitutionality of sections of the Colorado Charter Schools Act in a school desegregation case); *Porta v. Klagholz*, 19 F. Supp. 2d 290, 293 (D.N.J. 1998) (involving a challenge to the constitutionality of a New Jersey statute establishing and funding charter schools as applied to the operation of charter schools in church buildings); *In re Grant of the Charter School Application of Englewood on the Palisades Charter School*, 753 A.2d 687, 689 (N.J. 2000) (addressing claims that New Jersey's chartering statute violated the state constitution on various grounds); *Wilson v. State Board of Education*, 89 Cal. Rptr. 2d 745, 747 (Cal. Ct. App. 1999) (rejecting a constitutional challenge to California's chartering statute); *Council of Organizations & Others for Education About Parochial, Inc. v. Governor*, 566 N.W.2d 208, 211 (Mich. 1997) (challenging the constitutionality of Michigan's charter school legislation based on the state constitutional prohibition on using public monies for non-public schools).

242. See *infra* notes 254-322 and accompanying text (discussing unsuccessful challenges to charter school legislation in Michigan, California, and New Jersey).

243. See *Council of Orgs.*, 566 N.W.2d at 211.

244. See *id.* at 218-19 (explaining that Michigan's charter school statute was amended in response to court rulings).

245. See *infra* notes 322-23 and accompanying text.

deference to state education legislation,²⁴⁶ federal attacks on the constitutionality of state charter school statutes themselves are unlikely to succeed—especially as federalist trends have given state courts more power over the determination of state constitutional issues.²⁴⁷ The prospect of federal equal protection challenges to the operation of charter school statutes is slightly more promising,²⁴⁸ but these challenges are fraught with practical difficulties.²⁴⁹ The constriction of substantive federal review leaves state challenges to charter school statutes as the most likely setting for future litigation.²⁵⁰ An analysis of likely state court challenges to charter school legislation thus reveals the likely contours of future charter school litigation.

State challenges to charter school legislation based on state constitutional language will probably take one of the following two

246. See *Berry v. Sch. Dist. of Benton Harbor*, 56 F. Supp. 2d 866, 870 (W.D. Mich. 1999) (stating that a federal court “has no authority to review the general advisability and effectiveness of charter schools”); see also Huffman, *supra* note 214, at 1311 (noting the general lack of success of plaintiffs challenging education legislation in federal court).

247. See Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 105–06 (1995) (claiming that with the *Rodriguez* holding, plaintiffs have achieved significantly more success in state courts when dealing with educational equity issues); see also Alexandra Natapoff, 1993: *The Year of Living Dangerously: State Courts Expand the Right to Education*, 92 EDUC. L. REP. 755, 769–72 (1994) (noting the trend in state courts to construe state constitutions as requiring independent analysis).

248. *Plyler v. Doe*, 457 U.S. 202, 220–21 (1982) (employing an intermediate level of scrutiny in considering a Texas statute that denied free public education to undocumented children). Federal challenges to state educational programs often prove tenuous in light of the Court’s decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 54–55 (1973). In *Rodriguez*, the Court applied rational basis review and held that a Texas state system, which financed education primarily through property taxes, did not violate the Fourteenth Amendment’s Equal Protection Clause. *Id.* at 2. The prospects for heightened judicial scrutiny brightened somewhat with *Plyler v. Doe*, 457 U.S. 202, 221 (1982), which held that because education plays a “fundamental role in maintaining the fabric of our society,” it necessitates an intermediate level of review. *Id.* Nonetheless, the chances for rigorous federal review are slim. See generally Natapoff, *supra* note 247 (calling the recent vitality of state-based equity challenges to school funding systems a partial result of the foreclosure of federal relief). Furthermore, *Plyler* may fairly be limited to its unique facts—children were completely deprived of an education due to their parents’ immigration status. *Plyler*, 457 U.S. at 202–03.

249. See Natapoff, *supra* note 247, at 767–70. See generally Enrich, *supra* note 247, at 105 (“Only after the Supreme Court repudiated the application of federal equal protection strictures in property-wealth based variations in local education did plaintiffs turn their attention chiefly to arguments grounded in their state constitutions.”).

250. See Enrich, *supra* note 247, at 105–07 (describing state courts as the most likely setting for future education cases); Note, *The Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality*, 109 HARV. L. REV. 2002, 2003 (1996) (noting that state constitutions are a means of legally confining “school choice policies”).

forms: (1) a public/private argument, challenging the legislation under the provisions of a state constitution prohibiting public funds for non-public schooling,²⁵¹ or (2) an equity argument, challenging the legislation on the theory that the state constitution guarantees a basic level of education to all children and that charter schools either do not fulfill this obligation or do not adequately fulfill this obligation with respect to a specified individual or class of individuals.²⁵² Individual state constitutional provisions will determine the fate of these challenges. Substantial similarity exists, however, between state constitutions concerning the duty of the state government to educate its citizens.²⁵³ Consequently, similar challenges can be expected nationwide.

A. *Charter Schools as Public Entities with Private Functions*

The paradigmatic challenge to charter school legislation is a frontal assault, premised on the claim that the statute in question appropriates public monies for non-public education, in express

251. See, e.g., *Council of Orgs. & Others for Educ. About Parochiaid, Inc. v. Governor*, 566 N.W.2d 208, 211 (Mich. 1997) (challenging the constitutionality of Michigan's charter school legislation for violation of the state constitutional prohibition against using public monies for non-public schools).

252. See, e.g., *Leandro v. State*, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) (holding that the North Carolina Constitution guarantees to all schoolchildren the opportunity to achieve a "sound basic education"); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 211-12 (Ky. 1989) (holding that each child must be provided an opportunity to achieve an "adequate education"); *Bd. of Educ. v. Nyquist*, 439 N.E.2d 359, 368-69 (N.Y. 1982) (holding that the New York schools must provide a "sound basic education"). Educational adequacy and educational equity, while arguably separate issues with distinct legal theories, are both included in this second challenge because they are founded on state statutory language declaring a state duty to educate its citizens. Compare *Leandro*, 488 S.E.2d at 255-56 (challenging the adequacy of North Carolina's system of school funding), with *Kukor v. Grover*, 436 N.W.2d 568, 570 (Wis. 1989) (challenging traditional school finance). Because of this commonality, the legal backdrop to these challenges proves similar enough to justify joint treatment.

253. See Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 *TEMPLE L. REV.* 1325, 1343-48 (1992) (listing state constitutional clauses imposing the duty to educate). While the strength of the duty varies and may include an "adequate" provision of education, *Rose*, 790 S.W.2d at 211-12, a "sound basic education," *Nyquist*, 439 N.E.2d at 368-69, and, simply, a "basic education," *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 76-77 (Wash. 1978) (en banc), North Carolina's constitutional mandate is representative. Compare, e.g., N.C. CONST. art. IX, § 2 ("The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students."), with CAL. CONST. art. IX, § 5 ("The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year.").

violation of the state constitution.²⁵⁴ This raises the ultimate question of whether, for purposes of state constitutional application, charter schools are sufficiently “private” such that they violate state prohibitions against the use of public money for private purposes. The Michigan Court of Appeals thought so, holding Michigan’s charter school statute unconstitutional because it appropriated public money for nonpublic schools.²⁵⁵ The Michigan Supreme Court reversed, however, reasoning that charter schools were “public” schools within the meaning of the Michigan Constitution.²⁵⁶ While this decision appears to answer the question directly, the court left open the possibility that the concept of “public education” may vary significantly from state to state.²⁵⁷ In light of the slight differences between the North Carolina and Michigan chartering statutes,²⁵⁸ this raises significant questions for North Carolina courts.

By concluding that charter schools²⁵⁹ were “public schools” within the meaning of the state constitution, the Michigan Supreme Court dismissed both of the appellees’ main contentions.²⁶⁰ The appellees contended that charter schools were not public because they were not under the ultimate and immediate control of the state²⁶¹ and because a charter school’s board of directors was not publicly elected or appointed by a public body.²⁶² In addressing the first argument, the court considered a number of factors.²⁶³ Principally,

254. See *Council of Orgs.*, 566 N.W.2d at 217–18 (interpreting the Michigan constitutional mandate and concluding that charter schools, while autonomous, do not illegally appropriate public monies to private schools); see also MICH. CONST. art. VIII, § 2 (“No public monies or property shall be appropriated . . . by the legislature . . . to aid or maintain any private . . . school.”).

255. See *Council of Orgs. & Others for Educ. About Parochial, Inc. v. Governor*, 548 N.W.2d 909, 923 (Mich. Ct. App. 1996).

256. See *Council of Orgs.*, 566 N.W.2d at 217–18 (Mich. 1997).

257. See *id.* at 217–19.

258. Michigan, for instance, has no cap on the number of charters allowed, allows an initial charter term of ten years, and only allows a waiver of state regulations if the charter school seeks one. MICH. STAT. ANN. §§ 15.4501–15.4508 (Michie 1996) (setting up Michigan’s statutory scheme for charter schools). North Carolina, on the other hand, places a cap on charter schools, allows an initial charter for a maximum of five years, and grants an automatic waiver from state regulations upon approval. N.C. GEN. STAT. § 115C-238.29A to -238.29K (1999) (implementing North Carolina’s charter school program).

259. The Michigan charter school statute calls charter schools “public school academies.” For consistency, this Comment will refer to them as charter schools.

260. See *Council of Orgs.*, 566 N.W.2d at 216–18.

261. See *id.* at 216–17.

262. See *id.* at 217–18.

263. See *id.* at 216–17. The court focused on the ability of the authorizing body to revoke the charter, the fact that all the authorizing bodies are public institutions, the

the court examined the general control that the State retained over the entire charter process, including initial approval, fiscal accountability, and revocation procedures.²⁶⁴ Each of these, the court reasoned, gave the State significant power over charter schools; collectively, they compelled a conclusion that the charter schools were under the ultimate control of the state.²⁶⁵

The court then turned to the plaintiffs' second argument, that Michigan charter schools were not public because their board of directors were not publicly elected or approved by a public body.²⁶⁶ Because this element was the main focus of the court of appeals's decision,²⁶⁷ it would seem necessary for the supreme court to detail why allowing a private board oversight of charter schools does not affect their status as "public" schools. Regrettably, the decision provides no such detail.²⁶⁸ In this regard, the court's reasoning is cursory at best and unconvincing at worst.

The court relied on two factors in concluding that the existence of a private board of directors does not mean that charter schools are functionally nonpublic.²⁶⁹ First, the court emphasized that that the "[l]egislature . . . mandated the board of director's [sic] selection process."²⁷⁰ Second, the court observed that the "board of the authorizing bodies is publicly elected or appointed by public bodies."²⁷¹ The first justification is wholly unpersuasive. The mere allowance of a private board by the state does not make the board public; if it did, any governing body authorized or created by state charter would necessarily be public, regardless of its actual function.²⁷² The proper focus should be whether that private board

state's determination of the amount and frequency of funding for charter schools, and that "the Legislature intended the other sections of the School Code to apply to the public school academies." *Id.*

264. *See id.*

265. *See id.*

266. *Id.* at 217.

267. *See Council of Orgs. & Others for Educ. About Parochiaid, Inc. v. Governor*, 548 N.W.2d 909, 913 (Mich. Ct. App. 1996).

268. *See Council of Orgs.*, 566 N.W.2d at 217-18.

269. *Id.*

270. *Id.* at 217.

271. *Id.* at 218.

272. A governing body created by state enabling legislation could conceivably be deemed non-public, even if Michigan's charter schools are not. *See id.* at 218-19 (discussing the "common understanding" of what a public school is and suggesting that under other state constructions, the common understanding may differ). The lack of analysis provided by the court suggests that room for further argument exists. *Cf. King v. United States*, 53 F. Supp. 2d 1056, 1067 (D. Colo. 1999) (concluding that the state has ultimate control over a "private" charter school board because the governing board is

has a significant degree of autonomy from the state. In answering this question, the state's creation of the board is some evidence tending to demonstrate state control, but it is not dispositive.²⁷³

The court's second justification is stronger, but also unsatisfying. Because Michigan allows a local board of education or a public university to grant a charter,²⁷⁴ the court reasoned that the state retained ultimate control over the charter school board.²⁷⁵ This argument, however, collapses into the court's initial contention that the State retained ultimate control over the charter process.²⁷⁶ It does not mean that the State has any control over the charter school board. To the extent that the charter board is elected or appointed only after a charter has been granted, state control over the board is colorable, but this control adds little force to the court's conclusion. What is especially curious about this line of reasoning is that the court could have used the statutory language of Michigan's charter school statute itself to justify its position.²⁷⁷ The analytical weaknesses of the court's decision in *Council of Organizations*, thus, have little effect on the ultimate outcome.

What makes the Michigan decision significant for other states is its suggestion that similar challenges may lead to contrary conclusions in other states, depending on how particular states define "public education." The court observed that the Washington and Michigan constitutions differ in their requirement that public schools must be under voter control.²⁷⁸ Because state constitutions define "public" schools differently, the implicit suggestion is that a challenge to the "publicness" of a charter school may succeed in some states, even if

"accountable to the school district's local board of education for purposes of insuring compliance with applicable laws"). Significantly, the Colorado chartering statute grants the local board of education more control over a charter school board than that granted by Michigan's statute. Compare COLO. REV. STAT ANN. § 22-20.5-101 to -209 (1997) (stating that charter schools are fully accountable to local boards of education and giving local boards substantial control over curriculum, staffing, and operations), with MICH. STAT. ANN. §§ 15.4501-.4518 (Michie 1996) (limiting the local board of education's control over charter schools and exempting charter school boards of directors from certain local rules).

273. See *King*, 53 F. Supp. 2d at 1066-69 (discussing areas of state control over charter schools in addition to board creation).

274. See MICH. STAT. ANN. §§ 15.4501-.4518.

275. See *Council of Orgs.*, 566 N.W.2d at 217-18.

276. See *supra* text accompanying note 264.

277. See MICH. STAT. ANN. § 15.4501(1) (defining charter schools as public schools). Cf. *King*, 53 F. Supp. 2d at 1067 (noting that a charter school board is under state control because it is "subject to oversight and regulation not only by the School District's board of education, but by the state board of education").

278. See *Council of Orgs.*, 566 N.W.2d at 218.

unsuccessful in Michigan.²⁷⁹ The decision might further be limited by Michigan's "common understanding of what a 'public school' is."²⁸⁰

More recently, New Jersey²⁸¹ and California²⁸² courts have reached similar conclusions when considering facial challenges to state chartering legislation. In New Jersey, three school districts challenged the grant of charters to newly created charter schools, contending that the New Jersey charter school legislation was unconstitutional because it violated principles of equal protection and due process, impermissibly donated public funds for private purposes, and improperly delegated legislative power to a functionally private body.²⁸³ The Supreme Court of New Jersey rejected the school districts' claims and upheld the general constitutionality of New Jersey's chartering act, relying on arguments analogous to those in *Council of Organizations*.²⁸⁴ In cursory detail, the court reasoned that "[t]he choice to include charter schools among the array of public entities providing educational services to our pupils is a choice appropriately made by the Legislature . . ."²⁸⁵ The court did not examine the degree of control public institutions have over charter schools, but instead relied on the reasons given in the appellate opinion,²⁸⁶ which "comprehensively addressed" such questions.²⁸⁷ As

279. *See id.*

280. *See id.* Because North Carolina has no statutory analog to Michigan's "common understanding," the status of charter schools in North Carolina remains unsettled.

281. *In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 753 A.2d 687, 689 (N.J. 2000) (affirming the constitutionality of New Jersey's charter school act against a challenge that it appropriated public funds for private purposes and constituted an improper delegation of legislative power to a private body).

282. *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745, 752-53 (Cal. Ct. App. 1999) (holding that charter schools are public schools within the meaning of the California constitution).

283. *In re Grant of the Charter Sch. Application*, 753 A.2d at 688-89.

284. *See id.* at 689 ("Such schools actually are accountable to several groups for both their academic results and fiscal practices, including the charter schools' governmental approval authority, the individuals who organize the schools and the public that funds them.").

285. *Id.* at 691.

286. *See In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter School*, 727 A.2d 15, 42-46 (N.J. Super. Ct. App. Div. 1999).

287. *In re Grant of the Charter Sch. Application*, 753 A.2d at 689. Surprisingly, the court quickly dismissed two challenges based on the somewhat non-public nature of charter schools. *Id.* ("All of those challenges were comprehensively addressed in the opinion of the Appellate Division authored by the Honorable Michael Patrick King."). Those arguments, that charter schools are essentially private and therefore cannot receive public funds or delegated legislative authority, received more extensive treatment in *Council of Organizations*. *See supra* notes 261-77 and accompanying text. Rather than focus on the public versus private nature of charter schools, the court used an effect-based approach, questioning whether the effect of the approved charter schools would

such, the court's blessing of the charter school act was contextual, representing tacit approval of the lower court's reasoning. Unlike the *Council of Organizations* court, which provided more extensive discussion of whether charter schools are sufficiently public,²⁸⁸ New Jersey's highest court chose to uphold charter legislation merely by fiat.²⁸⁹

California courts, by contrast, squarely addressed the question of whether their state's charter schools are adequately public to survive a facial challenge in *Wilson v. State Board of Education*.²⁹⁰ Although not at the supreme court level, the *Wilson* decision provided a comprehensive treatment of the issues surrounding challenges to charter school legislation. In *Wilson*, two individual California residents petitioned the court for a writ of mandate commanding the State Board of Education to refrain from granting any charters or expending public funds on charter schools.²⁹¹ The residents offered a series of arguments to support their petition, all of which were variations on one of two basic themes: (1) that charter school legislation gives private institutions control over what must, by constitutional mandate, be public bodies and decisions; and (2) that charter school legislation violates the constitutional provision

improperly exacerbate racial segregation or result in negative economic impact on the existing public school system. *In re Grant of the Charter Sch. Application*, 753 A.2d at 691, 695. The court determined that because charter schools are public schools, the Commissioner of Education's review of each charter school application must take into account the likely racial and economic impact approval would have. *Id.* at 694–95, 698. The court refused to comment on the content of the Commissioner's view, leaving it to the Commissioner and the State Board of Education. *Id.* at 694 (“We express no view on the formality or structure of that analysis except to state that it must take place before final approval is granted to a charter school applicant.”). Inasmuch as this approval power is exclusively in the hands of the Commissioner, this approach to charter reform reflects a production-based approach to educational reform. *Cf. supra* notes 188–99 and accompanying text (concluding that while North Carolina's chartering statute vests titular approval power in the State Board, the other authorized chartering bodies have substantial control over charter approval).

288. *See supra* notes 261–77 and accompanying text.

289. The court's discussion of the impact of charter schools on the adequate provision of education may ultimately prove more meaningful than its attenuated discussion of the public nature of charter schools. The court acknowledged that charter schools were constitutional, but only on the condition that the entire public schools system (including charter schools) satisfied the constitutional requirement of a “thorough and efficient system of education.” *In re Grant of the Charter Sch. Application*, 753 A.2d at 691. If charter schools result in less than the thorough and efficient provision of education, such schools may be deemed unconstitutional based on an adequacy argument. *See id.* For a more thorough discussion of adequacy challenges and their relation to charter schools, see *infra* notes 323–54 and accompanying text.

290. *Wilson v. State Bd. Of Educ.*, 89 Cal. Rptr. 2d 745, 760 (Cal. Ct. App. 1999).

291. *Id.* at 747.

requiring the legislature to establish a “system of common schools.”²⁹² In rejecting these arguments, the court concluded that the charter school act, and its subsequent amendments, rested “on solid constitutional ground.”²⁹³

The reasons offered by the court in support of charter schools’ constitutionality were varied and, much like those in *Council of Organizations*, focused on the provisions of the charter school act that gave public institutions functional control over charter schools.²⁹⁴ In reaching the question of sufficiency of public control over charter schools, the court faced a rather exacting standard. The California constitution provides that “[n]o public money shall ever be appropriated for the support of . . . any school not under the *exclusive* control of the officers of the public schools”²⁹⁵ This exclusivity of control standard, as applied to charter schools, would seem difficult to meet, especially given that California’s charter school act allows private parties to petition for a charter.²⁹⁶ Nevertheless, the court concluded that charter schools were exclusively within the public school system and, therefore, also exclusively controlled by public bodies.²⁹⁷ The legislative determination in the charter school act that charter schools are under “the exclusive control of the officers of the public schools” persuaded the court in reaching this conclusion.²⁹⁸

The difficulty in this approach lies in the circular nature of its reasoning. This approach argues that charter schools are public; therefore, all charter officials and operators are public officials; therefore, all charter schools are under the exclusive control of public school officers. This syllogism misses a step, one that was clearly articulated in *Council of Organizations*—whether actual control, rather than mere legislative intent, is necessary to support a finding of exclusive public control.²⁹⁹ If charter schools must be under the

292. *Id.* at 750–60.

293. *Id.* at 760.

294. *Id.* at 750–60. The indications of public control listed by the court included state oversight in the areas of: grant and denial of charters; teacher certification requirements; educational standards, including minimum duration of instruction; required student assessments; extension and revocation of the charter; public fund appropriation; pupil attendance; auditing requirements; and independent study requirements. *Id.*

295. CAL. CONST. art. IX, § 8 (emphasis added).

296. CAL. EDUC. CODE § 47605 (West 1999).

297. *Wilson*, 89 Cal. Rptr. 2d at 756.

298. CAL. EDUC. CODE § 47615(a)(2) (West 1999).

299. *See supra* notes 257–65 and accompanying text (describing the *Council of Organizations* court’s determination that mere legislative intent is not sufficient to make charter schools public schools). Just as in *Council of Organizations*, in which legislative language deeming charter schools public schools was viewed as some evidence that charter

exclusive control of public school officers, certainly a mere legislative statement will not make it so.³⁰⁰ Stating the issue another way, the question is whether charter school officials and operators are under the exclusive control of public school officers.³⁰¹ This question cannot be adequately answered solely by resorting to legislative language and indicia of state control over charter schools, as did the *Wilson* court.³⁰² Neither approach reveals much about how charter directors actually operate their schools. One approach scrutinizes express statutory language; the other examines potential state oversight. Neither discusses how the legislative language and state oversight are applied to charter schools or whether that application fulfills the constitutional requirement.

The *Wilson* court's second main determination was that charter schools are sufficiently enmeshed in the public education system of California so as not to violate the constitutional requirement that the legislature set up one system of "common schools."³⁰³ The court based this finding on three reasons: (1) teachers in charter schools must meet the same requirements as other public school teachers; (2) charter schools' educational programs must meet the same standards as those of other public schools; and (3) charter school progress is measured by the same student assessments required of other public schools.³⁰⁴ These three factors demonstrate a striking operational similarity between California's charter schools and other public schools. Indeed, arguing that any real difference exists between the educational operation of charter schools in California and that of other public schools in California is difficult under this statutory scheme.

This frames the recurring difficulty of charter statutes and their judicial interpretation. Charter schools were envisioned as a way to allow education innovation and choice, largely free from state

schools were public schools, California's legislative language might be viewed as non-dispositive evidence of the exclusivity of state control.

300. See *Council of Orgs. & Others for Educ. About Parochial, Inc. v. Governor*, 566 N.W.2d 208, 214, 216 (Mich. 1997) (noting that the legislature deemed charter schools public but reviewing the residual control maintained by state officials over charter schools to demonstrate that charter schools are functionally public as well).

301. The court listed other areas of control that the state retained over charter schools. See *Wilson*, 89 Cal. Rptr. 2d at 754-56. This control focused on statutory language purporting to give public officers control over charter schools, however, and said little about the charter directors themselves. See *id.*

302. See *supra* note 294 and accompanying text (listing areas in which the state retained control over charter schools).

303. See *Wilson*, 89 Cal. Rptr. 2d at 752-53.

304. *Id.* at 753.

regulation.³⁰⁵ But charter schools cannot be *too* free, or else they could be deemed private and violate state constitutional provisions. Thus, legislators must engage in a careful balancing act between charter school freedom and the retention of state oversight, and, in the process, original goals of innovation and community choice are compromised.

These lessons reveal grounds for future challenge in North Carolina. As in other states, challenges will depend on the courts' interpretation of North Carolina's Act as a whole and how that statute relates to the State constitution's education clauses.³⁰⁶ Given the similarities between North Carolina's charter school statute and that of other states,³⁰⁷ a challenge to North Carolina's Act on the ground of illegal appropriation of public money for nonpublic purposes may well foreshadow charter school litigation in other states.

As recent case law demonstrates, constitutional challenges to chartering legislation follow a predictable pattern. The court announces a standard of review that makes a facial challenge to the constitutionality of the charter school statute seem unlikely to succeed.³⁰⁸ Then, using a multi-factored analysis, the court decides whether the operation of the charter school statute in question violates the state constitution by appropriating public money for nonpublic purposes.³⁰⁹ Typically, this begins with a reiteration of the legislative intent.³¹⁰ In North Carolina, this intent is found in two

305. See *supra* notes 11–18 and accompanying text.

306. See Hubsch, *supra* note 253, at 1335–36 (compiling state constitution education clauses and concluding that the result of future education rights litigation will depend on the courts' interpretation of that language).

307. See HASSEL, *supra* note 3, at 149 (listing key provisions of charter school statutes by state); *supra* notes 140 & 169 and accompanying text (comparing North Carolina's charter school statute to statutes of other states).

308. See, e.g., *Council of Orgs.*, 566 N.W.2d at 215 (giving “deference to a deliberate act of the Legislature” and stating that “[t]he power to declare a law unconstitutional should be exercised with extreme caution and never where serious doubt exists with regard to the conflict”); see also *Wilson*, 89 Cal. Rptr. 2d at 751 (“There can thus be no doubt that our Constitution vests the Legislature with sweeping and comprehensive powers in relation to our public schools, including broad discretion to determine the types of programs and services which further the purposes of education.”).

309. This is the heart of the analysis. See, e.g., *Council of Orgs.* at 216 (discussing ways in which the government retained control over charter schools); *In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 753 A.2d 687, 690–91 (reviewing the legislature's determination that charter schools are public schools).

310. See, e.g., *Council of Orgs.* at 214 (quoting a Michigan statute which describes charter schools as “public schools”).

provisions of the Charter School Act.³¹¹ Read together, these statutory provisions evince a clear legislative intent to make charter schools public within the meaning of the North Carolina General Statutes.³¹² In spite of this language, other statutory provisions, unique to charter schools, complicate the analysis.

Many of North Carolina's statutory provisions give charter schools a significant degree of operational autonomy: the State is limited in the terms it may impose on a charter school for receipt of local funds;³¹³ charter schools may be started by any private citizen or group;³¹⁴ charter schools are "exempt from statutes and rules applicable to a local board of education;"³¹⁵ the charter school board of directors exercises great authority over budgeting, curriculum, and operating procedures;³¹⁶ and charter school employees are not deemed employees of the local district.³¹⁷ Thus, while the statutory language of chartering statutes expressly considers charter schools public schools,³¹⁸ charter schools retain a significant measure of functional autonomy from the state.³¹⁹ In legal discourse, however, charter schools have apparently achieved public status,³²⁰ and North

311. N.C. GEN. STAT. § 115C-238.29E(a) (1999) ("A charter school . . . approved by the State shall be a public school within the local school administrative unit in which it is located. . . . [and] shall be accountable to the State Board for ensuring compliance with applicable laws and the provisions of their charters."); *id.* § 115C-238.29F(e)(4) (1999) ("The State Board of Education provides funds to charter schools, approves the original members of the boards of directors of the charter schools, has the authority to grant, supervise, and revoke charters, and demand full accountability from charter schools Accordingly, it is the determination of the General Assembly that charter schools are public schools").

312. *See id.* § 115C-238.29F(e)(4). Legislative intent alone, however, does not compel the legal conclusion that charter schools are public. *See Council of Orgs.*, 566 N.W.2d at 214-15 (considering legislative intent as one factor, among many, in determining whether charter schools are functionally public).

313. N.C. GEN. STAT. § 115C-238.29E(c).

314. *Id.* § 115C-238.29B(a) (1999).

315. *Id.* § 115C-238.29E(f).

316. *Id.* § 115C-238.29E(d).

317. *Id.* § 115C-238.29F(e)(1). For purposes of state-funded employee benefits, charter school employees may be considered employees of the local district. *Id.* § 115C-238.29F(e)(4).

318. *See, e.g.,* MICH. STAT. ANN. § 15.4501(1) (Michie 1996) (declaring that "[a] [charter school] is a public school under . . . the state constitution"); N.C. GEN. STAT. § 115C-238.29E(a)(3) (1999) ("A charter school . . . shall be a public school within the local school administrative unit in which it is located.").

319. *See supra* note 154 and accompanying text.

320. The overwhelming weight of authority suggests that this question is settled and that charter schools are public, both in popular conception and in legal status. For legal conclusions, see *Villanueva v. Carere*, 85 F.3d 481, 484 (10th Cir. 1996) (calling charter schools "public schools that are managed by their sponsors and financed primarily with the local school district's funds"); *King v. United States*, 53 F. Supp. 2d 1056, 1065-66 (D.

Carolina's combination of clear legislative intent, public financial support, and state control over the approval process provides strong support for this conclusion. As *Council of Organizations* made clear,³²¹ however, only a challenge to North Carolina's Act will resolve the issue.³²²

B. *Equity/Adequacy Challenges to Charter School Legislation*

In addition to direct challenges to the constitutionality of charter school legislation, charter schools also will likely face the type of state litigation traditional public schools have recently experienced.³²³ Although the United States Supreme Court has ruled that there is no explicit constitutional right to an education,³²⁴ that decision merely describes what is federally required of a state in providing education to its citizens.³²⁵ With increasing frequency, state courts have interpreted state constitutions to afford citizens a legally enforceable

Colo. 1999) (deeming charter schools public for purposes of governmental immunity); *Porta v. Klagholz*, 19 F. Supp. 2d 290, 293 (D.N.J. 1998) (describing the operation of a "public charter school" in determining whether the operation of such a school in a church building violates the Establishment Clause of the First Amendment). Commentators also consider charter schools public schools, and both proponents and detractors apparently agree. See David Osborne, *Make 'Em All Charter Schools*, WASH. POST, Nov. 14, 1999, at B3 (noting that charter schools are part of the public school system and arguing that the public school system can profit from an increase in the number of charter schools). See generally SARASON, *supra* note 51 (concluding that charter schools are public and describing the ways in which the charter movement stands to imperil traditional public education).

321. 566 N.W.2d at 218 (basing its conclusion on the conception of public schools under Michigan law); see also Goldstein, *supra* note 122, at 154-56 (discussing the general applicability of *Council of Organizations* in other states and concluding that its result may be limited to Michigan).

322. A likely challenge to North Carolina's Charter School Act is that the charter school board, when given control over curriculum, staffing, operational matters, and other vital functions, is operating privately, and that the charter statute does not authorize the creation of a private body. N.C. GEN. STAT. § 115C-238.29E (1999) ("A charter school that is approved by the State shall be a public school . . ."); see also, e.g., *In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 753 A.2d 687, 690 (N.J. 2000) (reviewing the powers granted to the charter school board by the New Jersey legislature).

323. This includes race-based discrimination claims, school funding claims, and qualitative educational adequacy claims, among others. See generally, Hubsch, *supra* note 253 (discussing state constitutional provisions concerning education and the relevance of such provisions to educational adequacy claims); Jennifer T. Wall, *The Establishment of Charter Schools: A Guide to Legal Issues for Legislatures*, 1998 BYU EDUC. & L.J. 69 (1998) (reviewing factors legislatures should consider when implementing charter school legislation, including Establishment Clause concerns, as well as liability, immunity and insurance issues).

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

325. *Id.*

constitutional guarantee to a certain level of educational opportunity.³²⁶ Most frequently, courts rely on state education clauses to support these rights.³²⁷ Now that state courts have shown an increased willingness to consider educational adequacy claims under state law,³²⁸ an important question for charter schools³²⁹ is the extent to which these holdings apply to charter schools. Using *Leandro v. State*³³⁰ as a case study, areas of concern for charter schools in litigation emerge.

In 1997, the Supreme Court of North Carolina handed down a landmark school finance decision, *Leandro v. State*,³³¹ which followed the general trend of permitting state school-financing systems to be challenged.³³² The *Leandro* decision also raises a potentially vexing question regarding the future of charter schools, which were written into the state school-financing system only one year before the decision. In *Leandro*, a group of students and school boards sued the State, challenging the constitutionality of the State's tax-based school funding system.³³³ They alleged that children in poor school districts were not receiving a constitutionally adequate education due to wealth disparities between districts, violating the constitutional

326. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 211–12 (Ky. 1989) (holding that each child must be provided an opportunity to achieve an “adequate education”); *Bd. of Educ. v. Nyquist*, 439 N.E.2d 359, 368–70 (N.Y. 1982) (holding that the New York schools must provide a “sound basic education”). Moreover, there are some indications that this right may be “fundamental,” thus triggering heightened scrutiny. See *Pauley v. Kelly*, 255 S.E.2d 859, 863 (W. Va. 1979) (interpreting the West Virginia Constitution to provide a fundamental right to education). See generally *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1355 (1982) (arguing that different standards of review should apply at the state level because state constitutions are more expansive than the federal Constitution).

327. See, e.g., *Pauley*, 255 S.E.2d at 878 (interpreting the state guarantee to a “thorough and efficient system of free schools” as mandating a threshold level of educational adequacy); *Rose*, 790 S.W.2d at 211 (“Section 183 requires the General Assembly to establish a system of common schools that provides an equal opportunity for children to have an adequate education.”).

328. See *Nyquist*, 439 N.E.2d at 368–70 (considering an adequacy challenge to the New York school system); William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1660–61 (1989) (explaining the significance of state constitutions in addressing school finance litigation).

329. This assumes the threshold question that charter schools are public. See *supra* notes 256–57 and accompanying text (reviewing the Michigan Supreme Court's determination that charter schools are public).

330. 346 N.C. 336, 488 S.E.2d 249 (1997).

331. *Id.*

332. See *supra* note 237 and accompanying text (listing adequacy challenges to state financing systems).

333. *Leandro*, 346 N.C. at 342, 488 S.E.2d at 252.

guarantee to a “sound, basic education.”³³⁴ The holding reveals, and possibly presages, the future of charter school litigation.

Before reaching the supreme court, the North Carolina Court of Appeals concluded that the right to an education guaranteed by the North Carolina Constitution is limited to the provision of equal access to education.³³⁵ In rejecting the idea that the constitutional provision constituted a qualitative standard, the court focused on equal access to educational opportunities.³³⁶ After the appellate ruling, the plaintiffs petitioned the supreme court for discretionary review, which was subsequently granted.³³⁷

The North Carolina Supreme Court first held that claims concerning the constitutional adequacy of funding are justiciable cases subject to judicial review.³³⁸ Second, and more significantly, the court held that the North Carolina Constitution guarantees the right to a qualitatively adequate education,³³⁹ or, in the court’s words, a “sound basic education.”³⁴⁰ Perhaps anticipating the difficulty courts could have in defining a “sound basic education,” the court took the unusual step of detailing four components of a “sound basic education,” focusing on the sufficiency of skill acquisition.³⁴¹ While these standards may seem lofty, they pose challenges of a different kind to charter schools. Functionally, they guarantee every child an enforceable right to receive basic instruction in certain core areas; without regard to ancillary considerations such as the type of school attended.³⁴² The curricular flexibility that is the hallmark of charter

334. *Id.* at 342, 347, 488 S.E.2d at 252, 255.

335. *Leandro v. State*, 122 N.C. App. 1, 11, 468 S.E.2d 543, 550 (1996).

336. *Id.*

337. *Leandro*, 346 N.C. at 344, 488 S.E.2d at 253.

338. *See id.* at 345, 488 S.E.2d at 253–54 (calling “without merit” the defendants’ argument that the case presented a political question and thus was not subject to judicial review). This holding has relatively little import for charter schools, save for an opportunity to participate in educational litigation in the state context. A contrary holding could potentially have shielded charter schools from suit and limited their legal vulnerability, but applying judicial review in this context is growing in favor. *See generally* Hubsch, *supra* note 253 (discussing the increasing viability of educational adequacy claims under state constitutional provisions).

339. *See Leandro*, 346 N.C. at 345, 488 S.E.2d at 254.

340. *Id.* at 347, 488 S.E.2d at 255.

341. *See id.* According to the court, a sound basic education will provide at least (1) sufficient language, mathematics, and physical science skills “to enable the student to function in a complex and rapidly changing society”; (2) a fundamental knowledge of geography, history, economics, and “political systems to enable the student to make informed choices”; (3) “sufficient academic and vocational skills to enable the student to successfully engage in post-secondary or vocational training”; and (4) “sufficient academic and vocational skills to enable the student to compete on an equal basis with others.” *Id.*

342. This conclusion, of course, assumes that charter schools are public schools. *See*

schooling might be imperiled as charter directors attempt to help their students meet these basic competencies. Significantly, North Carolina grants a statutory preference to charter schools serving students "at risk of academic failure."³⁴³ To the extent that an "at-risk" designation correlates with low academic achievement,³⁴⁴ the decision may encourage individual charter schools to abandon their mission of serving disadvantaged students for fear of not providing the required opportunity to achieve a sound, basic education.³⁴⁵

The *Leandro* court tempered its second holding, ruling that the equal educational opportunities clause of the state constitution does not require substantially equal funding or educational advantages in all school districts.³⁴⁶ Thus, while the North Carolina Constitution requires that all children have the opportunity to acquire an adequate education,³⁴⁷ it does not require equal educational opportunities among districts or equal educational outcomes.³⁴⁸ This may give charter schools a relative degree of freedom in implementing programs and insulate them from challenge even if the educational results (as measured by standardized student assessments) of an individual charter school fall substantially below similarly situated public schools. Most likely, the *Leandro* floor of a "sound basic education" will be construed to require a threshold level of educational opportunity³⁴⁹ and to allow substantial inequities to exist

supra notes 256–57 and accompanying text (reviewing the Michigan Supreme Court's determination that charter schools are public).

343. N.C. GEN. STAT. § 115C-238.29A(2) (1999).

344. For one definition of "at-risk" students, see *Villanueva v. Carere*, 85 F.3d 481, 487–88 (10th Cir. 1996) (defining "at-risk" pupils as those "who, because of physical, emotional, socioeconomic, or cultural factors, [are] less likely to succeed in a conventional educational environment). The North Carolina General Statutes do not specifically define "at risk" but speak generally of "students who are at risk of academic failure or of engaging in disruptive and disorderly behavior." N.C. GEN. STAT. § 115C-105.45 (1999).

345. For an example of how litigation threats might affect school principals, see generally Guillermo X. Garcia, *Student Sues After a Snapshot Leads to Suspension*, U.S.A. TODAY, Sept. 10, 1999, at 4A.

346. *Leandro*, 346 N.C. at 351, 488 S.E.2d at 257.

347. *Id.*

348. *Id.*

349. Focusing on opportunity rather than the ultimate outcome will not likely reduce inequities between districts. See Hubsch, *supra* note 253, at 1335–48 (discussing state constitutional clauses and their interpretation as creating an opportunity-based standard); James Martin, Note, *North Carolina's Court Fails North Carolina's Children: Leandro v. State and the Case for Equal School Funding*, 33 WAKE FOREST L. REV. 745, 790–93 (1998) (arguing that educational inequities between low-wealth districts and other districts will persist in the wake of *Leandro*). Focusing on opportunity, however, will give individual charter directors more flexibility.

without disturbing the basic funding system.³⁵⁰

When assessing future state challenges to charter schools, the significance of judicial deference to legislative decision making takes on special meaning. The *Leandro* court recognized “that the administration of the public schools of the state is best left to the legislative and executive branches of government.”³⁵¹ When considering the controversy over charter schools, this deferential standard may be even more emphatically applied.³⁵² Thus, courts will likely act with “some trepidation”³⁵³ when imposing standards or announcing substantive changes in educational policy.³⁵⁴ Nevertheless, because charter schools are public schools, they will likely be caught up in educational quality litigation, such as *Leandro*, under state constitutional mandates.

CONCLUSION

The two legal areas addressed—determining whether charter schools are public schools and analyzing how charter schools fit within educational quality litigation—hold important lessons for both policymakers and legal strategists. For the policymaker, charter school legislation will likely adapt to survive judicial challenge.³⁵⁵ The problem for charter school innovators is clear: to survive judicial scrutiny, charter schools must be “sufficiently” controlled by the state, although this control contravenes the initial purpose of charter legislation—leaving critical decision-making power in the hands of thoughtful (though private) groups and individuals.³⁵⁶ This result ought not to surprise educators or legislators because charter school legislation, as evidenced by the North Carolina Act, attempts to mix production and liberal approaches to education, which frequently collide.³⁵⁷

For the legal strategist, the continuing vitality of state

350. See Martin, *supra* note 349, at 790–93.

351. 346 N.C. at 357, 488 S.E.2d at 261.

352. See Hubsch, *supra* note 253, at 1327 (“State supreme courts are especially likely to defer where the issue is one of controversial public policy.”).

353. 346 N.C. at 354, 488 S.E.2d at 259.

354. Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 363 (N.Y. 1982) (stating that the complexity of the statewide education system means it is best controlled by the legislature).

355. Indeed, the Michigan legislature changed its statute to comport with the Michigan Court of Appeals’s decision in *Council of Organizations v. Council of Orgs. and Others for Educ. About Parochial, Inc. v. Governor*, 566 N.W.2d 208, 213 (1997) (noting that the amendments to the charter school act were made in response to the trial court ruling).

356. See *supra* notes 11–18 and accompanying text.

357. See *supra* Part II.

constitutional claims against educational systems should well apply to charter schools.³⁵⁸ While meaningful standards are rare, cases like *Leandro* indicate that courts are willing to make an attempt, however half-hearted, to guarantee to all citizens some fundamental right to a basic education. Whether charter schools will help that guarantee become a reality remains to be seen, but the ongoing attempts to localize education will probably put charter schools in a position of social, and increasingly legal, prominence.

ANDREW BROY

358. See *Council of Orgs.*, 566 N.W.2d at 216–17 (concluding that charter schools are public schools under the meaning of the Michigan Constitution).