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The Legal Landscape of Parental-Choice Policy

NICOLE STELLE GARNETT

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A M E R I C A N E N T E R P R I S E I N S T I T U T E

Executive Summary

Each year, more and more students in the United States use public funds to attend privately operated schools. While the vast majority of them are enrolled in charter schools, the number of students participating in private school choice programs has increased dramatically. At present, more than half of states have private school choice programs in place.

Until the United States Supreme Court's landmark *Zelman v. Simmons-Harris* decision in 2002, the constitutionality of private school choice was in serious question, because a number of earlier precedents invalidated state efforts to support faith-based schools on federal establishment clause grounds. In *Zelman*, however, the court rejected an establishment clause challenge to the Cleveland Pilot Project Scholarship Program, which enabled disadvantaged children to attend private and faith-based schools, thus clearing the federal-constitutional path to an expansion in school choice. Nevertheless, private school choice programs raise a number of other legal issues. This paper addresses several of the most significant.

First, it discusses whether students in the United States enjoy a constitutional right either to an education or to choose their schools and the implications of those rights in the battle for parental choice. The Supreme Court has held that the federal constitution does not protect a right to an education although it does protect the right of parents to send their children to public school.

Virtually every state constitution, however, enshrines the right to a *public* education—although there is tremendous diversity among both the wording of these entitlements and state supreme courts' interpretation of them. These provisions have played only a limited role in parental-choice battles, although they are frequently raised in challenges to new private school choice programs. Neither the federal nor any state constitution guarantees public funding to enable parental choice,

although state private school choice programs do guarantee funding for parental choice, at least for certain classes of beneficiaries.

Second, this paper explores the range of legal obstacles to the expansion of private school choice remaining after *Zelman*. In the aftermath of *Zelman*, many commentators predicted that state-constitutional establishment clauses—often called “Blaine Amendments”—would lead to the invalidation of many programs. This worst-case scenario has failed to materialize, although a few state supreme courts have invalidated programs on state-constitutional grounds, including Blaine Amendments and state-constitutional provisions mandating that states establish and maintain public school systems.

Third, this paper examines the intersection and possible tension between the growth in private school choice programs and the goals of promoting diverse and inclusive schools. Since private schools are not by virtue of their participation in a choice program transformed into government actors, they are not bound by either the federal constitution or federal special-education laws.

Efforts, however, have been made, thus far unsuccessfully, to challenge parental-choice programs as running afoul of both the federal equal protection clause and federal laws mandating maximum inclusion of disabled students. Despite the accusations leveled in these contexts, evidence suggests that most parental-choice programs actually lead minority students to enroll in more integrated schools. And many state programs are specifically designed to increase the educational options available to disabled students.

Finally, this paper discusses the religious-liberty implications of faith-based schools participating in private school choice programs. While *Zelman* made clear that religious schools need not secularize to participate in private school choice programs, many religious-school leaders remain concerned that the regulatory strings

The Legal Landscape of Parental-Choice Policy

In 1990, 35 years after Nobel Laureate Milton Friedman first made the case for school vouchers, Wisconsin enacted the nation's first modern private school choice program.¹ The Milwaukee Parental Choice Program provided public funds to enable 350 children to enroll in private, secular schools. Five years later, Wisconsin expanded the program to include religious schools.

Ohio soon followed suit with the Cleveland Pilot Project Scholarship Program. In 2002, the United States Supreme Court rejected an establishment clause challenge to the Cleveland program in *Zelman v. Simmons-Harris*, thus clearing the federal-constitutional path to expand private school choice.²

The *Zelman* decision gave proponents of private school choice reason to be optimistic. Many reform-minded state leaders had shied away from enacting voucher programs because of legal uncertainty. By eliminating the establishment clause question, the Supreme Court deprived opponents of one of their most potent weapons—the argument that vouchers crossed the elusive line separating church and state, terms which do not appear in the US Constitution.

But the legal question answered in *Zelman* represented only one impediment to the expansion of private school choice. For nearly a decade after *Zelman*, the private school choice movement languished. Impediments included the continued legal uncertainty about whether private school choice could survive state-constitutional challenges, the disconnect between the political support for private school choice and its intended recipients, and the inelasticity of supply in the private school sector.

But perhaps the most significant reason that the private school choice movement languished was the dramatic and unexpected ascendancy of charter schools, which were aggressively promoted as a more “public” and politically palatable alternative for school choice. Charter school enrollment has grown from virtually no students 20 years ago to 2.3 million in the 2012–13 school year, whereas private schools actually enrolled fewer students in 2010 than in 2000.³

Today, private school choice is enjoying its own unexpected ascendancy. At present, more than half of states and the District of Columbia have private school choice programs in place. These programs fall into four categories: (1) voucher programs, which provide publicly funded scholarships to enable students to attend private schools; (2) scholarship tax-credit programs, which incentivize donations to private scholarship-granting organizations that do the same; (3) education savings account programs, which empower parents to choose how to spend some portion of the public-education funding allocated for their children; and (4) refundable parental tax credits for private school tuition.

The largest programs in terms of enrollment are scholarship tax-credit programs in Florida and Arizona, which benefit, respectively, 70,000 and 60,000 students. The Milwaukee Parental Choice Program has expanded to benefit more than 26,000 students; Ohio has 5 voucher programs benefiting nearly 40,000 students; and 3 states—Indiana, Louisiana, and North Carolina—effectively entitle every low- and moderate-income child in the state to a scholarship ranging from \$4,200 in North Carolina to \$8,500 in Louisiana. In June 2015, Nevada became the first state to enact a universal private school choice program, an education savings account program that makes certain public-education funds completely portable. All told, during the 2014–15 school year, more than 350,000 students

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attached to public funds may threaten religious liberty. This has not been the case to date, although certainly the possibility of invasive regulations—including but not limited to those attached to public funds—has arguably increased in the wake of the Supreme Court’s recent decision constitutionalizing a right to same-sex marriage.

The religious-liberty implications of private schools participating in parental-choice programs and of religious schools converting to charter schools to secure

public funds diverge sharply, however, since the accepted wisdom is that charter schools are public schools and must therefore be secular. While the facts on the ground in many states arguably undermine this assumption, significant legal and political impediments remain to religious charter schools. In light of these impediments, the better path forward is to advance the case for authentic private school choice, both by improving program design and funding and by increasing the supply of high-performing private schools.

attended a private school as a beneficiary of a choice program.⁴

Especially alongside exponential growth in charter school enrollment, the expanding parental-choice footprint is rapidly reshaping American elementary and secondary education.⁵ Not surprisingly, the expansion of parental choice also raises important legal questions for policymakers, parents, and participating private schools. This paper reviews a few of the most significant.

The first issue is whether students in the United States enjoy a constitutional right either to an education or to choose their schools. The second set of questions concerns the legal landmines remaining to the expansion of private school choice after *Zelman*. In the aftermath of that decision, many commentators predicted that state-constitutional establishment clauses—often called “Blaine Amendments”—would lead to the invalidation of many programs. The third issue is the intersection between the growth in private school choice programs and the goals of promoting diverse and inclusive schools. Specifically, parental-choice programs have been challenged for running afoul of the equal protection clause and federal laws mandating maximum inclusion of disabled students.

The paper concludes by discussing the religious-liberty implications of private school choice. After *Zelman*, it is clear that religious schools need not secularize to participate in private school choice programs. While no existing program regulations threaten the religious identity and mission of faith-based schools, many leaders of religious schools remain concerned that the regulatory strings attached to public funds may threaten religious liberty. This has not been the case to date, although certainly the possibility of invasive regulations—including but not limited to those attached to public funds—has increased in the wake of the Supreme Court’s recent decision constitutionalizing a right to same-sex marriage.

The religious-liberty implications of private schools’ participation in parental-choice programs and of religious schools “converting” to charter schools to secure public funds are quite different from each other, since the accepted wisdom is that charter schools are public schools and must therefore be secular. While the facts on the ground in many states arguably undermine this

assumption, significant legal and political impediments remain for religious charter schools. In light of these impediments, it is best to advance the case for authentic private school choice, both by improving program design and funding and by increasing the supply of high-performing private schools.⁶

The Right to an Education in the United States

As a matter of federal-constitutional law, students have no right to an education in the United States. In *San Antonio Independent School District v. Rodriguez*, the Supreme Court considered a federal-constitutional challenge to the State of Texas’s method of financing public education, which was heavily dependent on local property taxes. The plaintiffs alleged that the system created deep disparities in funding and school quality that violated the due process and equal protection clauses of the Fourteenth Amendment. In rejecting this challenge, the Supreme Court ruled that education was not a fundamental right protected by the Fourteenth Amendment and that therefore Texas’s education-finance system was subject to substantial judicial deference.

While the court expressed, as it has on numerous occasions both before and since, “an abiding respect for the vital role of education in a free society,” it nonetheless stressed that the crucial task of preparing young people for participation in society was the purview of primarily state and local governments.⁷ Citing the landmark decision in *Brown v. Board of Education*, the court observed, “Education is perhaps the most important function of state and local governments . . . but the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.”⁸

That said, the fact that the US Constitution does not enshrine a substantive right to education does not mean that it does not significantly constrain state and local education policies. The court has consistently invalidated, on federal equal protection grounds, policies that *intentionally* deprive students of access to public-education opportunities on the basis of race, sex, or immigration status.⁹ Most recently, in *Parents Involved*

in *Community Schools v. Seattle School District No. 1*, the court ruled that the use of race in the assignment of elementary and secondary students as part of a “voluntary” effort to diversify public schools violated the Fourteenth Amendment’s equal protection clause.¹⁰

The court has also subjected state and local education policies to scrutiny under the First Amendment’s free speech and religion clauses, applied the due process clause to constrain student disciplinary policies, and ruled that the Fourth Amendment’s prohibition on unreasonable searches and seizures applies to public-education officials.¹¹ Moreover, several federal statutes arguably enshrine a right to education, including the Elementary and Secondary Education Act (now known as No Child Left Behind), which conditions states’ receipt of public-education funds on their compliance with certain federal mandates, and the Individuals with Disabilities Education Act, which entitles all disabled students to a “free and appropriate public education.”¹²

In contrast to the federal-constitutional context, the right to an education is universally guaranteed by all 50 states’ constitutions, either explicitly or by judicial interpretation. The contours of these guarantees vary significantly, ranging from open-ended and general to quite specific. Generally, state constitutions require the establishment of a public school system, with provisions using a range of adjectives to describe the required system (for example, “uniform,” “efficient,” “suitable,” “adequate,” and “thorough”). Florida’s constitution is perhaps the most elaborate, demanding that “adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education.”¹³

Litigation about the meaning of these clauses—raised primarily in cases challenging interlocal disparities in public school funding—has intensified over the past several decades. In these cases, state courts take a range of interpretive approaches. Some state supreme courts have ruled that the issue is nonjusticiable—that is, that the contours of state-constitutional rights to education are to be determined politically, not judicially.¹⁴

Beginning with the 1971 California Supreme Court opinion in *Serrano v. Priest*, however, other courts aggressively tackled the question of public-education

finance.¹⁵ To date, approximately one-half of all state supreme courts have invalidated their state’s system of financing public schools, with most relying on state-constitutional education guarantees—although some, including *Serrano*, have relied on state equal protection clauses. Early cases tended to rule that state constitutions demand funding equality across wealthy and poor school districts; later cases have ruled that state constitutions mandate equal educational opportunity, equal access to educational opportunity, or even a high-quality education with judicially defined components.¹⁶ Most recently, several courts have ruled that high-poverty school districts are constitutionally entitled to receive additional funds, given the needs of their student populations.¹⁷

In contrast to the federal-constitutional context, the right to an education is universally guaranteed by all 50 states’ constitutions, either explicitly or by judicial interpretation.

Although funding-equity litigation has proved intractable, with many courts finding themselves almost perpetually involved in resolving challenges to education-funding reforms, these decisions together can be read as articulating a right to a public education.¹⁸ For the most part, these provisions have not played a significant role in the legal battles surrounding school choice, although opponents frequently argue that new choice programs violate state education guarantees by undermining educational uniformity.

The two exceptions to this generalization are the Florida Supreme Court’s decision to invalidate a statewide voucher program on these grounds and the recent Washington Supreme Court decision invalidating the state’s new charter school law in a divided opinion, which effectively reasoned that charter schools are not public enough to receive public funds.¹⁹ That these cases are outliers suggests that the lack of a uniformly understood right to an education in the United States may provide a healthy space for experimentation with parental choice.

The Right to Parental Choice in the United States

The United States Constitution protects the right of parental choice, at least in a relatively narrow sense. In the 1925 opinion *Pierce v. Society of Sisters*, the Supreme Court invalidated an Oregon law mandating that all parents send their children to public schools. The court ruled that the Fourteenth Amendment's due process clause "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." The court opined, "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."²⁰ Together with *Meyer v. Nebraska*, a 1923 decision invalidating a state law that mandated the instruction of all school children be in English, *Pierce* is widely regarded as enshrining parents' right to direct their children's upbringing.²¹

Subsequent decisions, however, have made clear that this right is not necessarily a capacious one. While in *Wisconsin v. Yoder* the Supreme Court ruled that the Old Order Amish can assert a religious-liberty exemption to a compulsory-attendance law after eighth grade, the opinion's precedential weight has proved quite limited. Litigation asserting a constitutional right to home-school, for example, has been met with mixed results, although parents now have a statutory right to home-school their children in all 50 states.²² Courts have also held that *Pierce* does not preclude reasonable regulation of home-schooling or private schools, nor does it entitle parents to opt out of public school curricular offerings, even those that are offensive to their sincerely held religious beliefs.²³

Parents' federal-constitutional rights to educate their children in private schools does not include the right to public financing of parental choice. During the 1980s, a few unsuccessful lawsuits claimed that limiting the publicly funded educational options to public schools imposed an "unconstitutional condition" on the free exercise rights of religious parents who object to public school curricula.²⁴ Nor does any state constitution guarantee public funds to empower parents to select private schools for their children, although some litigants have unsuccessfully argued that parental choice ought to be

used to remedy the unconstitutional disparities in educational opportunities in school-finance litigation.²⁵ Efforts to challenge funding disparities between public schools and charter schools on state-constitutional grounds have been similarly unsuccessful.²⁶

States with either voucher or education savings account programs do entitle certain students to use public funds in private schools. Characterizing these entitlements as a right to publicly funded parental choice, however, is complicated by two related factors. First, these programs are enshrined in state statutes, not constitutions, making the entitlements easier to amend or even eliminate.

Second, eligibility to participate in private school choice programs generally is not universal: most programs are means tested, some limit participation to students transferring from public school (in some cases, from failing public schools), and a substantial minority limit eligibility to special-needs students. In June 2015, Nevada became the first state to make publicly funded educational choice almost universally available when it enacted a generous education savings account program.²⁷ The amount of funds made available to private school students through all private school choice programs, however, is universally and substantially lower than the public funding provided for students attending traditional public schools and charter schools.

Remaining Constitutional Hurdles to the Expansion of Private School Choice

Until the US Supreme Court's *Zelman* decision, the constitutionality of private school choice programs with religious schools was in serious question. Throughout the 1960s and 1970s, the Supreme Court issued a series of opinions invalidating government programs that provided financial and other support for private and faith-based schools. The court began to reverse course in the 1980s, upholding a number of government programs assisting students in faith-based schools. These later decisions rarely explicitly reversed earlier ones, however, leaving the establishment clause landscape a confusing jumble of conflicting precedents and enabling opponents to mount successful establishment clause challenges in lower courts.

The court's 5-4 decision in *Zelman* cleared away much of this brush. In *Zelman*, the court upheld the Cleveland Pilot Project Scholarship Program, a small voucher program that provided disadvantaged students in the Cleveland School District with modest scholarships to enroll in the school of their choice, including religious ones. The program did not require the schools receiving these funds to secularize or to guarantee that the scholarship dollars would not be spent on religious instruction.

Following Zelman, many commentators predicted that state-constitutional limits on the public funding of private and faith-based schools remained major impediments to the expansion of private school choice.

The majority reasoned that the program was constitutional for two related reasons. First, it was neutral toward religion. That is, all private schools in Cleveland and any public school outside of the district were eligible to participate. In fact, almost all of the participating schools were religious (most of them Catholic), and 96 percent of participating students attended a faith-based school. The court, however, emphasized that the question of whether a program was religiously neutral was a legal, not an empirical, one. In other words, as long as the program was not legally limited to religious schools, it should be considered religion neutral.

The second reason was that the decisions of where to spend the public funds available through the program were made by the parents of eligible children, not the government. Therefore, the court reasoned, public funds flowed to the religious schools only indirectly as the result of private choices. Again, the court rejected the argument that the range of options available to parents was insufficient. Justice Sandra Day O'Connor, writing for the majority, reasoned that the court should consider all options in the district—such as magnet and charter schools—rather than the relatively narrow band of schools participating in the voucher program.

Zelman was widely regarded as closing the door on federal establishment clause challenges to carefully crafted private school choice programs. After *Zelman* was decided, the US Court of Appeals for the Ninth Circuit surprised many by invalidating Arizona's scholarship tax-credit program. In 2011, however, the Supreme Court reversed this decision. In *Arizona Christian School Tuition Organization v. Winn*, the court held that the plaintiffs lacked standing to challenge the program because the money at issue—private donations incentivized by the tax-credit program—were not governmental funds. *Winn*, therefore, effectively immunized scholarship tax-credit programs from most establishment clause challenges.²⁸

Following *Zelman*, many commentators predicted that state-constitutional limits on the public funding of private and faith-based schools remained major impediments to the expansion of private school choice. In particular, commentators cited so-called Blaine Amendments. In 1875, US Senator James G. Blaine proposed an amendment to the US Constitution banning the use of public funds in "sectarian" schools—an effort that is widely accepted as a blatant example of rampant 19th century anti-Catholicism. The proposed federal amendment narrowly failed in Congress, but subsequently, states were required to include a similar prohibition in their own constitutions as a condition of entering the Union.²⁹ Other states followed suit voluntarily, and today 37 state constitutions include at least one provision restricting public funding of either faith-based schools or all private schools.³⁰

Contrary to post-*Zelman* predictions, however, these provisions have not proved to be an insurmountable obstacle to expanding parental choice. Blaine Amendment challenges always follow the enactment of a new private school choice program, including most recently Nevada's sweeping education savings account program.³¹ While a number of lower state courts have relied on these provisions to invalidate private school choice programs, only two state supreme courts have invalidated programs on Blaine Amendment grounds.³²

In 2009, the Arizona Supreme Court invalidated programs that provided publicly funded scholarships to enable children with disabilities and in foster care to attend private schools. The court ruled that the

program violated a state-constitutional provision that states, “No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school.”³³ The Arizona Supreme Court, however, rejected a Blaine Amendment challenge to the state’s scholarship tax-credit program, suggesting that tax credits may be an option even in states with restrictive Blaine Amendments.³⁴

In June 2015, the Colorado Supreme Court invalidated a voucher program in Douglas County, Colorado, on Blaine Amendment grounds. The majority reasoned that the state’s constitution was more restrictive than the federal establishment clause and that it prohibited the government from extending financial benefits, even indirectly, to religious organizations and schools.

As Justice Allison Eid argued in the dissent, the court’s sweeping ruling raises federal-constitutional questions, since it had the effect of discriminating against religious institutions. The logic of the majority opinion, as Justice Eid explains, arguably would prohibit Colorado from extending many other benefits to religious institutions, including tax exemptions and perhaps even police and fire protection. Justice Eid chided the majority for not taking seriously the claim that the state’s Blaine Amendment was motivated by unconstitutional anti-Catholic bias.³⁵ The parties in the case are now asking the US Supreme Court to review whether Blaine Amendments can be used to exclude religious, but not secular, institutions from government benefits.³⁶

Indeed, a plausible argument can be made that states cannot, for state-constitutional reasons or otherwise, exclude religious schools from a private school choice program without running afoul of the neutrality demanded by the First Amendment’s religion clause. The Supreme Court has repeatedly asserted that both the free exercise and establishment clauses prohibit the government from either favoring or disfavoring religious individuals or institutions.³⁷ The US Court of Appeals for the Tenth Circuit relied on this principle to invalidate the exclusion of religious colleges from a public scholarship program.³⁸

That said, the US Court of Appeals for the First Circuit has twice rejected the argument that the exclusion of religious high schools from statewide private school choice programs violates the First Amendment

and equal protection clauses. Both cases involved a long-standing “tuitioning” program in Maine, which provides public funds to enable children residing in school districts without public high schools to attend private, but not religious, schools. The first, *Strout v. Albanese*, reasoned that permitting parents to use public funds to send their children to religious schools would violate the establishment clause, a result foreclosed three years later in *Zelman*.³⁹

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The second, *Eulitt v. Maine Department of Education*, was decided after *Zelman* but relied heavily on the Supreme Court’s decision in *Locke v. Davey*, which upheld a Washington program that provided college scholarships but prohibited the recipient from pursuing a devotional theology degree.⁴⁰ In *Locke*, the Supreme Court reasoned that compliance with Washington’s Blaine Amendment trumped the minimal burden on the plaintiff’s free exercise rights. Since the majority opinion emphasized the unique antiestablishment interests at stake when state funds are used to support members of the clergy, *Locke* does not preclude—but does complicate—challenges to excluding religious schools from private school choice programs.⁴¹ It is worth noting, however, that except for Maine and Vermont’s “tuitioning” regimes, no private school choice program excludes religious schools.

Aside from Blaine Amendments, private school choice programs have been challenged as running afoul of the state-constitutional provisions at issue in equity and adequacy litigation. In *Bush v. Holmes*, the Florida Supreme Court held that a statewide “failing schools” voucher program violated a state-constitutional provision demanding a “uniform” system of public schools. Other state supreme courts, however, have rejected similar uniformity challenges to parental choice, reasoning that parental choice supplements rather than supplants public schools.⁴²

In July 2015, the North Carolina Supreme Court became the most recent state supreme court to reject a uniformity challenge to voucher legislation.⁴³ A uniformity challenge to the largest private school choice program in the country—Florida’s scholarship tax-credit program, which was enacted after the *Bush v. Holmes* decision and today benefits 70,000 students—is pending.⁴⁴ In May 2015, the trial judge in that case dismissed the challenge on standing grounds.⁴⁵

Integration, Inclusion, and Private School Choice

Opponents of charter schools and private school choice routinely assert that these programs lead children to learn in less integrated classrooms and enable the exclusion of students with special needs. They frequently mention “white academies,” which emerged in southern states after *Brown v. Board of Education* and enabled white parents to use public funds to avoid sending their children to integrated public schools.⁴⁶ These accusations are obviously sobering, and parental-choice proponents should take them seriously when designing and implementing choice programs.

But the accusations also are excessively and intentionally alarmist. The politics and demographics of parental choice today are a far cry from the political and legal landscape leading to the creation of white academies post-*Brown*. After all, most parental-choice programs, by design, benefit disadvantaged students, and disadvantaged minority students disproportionately take advantage of parental choice when it becomes available. Some minority parents choose to send their children to schools with predominantly or even entirely minority student bodies.

In the charter context, in particular, scholars are locked in a fixed battle over the meaning of enrollment data—with some scholars claiming that charter schools are more racially isolated than public schools and others arguing that they are not.⁴⁷ In the private school choice context, the available evidence suggests that parental choice generally increases the likelihood that a student will attend a more integrated school.⁴⁸

The fact that minority parents both take advantage of parental choice disproportionately and sometimes choose to enroll their kids in majority-minority

schools is not in itself a cause for alarm. Minority parents’ participation rates and enrollment decisions more likely reflect an understandable and admirable desire to improve their children’s educational prospects than a desire to self-segregate. Moreover, the choices of *parents* should not raise legal issue about racial segregation, even if parents choose these schools *because* of their racial demographics. The Constitution applies to only government actors, not private ones. It therefore does not constrain the decisions of parents participating in parental-choice programs.

Moreover, the Supreme Court has made abundantly clear that the mere receipt of public funds does not transform a private actor into a public one. For example, in *Rendell-Baker v. Kuhn*, the Supreme Court held that a heavily regulated private school for special-needs high school students that received more than 90 percent of its funds from the state was not a state actor. “The school,” the court observed, “is not fundamentally different from many private corporations whose business depends on [government] contracts. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.”⁴⁹ The actions of private schools participating in parental-choice programs are even more attenuated from the state than from government contractors because their receipt of public funds depends on private choices, not public ones. Therefore, the federal constitution does not govern these schools’ relationships with their employees and students.⁵⁰

Despite all this, in the summer of 2013, the US Department of Justice filed a federal court action alleging that Louisiana’s statewide voucher threatened to undermine desegregation efforts in 34 Louisiana school districts that remain under federal court supervision for past racial segregation. The Department of Justice further alleged that the program violated the Fourteenth Amendment’s equal protection clause to the extent that it upset the racial balance of public schools in these districts.⁵¹ Somewhat ironically, the majority of students receiving scholarships were African American, so the Department of Justice essentially was claiming that the departure of black students from public to private schools was resulting in unconstitutional segregation.⁵²

Ultimately, the Department of Justice dropped its demand that federal courts supervising desegregation consent decrees ensure that no transfer enabled by the program would upset the racial balance of local public schools—instead substituting a request for comprehensive programmatic data.⁵³ The Department of Justice’s action, however, suggests that the Obama administration believes the equal protection clause limits the expansion of parental choice in school districts subject to judicially supervised desegregation decrees.⁵⁴ The (questionable) logic of the administration’s judicial action is that these orders are remedial—they correct districts’ past acts of intentional segregation and ensure ongoing compliance with the equal protection clause. Therefore, the argument goes, the federal judges supervising desegregation in these districts have a duty to ensure compliance with numerical racial enrollment targets.

Moreover, just as support for parental choice is highest among minority parents, many parents of special-needs students frequently seek alternatives to public schools when parental choice is an option.

Outside of the limited—and diminishing—context of judicially ordered desegregation decrees, the Supreme Court has made clear that the Fourteenth Amendment’s equal protection clause prohibits only intentional government discrimination, not programs that have disproportionate racial effects.⁵⁵ Therefore policies with a disproportionate impact on racial minorities are not unconstitutional unless that effect was a policy’s intended result. Moreover, after *Parents Involved in Community Schools v. Seattle School District No. 1*, the equal protection clause would presumptively prohibit any effort to racially balance the students participating in parental-choice programs.⁵⁶

That is not to say that the demographics of parental choice have no legal implications. The governmental entities enacting and administering parental-choice programs, as well as private schools receiving federal funds, are obligated to comply with Title VI of the Civil

Rights Act of 1968, which prohibits discrimination on the basis of race, color, and national origin. Many private schools serving low-income children receive federal funds through child nutrition programs, supplemental instructional and professional-development programs established under the Elementary and Secondary Education Act, or both.

While the Supreme Court has held that Title VI, like the equal protection clause, prohibits only intentional discrimination, regulations promulgated pursuant to Title VI also prohibit policies with a disparate impact on minority students protected by the statute. These regulations could conceivably be used to police racial disparities in enrollment in private school choice programs or even in individual schools. The regulations, however, can be enforced by only the federal government because the Supreme Court has ruled that no “private right of action” is available to aggrieved individuals.⁵⁷ Some state supreme courts have ruled that disparate impact claims are cognizable under state equal protection clauses, although no parental-choice program has been invalidated on these grounds.

Opponents of parental choice also assert that private schools and charter schools routinely exclude students with disabilities. It is true that private schools are not required to provide the full array of special-education services mandated by the Individuals with Disabilities Education Act (IDEA), which entitles disabled students to a “free and appropriate public education.” In contrast, charter schools must accommodate the needs of all disabled students unless state education agencies make alternative arrangements for serving them.⁵⁸

Any private school that receives federal funds is bound by Title VI and Title IX of the Civil Rights Act of 1968, which prohibit, respectively, race and sex discrimination by recipients of federal funds, as well as Section 504 of the Rehabilitation Act of 1973, which prohibits recipients of federal funds from discriminating against individuals with disabilities.⁵⁹ Section 504 has the effect of requiring private schools to enroll disabled students if the student is qualified to participate in the school’s program “with minor adjustments,” but it does not require the school to substantially modify facilities or programming to accommodate disabled children.⁶⁰

Additionally, Title III of the Americans with Disability Act (ADA) requires places of public accommodation,

including private schools, to eliminate unnecessary eligibility standards and make reasonable accommodations for disabled students and employees (including providing auxiliary aids) unless these changes would result in a “fundamental alteration” in the school’s program.⁶¹ However, religious organizations, including faith-based schools, are exempt from these ADA provisions.⁶²

It is important to contextualize the claims that parental choice undermines the goal of full inclusion for disabled students. It is true that many private schools are not equipped to serve students with serious disabilities, but many public schools are not either. In fact, many districts pay specialized private schools to serve these students, as was the case in *Rendell-Baker*. Moreover, just as support for parental choice is highest among minority parents, many parents of special-needs students frequently seek alternatives to public schools when parental choice is an option.

The demand for these alternatives is reflected in the sizable proportion of private school choice programs that serve special-needs students: more than a dozen special-needs voucher or tax-credit programs have been enacted. One of them—Florida’s John M. McKay Scholarship for Students with Disabilities Program—is one of the largest private school choice programs in the United States, with nearly 30,000 participants. Schools participating in special-needs voucher and tax-credit programs are required to serve the needs of participating disabled students, which is enforced through a variety of procedural and reporting regulations.⁶³

IDEA also gives parents who are dissatisfied with public school instruction and services the right to withdraw their children, enroll them in private schools, and demand that the district pay the tuition. It is telling that this is a frequently litigated question, especially since the strategy is a risky one, as the district is not required to pay tuition unless a federal court finds that their school district failed to provide a “free and appropriate education.”⁶⁴

Parental Choice and Religious Liberty

The Supreme Court’s opinion in *Zelman v. Simmons-Harris* made clear that the federal constitution does not require faith-based schools to secularize as a condition

of participating in private school choice programs. More than 96 percent of the students in the program at issue in *Zelman*, the Cleveland Pilot Scholarship Program, attended religious schools.

As the dissenting justices’ vehement objections made clear, religion pervaded these schools’ curricula, and the program did not require schools to either sequester the funds for solely secular purposes or permit students to opt out of religious instruction and worship. Nevertheless, the majority asserted that the establishment clause did not prohibit parents from choosing to use publicly funded scholarships at these schools, because the program was “a program of true private choice” where “the incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government.”⁶⁵

The fact that the Constitution does not require faith-based schools to abandon their religious identity to participate in private school choice programs does not preclude government entities from imposing regulations that threaten to undermine the religious identity of faith-based schools. Many religious leaders understandably fear the regulatory strings that might be attached to the receipt of public funds. The regulatory record of existing private school choice programs, which now extends longer than 20 years, however, has not borne out those fears. Instead, this record suggests that governmental entities have consistently eschewed interference with the religious mission of participating school.

In fact, arguably only one program has imposed *any* regulation on the religious identity and mission of participating faith-based schools. The Milwaukee Parental Choice Program (and, since 2011, the Racine Parental Choice Program) require schools to permit participating students to opt out of religious programs and instruction.⁶⁶ In more than 20 years, however, those familiar with the program indicate that only a handful of students have exercised this option.

The regulations imposed on participating private schools focus exclusively on secular issues, such as academic quality and nondiscrimination in selecting students. Of the 41 private school choice programs in place in 2014, 20 required participating schools to administer standardized tests—either those administered by the

state or a nationally normed exam—and 15 required schools to both administer standardized tests and report the testing data to state regulators.⁶⁷ One state, Indiana, prohibited persistently failing schools from accepting new scholarship students until their academic performance improves.⁶⁸

Most programs require participating schools to be accredited by a nationally recognized accrediting agency and some minimal qualifications for teachers—usually a college degree but not a teacher certification. Several programs include minimal curriculum requirements, although no program requires participating schools to mimic the required curriculum for public schools.⁶⁹ Several states mandate independent academic evaluations of program-wide results.⁷⁰

Religious organizations are entitled to exemptions, either constitutionally or statutorily, from many regulations threatening their religious liberty and identity.

Additionally, most parental-choice programs also mandate compliance with state nondiscrimination laws in student selection, and some programs require that schools select participating students by lottery when demand exceeds available seats. All programs, however, allow schools to limit the number of participating students—some require them to do so—and to give preference to current students and their siblings.⁷¹

Moreover, and importantly, the government’s ability to meddle with the mission of religious organizations is dramatically circumscribed by law. Religious organizations are entitled to exemptions, either constitutionally or statutorily, from many regulations threatening their religious liberty and identity.

For example, in *Burwell v. Hobby Lobby*, the Supreme Court ruled that the Religious Freedom Restoration Act (RFRA) precluded the government from requiring for-profit employers with religious objections from complying with the Affordable Care Act’s controversial “contraception mandate.”⁷² Litigation about the

legality of applying the mandate to nonprofit entities, including religious organizations, is ongoing.⁷³ While RFRA applies to only the federal government and therefore does not limit conditions imposed on schools participating in most private school choice programs, 19 states have adopted nearly identical laws prohibiting governmental policies that impose a “substantial burden” on the free exercise of religion.⁷⁴

Most antidiscrimination statutes exempt religious organizations from provisions prohibiting religious discrimination in the hiring and firing of certain employees. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the Supreme Court unanimously ruled that the First Amendment’s free exercise clause entitled religious organizations to a “ministerial exception” to regulations governing their selection of ministers, including teachers in religious schools whose duties included passing on the faith.⁷⁵ *Hosanna-Tabor* suggests that faith-based schools can immunize themselves from interference with core personnel decisions by clarifying (in mission statements, contracts, and so forth) that teachers are expected to play important ministerial roles.

Whether the government could condition the receipt of parental-choice funds on a school waiving the ministerial exception—or on complying with regulations that infringe on religious liberty—remains open. This question implicates the complexities of the so-called unconstitutional conditions doctrine, which limits the government’s ability to condition receiving public benefits on the surrender of constitutional rights. Unfortunately, the precise contours of these limits are far from clear, making the question’s resolution impossible to predict.

In *Christian Legal Society v. Martinez*, the Supreme Court held that the University of California, Hastings College of the Law did not violate the First Amendment’s free exercise clause by refusing to officially recognize a student group that limited membership to professed Christians. The case suggests that governmental actors do have some leeway—although how much is not clear—to condition the receipt of public benefits on waiving free exercise rights.⁷⁶

Finally, while concerns about potential regulatory strings attached to parental-choice funds are not unfounded, it is important to note that such regulations

could also be imposed *directly* on faith-based schools, even those that do not participate in private school choice programs. In fact, many of the existing regulations that threaten the religious liberty of faith-based institutions, including religious schools, have been imposed across the board—not as a condition of receiving public funds.

The Affordable Care Act’s “contraception mandate” at issue in *Hobby Lobby v. Burwell* is a case in point. The mandate required all employers to provide insurance coverage for contraception and abortifacient devices and drugs, including faith-based nonprofit employers with religious objections to contraception, regardless of whether the employers receive a penny of government funding.⁷⁷

As the dissents in the recent decision constitutionalizing the right to same-sex marriage (*Obergefell v. Hodges*) detail, religious organizations, including faith-based schools, have reason to be concerned about the effects of extending nondiscrimination laws to include sexual orientation and transgender status.⁷⁸ For example, several days after *Obergefell*, the Obama administration announced that all federally funded programs supporting marriage or parenthood must extend benefits to same-sex couples on a nondiscriminatory basis.⁷⁹

Concerns about the effects of *Obergefell* on faith-based organizations, however, are not limited to organizations and schools that receive public funds. For example, during the oral argument in *Obergefell*, the solicitor general signaled that the tax-exempt status of organizations discriminating on the basis of sexual orientation was in question.⁸⁰ Since the decision, activists have openly called for the elimination of the tax benefits enjoyed by religious institutions.⁸¹

The Unique Case of Charter School Conversions

It is very important to distinguish between the religious-liberty implications of faith-based schools participating in a private school choice program and those of a faith-based school’s conversion into a charter school to secure public funds. While faith-based schools participating in private school choice programs can maintain their autonomy and religious identity, they must

sacrifice both to secure the funding provided by charter school laws. There are two reasons why it is commonly assumed that religious schools cannot become charter schools and remain religious. The first is the universal view that the First Amendment’s establishment clause prohibits religious charter schools, which I will challenge.⁸² The second is that state laws prohibit religious charter schools.

While faith-based schools participating in private school choice programs can maintain their autonomy and religious identity, they must sacrifice both to secure the funding provided by charter school laws.

State laws express this prohibition in various ways. The majority approach is to simply require charter schools to be nonsectarian. Seven states—and the federal government—additionally prohibit charter schools from being affiliated with religious institutions, and two others (Maine and New Hampshire) prohibit such affiliation to the extent that it is prohibited by the US Constitution. Others—for example, New York—prohibit charter schools from being under the control of a religious institution. Finally, a handful of states—for example, Georgia and Indiana—explicitly *permit* religious institutions to operate charter schools, so long as the charter schools are secular.⁸³

In other words, in most states, because religious institutions may not operate charter schools, not only must the converted school secularize but also the religious organization previously operating the school must relinquish control. For example, basketball legend David Robinson founded a faith-based school, the Carver Academy, in San Antonio in 2001. A few years ago, however, Robinson opted to enlist a charter operator to assume control of the school and run it as a secular charter academy.⁸⁴

As a practical matter, private, secular schools serving low- or moderate-income students have every incentive to become charter schools to secure public

funds. Even in states with private school choice programs, the per-pupil funding for charter schools is generally much higher than the scholarship amount provided to private schools. In some states, charter schools (but not private schools) also receive capital funding, and charter schools (but not private schools) are eligible for a variety of federal grants.⁸⁵ Private philanthropic efforts, including the New Schools Venture Fund and the Charter School Growth Fund, focus intensely on charter schools to the exclusion of private schools.⁸⁶

Although 12 states explicitly prohibit the conversion of private schools into charter schools, these prohibitions are in reality easily circumvented, because when a private school becomes a charter school, it generally closes and reopens as a new school.⁸⁷ Urban leaders usually welcome such conversions because they introduce established schools with strong educational track records. For example, when the Diocese of Brooklyn recently sought to convert some of its parochial schools to charters, New York City Mayor Michael Bloomberg not only welcomed the announcement but also actively helped the diocese structure the conversions in a way that avoided New York's express prohibition of private school conversions.⁸⁸

Charter school conversions are the subject of an intense debate among Catholic leaders and educators. A handful of archdioceses or dioceses, including Brooklyn, Indianapolis, Miami, and Washington, DC, have converted some of their schools to charter schools rather than close them. In many cities, charter schools operate in closed Catholic schools by default, since the buildings are available and ideal for school purposes.

Some Catholic school leaders, including many bishops, view the loss of religious identity and autonomy as too high a price to pay for public funding. Others, facing escalating costs and dwindling enrollments, reluctantly view charter school conversions as preferable to school closures, because they offer the resources to enable schools to continue serving inner-city children, even if not as Catholic schools. As a senior leader in the Archdiocese of Indianapolis explained when the archdiocese opted to convert two urban Catholic schools to charter schools, "Many urban Catholic schools are closing across the nation, and we did not want to

leave the students or communities we currently serve. Through this transformation, an urgent and unmet need will be filled."⁸⁹

In dioceses where charter conversions have occurred, proponents suggest possibilities to maintain continuity with the mission of the former parochial schools. For example, some argue for "wrap around" charter schools that offer religious education classes before or after school.⁹⁰ As a practical matter, except for the Archdiocese of Indianapolis, none of the dioceses converting their schools appears to have actually implemented a wrap-around model in the new charter schools.

Additionally, again with the exception of Indianapolis, all the dioceses relinquished operational control to a secular charter provider—although in DC, the archdiocese formed and populated the board of the operator, at least initially.⁹¹ The Archdiocese of Indianapolis opted to run the charter schools as secular schools itself—an option permitted under Indiana law—and offered religious instruction in the adjacent parishes after school hours.⁹² Tellingly, following the enactment of Indiana's statewide private school choice program, the archdiocese decided to reconvert one charter school back to a Catholic school and relinquish all control and affiliation with the second.⁹³

Given the charter school market's evolution, the First Amendment's establishment clause—contrary to conventional wisdom—arguably should not prohibit religious charter schools. The view that charter schools must be secular flows from two related assumptions about the nature of charter schools and charter school funding. The first is that charter schools are public schools, and there is no serious debate today about the rule that public school curriculum must be secular.⁹⁴ Although some federal courts have held that—at least for some constitutional purposes—charter schools are not governmental actors, the view that charter schools are public schools is well entrenched.⁹⁵

State laws universally characterize charter schools as public schools.⁹⁶ This characterization flows from the fact that, at least theoretically, charter school laws do more than permit charter schools to operate—they authorize the creation of new public schools. In theory, charter schools do not exist before they are granted a charter by—in most states—a government entity, most frequently state boards of education and local school

boards and, in some states, special public commissions and public universities.⁹⁷

However, the charter market has arguably evolved away from early expectations about how the chartering process would work. More and more charter schools are franchises or branches of a charter management organization (CMO) seeking permission to expand to a new market or within an existing one. The CMO, not the state, creates the school, which is privately operated and largely independently from the public educational authorities.

Moreover, the creation of a new school through a chartering process does not necessarily make it public for establishment clause purposes. After all, private schools generally cannot operate without government approval. Most private schools—including those participating in private school choice programs—are private corporations and are, like charter schools, created by a state's decision to grant a corporate charter. In fact, with the expansion of CMO-managed schools, private schools participating in parental-choice programs may be more likely to be created by state law—through the incorporation process—than charter schools are.

The second reason for assuming that the Constitution requires charter schools to be secular is related to the direct-indirect aid distinction in the Supreme Court's establishment clause jurisprudence. As the court observed in *Zelman*, "Our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals."⁹⁸ In the indirect-aid context, the court has held that the establishment clause does not prohibit religious institutions from participating in religion-neutral government-funding programs because the relevant decision maker is the private recipient of the funds—or in the case of school-aged children, the recipients' parents—not the government.

In contrast, the court has held that the government may not *directly* fund religious activities or instruction. As a result, the court has limited direct government assistance to secular aspects of a religious organization's activities. This extends through a long line of cases addressing the constitutionality of programs providing

secular aid to religious institutions—for example, transportation for religious school students, secular textbooks, educational materials including computers, tutors for secular remedial instruction, and capital expenditures for the construction of secular buildings at religious colleges.⁹⁹ In large part because the court has assumed that most religiously affiliated elementary and secondary schools, especially Catholic ones, are "pervasively sectarian"—that is, that religion pervades all aspects of instruction—direct financial assistance to sectarian elementary and secondary schools has long been considered a constitutional taboo.¹⁰⁰

Most private schools—including those participating in private school choice programs—are private corporations and are, like charter schools, created by a state's decision to grant a corporate charter.

Therefore, the constitutionality of religious charter schools depends on whether funds flow *directly* to the schools because of the government's decision to authorize its operation or *indirectly* because of parents' decisions to enroll their children. The prevailing wisdom is that the government decides to fund a charter school when it authorizes the school's creation but that parents decide to fund a private school by enrolling their children in it. In many states, this view is arguably incorrect because charter schools receive funding on a per-pupil basis as a result of a parent's enrollment decision.

Consider New Orleans, where parents of modest means have two choices for their children: (1) enroll them in a charter school, which results in the State of Louisiana directing per-pupil allocation funds to the charter school according to a formula based on the amount of state and local funding that a public school would receive to educate that child; or (2) enroll them in a private school, which results in the State of Louisiana directing a public scholarship to that school based on a similar formula.¹⁰¹ Arguably, the per-pupil allocation charter school funds and the

scholarship from the Louisiana Scholarship Program are a distinction without a difference. Indeed, the charter school funds and scholarship funds initially were drawn from the same state funding source, the Minimum Foundation Program.¹⁰²

In the end, the most prudent path forward is likely a proactive political strategy that seeks to expand the private school choice policy footprint and increase funding levels to parity with charter and traditional public schools.

In 2013, however, the Louisiana Supreme Court invalidated the scholarship program's funding mechanism on state-constitutional grounds unrelated to religion, ruling that these particular funds could not go to private schools.¹⁰³ Interestingly, the Louisiana Association of Educators is now challenging charter schools on identical grounds, arguing that charter schools should be treated for state-constitutional purposes as private schools, not public ones.¹⁰⁴ And the Washington Supreme Court arguably endorsed this very argument in early September 2015 when it invalidated the state's new charter school law, concluding that charter schools could not receive public funds because they are not "common schools."¹⁰⁵

Even if religious charter schools are constitutionally permissible, all states require them to be secular. Therefore, the possibility of religious charter schools would require either a statutory change—which would undoubtedly and swiftly prompt litigation—or a lawsuit challenging existing statutory prohibitions on free exercise or equal protection ground. At this point, both prospects seem a distant possibility. Moreover, both carry the risk of generating legal precedents that actually impede the expansion of parental-choice policies.

Indeed, even secular charter schools that incorporate curricular themes with religious and cultural overtones have been subjected to significant regulatory oversight and constitutional challenges.¹⁰⁶ For example,

Hebrew- and Arabic-themed charter schools have been scrutinized to ensure they were not teaching religion. The now-defunct Tarek ibn Ziyad Academy (TiZA), an Arabic-themed school in Minnesota, was named for the Muslim general who conquered Spain and was founded and directed by an imam. The school required a course in Arabic language, scheduled vacations around Muslim holidays, permitted "voluntary and student-led prayer," and promised to "help students integrate into American society, while retaining their identity." Following a settlement between the American Civil Liberties Union (ACLU) and the State of Minnesota, TiZA was forced to close.¹⁰⁷

The Hebrew-themed Ben Gamla Charter School in Hollywood, Florida, named for a historical figure who established Jewish schools throughout ancient Israel, was founded by a rabbi and directed by a former Jewish day school director. The school serves only Kosher food and requires that one period each day be dedicated to teaching Hebrew and a second period be taught in a mix of English and Hebrew.¹⁰⁸ Due to ACLU litigation threats, the school was forced to "scrub" its curricula of religious references three times and at one point required to freeze Hebrew instruction for several weeks.¹⁰⁹

Conclusion

In the end, the most prudent path forward is likely a proactive political strategy that seeks to expand the private school choice policy footprint and increase funding levels to parity with charter and traditional public schools. As that footprint expands, private school choice is becoming a reality for more and more Americans. The expansion raises a number of legal questions.

This paper seeks to unpack a number of the most important legal questions raised by private school choice. As the discussion illustrates, the legal battle for parental choice in education has been primarily a defensive one, fought in cases challenging the legality of programs enacted after hard-won political battles in state legislatures. This pattern differs from other efforts to expand the rights of the disadvantaged in the courts.

Some offensive challenges, to be sure, have occurred—including a handful of lawsuits demanding

parental choice as a remedy in education-funding litigation and several seeking to invalidate state-constitutional Blaine Amendments on federal-constitutional grounds. These efforts have largely been summarily dismissed in court, however, suggesting

that the best offensive strategy in the fight for parental choice likely is a good defense, focused on designing good programs and defending them when they are inevitably challenged in court.

Notes

1. Milton Friedman, "The Role of Government in Education," in *Economics and the Public Interest*, ed. Robert A. Solo (New Jersey: Rutgers University Press, 1955). Since the mid-19th century, Maine and Vermont both have maintained "town tuitioning" programs, which permit students in towns without public high schools to use public dollars to attend other public or private secular schools. Illinois and Minnesota have very modest nonrefundable parental tax-credit programs. See Friedman Foundation for Educational Choice, *The ABCs of School Choice: 2015 Edition*, 55–57, 95–97, www.edchoice.org/School-Choice/The-ABCs-of-School-Choice/2015-ABCs-of-School-Choice-WEB.
2. *Zelman v. Simmons-Harris*, 536 US 639 (2002).
3. Michael Q. McShane, ed., *New and Better Schools: The Supply Side of School Choice* (New York: Rowman & Littlefield, 2015).
4. Information about program details, including regulatory requirements and enrollment data, can be found in two excellent publications: The Alliance for School Choice, *School Choice Yearbook 2014–2015: Breaking Down Barriers to Choice* (Washington, DC: 2015), http://allianceforschoolchoice.org/wp-content/uploads/2015/04/AFC_2014-15_Yearbook.pdf?82497a; and Friedman Foundation for Educational Choice, *The ABCs of School Choice*.
5. Despite the recent expansion in the number of programs and enrollment, participation in private school choice programs pales in comparison to charter school enrollment, which grew by 13 percent between 2013 and 2014. In 2014–15, more than 2.5 million students attended a charter school, and charter schools enrolled more than 20 percent of all public school students in 43 school districts.
6. See McShane, ed., *New and Better Schools*.
7. *San Antonio Independent School District v. Rodriguez*, 411 US 1 (1973).
8. *Brown v. Board of Education*, 347 US 483 (1954); and *Rodriguez*, 411 US at 31.
9. See, for example, *Brown v. Board of Education*, 347 US 483 (1954); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 US 1 (1971); *Keyes v. School District No. 1*, 414 US 883 (1973); *United States v. Virginia*, 518 US 515 (1996); *Mississippi University for Women v. Hogan*, 458 US 718 (1982); and *Plyler v. Doe*, 457 US 303 (1982).
10. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 US 701 (2007).
11. See, for example, *Tinker v. Des Moines Independent Community School District*, 393 US 503 (1968); *Morse v. Frederick*, 551 US 393 (2007); *Lee v. Weisman*, 505 US 577 (1992); *Good News Club v. Milford Central School*, 533 US 98 (2001); *Goss v. Lopez*, 373 US 565 (1975); *Ingraham v. Wright*, 430 US 651 (1977); *New Jersey v. T. L. O.*, 469 US 325 (1985); and *Safford Unified School District No. 1 v. Redding*, 557 US 364 (2009).
12. 20 U.S.C. §6301; and 20 U.S.C. §1400.
13. See Molly A. Hunter, "State Constitution Education Clause Language," <http://pabarcr.org/pdf/Molly%20Hunter%20Article.pdf>.
14. *Committee for Educational Rights v. Edgar*, 672 N.E.2d 1178 (Illinois 1996).
15. *Serrano v. Priest*, 487 P.2d 1241 (California 1971).
16. See, for example, Paul E. Peterson and Martin R. West, eds., *School Money Trials: The Legal Pursuit of Educational Adequacy* (Washington, DC: Brookings Institution Press, 2007).
17. See James E. Ryan, "Standards, Testing, and School Finance Litigation," *Texas Law Review* 86 (2008): 223.
18. See, for example, Richard Whittaker, "Texas School Funding Still Unconstitutional," *Austin Chronicle*, September 14, 2014.
19. *League of Women Voters v. State of Washington*, Washington Supreme Court, No. 89714-0 (September 4, 2015).
20. *Pierce v. Society of Sisters*, 268 US 510 (1925).
21. *Meyer v. Nebraska*, 262 US 390 (1923).
22. The Home School Legal Defense Fund maintains an extensive database of information by state about the legal requirements for home-schooling. See Home School Legal Defense Association, "My State," www.hsllda.org/hs/.
23. See *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987).
24. In *Brusca v. State of Missouri ex rel. State Board of Education*, the court held that the state is not obligated to finance

nonpublic education. In *McDonough v. Aylward*, the court held that parents paying tuition to private school are not exempt from taxes supporting public schools. See *Brusca v. State of Missouri ex rel. State Board of Education*, 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd* 405 US 1050 (1972); and *McDonough v. Aylward*, 500 S.W.2d 721 (Missouri 1973).

25. See, for example, Michael Heise and Thomas Nechyba, *School Finance Reform: A Case for Vouchers* (Manhattan Institute for Public Policy Research: 1999), www.manhattan-institute.org/html/cr_9.htm; *Crawford v. Davy*, 2010 WL 162061 (New Jersey Appellate Court 2009); *Abbeville County School District v. State*, 767 S.E. 2d 157 (South Carolina 2014); and *Jenkins v. Leininger*, 659 N.E. 2d 1366 (Illinois Appellate Court 1995).

26. Valerie Strauss, "Arizona Court: Charters Can't Demand Same Funding as Traditional Public Schools," *Washington Post*, December 1, 2014; *Craven v. Huppenthal*, 338 P.3d 324 (Arizona Court of Appeals 2014); and *J.D. ex rel. Scipio-Derrick v. Davy*, 2 A.3d 387 (New Jersey Superior Court 2010).

27. The program enables the parents of low-income children to spend up to 100 percent of the state's allocation of public education funds on private education; all other students are entitled to receive 90 percent. Treyvan Milliard, "Nevada Parents to Get Unprecedented School Choice," *Reno Gazette-Journal*, June 1, 2015.

28. *Arizona Christian School Tuition Organization v. Winn*, 131 S.Ct. 1436 (2010).

29. See, for example, Richard W. Garnett, "The Theology of the Blaine Amendments," *First Amendment Law Review* 2 (2004): 45.

30. The Institute for Justice and American Legislative Exchange Council, *School Choice and State Constitutions: A Guide to Designing School Choice Programs* (April 2007), www.alec.org/docs/IJ-ALEC-school-choice.pdf.

31. Ian Whitaker, "ACLU Launches Lawsuit against Nevada School Voucher Law," *Las Vegas Sun*, August 27, 2015.

32. *Magee v. Boyd* held that the tax-scholarship program and individual refundable tax credit were constitutional and not in violation of the state-constitutional prohibition against appropriating money to nonstate charitable or educational institutions. *Hart v. State*, No. 272A14 (Supreme Court of North Carolina, July 23, 2015); *Meredith v. Pence*, 984 N.E. 2d 1213 (Indiana 2013); *Jackson v. Benson*, 578 N.W. 2d 602 (Wisconsin 1998); and *Magee v. Boyd*, 2015 WL 867926 (Alabama 2015).

33. *Cain v. Horne*, 202 P.3d 1178 (Arizona 2009).

34. *Kotterman v. Killian*, 972 P.2d 606 (1999).

35. In her *Taxpayers for Public Education v. Douglas County School District* dissent, Justice Allison Eid said, "The plurality cannot sweep the possibility of anti-Catholic bigotry under the plain language rug. . . . Allegations of such animus must be considered, even where the 'plain language' does not invoke religion." See *Taxpayers for Public Education v. Douglas County School District*, 2015 WL 3948220, ¶79 (Colorado 2015), www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2013/13SC233.pdf.

36. *Ibid.*

37. *Lemon v. Kurtzman* found that subsidization of parochial-schools teachers' salaries was an advancement of religion. *Wallace v. Jaffree* held that voluntary prayer had the purpose of endorsing religion. *Board of Education of Kiryas Joel Village School District v. Grumet* invalidated a special school district created for a religious enclave in violation of the establishment clause. *Sherbert v. Verner* denied unemployment benefits penalizing religious beliefs. *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah* held that a law targeting religious practices of specific religions was a violation of the free exercise clause. See *Lemon v. Kurtzman*, 483 US 602 (1971); *Wallace v. Jaffree*, 472 US 38 (1985); *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 US 687 (1994); *Sherbert v. Verner*, 374 US 398 (1963); and *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, 508 US 520 (1993).

38. *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008).

39. *Strout v. Albanese*, 178 F.3d 57, 63-64 (1st Circuit 1999). Also, *Bagley v. Raymond School Department* rejected a similar challenge on state-constitutional grounds. *Bagley v. Raymond School Department*, 728 A.2d 127 (Maine 1999).

40. *Eulitt v. Maine Department of Education*, 386 F.3d 344 (1st Cir. 2004).

41. *Locke v. Davey*, 540 US 722, 724-25 (2004).

42. *Hart v. State* held that the scholarship program provided modest scholarships rather than an alternative system of schools. *Meredith v. Pence* rejected a uniformity challenge to Indiana's Choice Scholarship Program. *Jackson v. Benson* concluded that the amended Milwaukee Parental Choice Program does not violate the uniformity clause of the state constitution. *Hart v. State*, No.

272A14 (Supreme Court of North Carolina, July 23, 2015); *Meredith v. Pence*, 984 N.E.2d 1213 (Indiana 2013); *Jackson v. Benson*, 578 N.W.2d 602 (Wisconsin 1998); and Michael Heise, *Education Rights and Wrongs: Publicly Funded Vouchers, State Constitutions, and Education Death Spirals*, Cornell Legal Studies, November 1, 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554070.

43. Anne Blythe and T. Keung Hui, “North Carolina Supreme Court Upholds School Voucher Program,” *News and Observer*, July 23, 2015.

44. Step Up for Students, “Lawsuit against the Florida Tax Credit Scholarship,” www.stepupforstudents.org/fea-fsba-lawsuit.

45. *McCall v. Scott*, No. 2014 CA 002282 (Florida Circuit Court, May 18, 2015); and Denise Smith Amos, “Judge Tosses Legal Challenge of Florida Vouchers,” *Florida Times-Union*, May 18, 2015, <http://jacksonville.com/news/metro/2015-05-18/story/judge-tosses-legal-challenge-florida-vouchers>.

46. James E. Ryan, “Brown, School Choice, and the Suburban Veto,” *Virginia Law Review* 90 (2004): 1635; and Myron Orfield and Thomas Luce, “Charters, Choice, and the Constitution,” *University of Chicago Legal Forum* 2014 (2014): 377.

47. Leland Ware and Cara Robinson, “Charters, Choice, and Resegregation,” *Delaware Law Review* 11 (2009): 1; Christopher Lubinski and Peter Weitzel, “Choice, Integration, and Educational Opportunity,” *Journal of Gender, Race, and Justice* 12 (2009): 351; and Suhrid S. Gajendragadkar, “The Constitutionality of Racial Balancing in Charter Schools,” *Columbia Law Review* 106 (2006): 144.

48. Friedman Foundation for Educational Choice, “Can School Choice Lead to More Integrated Schools?,” www.edchoice.org/school_choice_faqs/can-school-choice-lead-to-more-integrated-schools/.

49. *Rendell-Baker v. Kohn*, 457 US 830 (1982). See also *Moose Lodge Number 107 v. Irvis*, 407 US 163; and *Jackson v. Metropolitan Edison Co.*, 419 US 345 (1974). *Moose Lodge Number 107 v. Irvis* held that the state granting a liquor license to a private club was not sufficient entanglement to make the club a state actor. *Jackson v. Metropolitan Edison Co.* held that government regulation of a utility that possessed a state-granted monopoly did not make the utility a state actor.

50. An intriguing question slightly beyond the scope of this paper is whether the federal-constitutional norms that govern the relationship between traditional public schools and their employees—including the First Amendment’s protection of free speech, assembly, and religion; the Fourth Amendment’s prohibition on unreasonable searches and seizures; and the Fourteenth Amendment’s equal protection and due process clauses—bind charter schools. Although all state statutes characterize charter schools as public schools, federal courts have divided about whether this characterization necessitates the conclusion that they are, for purposes of federal-constitutional law, government actors subject to the federal constitution. Several courts have held that—at least for some purposes—charter schools are not state actors and therefore cannot be held constitutionally liable for their actions vis-à-vis employees. See, for example, *Caviness v. Horizon Community Learning Center*, 590 F.3d 806 (9th Cir. 2009).

51. See Allie Bidwell, “Justice Department Attempts to Block Louisiana School Voucher Program,” *US News & World Report*, August 26, 2013.

52. Danielle Dreilinger, “Louisiana School Voucher Data Show Need to Monitor Racial Balance, Federal Report Says,” *The Times-Picayune*, December 24, 2013.

53. Caitlin Emma, “DOJ Gives Up on Blocking Louisiana Voucher Program,” *Politico*, November 19, 2013.

54. Data compiled by *ProPublica* suggests that approximately 2 percent of school districts—300 out of more than 13,000—fall into this category. Yue Qiu and Nikole Hannah-Jones, “A National Survey of School Desegregation Orders,” *ProPublica*, December 23, 2014, <http://projects.propublica.org/graphics/desegregation-orders>.

55. *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 US 252 (1977).

56. *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738 (2007); Reynolds Holding, “Can Schools Still Achieve Diversity?,” *Time*, June 28, 2007, <http://content.time.com/time/nation/article/0,8599,1638595,00.html>; and Mark E. Wojcik, “Race-Based School Assignments after Parents Involved in Community Schools,” *Illinois Bar Journal* 95 (2007): 256.

57. *Alexander v. Sandoval*, 532 US 275 (2001).

58. 20 U.S.C. §1413(a)(5).

59. 29 U.S.C. 794(a).

60. 34 C.F.R. §104 et seq.

61. 42 U.S.C. §12182(b)(2)(A); and US Department of Education, “Q and A: Questions and Answers on Serving Children with Disabilities Placed by Their Parents at Private Schools,” April 2011, <http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C1%2C>.

62. Despite this exemption, in an ongoing investigation, the federal Department of Justice has taken the position that the State of Wisconsin is bound, by virtue of its own receipt of federal funds, to ensure that all schools participating in the state’s two private school choice programs, including exempt faith-based schools, are fully compliant with the ADA. Erin Richards, “Wisconsin Told to Boost Oversight of Voucher School’s Disability Rolls,” *Milwaukee Journal-Sentinel*, May 2, 2013.

63. Friedman Foundation for Educational Choice, *The ABCs of School Choice*, 108–9.

64. 20 U.S.C. §1412(a)(10)(C)(i) (“This subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free and appropriate education available to the child and the parents elected to place the child in such private school or facility.”) *Jasa v. Millard Public School District No. 17* held that the district was not required to provide on-site services to a child after the parents voluntarily moved him to a private facility when the district was providing a free and appropriate education in accordance with IDEA. *Jasa v. Millard Public School District No. 17*, 206 F.3d 813 (8th Cir. 2000).

65. 536 US at 653.

66. Wisconsin Stat. Ann. § 119.23(7)(c) (West 2014).

67. Alliance for School Choice, *School Choice Yearbook 2014–2015: Breaking Down Barriers to Choice*, 2015, http://allianceforschoolchoice.org/wp-content/uploads/2015/04/AFC_2014-15_Yearbook.pdf.

68. Indiana Code Ann. §§ 20-51-4-9, 20-51-1-4.7, 20-31-8-3 (West 2011).

69. For example, Indiana’s voucher program requires instruction in history, government, language arts, mathematics, sciences, fine arts, and health. Indiana Code Ann. § 20-51-4-1(b)-(h) (West 2011).

70. See, for example, Institute of Education Sciences, “Evaluation of the DC Scholarship Program,” US Department of Education, June 2010, <http://ies.ed.gov/ncee/pubs/20104018/pdf/20104018.pdf>.

71. See, for example, Wisconsin Stat. Ann. § 119.23 3(a) (West 2014); and Indiana Code Ann. § 20-51-1-4.3(3)(D) (West 2015).

72. *Burwell v. Hobby Lobby*, 134 S.Ct. 2751 (2014).

73. Information about the status of litigation challenging the application of the contraception mandate to religious entities has been collected by the Becket Fund for Religious Liberty. See the Becket Fund for Religious Liberty, “HHS Mandate Information Central,” www.becketfund.org/hhsinformationcentral/.

74. In *City of Boerne v. Flores*, the Supreme Court invalidated RFRA as it applied to states. 521 US 507 (1997); and Dave Johnson, “This Map Shows Every State with Religious-Freedom Laws,” *Time*, April 2, 2015, <http://time.com/3766173/religious-freedom-laws-map-timeline/>.

75. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694 (2012).

76. *Christian Legal Society v. Martinez*, 130 S.Ct. 2917 (2010).

77. “Administration Issues Final Rule on Contraception Coverage and Religious Organizations,” June 28, 2013, www.hhs.gov/news/press/2013pres/06/20130628a.html.

78. *Obergefell v. Hodges*, No. 14-556, 576 US ____ at 6-7 (2015) (Roberts, C.J., dissenting) and 27-29 (Alito, J., dissenting), www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf.

79. US Department of Health and Human Services, “UPDATE: The Healthy Marriage and Responsible Fatherhood FOA FAQs Have Been Updated,” <https://hmrfa.acf.hhs.gov/articles/update-the-healthy-marriage-and-responsible-fatherhood-foa-faqs-have-been-updated>.

80. Transcript of Oral Argument at 38, *Obergefell v. Hodges*, 576 US ____ (2015) (No. 14-556).

81. Mark Oppenheimer, “Now’s the Time to End Tax Exemptions for Religious Institutions,” *Time*, June 28, 2015, <http://time.com/3940376/supreme-court-gay-marriage-church-tax-breaks/>.

82. “Church, Choice, and Charters: A New Wrinkle for Public Education,” *Harvard Law Review* 122 (2009): 1750.

83. *Ibid.*
84. María Luisa Cesar, “Carver Going the Charter Route,” *My San Antonio*, July 27, 2012.
85. For a listing of federal grants available to charter schools, see the Office of Innovation and Improvement of the Department of Education, “Charter Schools Program (CSP) Grant Competitions,” www2.ed.gov/about/offices/list/oii/csp/about-cs-competitions.html.
86. See New Schools Venture Fund, www.newschools.org/; and Charter School Growth Fund, <http://chartergrowthfund.org/>.
87. Andy Smarick, “Can Catholic Schools Be Saved?” *National Affairs*, Spring 2011, www.nationalaffairs.com/publications/detail/can-catholic-schools-be-saved.
88. Javier Hernandez, “Secular Education, Catholic Values,” *New York Times*, March 8, 2009.
89. Mother Theodore Catholic Academies, “Press Release: Indianapolis City-County Council Votes to Transform Two Catholic Schools into Mayor-Supported Charters,” April 8, 2010.
90. Andy Smarick, “Can Catholic Schools Be Saved?,” *National Affairs*, Spring 2011, www.nationalaffairs.com/publications/detail/can-catholic-schools-be-saved.
91. Andy Smarick, “Catholic Schools Become Charter Schools: Lessons from the Washington Experience,” www.setonpartners.org/Seton_DC_Case_Study_FINAL.pdf.
92. “Archdiocese Gets OK to Create Two New Charter Schools,” *Criterion Online Edition*, www.archindy.org/criterion/local/2010/04-16/charter.html.
93. Eric Weddle, “2 of Mayor’s Charter Schools Choose to Close,” *IndyStar*, August 22, 2014, www.indystar.com/story/news/education/2014/08/22/mayors-charter-schools-choose-close/14474913/.
94. *Abington v. Schempp* invalidated Bible reading and school prayer as a violation of the establishment clause. *Wallace v. Jaffree* invalidated the moment of silence statute. *Lee v. Weisman* invalidated prayer before public school graduation. *Edwards v. Aguillard* invalidated a Louisiana law mandating the teaching of “creation science” in public schools. *Abington v. Schempp*, 374 US 203 (1963); *Wallace v. Jaffree*, 472 US 38 (1985); *Lee v. Weisman*, 505 US 577 (1992); and *Edwards v. Aguillard*, 482 US 578 (1987).
95. Aaron Saiger, “Charter Schools, the Establishment Clause, and the Neo-Liberal Turn in Public Education,” *Cardozo Law Review* 34 (2013): 1180.
96. See National Alliance for Public Charter Schools, www.publiccharters.org.
97. In some states, private, nonprofit entities, including religious entities, can act as charter authorizers. See “The Importance of Multiple Charter Authorizers,” Center for Education Reform, December 2011, www.edreform.com/wp-content/uploads/2012/05/CERPrimerMultipleAuthorizersDec2011.pdf.
98. 536 US 639 (2002).
99. *Board of Education v. Allen*, 392 US 236 (1968); *Meek v. Pittenger*, 421 US 349 (1975); *Wolman v. Walter*, 433 US 229 (1977); *Agostini v. Felton*, 521 US 203 (1997) (overruling *Aguilar v. Felton*, 473 US 402 (1997)); and *Tilton v. Richardson*, 403 US 1672 (1971).
100. *Lemon v. Kurtzman* stated, “A school which operates to commingle religion with other instruction plainly cannot completely secularize its instruction. Parochial schools, in large measure, do not accept the assumption that secular subjects should be unrelated to religious teaching.” *Bowen v. Kendrick* observed that the court has held “parochial schools” to be “pervasively sectarian.” *Meek v. Pittenger* stated, “It would simply ignore reality to attempt to separate secular education functions from the predominantly religious role performed by many of Pennsylvania’s church-related elementary and secondary schools.” *Lemon v. Kurtzman*, 403 US 602, 636–37 (1971); *Bowen v. Kendrick*, 487 US 589, 621–22 (1988); and *Meek v. Pittenger*, 421 US 349, 363 (1975).
101. R.S. 17:3971-4001; and La. Rev. Stat. §§ 17:4011-25.
102. In 2013, the Louisiana Supreme Court ruled on state-constitutional grounds unrelated to religion that the funds distributed from the Minimum Foundation Program could not go to private schools. Danielle Dreilinger, “Louisiana Supreme Court Rules Voucher Funding Violates the State Constitution,” *New Orleans Times-Picayune*, May 7, 2013, www.nola.com/education/index.ssf/2013/05/breaking_louisiana_supreme_cou.html.
103. Scholarships are now funded from other sources of state funds. Dreilinger, “Louisiana Supreme Court”; and Julia O’Donoghue, “Over \$3.37 Million for Louisiana’s School Voucher Program Goes Unused,” *New Orleans Times-Picayune*, November 25, 2014.

104. Danielle Dreilinger, "Teachers Union Sues Louisiana to Defund Some Charter Schools," *New Orleans Times-Picayune*, September 24, 2014.
105. John Higgins, "State Supreme Court: Charter Schools Are Unconstitutional," *Seattle Times*, September 4, 2015.
106. *Daugherty v. Vanguard Charter School Academy*, 116 F. Supp. 2d 897 (W.D. Michigan 2000).
107. Sarah Lemagie, "State Orders Charter School to Correct Two Areas Tied to Islam," *Star Tribune*, May 28, 2008; and Sarah Lemagie, "ACLU Settles with School, Sponsor," *Star Tribune*, February 7, 2008.
108. Abby Goodnough, "Hebrew Charter School Spurs Dispute in Florida," *New York Times*, August 24, 2007.
109. "School Can Resume Lessons in Hebrew," *Associated Press*, September 12, 2007, www.nytimes.com/2007/09/12/us/12charter.html; and Goodnough, "Hebrew Charter School."

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