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Religious Consumers and Institutional Challenges to American Public Schools: Cases from Jewish Education

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Abstract

The paradigm of American K–12 education is shifting as the institution of local educational polities, each responsible for its own “common schools,” faces competition from programs of school choice. Although charter schools and related reforms are generally studied in terms of quality and equity, the rise of consumer sovereignty as an alternative to political sovereignty as an organizing principle for educational governance has much wider ramifications. Paradigms of choice have already begun dramatically to alter religious education and its relationship to public schooling. Moreover, because these paradigms rely upon consumer preferences and the aggregation of those preferences by markets, the shape of religious activity in state-subsidized schools will be determined increasingly by consumers and producers – parents and schools – rather than by political actors. Government is likely to find its ability to limit and guide religion/school interactions substantially, and increasingly, constrained. In making this argument, this paper draws primarily upon examples from a small but instructive religious sector in American K–12 education, that of Jewish education. It discusses the direct deployment of the charter-school form to provide Jewish education. It then assesses ways in which shifts in the public framing of education from one of politics to one of markets has transformed public school politics in school districts dominated by Orthodox Jews.

Keywords

school choice; charter schools; First Amendment; religion; religious schools; Jewish education; United States

I. Introduction

In the United States of America, two polities – states and school districts – primarily determine the extent, nature, and distribution of K–12 educational services. They also provide those services in government-run schools

and levy taxes in their support.¹ This institutional structure for educational politics has enjoyed broad acceptance in both elite and popular American thinking. Its longstanding dominance attests to the remarkable success of Progressive educational reformers in establishing their particular vision of schooling – the free, common, democratic public school – as American education’s “one best system.”²

By subordinating schools to political authority, Progressive education privileges voice. Options for exit are real but limited. Jurisdictional exit involves concomitant entrance into some other jurisdiction, one which also uses political structures to set its own school policies and to levy its own school taxes.³ Dissatisfied parents may also opt for private education.⁴ But opting out carries a hefty price tag: one loses one’s entitlement to free education but retains the duty of compulsory schooling.⁵

Progressive institutional structures in today’s United States, however, face a competing paradigm that is gaining in influence, one that elevates exit relative to voice. This paradigm assigns sovereignty not to the polity but to the parent – the individual consumer. It rejects the necessity of bundling government support of schooling with government provision of educational services. And it understands every parent, whether his child is educated in public school, private school, or at home, to be similarly situated. The parent, not the community, bears a duty to provide for his child’s education and enjoys a corresponding entitlement to certain educational benefits from the state. Each parent determines, based on his own preferences, how to discharge that duty and deploy those benefits.

¹ *E.g.*, Eugenia F. Toma, “Public Funding and Private Schooling Across Countries”, 39 *J.L. & Econ.* (1996), 121, 130. Over time, power has shifted from local school district to state. *See id.*; William G. Howell, Introduction to *Besieged: School Boards and the Future of Educational Politics* (2005), 1–5. Interventions by the federal government, by federal and state courts, and by non-state actors are growing in importance but have not yet displaced the basic local-state duopoly. *See Howell, supra*, at 6–9.

² David B. Tyack, *The One Best System: A History of American Urban Education* (1974).

³ *See* Aaron J. Saiger, “The School District Boundary Problem”, 42 *Urb. Lawyer* (2010), 495, 496.

⁴ *See Pierce v. Society of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925).

⁵ *See* Sarah Barringer Gordon, *The Spirit of the Law: Religious Voices and the Constitution in Modern America* (2010), 62 (in the 1930s, “Even opponents of aid for parochial schools acknowledged that ‘the Catholic[s] must pay an enormous bounty to protect [their] children from the secular influence of the public school.’”); Martha Minow, “Confronting the Seduction of Choice: Law, Education, and American Pluralism”, 120 *Yale L.J.* (2011), 814, 819–820.

Nowhere is this development better reflected than in the exploding American charter school sector. The basic principle of chartering is the empowerment of parents to *choose* to enroll a child in a charter school, based upon the parent's individual determination that the particular charter school is the best way to meet their specific child's needs.⁶ Chartering has proven itself an idea with legs. There were no charter schools in the United States in 1990; today there are well over four thousand.⁷

This paper focuses upon one of several important areas that will change significantly as the United States shifts from an educational politics anchored exclusively in polity toward one also based upon the free choice of subsidized consumers: the religious education of children. When states and localities are responsible both for determining the content of curricula and of school policy, and for providing those services directly, they are bound by the First Amendment requirement that state actors not engage in religious preference or practice. Families that desire religious education in a Progressive world, therefore, are understood and understand themselves to be ineligible for the public educational benefits provided by the community. Such families are sidelined from society's provision of education. They sideline themselves. Under the model of consumer sovereignty, by contrast, every family pursues its own preferences without mediation by the polity. Under such a model parents whose preferences include religious ones need not be regarded differently than anyone else. The Supreme Court of the United States has blessed this perspective as a matter of First Amendment law, holding that, should the state subsidize education on a religiously neutral basis, such subsidies can be directed by parents (although not by the state) to religious schools.⁸

This short paper argues that, as the American legal and general cultures increasingly understand education properly to be subject to consumer as well as political sovereignty, the status, reach, and nature of religious education will shift dramatically. No longer will religious schooling be a sideline to the public system, relegated to those who opt out. Those with religious preferences will increasingly expect that their preferences be treated on a par with private preferences of other kinds. Their insistence is likely to meet with at least partial success. Moreover, because alternatives to Progressive education emphasize consumer preferences and the aggregation of those preferences by markets, the shape of religious activity in

⁶ See *infra* Part II.

⁷ See *infra* note 55 and accompanying text.

⁸ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). See also *Zobrest v. Catalina Foothills School Dist.* 509 U.S. 1 (1993); *Mueller v. Allen*, 463 U.S. 388 (1983).

state-subsidized schools will be determined increasingly by consumers and producers – parents and schools – rather than by political actors. State agents are likely to find their ability to limit and guide the religion-school interaction noticeably and increasingly constrained.

In making this argument, this paper draws primarily upon examples from a small but instructive religious sector in American K–12 education, that of Jewish education. After a brief account of the Progressive *status quo* in education in Part II, the paper considers two types of challenges to its assumptions that have arisen in the American Jewish community. Part III analyzes efforts to use the charter school form to advance Jewish education. Part IV discusses religious Jewish sectarians in several school districts who captured political control of their districts while continuing to educate their own children privately. These efforts, although they involve political rather than market institutions, share with charters a reliance upon parents' primary self-understanding as sovereign consumers of educational goods rather than as citizens. Both developments gain their energy and legitimacy from the waning of Progressivism.

II. Progressive Schooling and Religious Education

Beginning in the 19th century and extending into the first decades of the 20th, American education underwent a spectacular “organizational revolution.”⁹ Progressive reformers, with extraordinary energy and success, displaced the “voluntary and incidental” community-based schools that had existed across the country in favor of consolidated, government-run, professionalized, and bureaucratized school systems.¹⁰ The Progressive revolution was wide, deep, and long-lasting.¹¹ Although the Progressive institutional model has changed over time in important ways – particularly by means of interventions by the federal government and by federal and state courts – basic tenets of Progressivism today remain standard features of the American public school.

⁹ Tyack, *supra* note 2, at 6–7, 16. In some states, Progressive dominance was achieved substantially earlier. See, e.g., *Ohio ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ.*, 857 N.E.2d 1148, 1157 ¶28 (Ohio 2006).

¹⁰ Tyack, *supra* note 2, at 6–7, 16.

¹¹ See George M. Thomas, Lisa R. Peck, and Channin G. De Haan, “Reforming Education, Transforming Religion, 1876–1931”, in C. Smith (ed.), *The Secular Revolution: Power, Interests, and Conflict in the Secularization of American Life* (2003), 355.

Among those features are:

- Public schools are government agencies. The agency is the local school district, and it is managed by an elected board.¹² The school district is also a taxing authority, and local taxes combined with state subventions together constitute the vast majority of the school budget.¹³ Federal expenditure on K–12 education was long minimal and has never exceeded ten percent of all educational expenditures.¹⁴
- Political control over education is mitigated by a policy of deference to professional judgment. It is proper for elected school boards to delegate much of their authority, particularly with respect to curriculum and other pedagogical matters, to a professionalized school superintendent, usually trained by a Progressive school of education.¹⁵ Formally, however, the superintendent remains an agent of the board.
- Public schools charge no tuition and are open to all children resident in the locality. Many states understand these policies to be mandated by constitutional provisions drafted in the heyday of Progressive education that require public schools to be “free” and “common.”¹⁶ A “common” school must serve all children, regardless of religion and economic class, and educate them in a common civic and political culture.
- The public school has an explicit political agenda: educate children for citizenship. Therefore it is to create a community in school that is not only governed by the polity of its district but that models democratic polity for its students.¹⁷

By the time the Supreme Court began to use a modern framework to analyze cases involving religion and schooling,¹⁸ the wider American culture,

¹² See Michael B. Berkman and Eric Plutzer, *Ten Thousand Democracies: Politics and Public Opinion in America's School Districts* (2005), 18.

¹³ *Id.* at 25–26.

¹⁴ *Id.* at 17.

¹⁵ This aspect of Progressive thinking is associated particularly with Ellwood Patterson Cubberley. See Kathryn A. McDermott, *Controlling Public Education: Localism Versus Equity* (1999), 15.

¹⁶ See Aaron J. Saiger, “School Choice and States’ Duty to Support ‘Public’ Schools”, 48 *Boston College L. Rev.* (2007), 909, 930–931 & n.130 (providing a taxonomy of state constitutional provisions).

¹⁷ See Henry M. Levin and Clive R. Belfield, “The Marketplace in Education”, 27 *Review of Research in Education* (2004), 183; Don Dippo, “From Refuge to Polis: Shifting the Rationale for Religiosity in Schools”, 24 *Educ. Pol’y* (2010), 205, 208–209.

¹⁸ See, e.g., *Zorach v. Clauson*, 343 U.S. 306 (1952); *Everson v. Board of Education*, 330 U.S. 1 (1947).

including its schools and courts, had come to understand public schools as defined by these Progressive principles. There was no other model. Progressive education had won its battle to be considered, in Tyack's famous phrase, the "one best system."¹⁹

It was the intersection of the "one best system" and the Court's interpretation of the First Amendment that yielded the now-familiar principles that public schooling in the United States must be nearly entirely secular, free of religious teaching and practice. Many Progressives themselves had advocated what they thought of as secularism in their common schools, rejecting earlier American understandings of education as an inherently religious enterprise.²⁰ At the same time, few Progressives understood secularism to require a rigorous irreligiosity, as we mostly do today. Progressivism strenuously opposed schools taking a position in the "sectarian," inter-necine doctrinal and political debates of Protestantism.²¹ But anti-sectarianism did not imply a rejection of the nondenominational Protestantism typical of American schools into the second half of the 20th century, which some Progressives even supported.²²

The Court's insistence upon a more thorough secularism, however, was based directly upon other tenets of the Progressive revolution: that schools were to be publicly governed, funded, and staffed. For example, *Engel v. Vitale*, the landmark case holding school prayer unconstitutional, turns in its entirety upon public schools being government agencies whose program is established and implemented by government employees. Religious exercises, the Court argues in *Engel*, cannot be conducted by a "civil magistrate"²³ acting in an "official capacity."²⁴ It is the government, not the school *per se*, that "is without power to prescribe by law any particular form of prayer."²⁵ Similarly, the Court's decision extending *Engel* to bar public recitation of Bible verses in school, *Abington Township v. Schempp*, emphasized that such readings were "held in the school buildings under the supervision and with the participation of teachers employed in those

¹⁹ See Tyack, *supra* note 2.

²⁰ See Kent Greenawalt, *Does God Belong in Public Schools?* (2005), 16; Hugh Hecllo, *Christianity and American Democracy* (2007), 86–89.

²¹ See Lloyd P. Joregenson, *The State and the Non-Public School, 1825-1925* (1987), 20–23; Thomas, Peck, and De Haan, *supra* note 11, at 359–360, 378–379.

²² See Greenawalt, *supra* note 20, at 16; James C. Carper and Thomas C. Hunt, *The Dissenting Tradition in American Education* (2007), 122; Thomas, Peck, and De Haan, *supra* note 11, at 381–382.

²³ *Engel v. Vitale*, 370 U.S. 421, 432 (1962).

²⁴ *Id.* at 422.

²⁵ *Id.* at 430.

schools.”²⁶ The Court reiterated that “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy [and] to place them beyond the reach of majorities and officials... One’s right to... freedom of worship... and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”²⁷

When cases like *Engel* and *Schempp* were decided, it was obvious to everyone that the Court’s reference to a “teache[r] employed in th[e] schools”²⁸ signified a public employee. The cases were not intended to apply, and nobody understood them to apply, to private schools. Today, however, “public” schools are established under neoliberal quasi-markets as well as by centralized bureaucratic control. Religious practices in such schools are not “submitted to a vote;”²⁹ instead they emerge from the equilibrium of a market. The categories of “public” and “private” schooling, too self-evident to the 1960s Court even to need defining,³⁰ are not straightforward to apply to the schools being created amidst the educational revolution of today.³¹

III. Charter Schools and Religious Education

A. Sources and characteristics of the charter school form

Today, the most prominent challenge to the Progressive “one best system” is the argument that schooling should be provided through market rather than political institutions. Market-oriented advocacy has not replaced the Progressive common school with schools of choice to the extent that

²⁶ 374 U.S. 203, 223 (1963).

²⁷ *Id.* at 226 (citing *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943)).

²⁸ *Schempp*, 374 U.S. at 223.

²⁹ *Id.* at 226.

³⁰ See William J. Reese, *History, Education, and the Schools* (2007), 102 (“By the late nineteenth century, competing systems of schools had thus emerged – one labeled public, all others private – and these distinctions long endured.”). The Progressive revolution itself upended understandings of “public” and “private” that had been dominant in earlier periods. See Carl Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780–1860* (1983), 13 (until the Progressive revolution “the terms ‘public’ and ‘private’ did not have their present connotations, and most schools did not fit neatly into either of our modern categories”).

³¹ See *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Educ.*, 857 N.E.2d 1148 ¶27 (2006). (“Throughout time, new educational movements have faced opponents and detractors. But just as the common-school movement of the 1800s increasingly gained supporters throughout the United States, so too has the charter-school movement.”).

neoliberalism itself has become a new “one best system,” nor is it likely to do so. But neither are market institutions a flash in the pan. Schools of choice, “one of the most highly visible tools aimed at changing the very governance of education,”³² have grown explosively over the past decade, and continue to grow robustly. If their impact can be sustained, they will represent no less an educational revolution than the reforms instituted by the Progressives a century ago.³³ Already, they have shattered the organizational, ideological, and cultural monopoly that Progressive education once held in American educational culture.³⁴

As noted above, the organizing principle of the Progressive approach is citizenship: schools are part of the government, their authority rests upon local sovereignty, and they prepare students to become citizens themselves. The organizing institution of neoliberalism is the market – a peculiar, subsidized sort of market, but a market nonetheless.³⁵ Its actors exercise consumer, not political, sovereignty.³⁶ Instead of the community making collective choices about the kind of education it offers its children, each family chooses schools for their children based upon its individual preferences in a marketplace of schools that compete with one another for students. As in any other competitive market, schools that meet consumer demands are intended to flourish; those that fail are meant to wither away.³⁷

The recent history of school choice in America has been described elsewhere, and I give only the nutshell here. Growing disenchantment with educational outcomes in Progressive schools catalyzed arguments that market-based schooling enjoys structural comparative advantages over state-provided schooling. Schools forced to be responsive to a marketplace would have no choice but to generate academic achievement. The bureaucratic, state-run school, by contrast, faces no consequences for failure and therefore lacks incentives to succeed.³⁸

³² Mark Schneider and Jack Buckley, “Charter Schools as a Tool to Reform Local Schools by Transforming Governance”, in R.C. Feiock (ed.), *Metropolitan Governance: Conflict, Competition, and Cooperation* (2004), 183, 184.

³³ Cf. *Ohio Congress*, 857 N.E.2d at 1157 ¶127 (drawing an analogy between Progressive educational reform and the charter school movement).

³⁴ See Minow, *supra* note 5, at 843.

³⁵ See Saiger, *supra* note 16, at 952–953.

³⁶ See Schneider and Buckley, *supra* note 32, at 187–189 (describing charters as a form of polycentric rather than monocentric governance).

³⁷ See Jack Buckley and Mark Schneider, *Charter Schools: Hope or Hype?* (2007), 7.

³⁸ See Jeffrey R. Henig, *Spin Cycle: How Research is Used in Policy Debates: The Case of Charter Schools* (2008), 38, 40–42, 46 (describing these arguments and noting that charter schools, unlike vouchers, were also initially motivated by a desire to “give teachers the space and resources to use their full range of skills and imagination to educate”).

These arguments first gave rise to a movement for school vouchers, *i.e.*, government subsidies issued to parents that could be directed either to private or public schools, at the parents' discretion. Because voucher programs were potentially very expensive, early voucher experiments were restricted to poor children, and individual voucher amounts were low.³⁹ Concomitantly, because the existing pool of private schools prepared to accept relatively small subsidies to educate poor children was largely religious, voucher experiments perforce involved a lot of religious, especially Catholic, schools.⁴⁰ These schools therefore proceeded under a cloud of possible unconstitutionality.⁴¹ In 2002, however, in the pathmarking case of *Zelman v. Simmons-Harris*, the Supreme Court upheld as constitutional a voucher program in the city of Cleveland, Ohio. The Court based its conclusion upon the observation that any government money arriving via vouchers in the hands of a parochial school does so only because of the "genuine and independent choice" of parents among schools rather than because of state decisions.⁴²

Voucher programs continue to be of legal and political interest.⁴³ In the aftermath of *Zelman*, conventional wisdom was that the reform had flamed out: vouchers were enacted in only a handful of jurisdictions, and even repealed in some of those.⁴⁴ More recently, vouchers have found some new life in several statehouses and in the United States Congress.⁴⁵ Political popularity aside, vouchers remain important not only because they enjoy the specific sanction of the Supreme Court, but because they are a fairly pure market-based reform. Although government subsidy makes vouchers less than purely libertarian,⁴⁶ they are close enough to be attractive to

³⁹ *Zelman v. Simmons-Harris*, 536 U.S. 639, 646 (2002).

⁴⁰ *Id.* at 647.

⁴¹ *See id.* at 656 n.4 ("a principal barrier to entry of new private schools is the uncertainty caused by protracted litigation which has plagued the program since its inception").

⁴² *Id.* at 652.

⁴³ *See, e.g., Arizona Christian School Tuition Organization v. Winn*, 131 S.Ct. 1436 (2011).

⁴⁴ *See* Henig, *supra* note 38, at 42–44.

⁴⁵ *See* Mary Ann Zehr, "Capacity Issue Looms for Vouchers", *Educ. Wk.* (June 15, 2011), at 1 (reporting new, expanded, or potential voucher programs in the District of Columbia, Indiana, Wisconsin, Florida, and Pennsylvania); Sean Cavanagh, "GOP Lawmakers Press Voucher Expansion in States", *Educ. Wk.* (Apr. 27, 2011), at 22; Michelle D. Anderson, "Budget Compromise Puts Vouchers Back on Track for Students in DC", *Educ. Wk.* (Apr. 27, 2011), at 25.

⁴⁶ *See, e.g.,* Donald E. Erickson, "A Libertarian Perspective on Schooling", in W.L. Boyd and J.G. Cibulka (eds.), *Private Schools and Public Policy: International Perspectives* (1989), 21, 21–22.

a Milton Friedman.⁴⁷ Advocacy for vouchers helped to normalize the market-oriented partial privatization of schooling and make it seem less alarming, in both the legal and general cultures. This intellectual and ideological groundwork paved the way for the rise of the charter school, the most ubiquitous and important educational reform of the contemporary American scene.

Charters, like vouchers, offer potential to realize the neoliberal expectation that competition and entrepreneurialism can produce better educational results than hierarchy, monopoly, and decision making through politics.⁴⁸ In charters' ideal form (state regulations vary), any group may organize a charter school and solicit students.⁴⁹ Charters are therefore frequently described as "publicly funded but privately run" or "public but largely independent."⁵⁰ Families may then choose among traditional public school(s) for which they are eligible and available charter schools. By enrolling in a charter, a student redirects from her local public school to the charter some substantial portion of the government subsidy that the former school would otherwise have received.

Many states require charters to demonstrate adequate academic achievement by their students. In return, charters are exempt from much but not all the regulatory apparatus that constrains traditional public schools.⁵¹ They are regulated much less invasively than traditional public schools with respect to such matters as curriculum, organization, and discipline.⁵² They are often exempted from the collective bargaining agreements reached by their local school districts with teachers and other staff.⁵³ Charters are also generally prohibited from discriminating among students in admission or charging tuition; oversubscribed charters are supposed to admit students by lottery. Within these strictures, charters compete for

⁴⁷ Milton Friedman, "The Role of Government in Education", in R.A. Solo (ed.), *Economics and the Public Interest* (1955), 123.

⁴⁸ There is a substantial literature regarding whether this expectation has been borne out. For overviews, see generally Henig, *supra* note 38; J.R. Betts and P.T. Hill (eds.), *Taking Measure of Charter Schools* (2010).

⁴⁹ See Chester E. Finn, Bruno V. Manno and Gregg Vanourek, *Charter Schools in Action* (2001), 15.

⁵⁰ Associated Press, "Foundations Help Charter Network Secure Bonds", *Educ. Wk.* (May 12, 2010), at 4.

⁵¹ See Mark Schneider, Paul Teske, and Melissa Marschall, *Choosing Schools: Consumer Choice and the Quality of American Schools* (2002), 26.

⁵² See R. Kenneth Godwin and Frank R. Kemerer, *School Choice Tradeoffs: Liberty, Equity, and Diversity* (2010), 6.

⁵³ See *id.*

students with other charters and with other types of schools. If students enroll, a charter thrives. Otherwise it dies.⁵⁴

The charter sector has exploded. In 2008–09, 1.4 million children were enrolled in 4,700 charter schools, making charters five percent of all public schools.⁵⁵ By comparison, 500,000 children were enrolled in 2,000 charters in 2000, and there were no charter schools in 1990.⁵⁶ In New Orleans, almost all government-funded schools are now charter schools.⁵⁷ The Obama Administration has repeatedly expressed strong support for further expansion of charters.⁵⁸ The possibility that chartering is a reform that will “fizzle out” seems to be receding,⁵⁹ although its rate of growth is slowing.⁶⁰

Charters and other market reforms are touted by some as the salvation of an American educational system in crisis. Others decry them as folly, as acquiescing in an impoverished or incoherent educational teleology, and as exacerbating inequity. The debates over these claims are extremely important, but this research does not join them. Instead, the present paper takes the position that charters and other neoliberal reforms are substantially entrenched. They may not displace Progressivism, but they have already displaced the Progressive ideological monopoly in law, on the ground, and in the culture. Given that a neoliberal alternative to Progressive education has emerged, this paper and the larger project of which it is a part ask how this will affect various aspects of American governance in education. In particular, how will it affect our understanding of the role of religion in state-funded schools?

B. *The religious-culture charter school*

Chartering allows groups with particularistic and idiosyncratic agendas to aggregate themselves into schools and apply for state funds. It invites niche

⁵⁴ See Schneider, Teske, and Marschall, *supra* note 51, at 26; Finn, Manno, and Vanourek, *supra* note 49, at 15–16.

⁵⁵ Susan Aud et al., *The Condition of Education 2011* at 24, 84 (Nat'l Center for Educ. Stats. 2011-033).

⁵⁶ Joseph Murphy and Catherine Dunn Shiffman, *Understanding and Assessing the Charter School Movement* (2002), 28–29.

⁵⁷ See Robert A. Garda Jr., “The Politics of Education Reform: Lessons from New Orleans”, 40 *J. L. & Educ.* (2011), 57.

⁵⁸ See Erik K. Robelen, “State Picture on Charter Caps Still Mixed”, *Educ. Wk.* (12 Aug. 2009), at 19.

⁵⁹ Stephen D. Sugarman and Erlei M. Kuboyama, “Approving Charter Schools: The Gate-Keeper Function”, 53 *Admin. L. Rev.* (2001), 869, 871 (noting, but not predicting or endorsing, this possibility).

⁶⁰ See Buckley and Schneider, *supra* note 37, at 3.

marketing: charter schools, like magnet schools before them,⁶¹ often have themes.⁶² Some target specific areas of inquiry, from civics to engineering to marine biology. Some focus on particular foreign languages. Others target groups defined by criteria other than language.⁶³ It is not surprising, therefore, that consumers and providers of religious education imagine charter schools organized around religious themes. For those who take the position that religion is but one more kind of interest, just another way of affiliating among the plethora of affiliations that compete in the consociational marketplace, the religious charter is not a big leap.⁶⁴

Legally, the legitimacy of such an approach is heightened by the unquestioned neutrality of the charter concept toward religion. Neutrality characterizes both the etiology and the administration of charters. Unlike many other programs that direct public resources toward religious education, such as tuition tax credits or private-school vouchers, there is no plausible suggestion that charter laws were motivated by any impulse to promote religion or religious education. Chartering has been conceived, justified, debated, and adopted as a secular reform with secular goals. Moreover, the consociational characteristics of a charter system emerge from the bottom up, not from the top down. Were a charter to be granted to a religious charter school, it would be because one applied, not because it was a state actor. To be sure, there is state action involved in granting such a charter; but that action is accomplished pursuant to existing statutes and regimes of bureaucratic discretion that are religiously neutral.

The states have chosen, however, not to treat religion as they do other categories of interests or associations. Instead, state charter laws ubiquitously require charters to be secular, either through explicit requirements that they be “nonsectarian” or “nonreligious,”⁶⁵ and/or implicitly by

⁶¹ See Henig, *supra* note 38, at 35–36.

⁶² See Bruce Fuller, “Growing Charter Schools, Decentering the State”, in B. Fuller (ed.), *Inside Charter Schools: The Paradox of Radical Decentralization* (2000), 1, 7.

⁶³ A close parallel to religiously oriented charters is offered by charters with ethnic themes. Although open to all, these schools typically attract disproportionately members of the groups whose culture is emphasized. For example, there are Afrocentric charters and Native-American-centric charters. Martha Minow, *In Brown’s Wake: Legacies of America’s Educational Landmark* (2010), 103, 128; Linda Jacobson, “Charters with Native Hawaiian Focus Get Aid Infusion”, *Educ. Wk.* (Oct. 26, 2005), at 26.

⁶⁴ *Cf.* Minow, *supra* note 63, at 86 (decisions by Supreme Court on the border of free speech and free exercise also promote this idea).

⁶⁵ See, e.g., Ariz. Rev. Stat. § 15-183(E)(2); Calif. Educ. Code § 47605[d]; 10 Conn. Gen. Stat. § 66aa(1); 14 Del. Code § 506(a)(2); Indiana Code § 20-24-1-4; Iowa Code § 256F.4(2)(b);

designating charters as “public schools.”⁶⁶ Federal law encourages this stance by barring federal funding for sectarian charters.⁶⁷ It is far from obvious that states *must* make this choice as a matter of federal constitutional law, given *Zelman's* approval of public subsidies to parents whose school choices may include overtly religious private schools. Nevertheless, there is a strong argument that states *may* elect to exclude religious charters. In 2004, the Supreme Court upheld a program of graduate scholarships, run by the State of Washington, that provided state monies to graduate students in their chosen fields, but that excluded students choosing to pursue degrees in theology or other devotional topics.⁶⁸ The Court held that the “play” between the Establishment and Free Exercise Clauses⁶⁹ permitted, though it did not require, states so to exclude religious education from otherwise neutral programs of subsidy. State requirements that charters be secular are, at least on their face, similar. They subsidize individual choices but restrict those choices to the secular realm.

There are several potential motives for states to exclude religious charters. They may think (potentially erroneously) that the First Amendment requires them to do so, or they may want to forestall litigation on the question. States whose constitutions include Blaine Amendments or similar provisions,⁷⁰ which forbid the allocation of state monies to religious actors, may have determined that the exclusion was required by their own constitutions.

There are also fiscal arguments for insisting that charter schools be secular. Eighty percent of children enrolled in private schools in the United States study in religious schools.⁷¹ Currently, these students’ parents pay taxes but forgo the expensive services that the state offers to its children. If religious schools could easily recast themselves as charters and thereby gain access to public support, the drain on education budgets would be both substantial and sudden.

Minn. Stat. Ann. § 124D.10 Subd. 8(d); Utah Code Ann. § 53A-1a-507(1); S.C. Code Ann. § 59-40-40(1); Wis. Stat. Ann. § 118.40 (4)(a)(2).

⁶⁶ See *infra* notes 72–73.

⁶⁷ See Benjamin Siracusa Hillman “Is There a Place for Religious Charter Schools?”, 118 *Yale L.J.* (2008), 554, 561 & n.27.

⁶⁸ *Locke v. Davey*, 540 U.S. 712 (2004).

⁶⁹ *Id.* at 718.

⁷⁰ See Mark Edward DeForrest, “An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns”, 26 *Harv. J.L. & Pub. Pol’y* (2003), 551, 556–557.

⁷¹ See <http://www.capenet.org/facts.html> (website of the Council for American Private Education, citing reports from National Center for Education Statistics).

States also have ideological and political reasons to exclude religious education from public support. Some may support separationism in general; others may wish not to fund the educational practices of particular minority sects. More subtle political factors also promote religious exclusion. Although charter schools are undeniably public/private hybrids – privately run, but publicly funded – advocates of charters often insist that charter schools are by definition public schools.⁷² This claim, pressed by charter advocates, has been incorporated into the chartering statutes of many states,⁷³ largely to generate political support for chartering. The centrality of “public education” remains a potent value in American politics, and charters defined as “public” are consistent with that value. The arguments that charters divert funds from public education – which they self-evidently do if by “public education” one means only the traditional,

⁷² A pro-charter interest group, for example, has named itself the “National Alliance for Public Charter Schools.” See <http://www.publiccharters.org>. See also Martha Minow, “We’re All for Equality in U.S. School Reforms: But What Does it Mean?”, in M. Minow, R.A. Shweder, and H. Markus (eds.), *Just Schools: Pursuing Equality in Societies of Difference* (2008), 21, 40 (recites state rules that charters be nonsectarian, “open and free for all students”; then says “Although often exempt from systemwide rules governing textbook adoptions and even unionization, charter schools operate as public schools. They must also be academically and fiscally accountable to the public school system as well as to the parents who choose to send their children there.”); Vicki L. Phillips, “It’s Time for Public Schools and Public Charters to Work Together”, *Educ. Wk.* (Jan. 12, 2011), at 29 (Gates Foundation official arguing that we should attack “one of the most persistent divides in public education and accelerate progress for all our students: public charter schools v. traditional public schools.”).

⁷³ See, e.g., Ariz. Rev. Stat. § 15-181(A) (“Charter schools are public schools that serve as alternatives to traditional public schools”); Official Code Ga. Ann. § 20-2-2082 (“A commission charter school shall exist as a public school within the state as a component of the delivery of public education”); Colo. Rev. Stat. § 22-30-5-102(3) (“In authorizing charter schools, it is the intent of the general assembly... to advance a renewed commitment by the state of Colorado to the mission, goals, and diversity of public education”); 10 Conn. Gen. Stat. § 66aa(1) (“‘Charter school’ means a public, nonsectarian school”); 14 Del. Code § 501 (charters are “independent public schools”); Fla. Stats. § 1002.33(1) (“Charter schools shall be part of the state’s program of public education”); 52 Idaho Code § 33-5202 (“public charter schools... [o]perate independently from the existing traditional school district but within the existing public school system”); Indiana Code § 20-24-1-4 (“‘Charter school’ means a public elementary school or secondary school”); Iowa Code § 256F.1(1) (“Charter schools... shall be part of the state’s program of public education”); 105 Ill. Comp. Stats. § 5/27A-2 (charters are a species of “flexible and innovative techniques and programs... within the public school system”); Kan. Stats. § 72-1903(a) (charters “an alternative means within the public school system”); Md. Code Educ. § 9-101(b) (charters “an alternative means within the public school system”); New York State Charter Schools Act of 1998 § 2853(1)(b-1)(c) (“A charter school shall be deemed an independent and autonomous public school”). *But see* New York State Charter Schools Act of 1998 § 2853(4) (enumerating contexts in which charter schools are deemed to be nonpublic schools).

district-run schools – therefore loses political, if not analytic, force when charters are branded as “public.” Insisting that charters are public schools helps distinguish them from politically unpopular voucher programs. Similarly, it is hard to imagine the Obama Administration endorsing the charter movement so enthusiastically without being able to claim that charter schools are public schools. But one consequence of charters being “public” schools is that they must be secular, because part of the pervasive understanding of public schools, born under the “one best system,” is that they are necessarily secular.

Therefore, although change in the medium term is possible, for the near term it appears that the ban on religious charter schools is well entrenched.

This does not end the matter, however. The bottom-up nature of chartering still leaves a great deal of room for religiously-inflected entrepreneurs to deploy the form to their advantage. Moreover, the extent to which applicant schools tread near the limits of the rule that charters must be secular depends not on bureaucratic decisions but on decisions by private market actors.

One straightforward and important tactic available to such actors is to organize a school around the “secular” or “cultural” aspects of a religious community, while eschewing explicitly religious study and the overt performance of religious rites.⁷⁴ This tactic has been especially attractive, in the United States, to Jews and to Muslims, who are small religious and cultural minorities and for whom the transmission of distinctive cultures, in both their secular and religious dimensions, is part of the mission of religious education. Already there are several such charter schools operating in more than half a dozen states.⁷⁵

Jewish charter schools, generally characterized as “Hebrew-language” charter schools, take a range of approaches to the requirement that they be secular. Unlike classic Jewish day schools and *yeshivot* (the Orthodox version of such schools), all eschew religious instruction and sponsor no

⁷⁴ See Lawrence D. Weinberg, *Religious Charter Schools: Legalities and Practicalities* (2007), xx–xxi.

⁷⁵ See Preston Green III, “Charter Schools and Religious Institutions: A Match Made in Heaven?”, 158 *West’s Ed. Law. Rep.* (2001), 1; Note, “Church, Choice, and Charters: A New Wrinkle for Public Education?”, 122 *Harv. L. Rev.* (2009), 1750; Hillman, *supra* note 67. There are also “Christian” charters, in the sense that their origin and program reflect continuing roots in Christian religious education. See, e.g., Christopher O’Donnell, “Palmetto Christian to Become Public School”, *Herald-Tribune* (Sarasota, Fla.) (Nov. 2, 2009); Jennifer Smith Richards, “Charter’s Ties to Christian School Draw State Scrutiny”, *Columbus Dispatch* (Nov. 8, 2010); J.C. Reindl, “Knight Academy Charter School Schedule to Open in West Toledo”, *Toledo Blade* (July 11, 2008).

prayers. But they do many other things that religious Jewish private schools routinely do. Most notably, they teach the Hebrew language.⁷⁶ The schools also teach, to a greater or lesser degree, “about” Judaism and its “religious culture.” They may display Jewish symbols that straddle the boundary between culture and religion. They may mark and/or close on Jewish holidays. They may observe Jewish dietary laws in their cafeterias. They may accommodate, without sponsoring, student prayer and religious study groups. And, by creating an academic program of particular interest to Jews, some create, to a greater or lesser extent, a social and cultural setting in the school that is visibly Jewish, though not monolithically so.⁷⁷

In this description, the phrases “they may” and “some” are ubiquitous. Schools’ efforts to approach but not cross the line between secular and religious education are marked by a series of somewhat arbitrary, and not invariably necessary, compromises. Each decision is driven by a panoply of factors, including the religious commitments of the schools and parents, educational preferences, understanding of market conditions, and expectations regarding the “considerable criticism and extensive monitoring” that have accompanied their founding.⁷⁸ A law student who interviewed the founders of the Ben Gamla network of Hebrew charter schools in Florida, for example, reports that their flagship school purposely remains open on Jewish holidays, even as it maintains a kosher cafeteria; it “teaches about Jewish culture and history, but... has scrubbed the curriculum of specifically religious content.”⁷⁹ Other Hebrew charters have made these compromises differently. Some do not require the study of Hebrew, offering it only as an elective.⁸⁰ Others place a relatively greater emphasis upon instruction in Jewish culture and tradition.

There is no doubt that these Hebrew charter schools are, in the economic sense, substitutes for private religious schools. They offer consumers a different set of trade-offs across educational goods than other arrangements for religious education do. The two basic differences are that they eschew religious instruction and do not charge tuition. There are other tradeoffs as well. The charters do not require a commitment from children beyond the ordinary public school day, for example. They are more integrated socially and religiously than private Jewish schools. They offer a different

⁷⁶ See Julie Wiener, 2011. “L.A. Charter Tests Genre”, (*N.Y.*) *Jewish Wk.* (May 13, 2011), at 1.

⁷⁷ See Minow, *supra* note 63, at 46; Hillman, *supra* note 67, at 569.

⁷⁸ Hillman, *supra* note 67, at 569.

⁷⁹ *Id.*

⁸⁰ See Wiener, *supra* note 76.

menu of secular curricular and co-curricular programs from their private counterparts.

Whether this makes Hebrew charter schools desirable or inadequate substitutes for privately provided Jewish education depends upon where you sit. There can be no doubt that “to the extent that faith-based charter schools seek to teach about religion in a manner similar to what transpires in religiously affiliated non-public schools... they will be prohibited from doing so.”⁸¹ Hebrew charters are but partial substitutes for traditional day schools. But the choice among partial substitutes rests with each consumer. The fractured ideologies, theologies, and sociologies of contemporary American Judaism ensure that those choices will vary widely.

Absent formal sociological studies of school choice in the Jewish community, as an informal matter it nevertheless seems possible to identify two primary categories of consumers.⁸² One consists of highly affiliated families, primarily Orthodox, for whom rigorous Jewish education is a strong desideratum. In this group, private education in *yeshiva* day schools is the strong norm,⁸³ and group members typically undertake considerable sacrifice and expense to procure it. For religious families considering Hebrew charters as a potential substitute for *yeshiva* education, the absence of religion in the charters is a strong negative. But it is offset by relief from what can be a crushing tuition burden.⁸⁴ In the Orthodox world, with its fairly large families, the need to pay five-figure *yeshiva* tuitions for multiple children has become an overwhelming problem, a source of great concern among community leaders and deep angst amongst its laity.⁸⁵ In the wake of recent stresses in the U.S. economy, these concerns are

⁸¹ Charles J. Russo and Gerald M. Cattaro, “Faith-Based Charter Schools: An Idea Whose Time is Unlikely to Come”, 36 *Religion & Educ.* (2009), 72, 86.

⁸² A similarly *ad hoc* characterization appears in Carmel U. Chiswick, *Economics of American Judaism* (2008), 110.

⁸³ See Julie Wiener, “Teaneck Parents Eyeing Public (School) Option”, (*N.Y.*) *Jewish Wk.* (March 22, 2011) (Orthodox parents sending children to public school “unthinkable, almost taboo”; parents considering such a choice “agreed to speak to the Jewish Week only if their real names were not printed”).

⁸⁴ See Chiswick, *supra* note 82, at 114.

⁸⁵ The Internet is a favorite venue for complaints. A blogger made his name by describing a “\$200K chump,” unable to afford a \$60,000 *yeshiva* bill for four children in Bergen County notwithstanding his six-figure salary. See “The Finances of a Hypothetical \$200K Chump”, *Bergen County Yeshiva Tuition Blog*, June 10, 2010, available at <http://200kchump.blogspot.com/2010/06/finances-of-hypothetical-200k-chump.html>, (visited July 27, 2011). The quantity and emotionalism of comments on this topic in this and similar cybvenues is remarkable.

rising.⁸⁶ A recent headline in a local Jewish paper – “Tuition or Mortgage: Choosing Public School over Homelessness” – simultaneously captures the extent of the tuition burden and the strength of the *yeshiva* norm.⁸⁷ At this writing, the pressing and growing need for tuition relief among the traditionally observant continues for most but not all to be outweighed by the fact that, for that community, the religious dimension of Jewish education is its *raison d’être*.⁸⁸

A second market sector consists of families for whom Hebrew language charters present primarily an alternative to secular schools. For some, but by no means all, such families, were it not for the Hebrew charter, they would privately procure supplemental, after-school religious education. For this group, relative costs loom less large and choices are shaped primarily by non-economic preferences. It is almost certain that for some the choice is driven entirely by factors having to do with the non-religious dimensions of the programs – the quality of the education in traditional secular subjects, time in the classroom, the feel of the school – without regard to its Judaism or Hebraicism. Such parents are similar to those uninterested in Catholicism who nevertheless choose Catholic schools,⁸⁹ or to parents who report to researchers that proximity to their house is the most important factor in making a school choice.⁹⁰

Armchair sociologists familiar with the American Jewish community will, I expect, acknowledge the existence of these two different and identifiable groups, but resist the dichotomy presented as a fairly crude generalization. They will be right to do so. For every tradeoff that Hebrew charters present, and within every stratum of religious observance and cultural affiliation, there will be Jewish families with exactly opposite views of what constitutes a cost and a benefit. Many Jewish parents, some of them Orthodox, ascribe positive political valence to multiculturalism, to secular public schooling, and to the classic institutional forms of public education.

⁸⁶ See Jack Wertheimer, “The High Cost of Jewish Living”, *Commentary* (March 2010), 17, 17–18.

⁸⁷ Mayer Fertig, “Tuition or Mortgage: Choosing Public School over Homelessness”, *Jewish Star* (Aug. 21, 2009), available at <http://thejewishstar.wordpress.com/2009/08/18/tuition-or-mortgage-choosing-public-school-over-homelessness>.

⁸⁸ See Wertheimer, *supra* note 86, at 19.

⁸⁹ *Zelman v. Simmons-Harris*, 536 U.S. 639, 704 (2002) (Souter, J., dissenting) (“The families made it clear that they had not chosen the schools because they wished their children to be proselytized in a religion not their own, or in any religion, but because of educational opportunity.”).

⁹⁰ See *id.* at 704 & n.12 (Souter, J., dissenting); Saiger, *supra* note 16, at 955 & nn.281–282 (reviewing literature).

These parents, even as they may desire Hebrew education for their children, will experience some aspects of the synthesis of Hebrew chartering and public education as a benefit, and the simultaneous challenges that Hebrew chartering poses to classic public-school values as a cost. Similarly, many parents would prefer to get Hebrew education for free from the state, rather than pay for it; but some, even as they avail themselves of expensive private schooling, might avoid Hebrew charters because they believe that publicly funded schools should be secular and/or because they identify charters in general or Hebrew charters in particular as “public schools.”

Consider also the fact that the student populations of Hebrew charters are likely to be more heavily Jewish than ordinary secular schools. Again, there will be parents choosing between those two types of schools who view social stratification as a cost, and others who view it as a benefit. Similarly, weight will be assigned to heterogeneity by those choosing between a Hebrew charter and a *yeshiva*. So too will Jews disagree in their normative assessments of the extent to which charters emphasize “religious culture.” A paradigmatic example is a population of secular expatriate Israelis in America that has enrolled its children in Jewish day schools and grudgingly tolerated their rabbinic leadership, religious cast, and high tuitions in order to train their children in Jewish culture, Israeli culture, and Hebrew language. For these parents, who would have tended toward secular schools (the “*mamlacht*” system) had they remained in Israel, the religious aspects of American day school education are costs, and the willingness of Hebrew-language charters to dispense with them are attractive. Such examples can be easily multiplied.

We know that net, Hebrew charters do attract students who had been previously enrolled or who would otherwise have enrolled in Jewish day schools.⁹¹ The introduction of an attractive substitute will have substantial effects on an existing market.⁹² As businesses, day schools, *yeshivot*, and for that matter supplementary Hebrew schools must worry about their marginal, not their average, consumer.⁹³ Thus, for example, the potential

⁹¹ See Hillman, *supra* note 67, at 569.

⁹² See Julie Wiener, “Day School Enrollment Training Downward”, (*N.Y.*) *Jewish Week* (Dec. 13, 2011) (attributing “worrisome” declines in Jewish day school enrollment in part to “Hebrew charter schools,” especially in South Florida).

⁹³ Russo and Cattaro, in the context of proposed Catholic charters, characterize the removal of religion from curricula as “robbing Peter to pay Paul.” See Russo and Cattaro, *supra* note 81, at 86. This seems unfairly dismissive of the practice of catering to marginal consumers, which has confessional as well as economic justifications in both Catholic and Jewish education.

loss of the expatriate secular Israeli population is of considerable concern to some private Jewish day schools. It is therefore not surprising that mainstream leadership in the Orthodox community has resisted the possibility of Hebrew chartering, although it would open up some form of Jewish education to less-affiliated people.⁹⁴ This position is echoed by some involved with non-Orthodox day schools.⁹⁵ It is impossible, moreover, to disentangle the extent to which this opposition is economic and to which it is motivated by the desire to protect the traditional forms of Jewish education, with their religious emphasis.

Naturally, such positions will be opposed by parents, religious leaders, and entrepreneurs both financially and religiously attracted to the possibilities of Hebrew chartering.⁹⁶

A final observation: Hebrew language charters have not yet pushed the envelope nearly as far as they might with respect to religion. They have the potential to be considerably more “religious” than they are – *i.e.*, to make themselves closer substitutes for private religious schooling than they currently do. They might take inspiration from the best-studied Islamic charter school in the United States, the Tarek ibn Ziyad Academy in Minnesota, which has made different and more religiously oriented choices than most Hebrew charters.⁹⁷ Like the Hebrew charters, the school is officially secular and does not mandate prayer or other religious observance. But it does provide release time for prayers and places to conduct it.⁹⁸

⁹⁴ See Resolution of Rabbinical Council of America, May 12, 2009, available at <http://www.rabbis.org/news/article.cfm?id=105440> (“Even proposed ‘Hebrew language’ charter schools fail to provide an environment conducive to the development of deep-seated Jewish identity. Further, these schools are mandated to teach limited aspects of Jewish culture, self-consciously avoiding Torah and mitzvot [acts of religious obligation].”).

⁹⁵ Compare Elaine Cohen, “Hebrew Charter Schools a Very Real Concern”, *CJ – Voices of Conservative/Masorti Judaism* (Winter 2010–2011), 55, 56 (“I am very worried that the ardent efforts to sustain Jewish day schools in many regions of the country are going to be undermined” because of low-cost Hebrew charters) with Paul Plotkin, “Charter Schools Can Reinvigorate the Movement”, *CJ – Voices of Conservative/Masorti Judaism* (Winter 2010–2011), 47, 48 (Hebrew charters, and hoped-for enrollment in supplementary religious programs by parents of students in those schools, offer “the potential to reinvigorate the Conservative movement and to fulfill the dream of raising a Hebrew and Jewishly literate generation”).

⁹⁶ See Plotkin, *supra* note 95, at 46 (supplementary instruction offered by Hebrew-language charters could “reinvigorate older Conservative synagogues, creating a significant new revenue stream and putting many new children on campus. The plan could also provide employment opportunities for Conservative rabbis, teachers, and youth workers, as well as the resources to pay them.”).

⁹⁷ See Hillman, *supra* note 67, at 565.

⁹⁸ See *id.*

It mandates modest dress for students and faculty. It follows the Muslim calendar.⁹⁹ It cooperates with private parties to provide optional, after-school religious study.¹⁰⁰ It views these practices as “accommodations” to the religiosity of its students rather than religious exercise or the expression of a religious preference on its own part, a position in which the Minnesota authorities have largely, though not completely, acquiesced.¹⁰¹ Hillman suggests that these differences are due in large part to American Muslims being “both more religiously observant and less affluent” than their American Jewish counterparts.¹⁰² For Orthodox consumers whose *yeshiva* tuitions steadily increase, it is therefore easy to see how the Ibn Ziyad model could become increasingly attractive, and how rabbinical opposition to them could become more difficult to sustain.

Indeed, parents and educators willing to put up a fight could likely come even closer to traditional religious curricula and practices than Ibn Ziyad, while still remaining within the charter framework and within the strictures of the First Amendment. For example, they might be able to survive constitutional review even were they to provide substantial instruction in the Bible and other sacred texts. Although immediate objection to any instructional use of the Bible is nearly assured,¹⁰³ the Supreme Court has emphasized that texts sacred to some that also have cultural importance are a legitimate subject of secular study.¹⁰⁴ The Court likely had in mind older students; it is not trivial to see how one might present Biblical narratives to small children in a secular fashion. But methods of instruction that avoid truth- and faith-claims could be developed and arguments could be made. Secular teaching of the Bible could, on the same reasoning, pass the states’ requirement of nonsectarianism. The same arguments are available, moreover, for texts with substantially less importance to the general culture but that have affected particular religious cultures, such as the Talmud or

⁹⁹ *See id.*

¹⁰⁰ *See id.* at 566. The school was required to run school buses at the conclusion of the charter school day rather than after the optional after-school religious studies program.

¹⁰¹ *Id.* at 566–567.

¹⁰² *Id.* at 570.

¹⁰³ *See* Associated Press, “Idaho Charter School Warned on Use of Bible in Classroom”, *Educ. Wk.* (Dec. 2, 2009), at 4 (reprimand from Idaho Public Charter School Commission to Nampa Classical Academy for using the Bible as a teaching tool, notwithstanding a promise “not to teach religion”; the school “is fighting in federal court”).

¹⁰⁴ *See Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (“It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said... indicates that... study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.”).

the hadith. Arguments for permitting the “non-religious” teaching of such texts, even if they would not pass muster in a classic public school that is open to all without regard for background, might succeed in a context where a charter is freely chosen by those interested in a particular religious culture.

Such innovations would surely generate opposition at both the regulatory and judicial levels. But where religious entrepreneurs apply to establish religious-culture-themed charters on the same basis as other groups with other concerns and other themes, it is possible that the states would not be allowed to penalize them for their focus on religiously-inflected cultural studies. As noted above, the Supreme Court appears to have held that state legislatures, at their discretion, may place special burdens upon charters organized along explicitly religious lines, even if such burdens do not apply when organizing schools along other consociational principles.¹⁰⁵ But the “religious culture” schools are *not* religious *per se*. They might therefore fall under the rule of *Rosenberg v. Rector*,¹⁰⁶ so that states, having made space within a “system” of schools for any voices that meet neutral requirements, must make room for religious voices as well.¹⁰⁷ At the same time, if the schools are not religious it may be possible to argue that discriminating against them is not religious discrimination *per se*. Moreover, in the many states that cap the number of charters – such caps being an offense to the market-based theory of chartering and a concession to its political opponents – charters must be rationed somehow, and such innovations give regulators more leeway in rejecting or accepting applications for new charters.

Hebrew charters do not engage in fraud, pretense, or even spin when they say that they are not religious.¹⁰⁸ They clearly depart substantially from the way religious private schools are run, and would do so even if they came much closer to the religious/secular line. They do not teach religion or religious practice. At the same time, they are clearly substitutes for religious education. They achieve, at state expense, some of the same objectives that religious schools achieve. Their state subsidies attract some parents who would not otherwise have chosen a religious private school, and ease the financial burden upon other parents who would otherwise

¹⁰⁵ *Locke v. Davey*, 540 U.S. 712 (2004).

¹⁰⁶ *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

¹⁰⁷ See Weinberg, *supra* note 74, at 131–132.

¹⁰⁸ Martha Minow, for example, describes Hebrew- and Arabic-language schools in primarily linguistic and cultural terms, deemphasizing their religious dimension. See Minow, *supra* note 63, at 45–46, 133, 186; Minow, *supra* note 5, at 838–839, 843–844.

choose religious private schools. None of these things could happen in a top-down Progressive world, where government deliberates about education and then provides it in accordance with those deliberations. But they are nearly inevitable in a system where deliberation and provision are the realm of parents and entrepreneurs, some of whom have religious convictions.

IV. Sectarian Control of School Districts: Achieving Religious Ends through Secular Means

The New York metropolitan area, the world's second largest Jewish metropolis (after Tel Aviv), contains several school districts that are heavily Jewish in population. In a small handful of these, Orthodox Jews gained voting majorities on local public school boards over the last decade. These majorities have pursued many of the same objectives that Jewish parents and educators have sought using the charter school form.

Such efforts rely on a shift in the popular ideology or mindset through which individuals understand their place in the political structure of education. As people begin to think of education politics neoliberally, and of themselves less as citizens jointly pursuing the common good and more as individual consumers seeking to maximize their preferences in a marketplace, their changing attitudes affect the ways in which they behave in republican as well as market contexts.

Local Orthodox majorities result from a strong Orthodox preference for living among coreligionists. Even after such majorities arise in a particular school district, nearly all Orthodox families continue to send their children to private *yeshivot*. The public schools enroll fewer students than the local *yeshiva* systems, and serve a student population mostly non-Jewish and nearly exclusively non-Orthodox. This vector of circumstances – Orthodox voting control of the public school board, a public school student population almost completely non-Orthodox, and a larger private *yeshiva* student population – describes the school districts in Lawrence, New York (one of the “Five Towns” on New York’s Long Island), East Ramapo, New York (a district that includes the towns of Monsey and New Square), and Lakewood, New Jersey.¹⁰⁹

¹⁰⁹ Teaneck N.J., another jurisdiction with a large Orthodox population, has seen the defeat of school board candidates widely thought to be part of a nascent Orthodox bloc. See Joseph Ax, “Three Orthodox Candidates Challenge Teaneck Status Quo”, *North Jersey Record* (April 14, 2010).

Such political alignments initially seem unremarkable. Political dominance of school districts by religious communities and concomitant efforts to direct the public schools in pursuit of religious ends are nothing new in the United States. The “nonsectarian” Protestantism that long functioned as the *de facto* religion of public schools was ubiquitous because Protestant majorities dominated many districts and states.¹¹⁰ After the Supreme Court imposed a more neutral and demanding religious nonsectarianism on public schools, these same majorities often resisted, unable or unwilling to see any conflict between a non-denominational Protestantism and public education.¹¹¹ These religious majorities continue to use their political power to mitigate the secularism required by the Supreme Court.

Also well known are contemporary efforts by conservative Christian groups to win school board majorities and thus to further their more particularist religious interests. In several local districts as well as a handful of states,¹¹² blocs of conservative Protestant voters have sought aggressively to modify educational policies to make them more consistent with their faith. Melissa M. Deckman catalogues evangelical efforts to introduce moments of silence into the school day and to precede after-school activities with prayer; to make sex education coextensive with the teaching of abstinence; to abolish school programs and activities that address homosexuality without condemnation; to teach “creation science” or its variants; to instruct students “that U.S. culture is superior to all others”; and to block the selection of textbooks that are “liberal or ‘humanistic.’”¹¹³ Conservative Protestant majorities at the state and local levels have generally not overtly sought to defy the ban on prayer or Bible study in school proper, preferring to focus on religious practice outside of school hours, on policy changes that have ostensibly secular motivations, and on resistance to what they

¹¹⁰ See *supra* notes 20–22 and accompanying text.

¹¹¹ See Kenneth M. Dolbeare and Phillip E. Hammond, *The School Prayer Decisions: From Court Policy to Local Practice* (1971), 31–32 & fig.7. Resistance continues to this day. See Kent Greenawalt, *Religion and the Constitution, v. 2: Establishment and Fairness* (2008), 106 (“[A] radio interview I once did turned out to be occupied entirely with the question, ‘What could be wrong with the inclusive and innocuous prayer in *Engel v. Vitale*?’ Justice Stewart’s sentiments are shared by many of our citizens.”).

¹¹² See April Castro, “Election Loosens Conservatives’ Hold on Texas Board”, *Educ. Wk.* (Mar. 10, 2010), at 23.

¹¹³ Melissa M. Deckman, *School Board Battles: The Christian Right in Local Politics* (2004), 13–40, 149.

view as non-Christian influence in the schools.¹¹⁴ Nevertheless it could not be more clear that religious motivations underlie these policy agendas.

Although districts dominated by Jewish sectarians share obvious similarities with these districts, there also important differences. First, it matters that the sectarians are Jews and not Protestants; Jews are a tiny and marginal sect rather than a dominant religious group or even a large religious minority.¹¹⁵ The types of policies sought by conservative Protestants, though their victories are hard-fought, are only alterations to an American pedagogy and school culture founded in Protestantism.¹¹⁶ And whereas Protestants have long wielded power in American schooling, for Orthodox Jews to do so would have been unthinkable even twenty years ago, when everyone understood that public schools were assimilatory institutions, for better and for worse, not arenas where particularistic Jewish values or interests should be articulated or sought.¹¹⁷

Moreover, when involving themselves in school politics many conservative Protestants intend to enroll their children in public schools. Although nearly one million conservative Protestant children go to private Christian schools, and at least half of the one million homeschoolers in the United States are conservative Protestants, “92 percent of conservative Protestant families have their children in public schools, which is nearly identical to the national average.”¹¹⁸ Such families seek political power over education in order to make their own children’s education, as well as everyone else’s, conform to their values. This stands in stark contrast with Orthodox Jews, who seek control of public schools that they do not intend to use themselves. After gaining political control over school districts, the Orthodox

¹¹⁴ See David Sikkink, “Conservative Protestants, Schooling, and Democracy”, in S. Brint and J.R. Schroedel (eds.), *Evangelicals and Democracy in America, v.1: Religion and Society* (2009), 276.

¹¹⁵ See Chiswick, *supra* note 84, at 100, 105 n.6.

¹¹⁶ See Bruce A. Collet, “Sites of Refuge: Refugees, Religiosity, and Public Schools in the United States”, 24 *Educ. Pol’y* (2010), 189, 192.

¹¹⁷ In their marginality, the Orthodox districts are more similar to the Colorado City Unified School District, located in a “remote area of Northern Arizona and southern Utah,” which has been “long dominated by a polygamous sect” of dissenting Mormons. That sect, the “Fundamentalist Church of Jesus Christ of Latter-Day Saints,” moved to the area and “chose it decades ago for its isolation.” Management of the district by the sect has been troubled. “The state placed the district in receivership in late 2005 because of financial insolvency and mismanagement,” and released it, stating that it “was not in good shape both academically and financially” in October 2009. Associated Press, “Remote Arizona District Emerges from Four Years of State Control”, *Educ. Wk.* (Nov. 4, 2009), at 4.

¹¹⁸ Sikkink, *supra* note 114, at 277.

continue, in overwhelming numbers, to send their children to private *yeshivot*.

The other obvious analogy to these districts is the school district of Kiryas Joel in upstate New York. Kiryas Joel is unquestionably the most famous sectarian school district in the United States, and happens also to be controlled by Orthodox Jews. The eponymous town of Kiryas Joel was incorporated in New York with boundaries “drawn to include just... 320 acres owned and inhabited entirely by Satma[r]” Hasidim.¹¹⁹ The Satmar are not only sectarian but quintessentially isolationist. Indeed, they relocated to upstate New York from Brooklyn in order to remove themselves more fully from wider society.¹²⁰ Among many other anti-assimilationist and isolationist practices,¹²¹ the Satmar as a rule send their children to private *yeshivot*.¹²² Nevertheless, they sought to create a school district coextensive with the town of Kiryas Joel in order to provide a secular, state-funded program for the community’s disabled children.¹²³

The legislature of the State of New York acquiesced in this desire,¹²⁴ only to be overturned by the United States Supreme Court on the grounds that the creation of the district violated the First Amendment.¹²⁵ The Satmar of Kiryas Joel were subsequently successful, working with the legislature, in reconstituting the district so that it met the dictates of the Court.¹²⁶ The services the district provides to disabled children are secular in nature; there are no religious activities as there are in the *yeshivot*.¹²⁷ Nevertheless, it is clear that the secular school district provides to Satmar families a partial substitute for religious education, in that it provides to disabled students at least the social and linguistic segregation (though not the gender segregation)¹²⁸ they would have in *yeshivot* and emphatically would not have in the neighboring district schools they attended until the district was established.¹²⁹

¹¹⁹ *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 691 (1994).

¹²⁰ *Id.* at 691; Abner Greene, “Kiryas Joel and Two Mistakes About Equality”, 96 *Colum. L. Rev.* (1996), 1, 4.

¹²¹ See *Kiryas Joel*, 512 U.S. at 694 (cataloging some of these practices).

¹²² See *id.*

¹²³ See *id.* at 692.

¹²⁴ See *id.* at 693.

¹²⁵ See *id.* at 702.

¹²⁶ See Lou Grumet and Justin JaMail, “The Lessons of ‘Kiryas Joel’”, *N.Y. State Bar Ass’n J.* (May 2011), 11, 15.

¹²⁷ See Greene, *supra* note 120, at 5.

¹²⁸ See *Kiryas Joel*, 512 U.S. at 733 (Scalia, J., dissenting).

¹²⁹ See *id.* at 692.

Kiryas Joel is similar to other sectarian Jewish districts in that its Orthodox population has political control of its school district even as that population uses the schools only in exceptional cases. It differs, however, in that the public schools remain an endeavor designed for the welfare of the local Orthodox population – in the case of Kiryas Joel, of disabled Satmar students. The formal church-state issue that such a district faces is the same as that faced by districts dominated by conservative Protestants and by the districts I discuss below: public schools run by the state must be secular. But the politics are entirely different. The religious community of Kiryas Joel does not seek to impose its educational values or political priorities upon outsiders through the management of the public schools. There are well-documented and substantial cases of internal dissent and disagreement among the Satmar of Kiryas Joel, but however serious and legally troubling, these are intramural and rarely related to the education of the disabled.¹³⁰ The district stands in sharp contrast to the sectarian Orthodox districts listed above, where an Orthodox bloc seeks to run public schools that benefit other people's children.

The most central political conflicts in the latter set of districts revolve around school budgets. Orthodox blocs are hostile to expenditures,¹³¹ presumably because Orthodox families pay their taxes but as non-users of the schools reap no direct benefits from their operation.¹³² One could say that these Orthodox districts are the exception that proves William Fischel's claim that public school expenditure gains majority support because school quality is capitalized into home values.¹³³ Such capitalization gives reason to those whom Fischel calls "homevoters," a group that includes childless voters who do not themselves use the schools, to support school quality.¹³⁴ These incentives operate, Fischel notes, "for any voter who owns a home in which families with children might live" – because those potential children

¹³⁰ See Stewart Ain, "Chassidic Dissidents Press Cases in Court", (*N.Y. Jewish Wk.* (June 14, 2011) ("dissidents" within Kiryas Joel allege religious commandeering of local government).

¹³¹ Larry Gordon, "Campaign of Deception", *Five Towns Jewish Times* (April 4, 2007) (Lawrence); Josh Nathan-Kazis, "In N.Y. Town, Orthodox and Locals View for School Control", *Jewish Daily Forward* (May 6, 2011) (East Ramapo).

¹³² *Incantalupo v. Lawrence Union Free Sch. Dist. No. 15*, 652 F. Supp. 2d 314, 318–19 (E.D.N.Y. 2009) (reporting allegations made by plaintiffs regarding the Lawrence School District); "East Ramapo Residents Voting with Their Pocketbooks, While Others Voting for Education", *LoHud.com* (May 12, 2010) (news site for the Lower Hudson Valley of New York).

¹³³ See William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* (2001), 149.

¹³⁴ *Id.*

might attend public schools.¹³⁵ But in Orthodox-majority districts, where *yeshiva* attendance is the norm and housing demand among potential Orthodox immigrants robust, there is less expectation that potential buyers will themselves use the schools, mitigating homevoters' incentives to care about school quality.

Boards and the communities they represent have also been riven by controversies over the extension of secular services to private school students,¹³⁶ such as special education,¹³⁷ subsidized transportation to and from school,¹³⁸ and access to ball fields and similar facilities.¹³⁹ There have also been battles over the consolidation and closing of schools: growing Orthodox populations generally bring shrinking public school enrollments.¹⁴⁰ Moreover, because growing *yeshivot* are among the most obvious potential purchasers of newly empty public school buildings, some attribute boards' support for school closings to a desire to make buildings available to the *yeshiva* system.¹⁴¹ Persistent conflict over these and other issues have often led to routine bloc voting on boards, with friction even on relatively innocuous issues.¹⁴² The politics have been bitterly acrimonious.¹⁴³

In one sense, the positions favored by the Orthodox blocs in these districts are deeply religious. As in the case of conservative Protestants, the

¹³⁵ *Id.*

¹³⁶ See Zach Patberg, "Lakewood Parents Express Concerns to School Board", *Asbury Park Press* (Aug. 25, 2009), available at APP.com.

¹³⁷ See *Incantalupo*, 652 F. Supp. 2d at 320; Josh Nathan-Kazis, "Bias Feared in Public School Proposal to Absorb Yiddish Special Ed Program", *Jewish Daily Forward* (Jan. 28, 2011) (proposal in East Ramapo, ultimately abandoned, for public system to take over a "Yiddish and Hebrew bilingual special education program" that had previously been privately managed).

¹³⁸ See *Incantalupo*, 652 F. Supp. 2d at 320.

¹³⁹ See Gordon, *supra* note 131.

¹⁴⁰ See *Incantalupo*, 652 F. Supp. 2d at 320–21; Gordon, *supra* note 131 (describing a contretemps in Lawrence in which candidates opposed to the Orthodox bloc on the school board accused it of planning to "seize the Middle School – 'the jewel in our real estate crown' – and turn it into a building that will host a yeshiva"); Peter Applebome, "Rancor where Private-School Parents Make Public-School Decisions", *N.Y. Times* (April 26, 2009) (describing school closings in East Ramapo).

¹⁴¹ See Sumathi Reddy, "School Fight Gets Heated", *Wall St. J.*, (May 16, 2011) (allegations that "school board has favored private schools, closing two public schools and arranging for them to be used by yeshivas").

¹⁴² Alexandra Cheney, "East Ramapo Meets Tuesday to Discuss Controversial Lawyer Hiring", LoHud.com (Nov. 29, 2009) (news site for Lower Hudson Valley of New York).

¹⁴³ See *Incantalupo*, 652 F. Supp. 2d at 319 (allegation that Orthodox bloc seeks "to establish Orthodox Judaism as the official religion' of Lawrence") (quoting complaint); Reddy, *supra* note 141 (East Ramapo).

preferences of the community regarding public schooling are shaped pervasively by a religious worldview that embraces all aspects of life.¹⁴⁴ Orthodox thinking moreover places a higher value upon comprehensive religious education for all children than that of conservative Protestants. The commitment of the Orthodox to the *yeshiva* system in many ways parallels the dedication of the Old Order Amish to practical education for students of high school age: exit from regular public education is religiously central.¹⁴⁵ But in another, equally compelling sense, the politics of the Orthodox blocs are completely secular.¹⁴⁶ They do not seek religious instruction in public schools; what they want is frugality, access, and consolidation. These are values widely shared among Americans, and it seems safe to say that most proponents of such values hold them for strictly secular reasons. In this the preferences of the Orthodox are distinct from Amish opposition to formal high school instruction and from conservative Christian doubts about evolution. Were Orthodox Jews required, as some have suggested that citizens should be, to offer secular justifications for their preferences in order to be able to assert them in the public realm,¹⁴⁷ they would have no difficulty doing so in this instance.

In Lawrence, New York, the question whether the politics of the Orthodox bloc were secular reached the federal district court.¹⁴⁸ Non-Orthodox opponents of the governing regime sued the school board, charging that an “Orthodox majority, in general, has sought ‘to convert the public [School Board] into an Orthodox ruling committee, and to establish Orthodox Judaism as the official religion of Lawrence.’”¹⁴⁹ The court dismissed the claims with alacrity. That a religious community “mobilizes” in favor of cost-cutting, resource-sharing, and retrenchment, policies favored by them because they educate their own children in private schools, the court held,

¹⁴⁴ See Sikkink, *supra* note 114, at 280 (“A... cultural strand within conservative Protestantism is the belief that all aspect of life, including teaching and learning, are inherently religious.”).

¹⁴⁵ See *Wisconsin v. Yoder*, 406 U.S. 205, 210 (1972) (“Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents... Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life.”).

¹⁴⁶ See *Incantalupo*, 652 F. Supp. 2d at 323.

¹⁴⁷ See Gregory P. Magarian, “Religious Argument, Free Speech Theory, and Democratic Dynamism”, 86 *Notre Dame L. Rev.* (2011), 119, 121 (summarizing the debate).

¹⁴⁸ See *Incantalupo*, 652 F. Supp. 2d at 314.

¹⁴⁹ *Id.* at 319.

does not change the fact that each of these is a secular, not a religious, position.¹⁵⁰

As is true with respect to religiously oriented charter schools, it is also clear that a determined Orthodox majority could pursue its religious preferences more overtly than it has.¹⁵¹ Such potential may be realized should the tuition problem in the Orthodox community further erode the norm of *yeshiva* education.¹⁵² Consider, for example, a plan floated in 2005, after Orthodox representatives first gained a majority on the Lawrence school board, by a group of Lawrence *yeshiva* families struggling with tuition bills.¹⁵³ They suggested that the public schools offer a special program, open to anyone in the district but taught separately from the standard track. It would offer only one elective, which would be Hebrew language, and would not begin until the late morning.¹⁵⁴ The idea was that Orthodox children could have prayer and religious study in the mornings at local synagogues and then enroll as public school students to receive their schooling in the afternoon from the state.¹⁵⁵ The *yeshivot* would in this way be relieved of the expense of maintaining a secular program.

The late-in-the-day time block was an important feature of this proposal.¹⁵⁶ It allowed morning prayer, the longest service of the day, to continue under religious school supervision; and it preserved the *yeshiva* tradition of having religious studies come first in the school day, when students are thought freshest. The hours made it likely that few, if any, non-Orthodox students would be attracted to the proposed track, formally open to all; the atypical hours would foreclose extracurricular activities and be incompatible with the schedules of many secular families. The social homogeneity of the *yeshiva* system could therefore be substantially preserved even with respect to secular studies.

This proposal was made in 2005; the following year, the United States Education Department promulgated new, more permissive rules on

¹⁵⁰ *Id.* at 318.

¹⁵¹ See *supra* notes 98–107 and accompanying text.

¹⁵² See *supra* notes 85–88 and accompanying text.

¹⁵³ See Steven I. Weiss, "Long Island Proposal on Day Schools Draws Flak on Church-State Grounds", *Jewish Daily Forward* (July 29, 2005).

¹⁵⁴ See *id.*; cf. Randy Furst and Sarah LeMagie, "ACLU Suit Claims School Promotes Religion", *Minneapolis-St. Paul Star Trib.* (Jan. 22, 2009), at 3B (Ibn Ziyad charter school offers no bus home immediately at the end of school, waiting to run buses until the end of after-school activities that include "a religious studies course run by the Muslim American Society that more than half the students took last year").

¹⁵⁵ See Weiss, *supra* note 153.

¹⁵⁶ See *id.*

single-sex education.¹⁵⁷ I expect that the proposers, had it been a year later, might also have sought single-sex arrangements, thus duplicating another valued aspect of the *yeshiva* program, and perhaps concomitantly further reducing its attractiveness to children outside the Orthodox community.¹⁵⁸

The Lawrence plan, with or without its imagined same-sex extension, is very far from the Progressive “one best system.” But one can argue that it is in principle no different from the other secular priorities of the Orthodox population of Lawrence. Its planks are carefully secular and neutral. It accommodates the extracurricular schedule of a large group of students and their secular educational preferences; on its face, it does no more than that. At the same time it does involve preferences unlikely to be shared outside the Orthodox population – which is a big part of its motivation.

Politically, the proposal made for strange alliances. Political leadership of the district was in Orthodox hands, and understood the pressures high tuition was creating in the community. Even if district leadership had not been sympathetic, however, it needed the votes and political support of the Orthodox, in order to ratify school budgets¹⁵⁹ and to re-elect sitting members of the school board. The professional, secular leadership of the district – the superintendent and his staff – shared the need to maintain political support.¹⁶⁰ At the same time, the district was acutely conscious of the financial benefits public schools reap from having large private-school populations: a sudden obligation to educate all those Orthodox children would not bring any new local resources, because the Orthodox families were already paying property tax. (Increased state aid would not cover the costs of increased enrollment.) The district’s professional leadership therefore took a lukewarm attitude towards this proposal, promising to help its promulgators but making no commitments. Not surprisingly, and again in parallel with the Hebrew charter schools,¹⁶¹ the strongest opponents were local rabbis, for whom the *yeshiva-at-any-cost* norm is religiously important and also supports a large and vital industry in their communities.¹⁶²

¹⁵⁷ United States Department of Education, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance”, Final Rule, 71 *Fed. Reg.* (Oct. 25, 2006), 62,529.

¹⁵⁸ *Cf.* Minow, *supra* note 63, at 110 (noting effects of 2006 same-sex education rules on both traditional public and charter schools).

¹⁵⁹ Lawrence voters had voted down several school budgets in prior years.

¹⁶⁰ See Weiss, *supra* note 153.

¹⁶¹ See *supra* notes 94–95 and accompanying text.

¹⁶² See *id.*

Rabbinic opposition in turn dampened political support among the laity. In this particular contest between rabbinic power and tuition pressure, the former prevailed; but no observer of these communities should venture to predict future results of similar conflicts.

The contingent and perhaps temporary failure of this proposal should not obscure, moreover, the quite substantial accommodations that Orthodox religious sectarians with a local majority have gained from their school districts. They have successfully reduced budgets and gained access to specific parts of the public school programs that they can use: ball fields, facilities off-hours, and school buses. In Englewood NJ, another heavily Orthodox enclave, public school authorities have established bilingual Hebrew-English public schools that will compete with Jewish day schools, in part to meet voter demands and in part to forestall the creation of Hebrew charter schools.¹⁶³

This brief account of school boards under Orthodox control could be taken to confirm, rather than vitiate, the continuing dominance of traditional American paradigms for public education. The districts operate in the mainstream of American law. Certainly efforts by these sectarian majorities on school boards to assert the interests of the religious Jewish community pose a less obvious challenge to the traditional model of American education than does the neoliberalism of the charter movement. The districts continue to function as monopoly providers of secular public education, and whatever power the Orthodox community exerts is mediated through the traditional, Progressive institutions of the franchise and the elected board, rather than through newfangled forms like charters. It is undisputed that “individuals who happen to be religious may hold public office.”¹⁶⁴ And when the Supreme Court held in 1969 that the franchise in school board elections, as a matter of equality under the Fourteenth Amendment, extended even to a childless resident with no property, all the parties to the case agreed that taxpayers as well as parents had an interest in the public schools and a right to equal voice in their governance.¹⁶⁵ The efforts of sectarian blocs to limit expenditure, widen access, and consolidate schools are legitimate and have secular justifications.

¹⁶³ See Peter Applebome, “Diversity Plan for Public Schools, Using Hebrew?”, *N.Y. Times* (February 26, 2009). Englewood does not have a majority Orthodox voting bloc on its school board.

¹⁶⁴ *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 698–699 (1994).

¹⁶⁵ *Kramer v. Union Free Sch. Dist.* No. 15, 395 U.S. 621, 631 (1969).

Nevertheless, although these districts are uncontroversially republican, they are simultaneously deeply anti-Progressive. Their politics would be impossible but for the substantial erosion of the ideological dominance of Progressivism. The 2005 Lawrence plan for a late-day public school session, designed to meet the needs of the Orthodox and put off most everybody else, is inimical to Progressive common schooling. This is made vivid by the local usage that describes the Orthodox as the “private-school community” and their opponents as the “public-school community.”¹⁶⁶ This usage is understood by all even though it is the Orthodox bloc that governs the public schools. The heated exchanges between the two groups, on the Internet and other forums, show that the two groups share few basic ideas regarding school governance.

The self-styled “public-school” community, the heirs to Progressivism, believe that public schools are *common* schools and that their health benefits everyone. Why would anyone want, or would anyone else allow, people who are not interested in having the best possible public schools join, much less control, a public school board? To them, public schools are a trust and the board their fiduciaries. If there is to be a “private-school” community that is disinterested in the welfare of the public schools and averse to taxation in their support, their withdrawal from public schooling should be paralleled by a withdrawal from public school politics.

This is not, to put it mildly, the worldview of the anti-Progressive small-republicans who now run these districts. They think that people are entitled to want whatever they want with respect to public schools, just as they are entitled to do with respect to any other local service.¹⁶⁷ State and federal law, but not any broader duty, limit the obligations of the board with respect to the adequacy of public school services. Moreover, consumers of private education are as much part of the public-school polity as consumers of public schools. They have a “right” – another oft-heard term in these debates – to benefit from those schools as much as students enrolled in them do, to the extent allowed by state law. Therefore they should enjoy, for example, secular services like buses and ball fields on an equal basis. This is republican but not Progressive. It views the question whether a family is part of the actual public school polity as completely separate from the

¹⁶⁶ *E.g.*, Larry Gordon, Editorial, “Campaign of Deception”, *Five Towns Jewish Times* (April 19, 2007).

¹⁶⁷ See Amy S. Wells, Alejandra Lopez and Jennifer J. Holme *et al.*, “Charter Schools as Postmodern Paradox: Rethinking Social Stratification in an Age of Deregulated School Choice”, 69 *Harv. Educ. Rev.* (1999), 172, 174–175.

question whether its children have opted out of the miniature polis that Progressive common schools seek to embody.

I make no claims about which of these camps is legitimate or valid or more persuasive as a matter of politics or political theory. But I do mean to suggest that this view is (a) new and (b) illustrative of an important change. School board politics would not have been conducted this way twenty years ago. This is in part because Jews and Orthodox Jews in particular would have hesitated to assert their parochial interests with muscularity in any sort of secular politics. But that reluctance was related to the political/cultural assumption that would have been obvious then and is not obvious today, that to opt out of public schooling is also to opt out of public school governance. The “private-school community” in today’s Lawrence and East Ramapo and Lakewood think of education politics in terms of their rights and their individual preferences, not in terms of what experts say or in terms of the widely shared common good. This mode of thought, distant indeed from Progressivism, is surely shared by many, many Americans situated very far away – geographically, religiously, and culturally – from the Jews of Lawrence. One should feel confident that the 2005 Lawrence plan will not be the last anti-Progressive proposal floated in the evolving ideological environment.

V. Conclusion

When the Supreme Court decided *Zelman v. Simmons-Harris*, upholding the constitutionality of publicly funded vouchers that parents could direct to religious as well as secular schools, Justice Souter wrote a long, thorough, and angry dissent, which Justices Stevens, Ginsburg, and Breyer joined.¹⁶⁸ Justice Breyer also wrote separately, explaining his separate concurrence (joined by Justices Stevens and Souter) in this way:

I write separately... to emphasize the risk that publicly financed voucher programs pose in terms of religiously based social conflict. I do so because I believe that the Establishment Clause concern for protecting the Nation’s social fabric from religious conflict poses an overriding obstacle to the implementation of this well-intentioned school voucher program. And by explaining the nature of the concern, I hope to demonstrate why, in my view, “parental choice” cannot significantly alleviate the constitutional problem.¹⁶⁹

¹⁶⁸ *Zelman*, 512 U.S. at 686 (Souter, J., dissenting).

¹⁶⁹ *Id.* at 717 (Breyer, J., dissenting).

The majority dismissed Justice Breyer, saying he was raising “invisible specters of ‘divisiveness’ and ‘religious strife’” with no evidence that they had or were likely to arise.¹⁷⁰ At the time I would have been inclined to agree.¹⁷¹ But Breyer may have been prescient. Both school choice – albeit in the form of charter schools rather than voucher programs – and the penetration of neoliberal ideas into school district politics have occasioned significant religious conflict.¹⁷²

At the same time, Breyer was wrong to have imagined that choice in particular would stoke “religiously based social conflict.”¹⁷³ That conflict has been at least as bitter in the religiously-dominated school boards as in the charter-school quasi-markets. This is not surprising: school board decisions directly affect all students, whereas charter students choose to participate in religious charters. But the two contexts have more similarities than differences. The root of religiously-based social conflict is not choice *per se* but the erosion of the Progressive consensus in favor of a scheme where rights, entitlement, and choice are primary conceptual categories. Once such a cultural shift takes hold, there is plenty of room in the system as constituted for religiously-based voters, politicians, parents, and educators to inject religion into American schooling in ways that were until recently unimaginable.

The resulting educational marketplace is likely to look very different than the “one best system.” There will be more religion, potentially a lot more, as states increasingly facilitate neoliberal education rather than monopolistically provide common education. As the interaction of Jewish education and the educational political culture shows, the nature and shape of that religion will depend upon entrepreneurialism in the market and parental preferences, more than upon state action. It is therefore sure to surprise. In any event, that revolution is upon us. We have already opened the doors to it. I doubt whether we can close them again.

¹⁷⁰ *Id.* at 662 n.7.

¹⁷¹ *Accord* 2 Greenawalt, *supra* note 111, at 417.

¹⁷² See Steven I. Weiss, “Jew vs. Jew Struggle in N.Y. School Board Election”, *Jewish Daily Forward* (May 20, 2005).

¹⁷³ *Zelman*, 512 U.S. at 717 (Breyer, J., dissenting).

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