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Charter Schools, The Establishment Clause, and the Neoliberal Turn in Public Education

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CHARTER SCHOOLS, THE ESTABLISHMENT CLAUSE, AND THE NEOLIBERAL TURN IN PUBLIC EDUCATION

Aaron Saiger[†]

*Regardless whether the American charter school can improve academic performance and provide effective alternatives to traditional public schools, its steady entrenchment as an institution portends significant, destabilizing changes across education law. In no area will its impact be more profound than the law of religion and schooling. Despite the general view that charter schools are public schools, charters' neoliberal character—they are privately created and managed, and chosen by consumers in a marketplace—makes them private schools for Establishment Clause purposes, notwithstanding their public subsidy. This conclusion, which rests in substantial part on the *Zelman v. Simmons-Harris* vouchers case, implies that very substantial amounts of government money could be directed towards religious institutions as the charter sector expands. State decisions to permit or forbid religious chartering will determine the magnitude of this shift. But even states seeking to forbid religious chartering will find that the bottom-up, market-oriented structure of chartering invites religiously oriented educational entrepreneurs and parents to exploit the fuzziness of the categories “religion” and “school” in order to undermine such a ban. Practical and constitutional constraints upon the regulatory tools that the neoliberal paradigm makes available to states—rulemaking and exercising bureaucratic discretion when approving and renewing charters—ensure that efforts to abolish religion in charters will enjoy only partial success.*

[†] Professor of Law, Fordham University School of Law. I am grateful for insightful comments I received from Bruce Cooper, Nestor Davidson, Annie Decker, Richard Garnett, Abner Greene, Russ Pearce, James Ryan, Nelson Tebbe, and Amy Uelman, and to audiences at Bar Ilan University Faculty of Law and King's College London.

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INTRODUCTION

How, and to what extent, may government support religious practices in public schools? In private schools? These are famous questions of American constitutional law. The Supreme Court has addressed them by posing two other questions: What sorts of religious practices? What kind of support? The answers to these latter questions are the grist for the multifactor tests and judgment calls that yield answers to the former. So: students may pray in private school, but in public school permissibility depends upon what sort of prayer, when and where it occurs, who conducts and sponsors it, and what sorts of physical or psychological coercion its context might exert upon pupils.¹

¹ See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577

Public schools are funded by public monies, but whether a state may lend support to a private religious school depends on the form the aid takes. If cash, the method and route by which subsidy reaches school is determinative;² if materials, what matters is whether the loaned materials most resemble books, maps, or films, how the materials will be used, and by whom.³

In sharp contrast, constitutional lawyers have generally not asked: What *is* a public school? A private school? Instead, federal constitutional law has treated *public* and *private*, as those terms are used to describe schools, as self-defining. Public schools are the state-sponsored ones, run by the local elected school board, open to all local children, and supported with tax dollars. Private schools are, well, the private ones. They are run by entrepreneurs or like-minded individuals, supported by tuition and private charity, and need not educate any particular child beyond duties created by enrollment contracts and the dictates of conscience. Only a handful of Supreme Court cases—most notably the ten-year-old school vouchers case, *Zelman v. Simmons-Harris*—say anything at all about how to distinguish between public and private schools.⁴ But making this distinction has rapidly become urgent as a paradigm shift accelerates in American educational governance.

For many decades Progressivism defined the status quo in American schools. Progressive educational reformers viewed schools as government instrumentalities, paid for and managed by the state, free of charge, and common to all. Progressive schools rely for both legitimacy and mission upon the concept of citizenship: they are popularly elected, democratically accountable, and teach democratic values. Progressive education enjoyed extraordinary success, and was nearly completely dominant in the United States by the second half of the twentieth century. The result was a dichotomous industry in which public schools were a particular kind of school—the Progressive kind—and private schools were the way in which people, for various reasons, opted out of the civic enterprise of education.⁵

(1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Engel v. Vitale*, 370 U.S. 421 (1962).

² See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mueller v. Allen*, 463 U.S. 388 (1983); cf. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1440 (2011) (finding no taxpayer standing in an Establishment Clause challenge to a tax credit for religious school tuition).

³ See *Mitchell v. Helms*, 530 U.S. 793, 802–03 (2000) (Thomas, J.) (plurality opinion); EMMA LONG, *THE CHURCH-STATE DEBATE: RELIGION, EDUCATION AND THE ESTABLISHMENT CLAUSE IN POST WAR AMERICA* 57–58 (2012); Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 164 & nn.44–46 (2004) (gathering cases).

⁴ 536 U.S. 639; see also *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

⁵ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), finds a constitutionally guaranteed parental right to purchase schooling privately. *Pierce* permits government to regulate private schools very substantially, although it may not co-opt their private character. See *id.* at 534.

In recent years neoliberal approaches have challenged Progressivism and undermined its ideological hegemony. Neoliberalism prefers markets to bureaucracies and elevates consumer sovereignty in place of citizenship. It understands education to be a service provided by the market, one whose quality is enhanced by competitive pressure, and to which the criterion of economic efficiency—giving people what they want—should have full application. The merits of such ideas are widely and fiercely debated. In this project, however, I accept neoliberalism as substantially entrenched, and focus instead upon its consequences.

That neoliberalism is here to stay is vividly demonstrated by America's burgeoning charter school sector. Charters are the leading form of neoliberal education in the United States today, educating 1.6 million American schoolchildren. These schools share important features of traditional public schools. They are publicly funded and must accept all applicants (or, if oversubscribed, admit students by lottery). But charters are neoliberal at their heart. They are privately established and managed. Their public subsidies are per-student and granted only insofar as individual families choose to enroll their children in the charter. Charters therefore must adapt to market demands.

In no area of education law will the destabilizing impact of neoliberalism be more profound than in the law of religion and schooling. The well-established principle that public schools must be secular but private schools are free to be religious is an artifact of the contingent intersection in time between the era of uncontested Progressive hegemony and the Court's elaboration of modern First Amendment law. That principle, entirely adequate when all schools are either public in the Progressive sense or fully private, is not easily applied in a neoliberal world. Does the charter school, publicly funded, publicly regulated, nominally open to all, but privately run and dependent on private choices, fall on the public or private side of the legal line?

I conclude, against the popular, political, and scholarly consensus, that charter schools may simultaneously accept public subsidy and engage in religious activity. Where private groups organize schools that compete to attract students, those schools, for Establishment Clause purposes, are private schools. This conclusion is both compelled by the Court's cases, especially the *Zelman* vouchers case—which most recent commentators dismiss as a dead end in education law—and consistent with broader principles of Establishment Clause jurisprudence.

The ongoing expansion of chartering could therefore direct very substantial amounts of government money toward religious schooling. How much depends in large part, but not entirely, upon the states. I argue that states can choose to permit or forbid religious chartering. But

even states that choose the latter will find that their control over schools' religious activity is more limited in a neoliberal world than in a Progressive one. The bottom-up, market-oriented structure of chartering invites religiously-oriented educational entrepreneurs and parents to exploit the fuzziness of the categories "religion" and "school" in order to undermine such a ban.⁶ The regulatory tools that the neoliberal paradigm makes available to states—rulemaking and exercising bureaucratic discretion when approving and renewing charter applications—are unequal to the task of fully secularizing charter schools.

For example, some religious educators have spun charters off from private religious schools, shedding their explicit religiosity but retaining aspects of religious culture and preserving structural connections with their predecessors. Such charters have enrolled their mother schools' students, repurposed their facilities, hired their teaching staff, and constituted overlapping boards of directors. Other charters, both spun off and brand new, have used charters' ability to emphasize particular themes to create schools that focus upon the culture and language of specific religious minorities. These schools eschew parochially "religious" instruction but teach religious languages and cultures, and accommodate but do not advocate religious practices. Even more creatively, some private religious schools have co-enrolled their students in cyber charter schools. Taking advantage of cyber-students' ability to sign into cyber-school asynchronously and from places of their choosing, such schools in this way transfer to the state the provision and payment for secular education, even as they guarantee that this education will continue to take place in a fully religious context. Each of these kinds of schools is formally secular, but nevertheless incorporates important correlates of religious schooling unavailable in traditional public schools.

This Article proceeds as follows. Part I describes the rise of Progressivism and the neoliberal challenge, epitomized by the charter school movement. Part II canvasses sources of law outside the religion clauses regarding whether charters are properly categorized as public or private schools, but concludes that these determinations carry only slight weight in the First Amendment context. Part III makes the argument that, for religion clause purposes, charter schools are private schools that may engage in religious activity, notwithstanding state subsidy. Part IV demonstrates that states retain the option to restrict religious expression in charter schools, but that substantial regulatory and constitutional constraints face states that choose to do so. Part V concludes with some observations regarding how the neoliberal turn,

⁶ See *infra* Part IV.B.

intended to reshape the relationship between schools, bureaucracies, and parents, will perturb the always-fraught equilibrium between schooling and faith in America.

I. THE PROGRESSIVE SCHOOL AND ITS COMPETITORS

A. *The Progressive Public School*

The way that American states organize schools has its roots in the late 1800s, in reforms introduced by common-school advocates and then perfected by Progressive educators. Progressives, with extraordinary energy and success, displaced “voluntary and incidental” community-based schools across the country in favor of their preferred vision of education.⁷ The major features of Progressive education continue to limn American public schooling today. All children must attend some school, either public or private. Attendance at a free public school within one’s local district is as of right.⁸ Public school districts are local governments,⁹ whose local electorates select their governing boards and ratify their budgets. The elected board delegates implementation to a professionalized and bureaucratized staff.¹⁰ Districts tax and spend, hire and fire. Their programs are secular.¹¹

Instead of sending their children, for free, to the local public school, parents can opt out in favor of private education. Private schools are self-governing. They support themselves not through taxation but with tuition and donations.¹² They can teach, or eschew, religion at their discretion. They have no obligation to educate any particular child beyond duties created by enrollment contracts or the dictates of conscience. Government regulates them fairly minimally.

⁷ DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* 6–7, 16 (1974). Progressives achieved dominance in some states substantially earlier. *See, e.g.*, *State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ.*, 2006-Ohio-5512 ¶ 28, 857 N.E.2d 1148, 1157.

⁸ *See* Julie A. Reuben, *Patriotic Purposes: Public Schools and the Education of Citizens*, in *THE PUBLIC SCHOOLS* 1, 11–12 (Susan Fuhrman & Marvin Lazerson eds. 2005); Aaron Saiger, *The School District Boundary Problem*, 42 *URB. LAW.* 495, 500 & n.24 (2010).

⁹ There are over 14,000 districts nationwide, a number greatly diminished by district consolidation since the pre-Progressive era. MICHAEL B. BERKMAN & ERIC PLUTZER, *TEN THOUSAND DEMOCRACIES: POLITICS AND PUBLIC OPINION IN AMERICA’S SCHOOL DISTRICTS* 15 (2005); Thomas Corcoran & Margaret Goertz, *The Governance of Public Education*, in *THE PUBLIC SCHOOLS*, *supra* note 8, at 25, 33–34.

¹⁰ *See* TYACK, *supra* note 7, at 131–32; Corcoran & Goertz, *supra* note 9, at 32.

¹¹ EDGAR L. MORPHET, ROE L. JOHNS & THEODORE L. RELLER, *EDUCATIONAL ORGANIZATION AND ADMINISTRATION: CONCEPTS, PRACTICES, AND ISSUES* 5–7 (4th ed. 1982).

¹² STEVEN L. JONES, *RELIGIOUS SCHOOLING IN AMERICA: PRIVATE EDUCATION AND PUBLIC LIFE* 3 (2008).

Schooling need not be organized in this fashion. Prior to the twentieth century, in the United States “[t]he terms ‘public’ and ‘private’ did not have their present connotations, and most schools did not fit neatly into either of our modern categories.”¹³ In the 1800s, a smorgasbord of schooling arrangements were understood to serve a “public” function but “by contemporary standards . . . were private institutions,” including privately managed schools that received public funds.¹⁴ Cooperative arrangements for school purposes between states and private entities, including religious groups, persisted well into the twentieth century.¹⁵ The meanings of the terms shifted with time: “Although modern distinctions between ‘public’ and ‘private’ became more common in the North by mid-century, this change was slow and uneven.”¹⁶ Indeed, when Progressive-era reformers attacked the institution of the “private” school, by the term they meant something different than what Americans reflexively understood it to mean in, say, the 1960s or 1990s.¹⁷ Today’s American idea of what makes a public school is highly contingent.¹⁸

Nevertheless, by the latter half of the twentieth century Progressivism had achieved ideological “hegemony” in America.¹⁹ The Progressive public school was long the “taken-for-granted educative institution for most Americans,”²⁰ education’s “one best system.”²¹ Like the free press, it was a fundamental “institution of American constitutional democracy” (although mentioned nowhere in the Constitution).²² Its particular characteristics, and their bundling into a single institution, have been a fixed point in public understanding for decades. They remain so today. Artists across generations easily evoke a

¹³ CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860*, at 13 (1983); *accord* STEVEN K. GREEN, *THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA* 253 (2010); TYACK, *supra* note 7, at 57.

¹⁴ Reuben, *supra* note 8, at 5; *cf.* JAMES C. CARPER & THOMAS C. HUNT, *THE DISSIDENTING TRADITION IN AMERICAN EDUCATION* 172 (2007) (listing arguments in favor of public funding of Catholic schools because such schools, *inter alia*, would “contribute to the public good”).

¹⁵ *See* SARAH BARRINGER GORDON, *THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA* 57 (2010).

¹⁶ WILLIAM J. REESE, *HISTORY, EDUCATION, AND THE SCHOOLS* 100 (2007).

¹⁷ *See id.* at 99–102; KAESTLE, *supra* note 13, at 116.

¹⁸ “Public” and “private” also bear variable meanings cross-nationally. Nations’ diverse approaches to public/private and church/state lines in education belie any argument that Progressive institutions are necessary for secular democracy. *See* 1 CHARLES L. GLENN & JAN DE GROOF, *BALANCING FREEDOM, AUTONOMY AND ACCOUNTABILITY IN EDUCATION* 53, 60, 93, 101, 104–05 (2005).

¹⁹ JONES, *supra* note 12, at 2.

²⁰ *Id.* at 4.

²¹ *See generally* TYACK, *supra* note 7.

²² Jaroslav Pelikan, *The Public Schools as an Institution of American Constitutional Democracy*, in *THE PUBLIC SCHOOLS*, *supra* note 8, at xiii; *cf.* HENRY ADAMS, *THE EDUCATION OF HENRY ADAMS* 33 (1918) (equating the press and the school as fundamental institutions).

public school by sketching just a few of its classic markers—the hapless principal, the against-all-odds teacher, the befuddled board, diverse and distracted students—whether in a Norman Rockwell painting,²³ immigrant novel,²⁴ teen sitcom,²⁵ or Hollywood tearjerker.²⁶ The bundle of policies that define the institutional structure of the Progressive public school, however historically contingent, is deeply embedded in American life and culture.

Particularly important for this Article, during the second half of the twentieth century, when the Court was most active regarding religion and schools,²⁷ Progressive influence was at its apogee. Progressivism did not itself demand secularism; it opposed “sectarianism,” in the sense of taking sides in internecine disputes among Protestants, but was untroubled by pan-Protestant, nondenominational Christian religiosity.²⁸ Requirements that public schools be fairly rigorously secular were imposed by the judiciary, not by the Progressives.

Nevertheless, it was critical that the Court undertook to elaborate law on the topic in a fully Progressive context. The Court’s cases, along with treatises and monographs on religion and schooling, therefore did, and still do, treat the public schools as an axiomatic category requiring no exposition. Although they described, often at length, the historical development of public schools,²⁹ they gave no attention to *defining* “public school.” (This approach is in stark contrast with their treatment

²³ NORMAN ROCKWELL, SCHOOL TEACHER (HAPPY BIRTHDAY MISS JONES, TEACHER’S SURPRISE) (1956), available at <http://store.nrm.org/browse.cfm/4,3007.html>.

²⁴ E.g., HENRY ROTH, CALL IT SLEEP (1934); HERMAN WOUK, CITY BOY: THE ADVENTURES OF HERBIE BOOKBINDER (1948); BEL KAUFMAN, UP THE DOWN STAIRCASE (1964).

²⁵ E.g., *Room 222* (20th Century Fox Television premiered 1969); *Welcome Back Kotter* (The Komack Co. Inc. premiered 1975); *Head of the Class* (Warner Bros. Television premiered 1986); *Beverly Hills 90210* (90210 Productions premiered 1990); *Glee* (20th Century Fox Television premiered 2009).

²⁶ The modal plot pits a driven teacher’s love of learning against the twin scourges of teen anomie and official indifference. E.g., THE BLACKBOARD JUNGLE (Metro-Goldwyn-Mayer 1955); UP THE DOWN STAIRCASE (Park Place Production 1967); STAND AND DELIVER (Warner Bros. Pictures 1988); DANGEROUS MINDS (Hollywood Pictures 1995); MR. HOLLAND’S OPUS (Hollywood Pictures 1996); see also Philip French, *Au Revoir, Monsieur Frites*, THE OBSERVER, Mar. 1, 2009.

²⁷ KENT GREENAWALT, DOES GOD BELONG IN PUBLIC SCHOOLS? 17 (2005) [hereinafter GREENAWALT, DOES GOD BELONG]; MARTHA MINOW, IN BROWN’S WAKE: LEGACIES OF AMERICA’S EDUCATIONAL LANDMARK 85 (2010).

²⁸ See STEVEN K. GREEN, THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE 30–32 (2012) [hereinafter GREEN, BIBLE, SCHOOL, AND CONSTITUTION]; LLOYD P. JORGENSEN, THE STATE AND THE NON-PUBLIC SCHOOL, 1825–1925, at 20–23 (1987); LONG, *supra* note 3, at 88; George M. Thomas, Lisa R. Peck & Channin G. De Haan, *Reforming Education, Transforming Religion, 1876–1931*, in THE SECULAR REVOLUTION 355, 359–60, 378–79 (Christian Smith ed. 2003).

²⁹ VICTORIA J. DODD, PRACTICAL EDUCATION LAW FOR THE TWENTY-FIRST CENTURY § 1:05 (2d ed. 2010); GREENAWALT, DOES GOD BELONG, *supra* note 27, at 13–17; MARTHA M. MCCARTHY & NELDA H. CAMBRON-MCCABE, PUBLIC SCHOOL LAW: TEACHERS’ AND STUDENTS’ RIGHTS 28–29 (1987); RICHARD C. MCMILLAN, RELIGION IN THE PUBLIC SCHOOLS: AN INTRODUCTION 79–89 (1984).

of their other basic category, “religion.”³⁰) Until the vouchers case, *Zelman v. Simmons-Harris*,³¹ the Court itself used “public school” without even gesturing towards the possible utility of a definition. In the reigning educational context, this was reasonable: the universe of schools consisted on the one hand of Progressive-style public schools, both funded and managed by the state, and classically private schools on the other, neither state-funded nor state-managed.³² Hybrid forms, such as charters, were out of mind.

B. *The Neoliberal Challenge and Its Critics*

David Harvey, in his *Brief History of Neoliberalism*, captures the departure from Progressive education that underlies reforms like school vouchers and charter schools when he defines his subject as follows:

Neoliberalism is . . . a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices.³³

Charters and vouchers replace *public sovereignty* exercised by local citizens, which characterizes Progressive education, with *consumer sovereignty* exercised by parents shopping for the school that they think best suits their children.³⁴ And they supplant Progressive *governmental management*, whose core institutions are citizenship, elections, bureaucracies, and professionalism, with *private management*. Neoliberal schools live or die based upon market forces. Neoliberals argue that markets and market-like institutions can distribute goods based on private preferences with much greater efficiency, and correspondingly less welfare loss, than public provision; moreover, they are relatively less burdened by the shortcomings associated with public bureaucracies.³⁵

³⁰ See GREENAWALT, DOES GOD BELONG, *supra* note 27, at 116–20; McMILLAN, *supra* note 29, at 57.

³¹ 536 U.S. 639 (2002).

³² See GREENAWALT, DOES GOD BELONG, *supra* note 27, at 17–18.

³³ DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005).

³⁴ See Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 842, 845 (2011) [hereinafter Minow, *Seduction of Choice*].

³⁵ JOHN MERRIFIELD, THE SCHOOL CHOICE WARS 6–7, 10 (2001); Christopher Lubienski, *Innovation in Education Markets: Theory and Evidence on the Impact of Competition and Choice in Charter Schools*, 40 AM. EDUC. RES. J. 395, 396 (2003).

In the educational context, neoliberalism found its contemporary voice in the 1990s.³⁶ Growing disenchantment with educational outcomes in traditional public schools made room for the neoliberal argument that market-based schooling enjoys structural comparative advantages over state-provided schooling.³⁷ Schools forced to be responsive to a marketplace would have no choice but to generate academic achievement.³⁸ The bureaucratic, state-run school, by contrast, faces no consequences for failure and therefore lacks incentives to succeed.³⁹

Educational neoliberals first concentrated, following the early lead of Milton Friedman, upon school vouchers.⁴⁰ Vouchers are government subsidies that can be directed either to private or public schools, at parents' discretion. Early voucher programs ineluctably led to the commingling of issues of neoliberal education reform and of Establishment, because the pool of private schools prepared to accept the relatively small vouchers available through those programs was largely religious.⁴¹ After the Supreme Court held in *Zelman v. Simmons-Harris* that vouchers could constitutionally be issued to private, religious-school pupils, however, an expected wave of voucher programs never materialized.⁴² Conventional wisdom suggests that vouchers attracted few Americans, who are mostly content with their own public schools (even if worried about public schooling generally) and uninterested in siphoning school funds to the private sector, especially at the scale required to make the vouchers broadly attractive.⁴³ But this account, even on its own terms, is too glib. Vouchers continue to find

³⁶ See PATRICIA BURCH, *HIDDEN MARKETS: THE NEW EDUCATION PRIVATIZATION* 5 (2009).

³⁷ Jacob B. Michaelsen, *A Public Choice Perspective on Public Schooling*, in *PRIVATE SCHOOLS AND PUBLIC POLICY: INTERNATIONAL PERSPECTIVES* 63, 63 (William Lowe Boyd & James G. Cibulka eds. 1989).

³⁸ See Michael W. McConnell, *Governments, Families, and Power: A Defense of Educational Choice*, 31 *CONN. L. REV.* 847, 850–51 (1999) [hereinafter McConnell, *Governments, Families, and Power*].

³⁹ See generally JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990).

⁴⁰ See Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 123 (R.A. Solo ed. 1955).

⁴¹ The proper characterization of the relationship between religious interests and voucher advocacy is disputed. Some insist that public aid to religious schools was the primary motivation for vouchers while others contend that vouchers primarily sought to improve school quality. Compare Minow, *Seduction of Choice*, *supra* note 34, at 829–31, with *Zelman v. Simmons-Harris*, 536 U.S. 639, 682 (2002) (Thomas, J., concurring). See also James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 *UCLA L. REV.* 547, 547 (2007).

⁴² DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* 120–21 (2010).

⁴³ See Forman, *supra* note 41, at 549–50; Minow, *Seduction of Choice*, *supra* note 34, at 832–33.

life in various statehouses, the United States Congress, and political campaigns, suggesting that the issue retains political salience.⁴⁴ Perhaps more important, especially after *Zelman* bestowed upon them the imprimatur of constitutionality, vouchers helped to normalize the market-oriented partial privatization of schooling and make it seem less alarming. 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, hold out the neoliberal promise that competition and entrepreneurialism can produce better educational results than hierarchy, monopoly, and decision making through politics.⁴⁵ Charter schools do share important features with traditional public schools. In addition to a self-image that places them within, rather than outside, of the public school system,⁴⁶ they do not admit privately paying students and may not charge tuition.⁴⁷ Only in some states are charters exempt from the collective bargaining agreements reached by their local school districts with teachers and other staff.⁴⁸ Charters are also prohibited from discriminating among students in admission.⁴⁹ Oversubscribed charters must admit students by lottery,⁵⁰ although there is perennial concern that they use strategies such as location, targeted advertising, and counseling students at enrollment and re-enrollment to shape their student bodies to their liking.⁵¹

Nevertheless charters are neoliberal at heart. In charters' ideal form (state regulations vary), any group that meets basic requirements may organize a charter school and solicit students.⁵² Families may then

⁴⁴ Sean Cavanagh, *State GOP Lawmakers Push to Expand Vouchers; Some Legislation Would Extend Eligibility to Middle-Income Families*, EDUC. WK., Apr. 27, 2011, at 22; Lyndsey Layton & Philip Rucker, *Romney Endorses Education Vouchers*, WASH. POST, May 24, 2012, at A04; Mary Ann Zehr, *Capacity Issues Loom as Voucher Support Surges*, EDUC. WK., June 15, 2011, at 1 (reporting new, expanded, or potential voucher programs in the District of Columbia, Indiana, Wisconsin, Florida, and Pennsylvania).

⁴⁵ See generally JEFFREY R. HENIG, SPIN CYCLE: HOW RESEARCH IS USED IN POLICY DEBATES: THE CASE OF CHARTER SCHOOLS (2008); MERRIFIELD, *supra* note 35; TAKING MEASURE OF CHARTER SCHOOLS: BETTER ASSESSMENTS, BETTER POLICYMAKING, BETTER SCHOOLS (Julian R. Betts & Paul T. Hill eds., 2010).

⁴⁶ See *infra* notes 93–98 and accompanying text.

⁴⁷ See Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes That Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349, 367 (2003) (noting this principle and occasional exceptions thereto).

⁴⁸ See R. KENNETH GODWIN & FRANK R. KEMERER, SCHOOL CHOICE TRADEOFFS: LIBERTY, EQUITY, AND DIVERSITY 6 (2010).

⁴⁹ See Stephen D. Sugarman & Emlei M. Kuboyama, *Approving Charter Schools: The Gate-Keeper Function*, 53 ADMIN. L. REV. 869, 873 (2001).

⁵⁰ For typical requirements for open or random enrollment, see ARIZ. REV. STAT. ANN. § 15-184(A) (2012); MD. CODE ANN., EDUC. §§ 9-102(3), 9-102.1(b) (LexisNexis 2013).

⁵¹ Christopher Lubienski & Peter Weitzel, *Choice, Integration, and Educational Opportunity: Evidence on Competitive Incentives for Student Sorting in Charter Schools*, 12 J. GENDER RACE & JUST. 351, 361 (2009).

⁵² See CHESTER E. FINN, JR., BRUNO V. MANNO & GREGG VANOUREK, CHARTER SCHOOLS IN

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 on her behalf. In exchange for accepting market discipline (supplemented by regulatory requirements to demonstrate adequate student achievement⁵³), charters are exempted from much but not all the regulatory apparatus that constrains traditional public schools.⁵⁴ They are regulated much less invasively than traditional public schools with respect to such matters as curriculum, organization, and discipline.⁵⁵ Many states do exempt charters from collective bargaining with teachers.⁵⁶ Within whatever regulatory strictures are imposed, charters compete for students with other charters and with other types of schools. If students enroll, a charter thrives. Otherwise it dies.⁵⁷

The charter sector is growing explosively. In 2009–2010, 1.6 million children were enrolled in 5000 charter schools, making charters five percent of all public schools.⁵⁸ By comparison, 500,000 children were enrolled in 2000 charters in 2000, and there were no charter schools in 1990.⁵⁹ Fifteen school districts enroll at least a quarter of all public-school students in charters, including big-city districts in New Orleans, Detroit, the District of Columbia, Kansas City (MO), St. Louis, Cleveland, San Antonio, and Indianapolis.⁶⁰ Most government-funded schools in New Orleans are now charter schools;⁶¹ other large districts, including Los Angeles, Chicago, Houston, Philadelphia, and Miami-Dade, enroll more than ten percent of their students in charters.⁶² Public school districts in these and other cities are complaining about the

ACTION: RENEWING PUBLIC EDUCATION 15 (2000).

⁵³ Arnold F. Shober, Paul Manna & John F. White, *Flexibility Meets Accountability: State Charter School Laws and Their Influence on the Formation of Charter Schools in the United States*, 45 POL'Y STUD. J. 563, 566 (2006).

⁵⁴ See MARK SCHNEIDER, PAUL TESKE & MELISSA MARSCHALL, CHOOSING SCHOOLS: CONSUMER CHOICE AND THE QUALITY OF AMERICAN SCHOOLS 26 (2000).

⁵⁵ See GODWIN & KEMERER, *supra* note 48, at 6.

⁵⁶ See *id.*

⁵⁷ See Sugarman & Kuboyama, *supra* note 49, at 876 (having “satisfied customers” necessary, though insufficient, for a charter school); Sandra Vergari, *Charter Schools: A Significant Precedent in Public Education*, 59 N.Y.U. ANN. SURV. AM. L. 495, 500 (2003).

⁵⁸ INST. OF EDUC. SERVS., U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 2012, at 22 (2012), available at <http://nces.ed.gov/pubs2012/2012045.pdf>.

⁵⁹ JOSEPH MURPHY & CATHERINE DUNN SHIFFMAN, UNDERSTANDING AND ASSESSING THE CHARTER SCHOOL MOVEMENT 28–29 (2002).

⁶⁰ NAT'L ALLIANCE FOR PUB. CHARTER SCH., A GROWING MOVEMENT: AMERICA'S LARGEST CHARTER SCHOOL COMMUNITIES 3 (7th ed. 2012).

⁶¹ See generally Robert Garda, *The Politics of Education Reform: Lessons from New Orleans*, 40 J.L. & EDUC. 57 (2011).

⁶² NAT'L ALLIANCE FOR PUB. CHARTER SCH., *supra* note 60, at 3.

sizable bite charters are taking from their traditional enrollments.⁶³ The two most recent presidents, one of each party, have been charter boosters. The possibility that chartering will fizzle out seems remote.⁶⁴

Fierce debates rage over neoliberalism generally, over neoliberal education, and over charters in particular. In some quarters neoliberalism is a fighting word. It is the agenda of those who would privatize the public, quantify the incommensurable, and privilege the one percent.⁶⁵ After offering the definition that begins this Section, David Harvey quickly reminds his readers that neoliberalism primarily has been “a *political* project to re-establish the conditions for capital accumulation and to restore the power of economic elites.”⁶⁶

Such critiques need not take such doctrinaire forms. Michael Sandel recently criticized what he views as an undesirable progression from a “market economy” to a “market society”; his subtitle (“The Moral Limits of Markets”) suggests what he thinks of over-marketization.⁶⁷ Sandel, although he says nothing about neoliberalism and focuses on the buying and selling of goods that once had no price, recapitulates two standard critiques of an over-marketized society. First, it privileges the affluent: “Where all good things are bought and sold, having money makes all the difference in the world.”⁶⁸ Second, Sandel notes the “corrosive” if “difficult to describe” problem that “[p]utting a price on the good things in life can corrupt them.”⁶⁹ Not all things should be commodified.⁷⁰ The synthesis of private provision and public funding that characterizes governmental privatization initiatives also has more technocratic critics, who worry that outsourcing can have the effect of “[u]ndermining democratic norms of transparency, rationality, and accountability” and “diminish[ing] government capacity.”⁷¹

These arguments are instantiated in debates over schooling. In making their case, critics of charters (and, a fortiori, of voucher programs) adopt the notable rhetorical strategy of playing up the

⁶³ Motoko Rich, *Enrollment Off in Big Districts, Forcing Layoffs*, N.Y. TIMES, July 24, 2012, at A1.

⁶⁴ JACK BUCKLEY & MARK SCHNEIDER, CHARTER SCHOOLS: HOPE OR HYPE? 3 (2007).

⁶⁵ See Stanley Fish, *Neoliberalism and Higher Education*, N.Y. TIMES OPINIONATOR BLOG, (Mar. 8, 2009, 10:00 PM), <http://opinionator.blogs.nytimes.com/2009/03/08/neoliberalism-and-higher-education>.

⁶⁶ HARVEY, *supra* note 33, at 19; accord HENRY A. GIROUX, AGAINST THE TERROR OF NEOLIBERALISM: POLITICS BEYOND THE AGE OF GREED 10 (2008) (“[Neoliberalism] is an ideology that subordinates the art of democratic politics to the rapacious laws of a market economy.”).

⁶⁷ MICHAEL J. SANDEL, WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS (2012).

⁶⁸ *Id.* at 8.

⁶⁹ *Id.* at 9.

⁷⁰ *Id.*; accord HARVEY, *supra* note 33, at 33 (“Neoliberalization has meant, in short, the financialization of everything.”).

⁷¹ Jody Freeman & Martha Minow, *Introduction* to GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 1, 5 (Jody Freeman & Martha Minow eds., 2009).

public/private distinction. They argue that charters are not a species of public school reform but instead an attack upon “public schooling” itself, and thereby upon the public good. Michael Apple objects to “powerful interests” that, by advocating consumer choice in schooling, seek to destroy “unions, collective freedom, the common good, politics, . . . [and] collective deliberation.”⁷² Indeed, he accuses “neoliberal segments of the new hegemonic alliance”⁷³ in education of seeking “to radically alter who we think we are”⁷⁴ and to “transfor[m] our very idea of democracy, making it only an economic concept, not a political one.”⁷⁵ Part and parcel with the “entire project of neoliberalism,” market-based educational reform “is connected to a larger process of exporting the blame from the decisions of dominant groups onto the state and onto poor people.”⁷⁶

Unlike the general debate over neoliberalism, where wholesale condemnation on the far left coexists with positions like Sandel’s opposition to *over*-marketization and *over*-privatization, in the educational debate many mainstream observers argue in ways substantively indistinguishable from that of the most strident critics. Diane Ravitch, repenting of her earlier neoliberal sympathies, is substantially less altiloquent than Apple but echoes his complaint that “[f]or neoliberals, the world in essence is a vast supermarket.”⁷⁷ She complains, “[t]he rhetoric of many charter school advocates has come to sound uncannily similar to the rhetoric of voucher proponents and of the most rabid haters of public schooling. They often sound as though they want public schools to fail.”⁷⁸ She concludes that:

⁷² MICHAEL W. APPLE, EDUCATING THE “RIGHT” WAY: MARKETS, STANDARDS, GOD, AND INEQUALITY 9 (2001) [hereinafter APPLE, EDUCATING THE “RIGHT” WAY]. For similar voices, consider MICHAEL FABRICANT & MICHELLE FINE, CHARTER SCHOOLS AND THE CORPORATE MAKEOVER OF PUBLIC EDUCATION: WHAT’S AT STAKE? 8 (2012) (stating that charters “have started to rip communities of color apart”); PAULINE LIPMAN, THE NEW POLITICAL ECONOMY OF URBAN EDUCATION: NEOLIBERALISM, RACE, AND THE RIGHT TO THE CITY 6–15 (2011); JAMES RYAN, STRUGGLING FOR INCLUSION: EDUCATIONAL LEADERSHIP IN A NEOLIBERAL WORLD 30, 34 (2012) (this James Ryan is not the education scholar James E. Ryan of the University of Virginia); William H. Watkins, *Re-imagining Public Education*, in THE ASSAULT ON PUBLIC EDUCATION: CONFRONTING THE POLITICS OF CORPORATE SCHOOL REFORM 189, 189 (William H. Watkins ed. 2012) (“Corporate, privatizer, free-marketeer, ‘bankster’ neoliberals are working feverishly to create a narrative for 21st-century education.”); see also James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839, 841 (collecting further examples of similar rhetoric).

⁷³ APPLE, EDUCATING THE “RIGHT” WAY, *supra* note 72, at 33.

⁷⁴ *Id.* at 8.

⁷⁵ *Id.* at 15; accord LIPMAN, *supra* note 72, at 121–22 (“Charter schools have become the central vehicle to . . . eliminate whatever democratic control of public education there is.”); Kenneth J. Saltman, *Putting the Public Back in Public Schooling: Public Schools Beyond the Corporate Model*, 3 DEPAUL J. SOC. JUST. 9, 24 (2009).

⁷⁶ APPLE, EDUCATING THE “RIGHT” WAY, *supra* note 72, at 32.

⁷⁷ *Id.*

⁷⁸ RAVITCH, *supra* note 42, at 146; accord FABRICANT & FINE, *supra* note 72, at 123

[T]he problem with the marketplace is that it dissolves communities and replaces them with consumers. Going to school is not the same as going shopping . . . The market serves us well when we want to buy a pair of shoes or a new car or a can of paint; we can shop around for the best value or the style we like. The market is not the best way to deliver public services. Just as every neighborhood should have a reliable fire station, every neighborhood should have a good public school.⁷⁹

This wholesale rejection of the neoliberal project in education is striking. What makes it so clear to these thoughtful and informed writers that government provision is necessary to education when other programs guaranteeing important and basic services—food stamps, for example—operate relatively uncontroversially on a neoliberal paradigm? Why oppose market provision for schooling in principle? I do not mean to suggest that there are no answers to these questions. Particularly important is the claim that education is uniquely needful of public provision because of deep connections between education and the practice of public democracy.⁸⁰ My point here is that many critics feel little rhetorical need to make any argument. They assert, rather than justify, the incompatibility of marketization and the public good. It is obvious to them that public schools that are public in a Progressive way are public in the right way, because that is how public schools have been public for nearly a century. That they argue thus, and expect to be effective, is testament to the success and deep roots of educational Progressivism in America.

The debates over neoliberalism are extremely important, but I do not join them here. This Article is unusual in using the term “neoliberal” as a purely neutral description without normative implications. Their wisdom aside, charters and other neoliberal reforms are now substantially entrenched.⁸¹ Educational neoliberalism is

(“Charter reform . . . neglect[s] the fundamental obligation of every publicly funded institution to remain accountable to the citizenry financing its work, accessible to those in need of its services, and just in allocating resources.”).

⁷⁹ RAVITCH, *supra* note 42, at 221.

⁸⁰ See GIROUX, *supra* note 66, at 114–17. Public schools in the Progressive tradition have also long arrogated to themselves, *qua* democratic and public polities, a particular duty to prepare students for civic life and democratic citizenship, while cultivating doubts about whether private schools can prepare students similarly. James C. Carper & Thomas C. Hunt, *Taking Religion Seriously: Another Approach*, 38 RELIGION & EDUC. 81, 86 (2011); Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 168 (2002); William A. Galston, *The Politics of Polarization: Education Debates in the United States*, in THE PUBLIC SCHOOLS, *supra* note 8, at 57, 63; Reuben, *supra* note 8, at 12–13; Saiger, *supra* note 8, at 521–23; Paul Weithman, *Religious Education and Democratic Character*, in RELIGIOUS VOICES IN PUBLIC PLACES 194, 205–07 (Nigel Biggar & Linda Hogan eds. 2009). Such arguments did not originate with the Progressives and have roots in the pre-revolutionary and founding periods. See GREEN, BIBLE, SCHOOL, AND CONSTITUTION, *supra* note 28, at 13–15.

⁸¹ See BURCH, *supra* note 36, at 2–3.

unlikely to vanquish Progressivism, but has already displaced its ideological monopoly in law, on the ground, and in the culture,⁸² and will continue to compete with it for the foreseeable future. How neoliberal schools will affect various aspects of American educational governance and law has become critically important. This Article focuses on a single but vital aspect of this larger question: How will the rise of charters affect the legal regulation of religion in American education?

II. THE CHARTER SCHOOL UNDER A PUBLIC/PRIVATE DICHOTOMY

As Part I demonstrates, charter schools are in fact public/private hybrids,⁸³ routinely described as “publicly funded but privately run” or “public but largely independent.”⁸⁴ But charters confront a First Amendment regime that insists upon dichotomy. *Public* schools face one set of constitutional rules about religion and *private* schools another. This is because—although the institution of public schooling and the phrase “public school” are famously absent from the United States Constitution⁸⁵—the Supreme Court’s cases interpret the First Amendment to bar much religious activity in “public schools” while leaving private schools free to pursue religious missions.⁸⁶ The duality is rooted in the state action requirement, the basic principle that the First and Fourteenth Amendments constrain governments but not private persons.

It therefore becomes tempting to think that one can identify which First Amendment rules apply to charter schools by determining whether charters are public or private. On this approach, if charters are public schools, then they are required to be secular.⁸⁷ This Part argues that, to the contrary, whether a school is *public school* or a *state actor* is a context-dependent inquiry. Whether charters are public or private need not be answered identically for all purposes, for all constitutional purposes, or even for all federal constitutional purposes. “[W]hen state

⁸² See Fried, *supra* note 80, at 168.

⁸³ Christopher Lubienski, *Instrumental Perspectives on the “Public” in Public Education: Incentives and Purposes*, 17 EDUC. POL’Y 478, 482–83 (2003) [hereinafter Lubienski, *Instrumental Perspectives*].

⁸⁴ See Mead, *supra* note 47, at 352; *Foundations Help Charter Network Secure Bonds*, EDUC. WK., May 12, 2010, at 4.

⁸⁵ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33–35 (1973).

⁸⁶ GREENAWALT, DOES GOD BELONG, *supra* note 27, at 17–18.

⁸⁷ See Sugarman & Kuboyama, *supra* note 49, at 874–75. Only rarely in the literature does one encounter even glancing references to the possibility that charter schools could be religious. See Laycock, *supra* note 3, at 184–85.

action is found in a particular context, it doesn't mean that the actor is a state actor in all contexts."⁸⁸

In the educational arena, this principle was long obscured by the Progressive hegemony that limited the variety of institutional arrangements in American schooling.⁸⁹ With the waning of that hegemony it has become indisputable. This Part demonstrates this by reviewing, in its first Section, the dominant political and policy consensus that charter schools are public schools. It shows that this identification is not determinative as a First Amendment matter; it is both politicized and more contextualized than it might appear.

Subsequent Sections review three areas of law outside the First Amendment that depend on determinations that schools are *public* or *private*, state actors or not, and that might seem, at first thought, to be particularly relevant. In each of the three contexts—the education clauses of state constitutions, actions for damages against charter schools under § 1983, and the funding of special-needs children enrolled in privately managed schools—courts and agencies reach very different conclusions. These depend both upon specific features of the schools in question and also the purpose and nature of the legal regime for which the determination of publicness or privateness is important.

A. *Blanket Identification of Charters as “Public” Schools*

That charter schools are a species of the genus *public* is the prevailing view in policy, political, and popular circles.⁹⁰ Uninterrogated claims that charter schools are public schools are routine if not ubiquitous.⁹¹ A pro-charter interest group names itself the “National

⁸⁸ Alexander Volokh, *Prison Vouchers*, 160 U. PA. L. REV. 779, 814 (2012).

⁸⁹ See *supra* Part I.A.

⁹⁰ James E. Ryan, *Charter Schools and Public Education*, 4 STAN. J. C.R. & C.L. 393, 405 (2008).

⁹¹ See 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* 423 (2008) (charters and magnets are among “public school options”); ARNOLD SHOBER, *THE DEMOCRATIC DILEMMA OF AMERICAN EDUCATION: OUT OF MANY, ONE?* 196 (2012) (“Charter schools must accept the public accountability of the public school system because they *are* public schools.”); Michael E. Hersher, *The Law of Charter Schools*, in *EDUCATION AND THE LAW* 547, 547 (Stuart Biegel ed., 3d ed. 2012) (“Charter schools are part of the public school system, but they are not the same as regular public schools.”); Martha Minow, *We’re All for Equality in U.S. School Reforms: But What Does It Mean?*, in *JUST SCHOOLS: PURSUING EQUALITY IN SOCIETIES OF DIFFERENCE* 21, 40 (Martha Minow, Richard A. Shweder & Hazel Rose Markus eds. 2008) (“Although often exempt from systemwide rules governing textbook adoptions and even unionization, charter schools operate as public schools.”); Vicki L. Phillips, *It’s Time for Public Schools and Public Charters to Work Together*, *EDUC. WK.*, Jan. 12, 2011, at 29 (presenting the argument of a Gates Foundation official that society should attack “one of the most persistent divides in public education and accelerate progress for all of our students: public charter schools vs. traditional public schools”).

Alliance for Public Charter Schools,” for example.⁹² The publicness of the charter school has become central to the self-understanding of many funders, advocates, legislators, politicians, unions, scholars, and ordinary folk involved in or supportive of the charter movement. It is difficult indeed, for example, to imagine a Department of Education in a Democratic administration like Barack Obama’s offering charters the full-throated endorsement that it has,⁹³ or that charters could have diffused so rapidly across the states, were it not plausible to claim that charter schools are public schools.

This view, however, is not so much a reasoned conclusion as a framing of a political issue by victorious charter proponents. Analytically, the identification of charters as public is not straightforward. “Public school” denotes a bundle of characteristics,⁹⁴ and charters clearly share some of them and just as clearly do not share others.⁹⁵

Rather, legislators, politicians, and industry participants harness the term “public school” in service of charters⁹⁶ for the same reasons that charter opponents paint charters as utterly foreign to the institution of public schooling.⁹⁷ It cannot be, for example, that charters divert funds from public schools if they themselves *are* public schools. So the latter is asserted, notwithstanding that charters self-evidently *do* divert public education funds, if by “public education” one means only traditional, district-run schools.⁹⁸ Similarly, charter systems must be distinct from voucher programs if they are public schools, because vouchers involve private schools—although charters, just like voucher schools, are privately run schools that receive public funds when and only when parents choose to enroll their children in such schools.

It is not only that “public school” carries strong, positive associations in American politics;⁹⁹ the claim that charters are public

⁹² See NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS, <http://www.publiccharters.org> (last visited Feb. 2, 2013).

⁹³ See Erica Frankenberg & Genevieve Siegel-Hawley, *Choosing Diversity: School Choice and Racial Integration in the Age of Obama*, 6 STAN. J. C.R. & C.L. 219, 243 (2010).

⁹⁴ See Forman, *supra* note 72, at 845; Lubienski, *Instrumental Perspectives*, *supra* note 83, at 479–83; Ryan, *supra* note 90, at 405; Aaron Saiger, *School Choice and States’ Duty to Support “Public” Schools*, 48 B.C. L. REV. 909, 935–37, 939–44 (2007) [hereinafter Saiger, *School Choice and States’ Duty*].

⁹⁵ See, e.g., Mark Tushnet, *Vouchers After Zelman*, 2002 SUP. CT. REV. 1, 21 (“[A] school that chooses to accept vouchers becomes a particular kind of public school, less regulated than charter or community schools but still a public school.”).

⁹⁶ See Lubienski, *Instrumental Perspectives*, *supra* note 83, at 482 (“[P]erhaps because the general population is largely unfamiliar with educational alternatives, but committed to public education, many descriptions of such schools emphasize the public aspect in explaining reforms to the public.”).

⁹⁷ See *supra* Part I.B.

⁹⁸ See generally Rich, *supra* note 63.

⁹⁹ Carper & Hunt, *supra* note 80, at 87 (“[A] majority of citizens and the politically and

inoculates them from charges that they compete with, and in that sense threaten, public schools. It frames charters not as an alternative to public schools but instead as part of a long tradition of public-school reform from within. It is unsurprising, with charters on the rise, that this framing is at this moment dominant. But it is hard to regard this as shedding much light on whether, as a legal matter, charters are public schools.

One also finds in the legal literature scholars who identify charter schools generally as “public” state actors. Robert O’Neil, writing before *Zelman*, says that charter schools constitute an “[e]asy [c]ase” of state action.¹⁰⁰ For O’Neil, the close regulation of charters settles the question: if a charter school were given sufficient regulatory latitude to undermine its umbilical connection to state authority, “such an entity would not be a charter school as that term is currently understood.”¹⁰¹ This analysis perseveres post-*Zelman*. “Charter schools most likely would be found part of the government for constitutional purposes,” writes Gillian Metzger, “given that they are officially denominated public schools, often are created by the state, and operate subject to the state’s direct oversight.”¹⁰² Metzger also notes that charters have “extensive government involvement”¹⁰³ and that “managing a public school (although not providing educational services) is traditionally the exclusive prerogative” of government.¹⁰⁴

But O’Neil, Metzger, and other scholars of privatization who agree with them likely intend no implication that their conclusions about state action should extend to the First Amendment context. They make no argument that state action is not context dependent and advance no First Amendment claims. Indeed, O’Neil distinguishes a religious school that seeks to “constrain sacrilege or blasphemy on the part of its faculty” from one that tries to limit teacher speech on secular subjects or discriminate by race in student admissions.¹⁰⁵

B. *State Constitutional Law of Education*

Governors and state legislators feel the imperative to identify charter schools as public as keenly as any charter proponent. This is

culturally powerful still revere public education.”).

¹⁰⁰ Robert M. O’Neil, *School Choice and State Action*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 215, 220 (Stephen D. Sugarman & Frank R. Kemerer eds. 1999).

¹⁰¹ *Id.* at 221.

¹⁰² Gillian E. Metzger, *Privatization as Delegation*, 103 *COLUM. L. REV.* 1367, 1495 (2003).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1495–96.

¹⁰⁵ O’Neil, *supra* note 100, at 225.

evident from a review of state charter-school statutes. Even as these statutes establish rights, duties, and organizational structures that differentiate charters from public schools as traditionally organized, nearly every one explicitly provides that charter schools are, by definition, public schools.¹⁰⁶

These statutory definitions, along with whatever political benefits they bring, also address a particular legal imperative. Most state constitutions, many drafted and ratified under the influence of Progressive educational thinking, use the Progressive language of “public” or “common schools” in establishing the state duty to establish schools and students’ rights to attend them.¹⁰⁷ States discharge those duties and/or fulfill resident children’s rights by funding charters, on standard readings of these clauses, only if those charters are “common” or “public.” In a handful of states, this has led to litigation regarding what constitutes a “public” school.

In Ohio, a facial challenge under that state’s constitution alleged that the state’s constitutional duty to support a “thorough and efficient system of common schools”¹⁰⁸ prohibited charter schools from receiving state monies because charters are not “common.”¹⁰⁹ The Ohio Supreme Court rejected this argument.¹¹⁰ It held that the regulatory regime governing charter school operations was sufficiently governmental, and

¹⁰⁶ See ALASKA STAT. § 14.03.255(a) (2012); ARIZ. REV. STAT. ANN. § 15-181(A) (2012); ARK. CODE ANN. § 6-23-102 (2012); CAL. EDUC. CODE § 47601(e) (West 2012); COLO. REV. STAT. §§ 22-30.5-104(2)(b), 22-30.5-104(4.5)(a) (2012); CONN. GEN. STAT. § 10-66aa(1) (2012); DEL. CODE ANN. tit. 14, § 501 (2012); FLA. STAT. § 1002.33(1) (2012); GA. CODE ANN. § 20-2-2062(3) (2012); 2012 Haw. Sess. Laws act 130 pt. I, § 1 (S.B. 2115 at 3, 4); IDAHO CODE ANN. § 33-5202 (2012); 105 ILL. COMP. STAT. ANN. 5/27A-2(3) (West 2012); IND. CODE § 20-24-1-4 (2012); IOWA CODE § 256F.4(2)(b) (2012); KAN. STAT. ANN. § 72-1903(a) (West 2012); LA. REV. STAT. ANN. § 17:3973(2)(a) (2013); MD. CODE ANN., EDUC. § 9-101(b) (West 2013); MASS. GEN. LAWS ANN. ch. 71, § 89(c) (West 2012); MICH. COMP. LAWS ANN. § 380.501(1) (West 2012); MINN. STAT. § 124D.10(b)(2) subdiv. 7 (2012); MO. REV. STAT. § 160.400(1) (2012); N.J. STAT. ANN. § 18A:36A-3(a) (West 2013); N.M. STAT. ANN. § 22-8B-2(A) (2012); N.Y. EDUC. LAW § 2853(1)(c) (McKinney 2012); N.C. GEN. STAT. § 115C-238.29E(a) (2012); OHIO REV. CODE ANN. § 3314.01(B) (West 2013); OKLA. STAT. tit. 70, § 3-132(C) (2012); OR. REV. STAT. § 338.015 (2012); 24 PA. CONS. STAT. ANN. § 17-1703-A (West 2012); R.I. GEN. LAWS § 16-77-3.1(a) (2012); S.C. CODE ANN. § 59-40-40(2)(a) (2012); TENN. CODE ANN. § 49-13-105(a) (2012); UTAH CODE ANN. § 53A-1a-503.5(1) (West 2012); VA. CODE ANN. § 22.1-212.5(B) (2012); WYO. STAT. ANN. §§ 21-3-303(c), 21-3-304(a) (2012); Sugarman & Kuboyama, *supra* note 49, at 873. *But cf.* Maren Hulden, Note, *Charting a Course to State Action: Charter Schools and § 1983*, 111 COLUM. L. REV. 1244, 1255 & n.44 (2011) (stating only that a “majority” of states define charters as public schools and defining axes along which state statutory regimes differ).

¹⁰⁷ See Saiger, *School Choice and States’ Duty*, *supra* note 94, at 926–27.

¹⁰⁸ OHIO CONST. art. VI, § 2.

¹⁰⁹ *State ex rel Ohio Cong. of Parents v. State Bd. of Educ.*, 2006-Ohio-5512, ¶¶ 23–26, 857 N.E.2d 1148, 1156–57.

¹¹⁰ *Id.* ¶¶ 27–34, 857 N.E.2d at 1157–59.

sufficiently similar to the regime applicable to traditional public schools, to render charter schools public schools.¹¹¹

The Georgia Supreme Court faced both a somewhat different issue and an idiosyncratic constitutional text in 2011.¹¹² It held that its legislature could not itself charter schools pursuant to its constitutional authority to “provide by law for the creation of special schools in such areas as may require them.”¹¹³ The court understood the legislature’s authority to create “special” schools as an exception to the Georgia constitution’s general grant of authority “to county and area boards of education to establish and maintain public schools within their limits.”¹¹⁴ But charters, the court held, are not “special”: they “necessarily operate in competition with or duplicate the efforts of locally controlled general K–12 schools by enrolling the same types of K–12 students who attend locally controlled schools and by teaching them the same subjects that may be taught at locally controlled schools.”¹¹⁵ The Georgia court explicitly determined that differences between charter schools’ and traditional schools’ pedagogy, organization, funding, and susceptibility to the market did not make charters “special.”¹¹⁶ The court therefore concluded that charters are constitutional only if “county and area boards of education . . . establish and maintain” them as “public schools.”¹¹⁷

Whereas the Ohio case expands the scope of chartering, the Georgia case was a blow to charter proponents, who want to be able to call charters public but want even more to be able successfully to secure charters. This is difficult when chartering authority rests exclusively with the traditional school districts with which charters compete. But both cases emphatically endorse the view that charter schools are public schools. Moreover, both courts make the same move to reach this conclusion: they conclude that their states’ charter schools are sufficiently similar to traditional public schools because the regulatory regimes that govern them are sufficiently similar. “[W]hile it is true that community schools are exempted from certain state standards,” writes the Ohio court, “there are others to which the schools must also adhere.”¹¹⁸ The court multiplies examples at length.¹¹⁹ The Georgia court goes even further. It declares that charter and traditional public

¹¹¹ *Id.* ¶¶ 33–34, 857 N.E.2d at 1159.

¹¹² *Gwinnett Cnty. Sch. Dist. v. Cox*, 710 S.E.2d 773, 782 (Ga. 2011) (relevant Georgia constitutional language is “unique”).

¹¹³ GA. CONST. art. VIII, § V, ¶ 7(a).

¹¹⁴ *Id.* art. VIII, § V, ¶ 1.

¹¹⁵ *Gwinnett Cnty.*, 710 S.E.2d at 777.

¹¹⁶ *Id.* at 780–81.

¹¹⁷ GA. CONST. art. VIII, § V, ¶ 1.

¹¹⁸ *State ex rel Ohio Cong. of Parents v. State Bd. of Educ.*, 2006-Ohio-5512, ¶ 30, 857 N.E.2d 1148, 1157–58.

¹¹⁹ *Id.* ¶¶ 110–75, 857 N.E.2d at 1171–74.

school teachers alike “teach [their] students in accordance with the same statutory standards of professional performance that govern the conduct of all of the State’s educators.”¹²⁰ Moreover, “every general K–12 public school has a ‘unique operating charter’—whether memorialized in writing or merely implicit in the unique nature of each school’s faculty, administration and student body.”¹²¹ Charters and publics are really the same.

In setting out the facts of the cases, both courts note that their respective legislatures declared charter schools to be public schools.¹²² Neither seems inclined to question this assertion. This is not because these courts are prepared to derogate their authority in this area to lawmakers. Quite the contrary: the cases reject emphatically the formalist position that charter schools are “public” because state legislatures declare them to be so.¹²³ When a dissenter suggested that the Ohio opinion “treats the mandate for a system of common schools as standardless, denoting any schooling arrangement that the General Assembly decides to support by general taxation,”¹²⁴ the majority emphatically retorts: “[W]e do not approve of just ‘any schooling arrangement.’”¹²⁵ The Georgia court takes the maximalist position that *only* the judiciary may construe “a constitutional phrase”¹²⁶ like “special school,”¹²⁷ and that the legislature has “no power” to do so.¹²⁸ “Public schools” is also a constitutional phrase in Georgia.¹²⁹ So it is not based upon the public school code that these courts know what a constitutional public school is; rather, these courts agree with the legislators that charters fit within the meaning of the constitutional phrase “public school.”

But the court’s functionalism is only surface-deep. The courts review at great length the similarities between the regulatory regimes governing traditional public schools and charter schools; but they never explain why the nature of the regulatory regime is what matters in interpreting the constitutional text. Charters and traditional publics are also similar in having many rooms, and school bells, and blackboards;

¹²⁰ *Gwinnett Cnty.*, 710 S.E.2d at 780 (internal citation omitted).

¹²¹ *Id.*

¹²² *Ohio Cong.*, 2006-Ohio-5512, ¶ 5, 857 N.E.2d at 1152 (citing 147 Ohio Laws pt. I, 909, 1187); *Gwinnett Cnty.*, 710 S.E.2d at 776 (citing GA. CODE ANN. § 20-2-2081(2)).

¹²³ *Accord* Frank R. Kemerer & Catherine Maloney, *The Legal Framework for Educational Privatization and Accountability*, 150 WEST’S EDUC. L. REP. 589, 597–98 (2001).

¹²⁴ *Ohio Cong.*, 2006-Ohio-5512, ¶ 82, 857 N.E.2d at 1167 (Resnick, J., dissenting).

¹²⁵ *Id.* at ¶ 32, 857 N.E.2d at 1159 (majority opinion) (citing *id.* ¶ 82, 857 N.E.2d at 1167 (Resnick, J., dissenting)).

¹²⁶ *Gwinnett Cnty.*, 710 S.E.2d at 780.

¹²⁷ GA. CONST. art. VIII, § V, ¶ 7(a).

¹²⁸ *Gwinnett Cnty.*, 710 S.E.2d at 780.

¹²⁹ GA. CONST. art. VIII, § V, ¶ 1 (“Authority is granted to county and area boards of education to establish and maintain public schools within their limits”); *see also Gwinnett Cnty.*, 710 S.E.2d at 775–76 (discussing history of Georgia education clauses).

why is the shape of the regulatory regime not like these obviously unimportant features? This question can be answered, but the courts do not even attempt to respond to it. For all the space the opinions give to similarities between charters and public schools, they say nothing about how they determine which features of a school makes it public. Here is the peroration of the Ohio court's opinion: "To achieve the goal of improving and customizing public education programs, the General Assembly has augmented the state's public school system with public community schools" ("community schools" being Ohio's term for charters).¹³⁰ Similarly, neither the Ohio nor the Georgia cases mention private schools, apparently thinking them irrelevant. But they are very relevant: if the critical legal fact is that charters and traditional public schools are regulated similarly, then it is worth noting, at least, that private schools are also regulated by the states, in many respects similarly to the ways public schools are regulated. The Ohio and Georgia courts ignore this.

Ultimately, the Georgia and Ohio supreme courts do not address this question because for them it goes without saying. They know what a public school is when they see it—and what they see is what everyone means by "public school," i.e., a Progressive school. This approach has an originalist cast, in that the framers of twentieth-century education clauses arguably constitutionalized Progressivism when they used the terms "public" or "common school," terms of art to Progressives. But at base it is an ordinary-meaning claim: we still understand the terms as the Progressives did and do, because that is the kind of public school system that we have.

These cases therefore shed little light on the public/private question in federal constitutional law. Not only does the education-clause context place them in a state-law context without a federal analogue,¹³¹ but the interpretative roadmap that state courts offer in this area fails to engage the issue at the heart of the federal question.

C. Section 1983 Actions

Whether a particular school is public is sometimes relevant to tort liability. Libel is one example. The federal district court in the district of Minnesota barred a counterclaim alleging libel brought by a charter school because libel claims cannot be raised by "public" entities.¹³² The case, without much analysis, held that the charter school was a public

¹³⁰ *Ohio Cong.*, 2006-Ohio-5512, ¶ 32, 857 N.E.2d at 1158–59.

¹³¹ See Saiger, *School Choice and States' Duty*, *supra* note 94, at 925.

¹³² *Am. Civil Liberties Union of Minn. v. Tarek Ibn Ziyad Acad.*, No. 09-138(DWF/JJG), 2009 WL 4823378, at *4 (D. Minn. Dec. 9, 2009).

school largely because state law said it was a public school, and because it “incorporated itself as such in order to be approved as a public charter school under” the state chartering statute.¹³³ This language, and language in similar cases, suggests that some courts understand publicness as a question of state law, rather than one of federal law or of fact; and moreover that they view state declarations that charters are public as determinative of the state-law question.¹³⁴ Other cases simply assume that charters are public schools, perhaps because the parties failed to raise the issue and perhaps because courts found it obvious.¹³⁵

The Supreme Court addressed this question explicitly in the important case of *Rendell-Baker v. Kahn*, decided in 1982. *Rendell-Baker* involved a school organized, administered, and managed as a private corporation to provide special education services and to serve youth under the supervision of the criminal justice system.¹³⁶ The Court held that such a school did not act “under color of state law” for the purpose of 42 U.S.C. § 1983.¹³⁷ The Court reached this conclusion notwithstanding that the school received between 90% and 99% of its annual income from public authorities.¹³⁸ The Court categorically rejected Justice Marshall’s suggestion that “[t]he fact that the school is providing a substitute for public education is also an important indicium of state action.”¹³⁹ Instead the Court viewed the private school as a government contractor.¹⁴⁰ It enjoyed freedom of action¹⁴¹ except to the extent it chose to limit that freedom by contract. Its private nature was confirmed precisely by its contractual relationship with a public authority.¹⁴² It is also worth noting that Justice Marshall himself, while arguing that the school acted under color of state law, appeared to harbor no doubts that it was a “private enterprise,” a “substitute for,” rather than example of, public education.¹⁴³

Kimberly Yuracko relies in part on *Rendell-Baker* to argue that homeschoolers are state actors, either under a “public function” theory that attributes state action to “private actors [who] exercise monopolistic control over a traditionally public function,”¹⁴⁴ or a

¹³³ *Id.*

¹³⁴ *Cf.* Hulden, *supra* note 106, at 1268–70 (collecting cases).

¹³⁵ *E.g.*, *Porta v. Klagholz*, 19 F. Supp. 2d 290, 298–300 (D.N.J. 1998); *see also* Hulden, *supra* note 106, at 1268–69.

¹³⁶ *Rendell-Baker v. Kohn*, 457 U.S. 830, 832–33 (1982).

¹³⁷ *Id.* at 843.

¹³⁸ *Id.* at 832–33 & n.1.

¹³⁹ *Id.* at 848 (Marshall, J., dissenting).

¹⁴⁰ *Id.* at 843 (majority opinion).

¹⁴¹ *Id.* at 841.

¹⁴² *Id.* at 840–43.

¹⁴³ *Id.* at 847–48 (Marshall, J., dissenting).

¹⁴⁴ *See* Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123, 142–43 (2008).

“delegation” theory which prevents governments from ducking constitutional duties by “delegating . . . public functions to private actors.”¹⁴⁵ But *Rendell-Baker* explicitly rejects such an argument with respect to institutional, private schools. Private schooling predates public schooling, and even in the heyday of Progressivism a robust private school sector functioned in parallel with public schools.¹⁴⁶ Because education is not “traditionally the *exclusive* prerogative of the state,”¹⁴⁷ private schools, even when their resources come nearly entirely from public funds, do not provide a “public function” and thus become public state actors.¹⁴⁸ The Ninth Circuit so reasoned when it determined that charter schools were not necessarily state actors for employment purposes.¹⁴⁹ The court stressed that “[u]nder § 1983, a state’s statutory characterization of a private entity as a public actor for some purposes is not necessarily dispositive with respect to all of that entity’s conduct.”¹⁵⁰ It also, moreover, concluded that state law’s contrary characterization of charter schools as “public” was not “controlling.”¹⁵¹

D. *Educating Children with Disabilities*

Rendell-Baker is an interesting case because special education was, until the advent of charter and voucher programs, the primary arena in which the publicness and privateness of schools was an important federal regulatory question. *Rendell-Baker* itself involved a state-law program by which Massachusetts officials placed certain children in private schools at state expense to provide them with “necessary special education” services. This program is the Massachusetts counterpart to the federal scheme enshrined in the Individuals with Disabilities Education Act (IDEA).¹⁵² The IDEA guarantees to all disabled children (who live in states that choose to receive the associated federal funds) a right to a “free, appropriate public education” (FAPE).¹⁵³ FAPE, the core substantive right of the IDEA, is important to the state action question because it requires that disabled children be provided with education that is not only “free” but “public.”

¹⁴⁵ *Id.* at 146, 149.

¹⁴⁶ *Id.* at 145.

¹⁴⁷ *Rendell-Baker*, 457 U.S. at 842.

¹⁴⁸ *But cf.* Yuracko, *supra* note 144, at 146 (“Homeschooling parents” perform a “public function” because they “exercise exclusive control over education . . . with respect to their own children.”).

¹⁴⁹ *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 808 (9th Cir. 2010).

¹⁵⁰ *Id.* at 814.

¹⁵¹ *Id.* at 813–14, 816.

¹⁵² 20 U.S.C. §§ 1400–1482 (2006).

¹⁵³ *Id.* § 1412(a)(1)(A).

Nevertheless, the policy described in *Rendell-Baker*—placing special education students in private facilities at public expense—has been legislatively and judicially understood as a way to fulfill the FAPE requirement since the passage of the Education for All Handicapped Children Act, the predecessor of the IDEA. The statute, even as it promulgated the FAPE requirement and its associated definitions (which remain in force),¹⁵⁴ anticipated that states would “plac[e] or refe[r]” handicapped children in “private schools and facilities . . . as the means of carrying out [its] requirements.”¹⁵⁵ The recent 1997 amendments to the IDEA even more explicitly contemplate that private placement is a permissible “means for carrying out the requirements . . . requiring the provision of special education and related services to all children with disabilities,”¹⁵⁶ which is the core FAPE obligation. Public systems that fail to provide FAPE in their own institutions can also be compelled by parents, both retrospectively and prospectively, to pay tuition for appropriate private education in lieu of public services.¹⁵⁷

This last guarantee was established and then expanded in a line of Supreme Court cases that permitted parents to be reimbursed for unilaterally placing their children in private schools if they could subsequently demonstrate that the public schools would not have provided FAPE.¹⁵⁸ On the face of the statute this is remarkable: state failure to provide appropriate *public* education triggers an obligation to provide *private* education. The most recent of these cases, which broadened the scope of retroactive reimbursement for private school tuitions to include parents whose children were never enrolled in a public school, is particularly striking when it insists that without such reimbursement, a “child’s right to a *free* appropriate education . . . would be less than complete.”¹⁵⁹ This statement casually elides the statute’s requirement that appropriate education also be “public,” and its purported direct quotation of its own earlier precedent simply omits the word “public” without even ellipsis.¹⁶⁰

What emerges from the statute, regulations, and case law is a requirement to provide “public” education to disabled children that can be and is routinely met by placement in “private” schools. Those private schools do not thus become “public,” as *Rendell-Baker* attests; the IDEA also calls them “private.” The requirement that the education provided

¹⁵⁴ *Id.* §§ 1401(16), 1401(18), 1412(1) (1976).

¹⁵⁵ *Id.* § 1413(a)(4)(B) (1976); *accord* S. REP. NO. 94-168, at 50 (1975).

¹⁵⁶ 20 U.S.C. § 1412(a)(10)(B)(i) (2006).

¹⁵⁷ *Id.* § 1412(a)(10)(B); 34 C.F.R. § 300.325 (2012).

¹⁵⁸ *See* *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Burlington Sch. Comm. v. Dep’t of Educ.*, 471 U.S. 359 (1985).

¹⁵⁹ *See* *Forest Grove*, 557 U.S. at 244–45 (quoting *Burlington*, 471 U.S. at 369).

¹⁶⁰ *See* *Burlington*, 471 U.S. at 370.

in those private schools be “public” is met, in the view of the Congress and of the Court, primarily by ensuring that the costs of the private education be paid for with public funds.

Standard principles of statutory interpretation urge that the phrase “free, appropriate public education” be read to mean that “public” education must be something beyond “free.”¹⁶¹ This is buttressed by the Act’s definition of FAPE as “special education and related services that . . . have been provided” not only “at public expense . . . and without charge” but also “under public supervision and direction.”¹⁶² Further reinforcing the notion that “public” should mean something beyond “at no cost to parents” is the Act’s definition of “special education” as “specially designed instruction, at no cost to parents.”¹⁶³ But Congress did not intend, and neither Congress nor the courts have read, either “public . . . education” nor “public supervision and direction” to mean that public schools should *provide* the necessary services. All that is required is that public authorities, if they choose to direct public funds to private institutions, satisfy themselves that those private entities will provide the appropriate services.¹⁶⁴ Special education is therefore “public” if it is paid for by the public and if there is some level of public regulation, whether by rule or by contract, ensuring that the state gets what it pays for. It is a sort of “public” education that is routinely delivered in “private” schools.

III. RELIGIOUS CHARTER SCHOOLS UNDER FIRST AMENDMENT PRINCIPLES

Rather than asking whether charter schools are public schools in the abstract, one should ask whether they are public schools or private schools for the purpose of the relevant First Amendment rule that

¹⁶¹ Against this presumption is the Progressive practice of using the adjectives “free” and “public,” along with other terms such as “thorough,” “general,” “uniform,” and “efficient,” as synonyms for the Progressive, “common” school. See Saiger, *School Choice and States’ Duty*, *supra* note 94, at 926. Many state constitutions deploy these adjectives in groups and it is not clear that each is intended, or otherwise should, bear independent meaning. *Id.* at 925–26. But while such a reading of the IDEA would permit the “free” and “public” components of FAPE to bear overlapping meanings, those meanings would take on a Progressive cast inimical to the practice of private special-education placements.

¹⁶² 20 U.S.C. § 1401(9)(A).

¹⁶³ *Id.* § 1401(29).

¹⁶⁴ See *Burlington*, 471 U.S. at 369. Prior to the 1997 amendments to the IDEA, the courts suggested that the requirement that private entities provide “appropriate” services was based not on the FAPE provision that education be “appropriate” as well as “free” and “public” but on the legislative direction that, when FAPE was not provided, parents should be “grant[ed] such relief as the court determines is *appropriate*.” 20 U.S.C. § 1415(e)(2) (1975) (emphasis added); *Burlington*, 471 U.S. at 369. The 1997 amendments make it clearer that only a private placement that provides *appropriate* education fulfills FAPE rights. 20 U.S.C. § 1412(a)(10)(B)(ii).

private schools may engage in religious activities but public schools may not. The answer to such a question must be found in the Supreme Court cases that announce that public schools must be secular and in the policies that underlie those cases. This Part analyzes these sources and concludes that, for First Amendment purposes, charter schools are private schools, and can therefore engage in religious activities much as other private schools do.

The Part proceeds in the following way. Its first Section analyzes Establishment Clause case law, emphasizing *Zelman v. Simmons-Harris*,¹⁶⁵ to conclude that charters are First Amendment private schools that may engage in religious activity. Its second Section concludes that the current structure of charter school funding, in which states subsidize charters based upon their enrollment, is no obstacle to such activity. This is so notwithstanding the problematic case of *Mitchell v. Helms*.¹⁶⁶ A final Section develops an important caveat to this conclusion: states are obligated to guarantee a free, secular education to all children who want one, even if demand for secular schooling is insufficient to generate the necessary seats in an unregulated market.

A. *Charter Schools Are Private Schools for First Amendment Purposes*

The previous Part suggests that no single definition of “public school” directly applies to the hybrid form of the charter. Instead, the meaning of “public school” for religion clause purposes depends upon “the particular . . . context of public elementary and secondary schools”¹⁶⁷ and of the clauses. Schools are not public or private, for religion-clause purposes, because they are so labeled by legislatures or others;¹⁶⁸ federal constitutional criteria control the determination. The cases demonstrate that in the First Amendment context, a school is a public state actor if its services are publicly provided, in the sense that their instructional and policymaking staff are not only remunerated by the government but subject to its direct-line authority.¹⁶⁹ They must be government agents, not just contractors. In light of these cases, especially *Zelman v. Simmons-Harris*,¹⁷⁰ I conclude that, for religion-clause purposes, charter schools are private schools and not state actors.

¹⁶⁵ 536 U.S. 639 (2002).

¹⁶⁶ 530 U.S. 793 (2000).

¹⁶⁷ *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987).

¹⁶⁸ See *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218 (1964).

¹⁶⁹ *Agostini v. Felton*, 521 U.S. 203, 226, 230 (1997) (Thomas, J.) (plurality opinion) (quoting *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)). The *Agostini* opinion is quoted in *Mitchell*, 530 U.S. at 809.

¹⁷⁰ 536 U.S. 639.

The foundational case of *Engel v. Vitale*, holding that “it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government,”¹⁷¹ says nothing about what makes a public school public. Neither does *Abington School District v. Schempp*, which a year later prohibited public schools from beginning the school day with Bible readings.¹⁷² These and successor cases proceed without even a gesture towards defining the key term “public school” because the Abington Senior High School, like the Union Free School District No. 9 (in *Engel*), the Nathan Bishop Middle School (in *Lee v. Weisman*),¹⁷³ and the legions of other public schools that populate the Court’s cases each was obviously, quintessentially, a public school. Everyone understood what a public school was; there was no potential for confusion.

These cases nevertheless make clear, to use the language of *Engel*, that the First Amendment is violated when government officials do the “compos[ing]” and the “carr[y]ing on.”¹⁷⁴ Similarly, *Abington School District* emphasized that the Bible readings were unconstitutional because they were “held in the school buildings under the supervision and with the participation of teachers employed in those schools.”¹⁷⁵ Later cases make the same point, that religious activity in public schools is forbidden because “[s]tate officials direct” that activity.¹⁷⁶ The core problem identified by the case law is government employees and/or government facilities directing religious instruction or practice.

This proposition becomes explicit in *Zelman v. Simmons-Harris*, which upheld a program in which the state of Ohio offered vouchers to Cleveland parents that could be redeemed at participating private schools.¹⁷⁷ Schools’ variable willingness to participate and parents’ choices combined to lead nearly all vouchers to be cashed at religious schools.¹⁷⁸ The Supreme Court found that the program was nevertheless constitutional because it was “neutral in all respects toward religion.”¹⁷⁹ Government aid reached religious schools only as a result of the “genuine and independent choices of private individuals.”¹⁸⁰

Zelman is notable as the only Supreme Court opinion that explicitly considers the quasi-market that results from parents’ ability to select among three kinds of schools: traditional public schools,

¹⁷¹ *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

¹⁷² 374 U.S. 203, 223 (1963).

¹⁷³ *Lee v. Weisman*, 505 U.S. 577, 586 (1992).

¹⁷⁴ *Engel*, 370 U.S. at 425.

¹⁷⁵ *Abington Sch. Dist.*, 374 U.S. at 223.

¹⁷⁶ *Weisman*, 505 U.S. at 577.

¹⁷⁷ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

¹⁷⁸ *Id.* at 647.

¹⁷⁹ *Id.* at 653.

¹⁸⁰ *Id.* at 649.

traditional private schools, and charter schools. (As noted, Ohio calls its charters “community schools.”) The Justices’ several opinions debate at length whether and how the presence of the community schools on the menu available to Cleveland parents should affect the outcome of the case. For the *Zelman* majority, Ohio invited parents to exercise choice across both “community school” and voucher options in addition to traditional public schools.¹⁸¹ Charter schools and the voucher program were together part of “a broader undertaking by the State to enhance the educational options of Cleveland’s schoolchildren” through choice.¹⁸² The presence of the community schools, all secular, in the mix was evidence that the voucher program did not “skew” parents’ choices towards religious options.¹⁸³ The dissenters, by contrast, viewed the question of whether the voucher program presented parents with a “genuine and independent”¹⁸⁴ choice between religion and irreligion only in terms of whether the set of participating *private* schools included both religious and secular institutions.¹⁸⁵

The Court’s opinion in *Zelman*, apparently purposefully, repeatedly avoids stating whether the community schools are “public” or “private.” In introducing them, it says merely that they “are funded under state law but are run by their own school boards, not by local school districts.”¹⁸⁶ The opinion goes on (accurately) to note that the schools at issue in the case exist along a spectrum that ranges from public to private: “Parents that choose to participate in the scholarship program and then to enroll their children in a private school (religious or nonreligious) must copay a portion of the school’s tuition. Families that choose a community school, magnet school, or traditional public school pay nothing.”¹⁸⁷ No label is attached to the charters.

The separate opinions in the case are more willing to categorize charters in order to advance their arguments. Justice Thomas calls Ohio’s charters “privately run community schools.”¹⁸⁸ Justice Souter, writing for four dissenters, calls them “community public schools.”¹⁸⁹ But Souter expresses some doubt about his conclusion: “To be fair, community schools do exhibit some features of private schools: they are autonomously managed without any interference from the school district or State.”¹⁹⁰ “[I]n substance,” he writes, community schools are

¹⁸¹ *Id.* at 659.

¹⁸² *Id.* at 647.

¹⁸³ *Id.* at 653–54 (quoting *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 487–88 (1986)).

¹⁸⁴ *Id.* at 649.

¹⁸⁵ *Id.* at 699 (Souter, J., dissenting).

¹⁸⁶ *Id.* at 647 (majority opinion).

¹⁸⁷ *Id.* at 654.

¹⁸⁸ *Id.* at 681 (Thomas, J., concurring).

¹⁸⁹ *Id.* at 699 (Souter, J., dissenting).

¹⁹⁰ *Id.* at 701 n.9.

“merely private schools with state funding.”¹⁹¹ Souter’s objection to the majority’s reasoning (in this section of his lengthy dissent) is not so much that it miscategorizes community schools as that its reasoning about the range of choice includes “any public school” that is “nontraditional.”¹⁹²

Souter’s admission that charters are “in substance merely private schools” is telling.¹⁹³ Indeed, the standard charter regime—in which parents may opt to send their children to a particular charter, in which case a public subsidy is directed or redirected to that school—is isomorphic with the voucher program the Court blesses in *Zelman*. Private parties manage and make decisions for both charter schools and voucher-receiving schools. In both cases, schools’ eligibility to receive a per-student subsidy depends both upon their compliance with government requirements and parental decisions: only if they can get families to enroll their children do they receive funds. Also, in neither case do parents receive cash. The actual transfer of funds, triggered by parental choice, is direct from government to school.

Charter schools and *Zelman*’s voucher schools do differ, but not in ways significant for First Amendment purposes. It obviously does not matter, for example, that schools must apply for charters while private schools can cash vouchers if they meet eligibility requirements and then elect to participate. Nor, I argue, do two more significant differences—the scope of public regulatory control and the charging of tuition—provide a basis for distinction.

Charters are often claimed to be more similar to public than to private schools because charters are very heavily regulated. In addition to requirements regarding collective bargaining (in some states) and admissions (in all), states often require charters to cover a set curriculum, to provide special education, and to keep various kinds of records.¹⁹⁴ Charters are subject to requirements, sometimes strenuous, governing reporting of academic and other data and to assessment and re-assessment by their chartering authority.¹⁹⁵ Such heavy regulation, as noted above, was pivotal to the determination by some state courts that charter schools are public schools.¹⁹⁶

This position is ironic for two reasons. First, the sine qua non of the charter system is that charters can “operate with much less oversight

¹⁹¹ *Id.*

¹⁹² *Id.* Although Justice Stevens joined Souter’s dissent, Stevens’s own separate opinion, joined by none of his colleagues, insists that community schools are a species of public schools. *Id.* at 685 (Stevens, J., dissenting).

¹⁹³ *Id.* at 701 n.9 (Souter, J., dissenting).

¹⁹⁴ See *supra* notes 48–51 and accompanying text.

¹⁹⁵ See Sugarman & Kuboyama, *supra* note 49, at 920.

¹⁹⁶ See *supra* Part II.A.

and regulation than traditional public schools.”¹⁹⁷ The whole concept is that market accountability substitutes for close regulation.¹⁹⁸ Second, traditional private schools are also subject to substantial regulation.¹⁹⁹ Many states impose obligations upon them with respect to curriculum, testing, record-keeping, and teacher qualifications. True, the state cannot restrict, except in particular ways, the choices they make about supplementing that curriculum, but neither do states restrict charters in this way. Private school teachers can be subject to state requirements for accreditation and to state labor law (although, the Supreme Court recently affirmed, the latter is subject to a “ministerial exception”).²⁰⁰ Indeed, in *Zelman* itself, the religious private schools participating in the voucher program were subjected not only to the regulatory regime governing all private schools,²⁰¹ but also to additional requirements regarding nondiscrimination,²⁰² size,²⁰³ curriculum,²⁰⁴ and transparency.²⁰⁵ These similarities were brought to the Court’s attention.

There are areas with respect to which the regulatory regimes governing private schools and charters differ. Charters, but not private schools, must admit all applicants or use a lottery should the number of applications exceed the number of places.²⁰⁶ Nor must private schools reach target levels of academic achievement,²⁰⁷ or submit to regular inspections from state officials, as charters are often required to do.²⁰⁸ But each of these is an obligation detailed in the school’s charter, which is no more than a contract between the chartering authority and the school.²⁰⁹ That chartering authorities seek a particular set of contract terms does not change the character of the charter as a public/private agreement. Moreover, private schools do face some analogous requirements. Floors for academic achievement and periodic monitoring are features of private-school accreditation.²¹⁰ With respect to student admissions, the voucher schools of *Zelman* were also

¹⁹⁷ Amy Stuart Wells et al., *Charter Schools as Postmodern Paradox: Rethinking Social Stratification in an Age of Deregulated School Choice*, 69 HARV. EDUC. REV. 172, 174 (1999).

¹⁹⁸ See *id.*

¹⁹⁹ 2 GREENAWALT, *supra* note 91, at 179.

²⁰⁰ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707–08 (2012).

²⁰¹ OHIO REV. CODE ANN. § 3313.976(A)(3) (West 2012).

²⁰² *Id.* § 3313.976(A)(4).

²⁰³ *Id.* § 3313.976(A)(5).

²⁰⁴ *Id.* § 3313.976(A)(6).

²⁰⁵ *Id.* § 3313.976(A)(7).

²⁰⁶ See *supra* notes 49–50 and accompanying text.

²⁰⁷ See Sugarman & Kuboyama, *supra* note 49, at 901–02, 919, 921.

²⁰⁸ See *id.* at 920.

²⁰⁹ See FINN, MANNO & VANOUREK, *supra* note 52, at 15.

²¹⁰ See Sugarman & Kuboyama, *supra* note 49, at 878.

subjected to a regime of open admissions and lotteries for oversubscribed seats, but did not become public thereby.²¹¹

The differences between charter and private school regulation, in short, are differences only of degree, and not in kind. Professor O’Neil imagines that a charter school insufficiently coupled to public authority by regulation would not be a charter school: “It might well partake some of the qualities of a charter school but would be in fact (whatever the terminology) a state-licensed, state-regulated, and possibly state-funded private school.”²¹² I cannot discern where on the spectrum of regulation, from private schools to private schools receiving vouchers to charters to traditional publics, O’Neil’s red line is to be drawn.

Charters also differ from private schools, and are similar to traditional public schools, because they charge no tuition.²¹³ Private schools, on the other hand, charge some or all of their students. The *Zelman* voucher required a parental copayment to the school.²¹⁴ But the Supreme Court, in its tax-credit cases,²¹⁵ its special education cases,²¹⁶ and especially in *Zelman*, has made it abundantly clear that private schools that accept state vouchers remain private schools. This is true even if the private schools use the vouchers as their primary source of support for the voucher-bearing student’s education, imposing only minimal additional private charges on the family.²¹⁷ Moreover, charter schools also have access to some kinds of private monies, such as philanthropy, grants, and, in the case of for-profit charters, investment capital.²¹⁸ The income stream enjoyed by a regulated and subsidized private school again differs only in degree, not in kind, from that enjoyed by a charter school.

Private management, however, does constitute a difference in kind. As James Ryan has argued, “it must be the combination of government funding and government oversight that makes a school public.”²¹⁹ And if, as I have argued, even close regulation is insufficient to constitute the necessary kind of oversight, then it must be public control, not public subsidy, that defines “public” in contradistinction to private schools.

²¹¹ OHIO REV. CODE ANN. § 3313.977(A)(1)(d) (West 2012) (providing for admission to voucher-accepting schools “from among such applicants by lot,” subject only to preferences for previously enrolled students, siblings of previously enrolled students, and students of low income).

²¹² O’Neil, *supra* note 100, at 221.

²¹³ See Sugarman & Kuboyama, *supra* note 49, at 873.

²¹⁴ *Zelman v. Simmons-Harris*, 536 U.S. 639, 646 (2002).

²¹⁵ See, e.g., *Mueller v. Allen*, 463 U.S. 388 (1983).

²¹⁶ See *supra* Part II.D.

²¹⁷ Ohio limited the copayment that Cleveland private schools could impose upon voucher families. *Zelman*, 536 U.S. at 646.

²¹⁸ See, e.g., *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 809 (9th Cir. 2010) (noting this fact in the context of a § 1983 analysis).

²¹⁹ Ryan, *supra* note 90, at 407–08.

Public control means line control, where every policy action by the school is ultimately subject, through bureaucratic hierarchy, to local voters. In this sense, charter schools decisions are clearly not public. To be sure, the scope of their potential decisions is limited by the state, but in exactly the same sense as any private actor in a regulated industry contracting with the government has its discretion limited. A charter must abide by relevant regulation, and may choose to accept above those requirements the terms of any government contract, but within the envelope established by these the charter is free to act as it will.

This reading offers a significant rehabilitation of *Zelman*. Where most authors in the aftermath of *Zelman* dismiss it on the grounds of vouchers' negligible political purchase,²²⁰ *Zelman's* reach extends to the galloping proliferation of charter schools. It stands for the proposition that the bulk of Supreme Court jurisprudence about religion and public schools does not apply to neoliberal educational regimes. Charter schools are so similar to the voucher-accepting schools of *Zelman* that it is difficult to posit any plausible argument asserting that they are, as schools, different. Therefore, just as the private schools in *Zelman* could teach and practice religion, even while supported by publicly funded vouchers, because that funding was provided them only to the extent that they were freely chosen by parents—so too charters embedded in such a program of parental choice can freely teach and practice religion.

B. *Charter Funding Is No Obstacle to Charters' Religious Activities in a Neoliberal Framework*

Prior to *Zelman*, a case concerning loans by the State of Louisiana to parochial schools of “instructional and educational materials” badly fractured the Supreme Court.²²¹ The controlling separate opinion in the case,²²² written by Justice O'Connor and joined by Justice Breyer, distinguished “direct” and “indirect” government aid to religious schools. O'Connor and Breyer agreed with four other Justices that “indirect” aid, mediated by private choice like scholarship²²³ or voucher²²⁴ programs, is constitutional if the program is neutral with respect to religion.²²⁵ But, O'Connor wrote in *Mitchell v. Helms*, direct

²²⁰ See *supra* notes 42–43 and accompanying text.

²²¹ *Mitchell v. Helms*, 530 U.S. 793, 802 (2000) (Thomas, J.) (plurality opinion) (quoting 20 U.S.C. § 7351(b)(2) (2000)).

²²² For the controlling nature of O'Connor's opinion, see Steven K. Green, *The Constitutionality of Vouchers After Mitchell v. Helms*, 57 N.Y.U. ANN. SURV. AM. LAW 57, 63 (2000) [hereinafter Green, *The Constitutionality of Vouchers*]; Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 75 (2005).

²²³ See *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

²²⁴ See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

²²⁵ See Tushnet, *supra* note 95, at 7–8.

aid requires additional guarantees that it not be used for or diverted to religious purposes.²²⁶ *Zelman*, moreover, preserved the direct/indirect distinction.²²⁷

State aid to charter schools does appear to be “direct” aid as O’Connor understands it. At one time the Supreme Court used the term “direct aid” to encompass not only any “cash paymen[t]” but any “substantial” subsidy to a religious school.²²⁸ “Indirect aid” meant only those subsidies that met the *Lemon*-era requirement that they not have the “primary effect” of advancing religion.²²⁹ But O’Connor, who approves of indirect cash payments, repurposes the term “direct” to mean state payments made to religious schools without the mediation of a private party, such as a student or a family.²³⁰ Indirect payments (not necessarily cash) must be placed in the hands of a private person who then redirects it to the school.²³¹ O’Connor is explicit that payments remain direct if they are per-capita aid based upon enrollment, even if enrollment is a private choice, so long as payment flows directly from state to school.²³² This is precisely the structure of state aid to charter schools.

Nonetheless, for several reasons Justice O’Connor’s *Mitchell* opinion should not be understood to prevent charter schools from simultaneously engaging in religious activity and receiving state aid. First, its distinction between direct and indirect aid is extraordinarily formalist, verging on the incoherent.²³³ A scheme under which aid flows “directly” to a school on a per-capita basis, but where the number of heads for which aid is provided is entirely dependent on students’ “free and independent” enrollment decisions, is in no meaningful way different from indirect aid.²³⁴ In both, private choices are the sole determinant of whether and how much public monies schools receive.²³⁵

²²⁶ See Lupu & Tuttle, *supra* note 222, at 75.

²²⁷ See *Zelman*, 536 U.S. at 649 (“[O]ur decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice . . .” (citations omitted)).

²²⁸ *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 393–94 (1985); see also Steven K. Green, *Private School Vouchers and the Confusion over “Direct” Aid*, 10 GEO. MASON U. C.R. L.J. 47, 74–75 (1999–2000).

²²⁹ See *Ball*, 473 U.S. at 393.

²³⁰ Cf. Green, *The Constitutionality of Vouchers*, *supra* note 222, at 71 (stating that it is “unclear” whether Justice O’Connor rejects the usages in *Ball* in favor of pure formalism).

²³¹ *Mitchell v. Helms*, 530 U.S. 793, 841–42 (2000) (O’Connor, J.) (concurring in judgment); Richard W. Garnett, *The Story of Henry Adams’s Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1867–68 (2001).

²³² *Mitchell*, 530 U.S. at 842 (O’Connor, J.) (concurring in judgment).

²³³ See Michael J. Frank, *The Evolving Establishment Clause Jurisprudence and School Vouchers*, 51 DEPAUL L. REV. 997, 1052–53 (2002).

²³⁴ See Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 512 n.76 (2002) (“[This] distinction strikes me as amounting to form over substance.”).

²³⁵ See Frank, *supra* note 233, at 1053–54.

It is not as if the vouchers in *Zelman* or the scholarship in *Witters* involved actual cash given to private parties, who then elected whether to send it on to the school in which they enrolled; the programs involved paperwork, not tender. This makes it quite difficult to understand O'Connor's claim that "when the government provides aid directly to the student beneficiary, that student can attend a religious school and yet retain control over whether the secular government aid will be applied toward the religious education."²³⁶ A parent who enrolls a student in a charter school, and by doing so directs one unit of state per capita aid to that school, is isomorphic to a parent who endorses a voucher chit over to a private school, which school on that basis then receives a state check.

Such empty formalism is good reason to ignore O'Connor's direct/indirect distinction, particularly after *Zelman*. That same emptiness, in any event, offers states straightforward work-arounds. States could easily add to forms parents use to enroll their children in charter schools a statement to the effect, "With this election I direct the \$x in state aid to which my child is entitled to the charter I have selected above." This change in wording would transform charter funding into the sort of "indirect" program that *Mitchell* does not bar, and which five Justices (including O'Connor) blessed in *Zelman*. If formalism is to carry the day, it can be accommodated easily.

O'Connor's strongest argument in favor of formalism is that direct aid sends a stronger "message of [religious] endorsement" than indirect aid.²³⁷ A virtue of indirect, mediated aid, she suggests, is that reasonable observers will understand its use for religious purposes to result from private rather than public decision. This will not be as clear in the case of direct, per-capita aid.²³⁸ And endorsement has been a dominant concern regarding religion and schools since *Engel v. Vitale*, the foundational case that outlawed prayer in public schools.²³⁹ *Engel* makes resounding pronouncements that a prayer conducted by a "civil magistrate"²⁴⁰ pursuant to "officia[l] prescri[ption]"²⁴¹ is an illegitimate "union of government and religion."²⁴²

But consider a charter school whose principal decided to begin the day with a prayer, whether "nondenominational" like the one in *Engel* or unapologetically sectarian. That prayer is not "official" in the way that its counterpart was in *Engel*. Its text would be set not by a "civil

²³⁶ *Mitchell*, 530 U.S. at 842 (O'Connor, J.) (concurring in judgment).

²³⁷ *Id.* at 842-43.

²³⁸ See Garnett, *supra* note 231, at 1869; Steven G. Gey, *Reconciling The Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 752 (2006).

²³⁹ See *Engel v. Vitale*, 370 U.S. 421 (1962).

²⁴⁰ *Id.* at 432.

²⁴¹ *Id.* at 433.

²⁴² *Id.* at 431.

magistrate”²⁴³ but by a private party, avoiding government involvement in the “compos[ition] [of] official prayers.”²⁴⁴ The setting and timing of the prayers would similarly not be determined by government. The prayers moreover would be heard only by students whose families had affirmatively elected for them to be present. So long as no state statute required, urged, or invited charters to undertake prayer, almost none of the reasoning of *Engel* is apropos to such a scenario. Prayer in freely chosen charter schools is therefore far from embodying the “official prescription” that *Engel* rejects. Rather, it instantiates the alternative approach to prayer that *Engel* celebrates: “[G]overnment in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves *and to those the people choose to look to for religious guidance.*”²⁴⁵

The precise concern of *Mitchell* is that the funding of such schools, rather than their practices per se, might constitute impermissible endorsement. Justice O’Connor long urged the partial displacement of *Lemon* in favor of a focus upon whether government is “conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.”²⁴⁶ O’Connor’s question should be asked with respect to an “objective observer” who is acquainted with both “the text, legislative history, and implementation of the statute” at issue and “with the Free Exercise Clause and the values it promotes.”²⁴⁷ On the other hand, O’Connor’s formulation of the endorsement test requires that the religious message cannot be perceived under the statute “as drafted *or as actually implemented.*”²⁴⁸ Neoliberal plans that allowed religious chartering could have the effect of increasing the availability of religious options for students, sometimes dramatically so.

What O’Connor’s objective observer would understand when faced with religious charters depends heavily upon the frame the observer deploys. Even absent a formalist work-around, such an observer would not be able to perceive endorsement based on the theory of charters, which is that a thousand flowers should bloom. Some charters will incorporate prayer into their school day, and various charters will choose prayers of various types; but other charters will not pray at all, and devote themselves instead to meditation, or microbiology, or mime. Seeing that the government had opened the field to a cornucopia of approaches, religious and nonreligious, O’Connor’s observer could hardly conclude that the state was endorsing any, including the religious

²⁴³ *Id.* at 432.

²⁴⁴ *Id.* at 425.

²⁴⁵ *Id.* at 435 (emphasis added).

²⁴⁶ *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O’Connor, J., concurring in judgment).

²⁴⁷ *Id.* at 76, 83.

²⁴⁸ *Id.* at 73 (emphasis added).

ones. This is quite different than the situation the same observer faced in *Mitchell*, where most of the schools receiving the aid at issue were religious.²⁴⁹

Such an observer would not be confused by the practice of referring to charters as “public” into thinking that charters actually *are* public, in the traditional sense, because she would be paying attention to the legislative history of chartering and would understand this to be a misleading, if politically helpful, device.²⁵⁰ Nor would the observer be swayed into inferring from the fact of government funding, generous and on a per-pupil basis, and in most cases the overwhelming if not exclusive source of funds for the charter, either the reality or the impression that the charter is the state. Not only is this conclusion foreclosed by *Zelman*, but the thrust of the neoliberal turn is to place decisions in the hands of a market, albeit a subsidized one. The observer would understand that charter schools seek to satisfy their students, not the state.

On the other hand, if the objective observer framed the funding of religious charters as an incremental change to prior funding schemes, she might well perceive endorsement, particular as the transition is “actually implemented.”²⁵¹ Given that the requirement of strict secularism is among the greatest sources of discontent with American public schooling for a large segment of the public,²⁵² a predominant effect of relaxing that restriction could well be to increase religious options. This is true a fortiori if there is a transition from current state law regimes, which allow charters but require them to be secular, to a regime that drops the secularism requirement in favor of a lesser requirement that sufficient secular seats be available in a school system.²⁵³ While under the theoretical frame this is merely an opening up or a deregulation of the market, the transitional frame makes it look like the state is having the effect (holding intent aside) of facilitating religion.

It seems clear that the former frame is correct. The transitional frame would introduce a very strong small-“c” conservative bias into endorsement analysis: things that would have been allowed are forbidden because they were not done sooner. Moreover, transitional concerns can be expected to dissipate. As neoliberalism takes hold in American educational culture, more individuals, including ordinary parents, students, and citizens—and surely the attentive, informed observers among them—will increasingly understand that whatever

²⁴⁹ *Mitchell v. Helms*, 530 U.S. 793, 803 (2000) (Thomas, J.) (plurality opinion).

²⁵⁰ See *supra* notes 96–98 and accompanying text.

²⁵¹ *Jaffree*, 472 U.S. at 73 (O’Connor, J., concurring in judgment).

²⁵² See *infra* Part V.

²⁵³ See *infra* Part III.C.

religious content exists as part of a system of choice is attributable to private, not state, preferences.

And there can be no doubt that charter schools, and charter-school aid, are neutral. Some have claimed that voucher programs are sub rosa efforts to direct state funding to religious schools, even as they are officially justified in secular terms.²⁵⁴ These arguments, although rejected by the courts, can be made in good faith. In contrast, notwithstanding occasional blunderbuss to the contrary,²⁵⁵ there should be no dispute that charter schools were introduced and allowed to proliferate to achieve the secular goal of improving educational outcomes and expanding the range of educational choices available to parents.²⁵⁶ This is much clearer in the charter case than it was in *Lemon*, where a secular purpose was found for policies that authorized state payments to secular teachers in private (including religious) schools.²⁵⁷ Indeed, as I discuss in Part IV, charters today are implemented pursuant to statutes that forbid them to engage in religious exercise.

Because many states as a matter of positive law prohibit religious activity in charter schools,²⁵⁸ it might be possible to argue that charter statutes would fail to meet the requirement that government programs “must have a secular legislative purpose”²⁵⁹ were these prohibitions to be amended, or omitted in a new statute otherwise cognate with statutes in other states. But this narrow a view of “secular purpose” is deeply inconsistent with the case law.²⁶⁰ Justice Thomas has, with substantial support on the Court, urged neutrality as the proper interpretation of the secular purpose test. For Thomas, a statute is constitutional “if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose.”²⁶¹ This is precisely what is offered by a chartering scheme that is silent as to religion or even explicitly provides that religious and nonreligious schools may be chartered on the same basis. More sweeping accounts of secular purpose in this instance yield similar conclusions. As Kent Greenawalt argues, a valid law must have “either a secular purpose (that is not only the remote objective of a more direct purpose to promote religion) or a purpose to accommodate religion in a permissible way.”²⁶² It is untenable to argue that allowing religious and

²⁵⁴ See *supra* note 41.

²⁵⁵ Minow, *Seduction of Choice*, *supra* note 34, at 839 & n.103.

²⁵⁶ See, e.g., MD. CODE ANN., EDUC. § 9-101(b) (West 2013).

²⁵⁷ *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

²⁵⁸ See *infra* Part IV.A.

²⁵⁹ *Lemon*, 403 U.S. at 612–13.

²⁶⁰ See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 807–08 (2000) (Thomas, J.) (plurality opinion) (stating that the Court has “modified” and “recast” the secular purpose test of *Lemon*).

²⁶¹ *Id.* at 810.

²⁶² 2 GREENAWALT, *supra* note 91, at 162.

nonreligious organizations to charter schools on the same basis is intended to *promote* religion under such a definition. A policy of enriching the totality of educational options, pursued for a decade without religious participation, is neutral with respect to religion.²⁶³

One final reason not to allow *Mitchell* to block even “direct” aid to religious charter schools is that, though technically still good law, it no longer commands support on the Supreme Court. O’Connor’s *Mitchell* opinion is a quintessential expression of her long-held place as a swing voter situated between two four-Justice blocs. It seems very unlikely that Justice Samuel Alito, who replaced Justice O’Connor, shares her idiosyncratic view of Establishment,²⁶⁴ and quite likely that he would be sympathetic to the view of the four-Justice plurality in *Mitchell* that would have held that any program of direct aid is constitutional if neutral as to religion.²⁶⁵

The first two Sections of this Part demonstrate that charter schools, although described by state legislatures, politicians, academic commentators, and some Justices as “public schools,” are allowed to do things that our legal culture has insisted for decades that public schools may not do. It is constitutional for charters to begin their day with formal prayer, publicly read the Bible, and teach children that religious propositions are true or false. A fortiori, charters constitutionally can also engage in the various marginal activities that have occupied the Supreme Court since the seventies with respect to public schools—observing moments of silence,²⁶⁶ praying at school football games²⁶⁷ and graduations,²⁶⁸ and (perhaps) teaching “creation science.”²⁶⁹ So long as charter statutes and funding policies of the state neither intend, direct, encourage, nor discourage the content of charters’ decisions about religious practice or teaching, Supreme Court cases regarding religious activity in public schools do not apply to charters.

C. *Secular Schools Must Be Available to All Comers*

The *Zelman* Court took the position that its opinion was not a major change in course, but simply the straightforward, easy extension of an “unbroken line of decisions rejecting challenges to similar

²⁶³ Cf. *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002) (stating that the voucher program is “neutral in all respects toward religion”).

²⁶⁴ See Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263, 1286 (2008).

²⁶⁵ See Tushnet, *supra* note 95, at 7–8.

²⁶⁶ *Wallace v. Jaffree*, 472 U.S. 38 (1985).

²⁶⁷ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

²⁶⁸ *Lee v. Weisman*, 505 U.S. 577, 586 (1992).

²⁶⁹ *Edwards v. Aguillard*, 482 U.S. 578 (1987). I leave open the question whether states can neutrally regulate the teaching of the life sciences to exclude pseudo-scientific theorizing.

programs.”²⁷⁰ This view suggests that the opinion might not apply were its subject not a voucher experiment but a pervasive and full-blown charter sector. We know only a little about how a market equilibrium might look in such a world.²⁷¹ One possibility is particularly important: that the sum of individual preferences in a local quasi-marketplace for charters might yield a system where *all* government-subsidized schools were religious. This does not seem likely; but neither, given the uneven geographical distribution of religious commitments across the country, does it seem fanciful.

This possibility raises the specter of impermissible religious coercion and unconstitutional primary effects. Potential responses to that coercion, in which the government acts to ensure that secular education is available, also raise the possibility of impermissible entanglement. This Section considers these issues and concludes that states must subsidize, sponsor, or otherwise manage the school systems they fund so as to guarantee a free education in a fully secular setting to every child who wants one. However, states need not guarantee that every educational choice with religious content offered by a choice-based system also be offered in a religion-free version.

1. Coercion

Compulsory schooling is intrinsically coercive. State insistence that every child attend school cannot cloak a demand that any child engage in religious exercise. This has been important in the Court’s cases at least since *Abington School District v. Schempp*.²⁷² Indeed, some cases identify coercion as the key reason that the Court insists upon secularism in public schools:

Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. . . . The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students’ emulation of teachers as role models and the children’s susceptibility to peer pressure.²⁷³

²⁷⁰ *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002). *Contra id.* at 687–88 (Souter, J., dissenting) (stating that the majority opinion “ignor[es]” or even “repudiate[s]” existing case law).

²⁷¹ See Tushnet, *supra* note 95, at 11; *supra* notes 58–61 and accompanying text.

²⁷² 374 U.S. 203, 224–25 (1963).

²⁷³ *Edwards*, 482 U.S. at 584.

The Court, moreover, has been generous in its appreciation of the potential forms coercion can take and skeptical that opting out can cure coerciveness. Students required to be in school but officially invited to stand by passively or even to absent themselves during a religious exercise are still, in the view of the Court, coerced.²⁷⁴ Beyond such formal in-school activities that create “indirect coercive pressure upon religious minorities to conform,”²⁷⁵ the Court has deemed unlawful the inclusion of religious elements in genuinely optional school-related events. In *Lee v. Weisman* the Court held that official prayer at a public school “formal graduation ceremon[y]” was inconsistent with the First Amendment,²⁷⁶ even though students were not required to be present.²⁷⁷ In *Santa Fe Independent School District v. Doe*, the Court similarly struck down a policy that allowed students collectively to agree to prayers at varsity football games and then elect a peer representative to deliver them.²⁷⁸ “[R]each[ing] past formalism,”²⁷⁹ these cases insist that to bundle religion with an activity that elicits in students a “genuine desire” to participate, or with respect to which they face “immense social pressure” from peers, is sufficient to constitute coercion.²⁸⁰

The Court’s coercion doctrine therefore clearly requires every state that makes schooling compulsory to guarantee a secular education to every student who wants one. Under *Weisman* and *Santa Fe*, this option must be offered at the school, not the programmatic, level. It is insufficient to allow students to opt out of religious activities that a charter school conducts, lest they feel coerced to participate nevertheless. There must be enough seats in fully secular schools—schools free from religion “root and branch”—to accommodate as many children who want them.

The most straightforward way to ensure this, aside from prohibiting religious school choice altogether, is to continue to operate traditional public schools, available to all comers, alongside charters. Such schools, because they are government-run as well as government-funded, perforce satisfy the requirement that secular schools be available. This is of course what every American jurisdiction now does. Although this practice is likely to persist indefinitely, going forward an all-charter system could arise, as developments in post-Katrina New Orleans suggest.²⁸¹ In such a system the state would still have to guarantee sufficient secular seats for all takers. If necessary, it would

²⁷⁴ *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

²⁷⁵ *Id.*

²⁷⁶ *Lee v. Weisman*, 505 U.S. 577, 580 (1992).

²⁷⁷ *Id.* at 586, 593.

²⁷⁸ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 297–98 (2000).

²⁷⁹ *Id.* at 311 (quoting *Weisman*, 505 U.S. at 595).

²⁸⁰ *Id.* at 311–12 (quoting *Weisman*, 505 U.S. at 595, 593).

²⁸¹ *See* Garda, *supra* note 61; *supra* text accompanying note 61.

have to meddle with the market mechanism, using subsidies, preferences in the chartering process, or other tools. Even in heavily religious areas, this should be feasible.

The harder question is whether a system in which many but not all options available to children are religious can still be coercive *even if* there are enough seats in secular schools for all who desire them. In other words, is running traditional public schools alongside charters always sufficient to avoid unconstitutional coercion? In the alternative, were a hypothetical locality to abandon traditional public schooling in favor of an all-charter system, would it be constitutionally sufficient to offer to each student who requests secular schooling some seat in some secular charter school, or would more be required?

The difficulty arises because each charter school with a religious component combines secular and religious elements. A spectrum of possible cases can be identified. At one end is a system in which every available charter that involves religious practice is twinned with a cognate school option materially identical in all respects except for being secular. At the (imaginary) extreme, materiality extends to all relevant characteristics of the school: academic program, but also disciplinary policy, culture, racial and economic characteristics of students and teachers, size, location, and so on. Such a system is clearly not religiously coercive. At the other end of the spectrum is a locality where the operation of a genuine quasi-market generates only religious schools. Doubtless in such circumstances the state must supplement such a market with a single secular alternative, just as it would have to do if most students in the district attended private religious schools. The question the latter possibility raises is whether public funding of the religious charters imposes additional duties upon the state beyond funding that one alternative. Is it unconstitutionally coercive for the state to present students with a binary choice between Execrable Public High and the Excellent Preparatory Academy when Excellent includes religious practice, making Execrable the only secular option?

In between these extremes are a range of more realistic possibilities. The traditional public school could be far from execrable, but still dissimilar to various religious charter options. Consider a hypothetical charter school that focuses, for example, on both evangelism and environmental science.²⁸² Would this particular bundling of sacred and secular lead a student passionate about the environment to feel unconstitutionally “coerced” to accept (or to urge her parents to accept) some evangelism in order to pursue environmentalism, just as a student passionate about football might elect to endure an uncongenial prayer? Such potential coercion is not cured by the availability of a seat in

²⁸² For examples of charter school themes, see *infra* note 352.

perfectly adequate traditional, but not environmentally-focused, public school. Similarly, a student who thrives in intimate surroundings might trade away her secular preference in order to escape Enormous Central High. Such students might be “coerced” even if they make the trade willingly. Coercion could occur, moreover, even if multiple secular options were generated by the quasi-market. The existence of a secular charter that emphasizes fine arts and another that focuses on French might leave our environmentally oriented but irreligious student still willing (or tempted) to swallow some evangelism to get environmental studies.

It must be noted, moreover, that the “twinned” system cannot be realized. It seems fanciful as a practical matter, surely beyond the capacity of any school district. Indeed, it is fanciful in principle. Every school is different. Also, one reason that some religious private schools have the secular features they have is because they are part of a religious community; the religious principles that guide all the school’s activities shape its secular elements. These include both curricular approaches, like strategies for teaching reading or mathematics, and issues like discipline, grading, teachers’ authority, and feeling of community that constitute a school’s culture.²⁸³ Many religious educators’ work in these areas in today’s private schools is explicitly, purposefully, and inherently religious. A rule that no government-subsidized bundle can include religion without the availability of an equivalent nonreligious bundle is a rule that no bundle can include religion.

Some of the Court’s dicta nevertheless suggest that anything short of the “twinned” system might be unconstitutionally coercive. Choosing a school imposes a more “difficult choice” than forgoing a football game.²⁸⁴ Team sports are “decidedly extracurricular,” unlike the choice of a school.²⁸⁵ Similar or greater “informal pressure” and “genuine desire[s]” might arise in connection with choosing a school than with attending graduation.²⁸⁶ If all that is necessary to “coerce” adolescents is for there to be some school program that poses a “difficult choice” or conflicts with a “genuine desire,” then our environmentally minded student would be coerced by the religious environmental charter regardless of her other options, unless one of those options is an otherwise similar secular environmental charter. Our small-school student would be coerced by the small charter absent a small secular high school.

Other decisions suggest a different approach. The most striking is *Zelman*, which actually sits very close to one of the limiting cases in the

²⁸³ See JONES, *supra* note 12.

²⁸⁴ *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 312.

²⁸⁵ *Id.* at 311.

²⁸⁶ *Id.*

spectrum of coercion suggested above. In *Zelman*, the secular options offered students were abysmal traditional district schools²⁸⁷ and chartered community schools that, from an academic point of view, were little better.²⁸⁸ The only “good” schools available to Cleveland public school students were, in fact, private, voucher-redeeming religious schools.²⁸⁹ The claim that the choice between good-and-religious and bad-but-secular was inadequate, advanced enthusiastically by the dissenters, was outvoted. The Court was satisfied merely because there was “no record evidence that any voucher-eligible student was turned away from a nonreligious private school in the voucher program, let alone a community or magnet school.”²⁹⁰ It is not necessary to imagine some hypothetical family with a strong preference for academic quality and a weak preference against religion that would choose the religious option in such a circumstance; the existence of such families was documented in the *Zelman* record.²⁹¹ The Court upheld the voucher program nevertheless.

Nor does the result in *Zelman* depend on the availability of multiple secular options. The charters as well as the traditional public schools of Cleveland were secular; this might distinguish the case from one where a single nonreligious school is the only alternative to a host of religious charters. But the *Zelman* Court does not seem to rely upon this. Had the charters not existed, the result would have been the same.²⁹²

How can these two strands of dicta be reconciled, one that calls any difficult decision imposed by the state with religion among the options “coercive” and the other untroubled by requiring students to choose, by action or inaction, between the “educational disaster” of publicly funded schools and the pervasively religious environment of a parochial school? It is facile, I think, to peg the differences to the passage of time and changing membership on the Court. Rather, two factors seem important. One is that families, not children themselves, choose schools in charter or voucher systems, unlike the choices about football games and graduations made primarily by students in *Santa Fe* and *Weisman*. Children are susceptible to peer pressure in a way that their parents are not; and families make their school choice deliberately and privately, rather than in the hothouse, parent-free environment within a school’s halls.

²⁸⁷ *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002); *id.* at 683 (Thomas, J., concurring).

²⁸⁸ *Id.* at 702 n.10 (Souter, J., dissenting).

²⁸⁹ See Tushnet, *supra* note 95, at 13.

²⁹⁰ *Zelman*, 536 U.S. at 670–71 (O’Connor, J., concurring).

²⁹¹ See *infra* note 336.

²⁹² *Zelman*, 536 U.S. at 697 (Souter, J., dissenting).

Even more important, it seems to me, is that school choice is an institutional effort to expand, not contract, the choices available to students. A charter system usually grows the set of secular options for students, and even in the limiting case does not shrink it. In *Santa Fe* and *Weisman*, by contrast, when the choice is prohibited, what is likely left is the secular football game and the secular graduation. This distinction appears to have driven the *Zelman* Court's lack of interest in coercion. Of course, this ignores second-order effects: if religious choices are not available, there will be more political pressure for good public schools. But second-order effects do not impact the coercion experienced by families and children.

The upshot of this analysis is that just as secular public schools are not required to establish or encourage schools that match the secular elements of the programs of religious schools that are privately managed and privately funded, they also need not match the secular program of religious charter schools, privately managed but publicly funded.²⁹³ In the most important instance, if there is a charter of high academic quality that includes religious practice, there need not also be a secular school of equally high quality. All that is necessary is that there be a secular program large and flexible enough that any student whose family prefers secular to religious education can secure a seat in some secular school.

2. Entanglement and Primary Effects

The First Amendment prohibits excessive state "entanglement" with religion. Entanglement concerns are not directly raised by public regulation of religiously oriented charter schools, as routine state accreditation and regulation of traditional parochial schools demonstrates.²⁹⁴ But one might worry that the obligation to assure a secular program for all students wanting one, described in the previous Section, could foster unconstitutional entanglement. This is a relatively minor concern in areas where there is substantial population density and reasonable religious diversity, so that a choice program unregulated as to religious content generates the needed secular alternatives without government intervention. But as noted above, in areas of the United States that are deeply and homogeneously religious, a quasi-market might generate only religious schools of choice. States might then need

²⁹³ A similar conclusion is advanced with regard to faith-based prison programs in Volokh, *supra* note 88, at 814–15.

²⁹⁴ See *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 764–65 (1976); 2 GREENAWALT, *supra* note 91, at 179.

to intervene in the market mechanism. Even in such circumstances, however, an entanglement problem seems farfetched.

The regulatory need to assure sufficient secular seats in a quasi-market would not deeply engage state regulators in the operation of religious schools. To determine whether the state faced a situation where the quasi-market itself did not generate sufficient secular options, and how large a secular option must therefore be provided, the government would need only determine *that* particular charter schools had religion in their program. This is hardly the “excessive’ entanglement,”²⁹⁵ “pervasive monitoring,”²⁹⁶ or “close and continuing surveillance of religious activities” by government²⁹⁷ that is constitutionally problematic. It intrudes government into charters’ operations far less than the supervision of secular teachers working in religious school buildings that was approved in *Agostini*.²⁹⁸

Moreover, there is doubt whether entanglement, on its own without intent or endorsement, remains a constitutional violation. The *Lemon* test, while never formally overruled, itself lives in a twilight of constitutional doubt. Justice O’Connor argued in 1997 that entanglement should be treated not as a separate inquiry but as an “aspect” of *Lemon*’s “primary effects” test²⁹⁹: a state program may not have among its primary effects the advancement or inhibition of religion. Four Justices reiterated this view in 2000.³⁰⁰ This test would clearly be met, for the reasons given above, by charters in many cosmopolitan, dense communities. What about more homogenous and religious communities where quasi-markets, by hypothesis, might yield mostly religious charters, supplemented by a single traditional public school or a relatively small set of secular options? There the “primary effect” of such a program might appear to be to advance religious education.

It is unlikely that the Court would be troubled by such an effect. First, there is a question of denominator: Is the primary effect of allowing quasi-markets statewide to advance religion if it has a cosmopolitan effect in the big cities but a mostly religious effect in some smaller communities? More important, since *Mueller v. Allen*³⁰¹ the Court has been unremittingly hostile to the possibility that an otherwise constitutional policy can be rendered suspect because the sum of private choices pursuant to that policy have a religious cast. For constitutional

²⁹⁵ *Agostini v. Felton*, 521 U.S. 203, 233–34 (1997).

²⁹⁶ *Id.* at 233.

²⁹⁷ 2 GREENAWALT, *supra* note 91, at 179.

²⁹⁸ *Agostini*, 521 U.S. at 234.

²⁹⁹ *Id.* at 233; *cf.* 2 GREENAWALT, *supra* note 91, at 178 (“It is hard to know how much difference [O’Connor’s recharacterization] may make.”).

³⁰⁰ *Mitchell v. Helms*, 530 U.S. 793, 807–08 (2000) (Thomas, J.) (plurality opinion).

³⁰¹ 463 U.S. 388 (1983).

purposes, the effects of a market or quasi-market must be divorced from the contingent choices actually made by market participants. It would be “absurd” to hold that “a neutral school-choice program might be permissible” in places where the ratio of secular to religious schools was high but not in other places where, owing to market demand, the ratio “happens to be” low.³⁰² Any religious skew in the pattern of private choices, so long as that skew is not introduced by government, is constitutionally “irrelevant.”³⁰³

IV. THE CHARTER QUASI-MARKET

I have argued to this point that, as a matter of federal constitutional law, states constitutionally may fund charter schools that teach religion and sponsor religious observance. This does not imply that states must do so. Either option is constitutional. Although states today universally elect to limit funding to charter schools that are secular, a correct understanding of the application of the First Amendment to charters would probably lead some, but not most, to loosen those prohibitions. But others will maintain their current statutes. The current uniform state preference for secularism in charters cannot be attributed entirely, or even mostly, to confusion about what the First Amendment requires.

This does not, however, moot the question of charters and religion. Although charters are regulated, they remain privately managed. States are substantially less well positioned to regulate efforts to test the church/state boundary when state-regulated private entrepreneurs, rather than elected officials and bureaucrats, make fine-grained decisions about how schools will run. State efforts to maintain secularism in the charter sector will be constrained both by the practical limitations of their regulatory toolkit and, potentially, by federal First Amendment rules. The demands of the charter quasi-market and the creativity of its participants will give rise to diverse and ingenious efforts to bring publicly-funded education and religious activity closer together. States will be hard-pressed to maintain the level of secular dominance that characterized Progressive education in a neoliberal context.

A. *States May Elect to Deny Charters to Religious Schools*

Even within a Progressive framework, it is possible to argue that the First Amendment or its values require states that fund public, secular schools also fund religious schooling for those who desire it.

³⁰² *Zelman v. Simmons-Harris*, 536 U.S. 639, 657 (2002).

³⁰³ *Id.* at 658.

Professor Michael McConnell and others famously argued that funding secular but not religious education is a negative subsidy on constitutionally protected religious exercise, and therefore potentially an unconstitutional condition.³⁰⁴ Although a state could restrict its funding only to secular, Progressive schools if it had a “good faith” belief that such schools were superior to private schools in realizing goals “unrelated to religion” such as integrating students or teaching citizenship, on McConnell’s theory it could not do so in order to discourage the consumption of religious schooling.³⁰⁵

This argument, however compelling, is at odds with the enormous weight of the case law and gained little traction.³⁰⁶ But the rise of school choice spurred variations on the claims that distinguished neoliberal from Progressive contexts. Some scholars argue that although it is constitutional for states to fund only “public education,” it is less clear that states, having chosen also to fund “private schools,” can limit such funding to secular institutions.³⁰⁷ This argument appeals regardless whether one thinks religion should be treated no differently than other sorts of personal commitments³⁰⁸ or that the Constitution accords special status to religious beliefs.³⁰⁹

Claims that states that fund private schools cannot exclude religious ones took substantial energy from *Rosenberger v. Rector and Visitors of the University of Virginia*,³¹⁰ in which the Court held that a public university that underwrote student publications could not withhold funds from a publication that proselytized so long as the latter met the general eligibility requirements for subsidy.³¹¹ I think *Rosenberger* is deeply relevant to charter school regulation, for reasons I suggest below.³¹² But the particular argument that a neutral program of school aid cannot exclude religious schools because of their religiosity

³⁰⁴ Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1018 (1991); Michael W. McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 SAN DIEGO L. REV. 255, 269, 271, 275 (1989) [hereinafter McConnell, *Unconstitutional Conditions*]; see also MARK G. YUDOF ET AL., EDUCATION POLICY AND THE LAW 116 n.1 (2012) (collecting literature); Laycock, *supra* note 3, at 187.

³⁰⁵ McConnell, *Unconstitutional Conditions*, *supra* note 304, at 269.

³⁰⁶ See Laycock, *supra* note 3, at 172 & n.100.

³⁰⁷ Jesse H. Choper, *Federal Constitutional Issues*, in SCHOOL CHOICE AND SOCIAL CONTROVERSY, *supra* note 100, at 235, 248–49; accord Tushnet, *supra* note 95, at 15–21. This debate transcends the educational context. See Tebbe, *supra* note 264, at 1265 (identifying exclusion of religion from general funding programs as “an incipient constitutional issue”).

³⁰⁸ The canonical exposition of this view is Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994).

³⁰⁹ McConnell, *Governments, Families, and Power*, *supra* note 38, at 854.

³¹⁰ 515 U.S. 819 (1995).

³¹¹ See Laycock, *supra* note 3, at 169–70 (discussing *Rosenberger*); Tebbe, *supra* note 264, at 1303–06 (same); Tushnet, *supra* note 95, at 18 (same).

³¹² See *infra* notes 383–385 and accompanying text.

has been substantially impeded by *Locke v. Davey*, decided by the Supreme Court in 2004.³¹³ In *Davey*, the Court upheld a program of graduate scholarships that provided state monies to post-secondary students pursuing their chosen fields, but that excluded students choosing to pursue a “theology degree.”³¹⁴ The Court held that the “play in the joints” between the Establishment and Free Exercise Clauses³¹⁵ permitted, but did not require, states so to exclude religious education from otherwise neutral programs of subsidy for study.

There is ample room to argue that *Davey* does not extend to the charter school context. The program at issue in *Davey* excluded *degrees* in theology, not theology courses; the opinion explicitly notes that the program permitted “students to attend pervasively religious schools, so long as they are accredited.”³¹⁶ In the K–12 context, even the most pervasively religious of charters is not only accredited but spends large amounts of time teaching secular subjects.³¹⁷ For the same reasons it would be impossible to describe a religious charter student as engaging in “an essentially religious endeavor . . . akin to a religious calling as well as an academic pursuit”—the Court’s description of Mr. Davey’s program of study.³¹⁸ And, as Professor McConnell argues, refusing to fund religious charters is to do what the *Davey* Court said the Washington program did not do, namely to “require students to choose between their religious beliefs and receiving a government benefit.”³¹⁹

Nevertheless, Professor Laycock is convincing when he argues that these persuasive distinctions are likely to be ignored.³²⁰ The “impressionistic and aesthetic” reading of *Davey*—that it entitles states to exclude religious schools from programs that provide otherwise general funding to schools or students—is likely to prevail for some time.³²¹

Certainly the state charter school statutes now in force ubiquitously require charters to be secular. Most explicitly require charters to be “nonsectarian” or “nonreligious,”³²² and it is likely that most of the

³¹³ 540 U.S. 712 (2004); see Tebbe, *supra* note 264, at 1266–67, 1306–07 (noting that *Rosenberger* and *Davey* are “in tension”).

³¹⁴ *Davey*, 540 U.S. at 718.

³¹⁵ *Id.* (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970)).

³¹⁶ *Id.* at 724.

³¹⁷ See Laycock, *supra* note 3, at 184–85.

³¹⁸ *Davey*, 540 U.S. at 721.

³¹⁹ *Id.* at 720–21.

³²⁰ See Laycock, *supra* note 3, at 185–87.

³²¹ *Id.* at 186–87 & n.193 (collecting cases).

³²² See, e.g., ARIZ. REV. STAT. ANN. § 15-183(E)(2) (2012); ARK. CODE ANN. § 6-23-103(4)(B) (2012); CAL. EDUC. CODE § 47605(d)(1) (West 2013); COLO. REV. STAT. § 22-30.5-104(1) (2012); CONN. GEN. STAT. § 10-66aa(1) (2012); DEL. CODE ANN. tit. 14, § 506(a)(2) (2012); FLA. STAT. § 1002.33(9)(a) (2012); GA. CODE ANN. § 20-2-2062(2) (2012); IND. CODE § 20-24-1-4 (2012); IOWA CODE § 256F.4(2)(b) (2012); LA. REV. STAT. ANN. § 17:3991(C)(5) (2012); MD. CODE ANN., EDUC. § 9-102(1) (West 2013); MINN. STAT. § 124D.10(b)(2), subdiv. 8(d) (2012);

remainder assume that their requirement that charter schools be “public” includes a prohibition on religious activity. Some states probably impose such requirements in the mistaken but conventional belief that the First Amendment requires them to do so.³²³ But they have other reasons as well. A significant number of state constitutions restrict public funding of religious institutions more rigorously than does the federal Constitution, although scholars differ regarding how many of these states’ provisions will be understood to prevent subsidies that ultimately flow to religious education.³²⁴ These limitations would fall in their entirety, of course, if the First Amendment is read to require funding of religious and secular entities on equal terms, or if the state constitutional provisions themselves are infirm under the First Amendment—but both these possibilities, although the subject of robust theoretical debate, remain remote in practice.³²⁵ On the standard reading of *Davey* and the constitutionality of “Blaine amendments” and cognate state provisions, states may under federal law choose to foreclose religious participation in charter programs, and therefore whether they must do so depends upon the religion jurisprudence each state has developed under its own constitution.³²⁶

States also have fiscal and political reasons for maintaining an all-secular chartering system. Ten percent of American children are

MO. REV. STAT. § 160.405(4)(1) (2012); N.H. REV. STAT. ANN. § 194-B:1(III) (2013); N.M. STAT. ANN. § 22-8B-4(J) (2012); N.Y. EDUC. LAW § 2854(2)(a) (McKinney 2012); OHIO REV. CODE ANN. § 3314.029(A)(1)(d) (West 2012); OKLA. STAT. tit. 70, § 3-136(A)(2) (2012); 24 PA. CONS. STAT. ANN. § 17-1715-A(4)–(5) (West 2012) (“A charter school shall be nonsectarian in all operations . . . [and] shall not provide any religious instruction, nor shall it display religious objects and symbols.”); R.I. GEN. LAWS § 16-77-3.1(d) (2012); S.C. CODE ANN. § 59-40-40(1) (2012); UTAH CODE ANN. § 53A-1a-507(1) (West 2012); VA. CODE ANN. § 22.1-212.5(B) (2012); WIS. STAT. § 118.40(4)(a)(2) (2011); WYO. STAT. ANN. § 21-3-304(a) (2012); *cf.* NEV. REV. STAT. § 386.505(3) (2011) (prohibiting “formation of charter schools on the basis of a single race, religion or ethnicity”). *But cf.* MICH. COMP. LAWS § 380.522(1) (2012) (“*To the extent disqualified under the state or federal constitution, an urban high school academy shall not be organized by a church or other religious organization and shall not have any organizational or contractual affiliation with or constitute a church or other religious organization.*” (emphasis added)).

³²³ Notable here is New Hampshire’s incorporation, in its chartering statute, of the federal *Lemon* test as the method of “determining whether a proposed chartered public school is a prohibited religious school.” N.H. REV. STAT. ANN. § 194-B:7 (2012).

³²⁴ 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 551, 555–57 (2003); Nicole Stelle Garnett, *Affordable Private Education and the Middle Class City*, 77 U. CHI. L. REV. 201, 218 (2010); Ira C. Lupu & Robert W. Tuttle, *Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 959–60 (2003) [hereinafter Lupu & Tuttle, *Zelman’s Future*]. Some scholars also continue to argue that these state bars are themselves unconstitutional.

³²⁵ See Lupu & Tuttle, *Zelman’s Future*, *supra* note 324, at 969–70. On the possible unconstitutionality of state “Little Blaine Amendments” that bar state funding of sectarian organizations, see *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (Thomas, J.) (plurality opinion); Tushnet, *supra* note 95, at 15–18 (discussing Justice Thomas’s *Mitchell* opinion).

³²⁶ See Lupu & Tuttle, *Zelman’s Future*, *supra* note 324, at 960 & nn.198–99.

enrolled in private school, and roughly eighty-five percent of those attend schools with religious affiliations.³²⁷ These students' parents are a fiscal blessing to states and localities: they forgo expensive government services while still paying taxes. If religious schools could easily recast themselves as charters and thereby gain access to public funding, the drain on education budgets would be both substantial and sudden.³²⁸ Some states address this problem by prohibiting the conversion of existing private schools to charters;³²⁹ but since parents can switch schools, this is only a partial fix.

Finally, there are nonfiscal ideological and political reasons for excluding religious education from charter programs. States may have separationist preferences. They may wish not to fund the educational practices of particular minority sects. They may have no stomach for litigation or controversy in this area. They may think that nonsectarianism enhances public support for charters. There are many other possible motivations.

It seems plausible to think that many or all of these factors help motivate the requirement in state positive law that charters not be religious. A correct understanding of the application of the First Amendment to charters would not lead all states to change course. But the mistaken view that charters cannot be religious surely has an effect. Its correction would surely move some states towards relaxing the nonsectarianism requirement, especially those where the agenda of evangelical Christian educators³³⁰ and their allies³³¹ is strong. This coalition's clout has led several states and districts systematically to resist the First Amendment constraints on Progressive education.³³² Should voters and elected officials in these areas come to view religious chartering as constitutional, the requirement that charters be secular would likely be loosened in a significant number of jurisdictions.

³²⁷ See *Facts and Studies*, CAPE: COUNCIL FOR AMERICAN PRIVATE EDUCATION, <http://www.capenet.org/facts.html> (last visited Feb. 8, 2013) (citing reports from the National Center for Education Statistics, containing data for the 2009–2010 school year).

³²⁸ See JANET D. MULVEY, BRUCE S. COOPER & ARTHUR T. MALONEY, *BLURRING THE LINES: CHARTER, PUBLIC, PRIVATE, AND RELIGIOUS SCHOOLS COMING TOGETHER* 32 (2010) (documenting concern in New York City over “the stress that would be placed on public schools if all students from . . . closed Catholic schools entered the public school system”).

³²⁹ See *infra* note 370.

³³⁰ See STEPHEN ARONS, *SHORT ROUTE TO CHAOS: CONSCIENCE, COMMUNITY, AND THE RECONSTITUTION OF AMERICAN SCHOOLING* 55–58 (1997); ROBERT WUTHNOW, *RED STATE RELIGION: FAITH AND POLITICS IN AMERICA'S HEARTLAND* 295–97, 303–11 (2012).

³³¹ See MELISSA M. DECKMAN, *SCHOOL BOARD BATTLES: THE CHRISTIAN RIGHT IN LOCAL POLITICS* 16 (2004).

³³² See KENNETH M. DOLBEARE & PHILLIP E. HAMMOND, *THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE* 31–32 & fig.7 (1971); 2 GREENAWALT, *supra* note 91, at 106.

B. *The Limits of Regulatory Oversight*

That states are entitled to exclude religious schools from chartering does not end the matter. Chartering, and educational neoliberalism more generally, shift decisionmaking power from public to private actors. Private actors determine how charters behave; government regulates, but does not make, those determinations. Because demand for religious schooling is large, one expects educational entrepreneurs to create schools that come as close as possible to meeting that demand, subject to their regulatory constraints. Charter schools will therefore push against limitations upon their religious activity. States will find it difficult, and even potentially unlawful, fully to prevent such moves—if they even want to, which not all states will.³³³

This is not to say that regulatory power is insubstantial. If state law forbids “sectarian” or “religious” charter schools, then a charter school cannot organize itself as a religious private school does. It cannot organize prayers, nor can it teach the truth of the Bible or of other religious propositions. But these are not the only things that religious schools do, nor are they only things that draw parents towards religious schools. Religious schools have unique substantive and procedural approaches to teaching culture, inculcating values, and maintaining discipline.³³⁴ They emphasize particular topics and approaches in teaching social studies, literature, history, and science.³³⁵ Especially important, their students often reach high levels of academic achievement.³³⁶ A school that cannot pray or teach religious truth will probably not appeal to the core constituencies of existing private religious schools that enroll in order to provide their children with religious education. But such a school could easily enjoy broad appeal among more marginal consumers that appreciate these other aspects of religious education—with the added enticement of being tuition-free. These parents, like all parent-consumers in a quasi-market, have buying power to which charter entrepreneurs will respond.

³³³ See Minow, *Seduction of Choice*, *supra* note 34, at 839 & n.103.

³³⁴ See JONES, *supra* note 12, at 40, 43.

³³⁵ See *id.* at 43, 117, 152–53.

³³⁶ See U.S. DEP’T OF EDUC., PRESERVING A CRITICAL NATIONAL ASSET: AMERICA’S DISADVANTAGED STUDENTS AND THE CRISIS IN FAITH-BASED URBAN SCHOOLS 6–8 (2008); Margaret F. Brinig & Nicole Stelle Garnett, *Catholic Schools, Urban Neighborhoods, and Education Reform*, 85 NOTRE DAME L. REV. 887, 901 (2010); *cf.* *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Souter, J., dissenting) (“[A]lmost two out of three families using vouchers [in Cleveland] to send their children to religious schools did not embrace the religion of those schools. The families made it clear 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.” (citations to the record omitted)); Garnett, *supra* note 324, at 214 (implying that her mostly Catholic neighbors enroll their children in Catholic schools more because of the schools’ record of academic achievement than their families’ religiosity).

This is no theoretical exercise. Across the country, charter schools have been established that begin with a religious program and then strip out its explicitly religious elements. More than a trivial residue remains. Charter schools with roots in both the Catholic and Protestant educational establishments, for example, find substitutes when they forgo prayer and explicit Christian instruction.³³⁷ When the Trinidad Campus of the Center City Public Charter School in Washington, D.C. morphed from Catholic to charter school, it replaced the Lord's Prayer with students' daily recital of a promise to "pursue personal excellence in character, conduct and scholarship."³³⁸ But Trinidad maintains a school "shrine . . . dedicated to the school's core values: collaboration, compassion, curiosity, discipline, integrity, justice, knowledge, peacemaking, perseverance and respect."³³⁹ The school also maintained the leftover "stone cross at the entrance of the school," and continues to employ the same teachers and nuns that worked for the building's former tenants.³⁴⁰ Likewise, the Nampa Charter School in Idaho denies that it is a "Christian school," but deploys curriculum and training developed for private Christian schools, teaches Latin, and forbids sex education.³⁴¹ It also includes the Bible among the "major text[s]" of Western civilization in its history classes,³⁴² accepting the invitation of the Court in *Abington School District v. Schempp* to deploy the Bible as a secular text.³⁴³

Schools like these, whether spun off from private religious schools or free-standing, have been described as "religious/cultural charters"³⁴⁴ and, more critically, as "religious schools-lite."³⁴⁵ They have been especially attractive to religious minorities. For such groups, it is of

³³⁷ Discrete Christian denominations, such as the Mormons and the Amish, are also involved in chartering. See FINN, MANNO & VANOUREK, *supra* note 52, at 161.

³³⁸ MULVEY, COOPER & MALONEY, *supra* note 328, at 29.

³³⁹ *Id.*

³⁴⁰ *Id.*; see also Nicole Stelle Garnett, *Are Charters Enough Choice? School Choice and the Future of Catholic Schools*, 87 NOTRE DAME L. REV. 1891, 1891-93 (2012) (documenting a similar transformation of a Catholic school to a charter school in Indianapolis); Sugarman & Kuboyama, *supra* note 49, at 875 (noting concern over charters that rent religious buildings whose "pupils . . . [are] largely drawn from the congregation of the landlord"). But see Carolyn Slutsky, *Hebrew Charter School to Displace Shul*, N.Y. JEWISH WK., July 22, 2009 (on file with author) (Hebrew-language charter insisting upon the removal of all religious symbols from a rented synagogue before taking possession).

³⁴¹ MULVEY, COOPER & MALONEY, *supra* note 328, at 96.

³⁴² *Id.* at 35.

³⁴³ 374 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.").

³⁴⁴ Marcia J. Harr Bailey & Bruce S. Cooper, *The Introduction of Religious Charter Schools: A Cultural Movement in the Private School Sector*, 18 J. RES. ON CHRISTIAN EDUC. 272, 272 (2009).

³⁴⁵ Charles J. Russo & Gerald M. Cattaro, *Faith-Based Charter Schools*, 36 RELIGION & EDUC. 72, 83 (2009).

critical religious importance to maintain cultural and linguistic traditions that are confessionally fundamental, but technically secular, in content.³⁴⁶ Bailey and Cooper identify such charters founded by Muslim, Jewish, Greek Orthodox, and Hmong communities.³⁴⁷ These schools teach “the history, customs, and language of the religion during the required school day.”³⁴⁸ They all eschew school-organized prayer and the teaching of religious truths, but differ to a significant extent in the extent to which they push the religious/secular boundary. Some schools display symbols that straddle that line, observe religious dietary laws in their cafeterias, and/or close for religious holidays—and others do not.³⁴⁹ A well-studied Islamic charter school, the Tarek Ibn Ziyad academy, found itself in court over its policy of, while not sponsoring prayers directly, recessing formal classes and providing space for student-organized worship.³⁵⁰ Some Hebrew charter schools err in the other direction, not requiring Hebrew language instruction but merely offering it as an elective.³⁵¹

The teaching of languages with special religious import but that are also secular tongues—Arabic, Greek, Hebrew, Latin—is particularly significant because an important attraction of charter schools is their ability to organize themselves around particular themes or topics.³⁵² Chartering invites niche marketing, even to idiosyncratic interests, so long as schools can command students in the quasi-marketplace.³⁵³ One

³⁴⁶ See, e.g., MINOW, IN *BROWN'S WAKE*, *supra* note 27, at 105 (describing religious separatist Jews seeking their own school district for reasons “of religious, linguistic, and cultural identity”).

³⁴⁷ Bailey & Cooper, *supra* note 344, at 272.

³⁴⁸ *Id.* at 277.

³⁴⁹ See Benjamin Siracusa Hillman, Note, *Is There a Place for Religious Charter Schools?*, 118 *YALE L.J.* 554, 570 (2008). It is important to note that traditional public schools with substantial enrolment from discrete religious minorities sometimes follow similar practices. See, e.g., MICHAEL S. MERRY, *CULTURE, IDENTITY, AND ISLAMIC SCHOOLING: A PHILOSOPHICAL APPROACH* 26 (2007) (noting that the two public high schools in Dearborn, Michigan “offers [sic] bilingual classes in Arabic, accommodate Islamic holidays, excuse those students who are inclined toward Friday prayers, and offer *halal* meat in its [sic] cafeteria”).

³⁵⁰ See *id.* at 565; Bailey & Cooper, *supra* note 344, at 279–80.

³⁵¹ See Julie Wiener, *L.A. Charter Tests Genre*, *N.Y. JEWISH WK.*, May 10, 2011, available at http://www.thejewishweek.com/news/national/la_charter_tests_genre.

³⁵² E.g., *KAN. STAT. ANN.* § 72-1903(b) (2012) (“A charter school also may be organized around a special emphasis, theme or concept”); *N.H. REV. STAT. ANN.* § 194-B:1-a(III) (2013) (stating that one purpose of chartering is to “[e]ncourage the establishment of . . . schools with specific or focused curriculum, instruction, methods, or target pupil groups”); *OKLA. STAT. tit. 70, § 3-136(A)(3)* (2012) (“A charter school may offer a curriculum which emphasizes a specific learning philosophy or style or certain subject areas such as mathematics, science, fine arts, performance arts, or foreign language.”); *TENN. CODE ANN.* § 49-13-104(1) (2012) (providing for charters with “a distinctive, thematic program”).

³⁵³ See, e.g., FINN, MANNO & VANOUREK, *supra* note 52, at 163; Karen Abercrombie, *In A Detroit Suburb, an Automaker's Vision Gets New Life*, *EDUC. WK.*, Mar. 4, 1998, at 6 (reporting on a charter school based on manufacturing); Ray Parker, *Unique Charter School Offers Lessons in Horse Sense*, *ARIZ. REPUBLIC* (Oct. 1, 2009), <http://www.azcentral.com/community/mesa/>

of the most significant niches is filled by charters whose programs, though open to all, reflect the interests of specific racial, ethnic, and linguistic identity groups.³⁵⁴ Hebrew- and Arabic-language charters in particular are presented, with some justification, as catering to linguistic and ethnic, as much as religious, cultures. Dean Minow, for example, includes them in her discussion of charters that emphasize Spanish and Chinese.³⁵⁵

Some of these same charters, however, have found ways to supplement their programs with privately provided religious education. This practice honors legal boundaries but still provides the religious/secular synthesis previously monopolized by private religious schools. For example, private providers sometimes offer programs of afterschool religious education exclusively to students in a particular “religious/cultural charter.”³⁵⁶ Some charters insist that such programs be provided off-site, to emphasize their formal separation from the publicly subsidized program; others feel no such compunctions.³⁵⁷

More inventively, entrepreneurs have deployed the “cyber” or “virtual” charter form to religious (and competitive) advantage. Providing instruction online rather than through physical teacher/pupil interaction is a still-small but growing trend in K–12 education, and one rapidly taking on outsize importance.³⁵⁸ Sensing its potential to realize cost savings, improve access, and allow educational customization, a number of states are experimenting with virtual education, and most of these permit its use by charter as well as traditional public schools.³⁵⁹

articles/2009/10/01/20091001mr-equineskl1002.html (reporting on a charter based on equine and veterinary subjects).

³⁵⁴ See RAVITCH, *supra* note 42, at 124–25 (“Ethnic groups embraced [charter schools] as a refuge in which to teach their cultural heritage.”); Bruce Fuller, *Growing Charter Schools, Decentering the State*, in INSIDE CHARTER SCHOOLS: THE PARADOX OF RADICAL DECENTRALIZATION 1, 7 (Bruce Fuller ed., 2000).

³⁵⁵ MINOW, IN *BROWN’S WAKE*, *supra* note 27, at 45.

³⁵⁶ See MULVEY, COOPER & MALONEY, *supra* note 328, at 97 (noting efforts by New Orleans Baptist Missions to form charters by “adopting an existing school”); Julie Wiener, *For Charters’ Jewish Cousins, So Near, So Far*, N.Y. JEWISH WK., Dec. 28, 2010, available at <http://www.thejewishweek.com/print/14288> (surveying this practice at Hebrew-language charter schools and reporting that such programs attract between twenty and thirty percent of students in the charters).

³⁵⁷ See Wiener, *supra* note 356.

³⁵⁸ JAY GREENE ET AL., BROWN CTR. ON EDUC. POL’Y AT BROOKINGS, EXPANDING CHOICE IN ELEMENTARY AND SECONDARY EDUCATION: A REPORT ON RETHINKING THE FEDERAL ROLE IN EDUCATION 16 (2010), available at http://www.brookings.edu/~media/Files/rc/reports/2010/0202_school_choice/0202_school_choice.pdf; PAUL PETERSON, SAVING SCHOOLS: FROM HORACE MANN TO VIRTUAL LEARNING 231–34 (2010); J. SCHNITZ, & J.E. YOUNG, MODELS OF VIRTUAL SCHOOLING (1999), available at <http://www-03.ibm.com/industries/ca/en/education/k12/pdf/virtualschool.pdf>; Aaron J. Saiger, *Changing the Conversation in Education Law: Political Geography and Virtual Schooling*, 41 J.L. & EDUC. 337, 355–57 (2012) [hereinafter Saiger, *Changing the Conversation*].

³⁵⁹ See FLA. STAT. §§ 1002.33, 1002.45(d) (2012); IDAHO CODE ANN. § 33-5205(1)(b) (2012); MINN. STAT. §§ 124D.095, 124D.10 (2012) (extending state “Online Learning Option Act” to

Most cyber-schools are charters,³⁶⁰ and these schools serve tens of thousands of students.³⁶¹

In the context of religious education, *asynchronicity* is a key aspect of cyber-schooling. Asynchronous charter students can log on for school at times and places of their own choosing, in the cyber-analogue to the pre-internet correspondence course.³⁶² Steven L. Jones provocatively calls virtual charters “public schools in the home”;³⁶³ but although most virtual instruction takes place at home, it need not. Asynchronicity allows students in a private religious school each to enroll in a secular cybercharter, as individuals, and receive their secular education at times and places as directed by the religious teaching staff, even as religious instruction itself remains privately funded.³⁶⁴ A

charters); OHIO REV. CODE ANN. §§ 3301.079, 3302.41 (West 2012) (defining “blended learning” as “the delivery of instruction in a combination of time in a supervised physical location away from home and online delivery whereby the student has some element of control over time, place, path, or pace of learning” and allowing community schools to use a “blended learning model”); OR. REV. STAT. §§ 329.840, 338.005 (2012) (creating the Oregon Virtual School District and granting access to it to “public charter schools”; also creating “virtual public charter schools” that provide online courses and have no physical location); 24 PA. CONS. STAT. ANN. §§ 17-1741-A to 17-1751-A (rules for “cyber charter schools”) (West 2012); S.C. CODE ANN. § 59-40-40 (2012) (inviting charters to provide “virtual services”); WIS. STAT. § 118.40(8) (2011). *Contra* MD. CODE ANN., EDUC. §§ 7-1401(c), 7-1402(a), 9-102(12) (West 2013) (authorizing “virtual schools” but allowing only “county board[s]” to sponsor them, whereas charter schools must “[r]equir[e] students to be physically present on school premises for a period of time substantially similar to that which other public school students spend on school premises.”); TENN. CODE ANN. § 49-13-106(c)(2) (2012) (“No cyber-based public charter school may be authorized.”). *See generally* Thomas Clark, *Virtual Schooling and Basic Education*, in *ECONOMICS OF DISTANCE AND ONLINE LEARNING: THEORY PRACTICE, AND RESEARCH* 52, 57–58 (William J. Bramble & Santosh Panda eds., 2008) (detailing reach of online charters); Greene et al., *supra* note 358 (advocating a substantial expansion of virtual chartering).

³⁶⁰ *See* JOHN WATSON, BUSH GEMIN & JENNIFER RYAN, *KEEPING PACE WITH K–12 ONLINE LEARNING: A REVIEW OF STATE-LEVEL POLICY AND PRACTICE* 8 (2008).

³⁶¹ *See id.*; SLOAN CONSORTIUM, *K–12 ONLINE LEARNING: A 2008 FOLLOW-UP OF THE SURVEY OF U.S. SCHOOL DISTRICT ADMINISTRATORS 1* (Jan. 2009), *available at* http://www.sloanconsortium.org/sites/default/files/k-12_online_learning_2008.pdf (presenting data from a survey of school districts during the 2007–2008 finding that 75% of responding districts had at least one student enrolled in an online or blended course and that two-thirds of these districts expect growth in online enrollments); Garnett, *supra* note 340, at 1899 (reporting a 2008 count of “185 ‘virtual’ charter schools in twenty-five states”); Trip Gabriel, *More Pupils Are Learning Online, Fueling Debate on Quality*, N.Y. TIMES, Apr. 6, 2011, at A1 (reporting estimate of 1 million students involved in some form of online or blended education). These schools bring their share of disputes. *See* Stephanie Saul, *Profits and Questions at Online Charter Schools*, N.Y. TIMES, Dec. 13, 2011, at A1; *State Moves to Shut Down Minn.’s First Online Charter*, EDUC. WK., Mar. 16, 2011, at 4; Dakarai I. Aarons, *Colo. Charter Dispute Stirs Oversight Issues; Riven by Firings, Infighting, Noted School Network Is Challenge for Authorizers*, EDUC. WK., Oct. 7, 2009, at 8.

³⁶² *See* BURCH, *supra* note 36, at 77; WATSON, GEMIN & RYAN, *supra* note 360, at 10; Edward Lin, Comment, “Virtual” Schools: *Real Discrimination*, 32 SEATTLE U. L. REV. 177, 178 (2008) (cataloging secular motivations for online schooling).

³⁶³ JONES, *supra* note 12, at 89.

³⁶⁴ *See* Saiger, *Changing the Conversation*, *supra* note 358, at 359.

handful of religious schools have adopted this model,³⁶⁵ which allows the interpenetration of secular and religious instruction:

[A] religious teacher might work with half the class on some religious topic while the other half, on its own for the moment, engages in secular cyber-study under the teacher's passive supervision. Or a cleric might begin a 45-minute English lesson with a prayer—right before secular studies begin—or interrupt a cyber-biology lesson to admonish students that “[t]his evolution bit is straight from Satan.”³⁶⁶

Such environments could quite closely approximate the current practices of many pervasively religious private schools and religious homeschooling families. But while in the private and homeschooling contexts parents pay for secular studies (in the former case with their money and the latter with their time³⁶⁷), this model shifts these costs to the state. This potentially large reduction in parental costs could induce considerably more of them to seek religious schooling than do today.³⁶⁸

Such strategies are extremely difficult for states to block by regulation, especially without impeding a large amount of desirable chartering activity. It is not just that regulatory limitations are subject to politics and lobbying;³⁶⁹ it is more that regulation is a blunt tool with which to confront the religiously-motivated entrepreneur. So, some states have forbidden religious private schools or private schools in general from converting to charters,³⁷⁰ as the Trinidad campus did.³⁷¹

³⁶⁵ Julie Wiener, *Has Tech Reached the Tipping Point?*, N.Y. JEWISH WK., July 26, 2011, available at http://www.thejewishweek.com/news/new_york/has_tech_reached_tipping_point (describing an Orthodox Jewish *yeshiva* in Los Angeles that teaches religious studies using traditional face-to-face instruction from the first bell until 2 PM, whereupon all students pursue secular studies as cybercharter students under the physical supervision of the religious teaching staff).

³⁶⁶ Saiger, *Changing the Conversation*, *supra* note 358, at 359 (quoting Guy Lancaster, “*This Evolution Bit is Straight from Satan*”: *McLean v. Arkansas Board of Education and the Democratization of Southern Christianity*, 33 RELIGION & EDUC. 69, 84 (2006)).

³⁶⁷ See Michelle R. Davis, “*Hybrid*” *Charter Schools on the Rise*, EDUC. WK., June 15, 2011 (reporting that families cannot take full advantage of virtual education without “ability to have their children at home or supervised in their workspace”).

³⁶⁸ See MERRY, *supra* note 349, at 28, 33, 38 (noting financial pressures on Islamic schools and parents); Garnett, *supra* note 340, at 1897 (noting similar pressures on Catholic schools); Jack Wertheimer, *The High Cost of Jewish Living*, COMMENTARY (Mar. 2010), at 17, 17–18 (noting similar pressures on Jewish schools and parents), available at <http://www.commentarymagazine.com/article/the-high-cost-of-jewish-living/>.

³⁶⁹ See *Zelman v. Simmons-Harris*, 536 U.S. 639, 715 (2002) (Souter, J., dissenting) (“A day will come when religious schools will learn what political leverage can do . . .”).

³⁷⁰ See CAL. EDUC. CODE § 47602(b) (West 2012); DEL. CODE ANN. tit. 14, § 502 (2012) (“No private or religiously affiliated school may apply to become a charter school.”); GA. CODE ANN. § 20-2-2062(2) (2012) (stating “sectarian schools” and “religious schools” as well as “private for profit schools” and “existing private schools” may not petition for charter status); 105 ILL. COMP. STAT. 5/27A-4(c) (West 2012); MASS. GEN. LAWS ch. 71, § 89(d) (2012); OHIO REV. CODE ANN. § 3314.01(A)(2) (West 2012) (“No nonpublic chartered or nonchartered school in existence on January 1, 1997, is eligible to become a community school under this chapter”); *id.*

States also sometimes forbid “home-based” institutions from seeking charters.³⁷² Such bans essentially invite groups to reorganize and set up new schools rather than converting old ones,³⁷³ even as they can deprive the new schools of valuable assets, including appropriate real estate.³⁷⁴ Two schools can have different corporate identities but still share, for example, the same directors, staff, or facilities.³⁷⁵ States can respond in turn by forbidding such arrangements also.³⁷⁶ But this, in addition to

§ 3314.029(A)(1)(d) (charter applications must include “statement that the school . . . will not be operated by a sectarian school or religious institution”); 24 PA. CONS. STAT. ANN. § 17-1717-A(a) (West 2012) (“No charter school shall be established or funded by and no charter shall be granted to any sectarian school, institution or other entity.”); R.I. GEN. LAWS § 16-77-3.1(d) (2012) (“No private or parochial schools shall be eligible for charter public school status”); TENN. CODE ANN. § 49-13-106(c)(1) (2012) (“No charter agreement shall be granted under this chapter that authorizes the conversion of any private, parochial, cyber-based or home-based school to charter status.”); WIS. STAT. § 118.40(3)(c)(2) (2011) (“A school board may not enter into a contract that would result in the conversion of a private, sectarian school to a charter school”). WYO. STAT. ANN. § 21-3-303(c) (2012).

³⁷¹ See J.C. Reindl, *Knight Academy Charter School Scheduled to Open in West Toledo*, TOLEDO BLADE, July 11, 2008, available at <http://www.toledoblade.com/Education/2008/07/11/Knight-Academy-charter-school-scheduled-to-open-in-West-Toledo.html> (affiliation of a new charter with existing Catholic school).

³⁷² See COLO. REV. STAT. § 22-30.5-104(1) (2012); DEL. CODE ANN. tit. 14, § 506(a)(2) (2012); GA. CODE ANN. § 20-2-2062(2) (2012); MINN. STAT. § 124D.10 subd. 8(e) (2012) (“Charter schools must not be used as a method of providing education or generating revenue for students who are being home-schooled.”) NEV. REV. STAT. §§ 386.505(1), 386.506 (2011); N.H. REV. STAT. ANN. § 194-B:1(III) (2013); N.M. STAT. ANN. § 22 8B 4(J) (2012); S.C. CODE ANN. § 59-40-40(1) (2012); TENN. CODE ANN. § 49-13-106(c)(1) (2012); UTAH CODE ANN. § 53A-1a-504(3) (West 2012); VA. CODE ANN. § 22.1-212.5(B) (2012); WYO. STAT. ANN. §§ 21-3-303(c), 21-3-304(a) (2012).

³⁷³ See Christopher O’Donnell, *The ‘C’ Will Stand for ‘Charter’ Next Year*, SARASOTA HERALD-TRIBUNE, Nov. 2, 2009, at A01, available at <http://www.heraldtribune.com/article/20091102/ARTICLE/911021059> (reporting that rather than convert to a charter school, leadership of Palmetto Christian School in Florida “closing” the school in the summer and “opening Palmetto Charter School at the start of the new school year”); see also *id.* (noting seven similar closures-followed-by charter-openings by the Archdiocese of Miami).

³⁷⁴ Cf. GORDON, *supra* note 15, at 57 (stating that in the 1940s and 1950s, “[t]here were significant ties in many areas between public schools and Catholic educators,” and that local officials “[o]ften . . . used church buildings as public elementary and secondary schools”)

³⁷⁵ See Mary Shanklin & Vicki McClure, *Deals and Debts*, ORLANDO SENTINEL, Mar. 26, 2007, at A1, available at <http://www.orlandosentinel.com/orl-special-charterschools-part2,0,5924982.htmlpage> (reporting that Rio Grande Charter School of Excellence in Orlando FL “shares board members, facilities and funding with New Covenant Baptist Church”).

³⁷⁶ See MICH. COMP. LAWS § 380.522 (2012) (“To the extent disqualified under the state or federal constitution, an urban high school academy shall not be organized by a church or other religious organization and shall not have any organizational or contractual affiliation with or constitute a church or other religious organization.”); MINN. STAT. § 124D.10 subd. 3(b)(2) (2012) (stating that charter organizers may not be “nonpublic sectarian or religious institution; any person other than a natural person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the nonpublic sectarian or religious institution; and any other charitable organization under this clause that in the federal IRS Form 1023, Part IV, describes activities indicating a religious purpose”); *id.* § 124D.10 subd. 8(d) (“A charter school . . . authorizer may not authorize a charter school or program that is affiliated with a nonpublic sectarian school or a religious institution.”); N.C. GEN. STAT. § 115C-238.29F(b) (prohibiting charters “affiliated with a nonpublic sectarian

further depriving new charters of potentially important experience and support, mostly induces converting schools to replace formal affiliation or overlaps with informal ties.³⁷⁷ States worried that private schools might form or adopt charters for their students' secular studies, while retaining their enrollment for religious education, have also sought to block that practice;³⁷⁸ once again, it seems fairly easy to reconfigure the private school as an extracurricular institute in order to evade such restrictions.³⁷⁹ These regulations resemble squeezing a balloon.³⁸⁰ Ultimately, states cannot, even if they want to, prohibit adherents of a particular faith from participating in chartering.

The other way that states could restrict charters that push the envelope of religious instruction is to exercise discretion in approving and denying charter applications. Such discretion is available and, in those states that impose quotas on the total number of charters,³⁸¹ unavoidable. But while in the Progressive context, discretion is used to avoid even hints of religiosity in schools that are the single free option for all, the same techniques, when deployed in the neoliberal context against private providers, can come to seem like antireligious animus. Of course, these charters are carefully *not* religious, as a technical matter. But that does not mean that opposition to chartering individuals and groups that appear to have roots in religious communities, or who have particular values, cannot be deemed anti-religious discrimination. The Court's religion cases, up to and emphatically including *Davey*, disfavor regulatory burdens upon religious exercise of this nature.³⁸²

The neoliberal structure of chartering also increases the salience of *Rosenberger v. Rector & Visitors of the University of Virginia*.³⁸³ The

school or a religious institution") (2012); OKLA. STAT. tit. 70, § 3-136(A)(2) (2012) (same); OR. REV. STAT. § 338.035(7) (2012) (same); R.I. GEN. LAWS § 16-77-3.1(d) (2012) (same).

³⁷⁷ See MULVEY, COOPER & MALONEY, *supra* note 328, at 63–64 (reviewing the relationship between the Muslim American Society of Minnesota and the Tarek ibn Ziyad school); Jennifer Smith Richards, *A School Retooled*, COLUMBUS DISPATCH, Nov. 8, 2010, at 1A (reporting that the state acquiesces to a charter's claims that its links to a closed Christian "private school are superficial" even though it "has the same founder, is staffed by many of the same teachers and attended by many of the same students" and uses the same building).

³⁷⁸ See CAL. EDUC. CODE § 47602(b) (West 2012) (forbidding the conversion of private schools to charter schools; also "[n]o charter school shall receive any public funds for a pupil if the pupil also attends a private school that charges the pupil's family for tuition").

³⁷⁹ See *supra* notes 356–357.

³⁸⁰ See Mead, *supra* note 47, at 356–57.

³⁸¹ See, e.g., CAL. EDUC. CODE § 47602(a) (West 2012); CAL. CODE REGS. tit. 5, § 11968 (West 2013); 105 ILL. COMP. STAT. 5/27A-4(b) (2012); MINN. STAT. § 120.064 (2012); N.Y. EDUC. LAW § 2852(9) (McKinney 2012); R.I. GEN. LAWS § 16-77-3.1(g) (2012). See generally CTR. FOR EDUC. REFORM, CHARTER SCHOOL LAWS ACROSS THE STATES 2012, at 8–9 (Alison Consoletti ed., 13th ed. 2012), available at http://www.edreform.com/wp-content/uploads/2012/04/CER_2012_Charter_Laws.pdf.

³⁸² See Laycock, *supra* note 3, at 162, 214 ("[*Davey*] authorizes discriminatory funding, but it does not authorize discriminatory regulation.").

³⁸³ 515 U.S. 819 (1995).

prism of free speech applies naturally to the chartering context. Operating a charter school, like the use of public school property or the publication of magazines under university auspices, is open to all under neutral principles.³⁸⁴ The regulatory apparatus of charter schooling bears a strong family resemblance to the detailed but neutral rules that governed university subsidies for student publication in *Rosenberger*.³⁸⁵ And, again, the issue is not discrimination against religion per se but against views and practices tinged with religion. With respect to such elements of a charter program, viewpoint neutrality might well be a constitutional requirement.

In short, the institution of chartering itself, through its reliance on private providers and its choice of regulation rather than bureaucracy as the method of state control, creates a great deal of room for creative businesspeople to satisfy the demand for religious education, especially at the margin. Even if the claim that charters may be religious is rejected, chartering still has the potential to bring about a monumental shift in the relationship between church and state in American education. Where in a Progressive world government could enforce American schools characterized by strict separation, in a neoliberal one demand in the marketplace inevitably makes such boundaries more porous.

V. THE EVOLVING LANDSCAPE OF RELIGIOUS EDUCATION AND PUBLIC SUBSIDY

Neoliberalism is not the first, last, or biggest shift in educational and religious cultures to affect the tortuous course of the relationship between American religion and American schools. Nevertheless, it is surely significant. The rise of chartering creates the opportunity for substantial public funds to flow to religious and quasi-religious schools. The outsize importance of both church and school in American society, and the richness of America's history of interaction between them,³⁸⁶ make it impossible fully to predict the consequences of this momentous change. In this brief conclusion, I suggest only that there are (at least) four important places to look.

First, more American pupils will receive religious and religiously inflected education. Some states will likely allow religious charters and quasi-religious ones will seek students nationwide. The rise of these

³⁸⁴ *Id.* at 830; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993).

³⁸⁵ 515 U.S. at 823–25.

³⁸⁶ See GREEN, BIBLE, SCHOOL, AND CONSTITUTION, *supra* note 80, at 225–27, 251–325; GORDON, *supra* note 15; JONES, *supra* note 12.

schools reduces the effective price of religious education. This will benefit some families already paying for religious schooling, but a greater impact will be felt among families whose budget constraints lead them to prefer traditional public schools over paying tuition. These families are the natural target market for religious charter entrepreneurs. Suppliers will seek to bundle religious content, cultural aspects of religious schooling, and secular programs in ways that will be attractive to these families. How they do so, and to a lesser extent how states regulate their efforts, will determine much about the kind of schooling that many American students receive.

Chartering is also a harbinger of great challenge for traditional private religious schools. Private schools, especially religious ones, have long been a locus for dissent over public schooling and play a pivotal role in American education and in the national conversation over educational values.³⁸⁷ This vital sector will have to respond to its new competitive environment.³⁸⁸ Existing religious schools, like any private business, focus particularly on their marginal consumers, the group that will be targeted by new competition from charters. The early anecdotes of private schools converting to charters³⁸⁹ suggest that one response is contraction, with schools accepting more regulation and less overt religiosity in exchange for state subsidy; but this will hardly be the only or even the modal change. The kind of religious education that private religious schools offer will also shift. It was hoped that neoliberalism would induce change in traditional public schools by introducing competition into their environment; for similar reasons it will change the religious school sector. Not all such changes will be universally welcomed throughout the existing private-school industry.

The third potential effect of religious chartering is to alter the dynamic by which certain American communities of faith understand themselves to be alienated and excluded from the enterprise of public education.³⁹⁰ These communities never reconciled themselves to court decisions regarding school prayer, Bible reading, and the teaching of evolution.³⁹¹ Religious chartering makes room for a reorientation of

³⁸⁷ See CARPER & HUNT, *supra* note 14; JONES, *supra* note 12, at 101.

³⁸⁸ See JONES, *supra* note 12, at 21 (noting the impact of “‘free,’ nonsectarian public schools” upon denominational schools in the nineteenth century).

³⁸⁹ See *supra* notes 328–343, 370–371 and accompanying text.

³⁹⁰ See JONES, *supra* note 12, at 165 (“[S]ome Protestants, though certainly not all, have joined segments of the Catholic, Jewish, and Muslim communities on the institutional sidelines of American education.”); Carper & Hunt, *supra* note 80, at 85–86.

³⁹¹ See MICHAEL BERKMAN & ERIC PLUTZER, EVOLUTION, CREATIONISM, AND THE BATTLE TO CONTROL AMERICA’S CLASSROOMS 13–16 (2010) (collecting bibliography); BRUCE J. DIERENFIELD, THE BATTLE OVER SCHOOL PRAYER: HOW *ENGLE V. VITALE* CHANGED AMERICA 189 (2007); Clyde Wilcox & Sam Potolicchio, *The Christian Right and Church-State Issues*, in OXFORD HANDBOOK OF CHURCH AND STATE IN THE UNITED STATES 387, 391 (Derek H. Davis ed., 2010).

school politics, in which religious groups become both more supportive of and more involved in “public” schooling as an enterprise.³⁹² This might well lead to new thinking about how religious and secular schooling could better reflect shared democratic values and public purpose.³⁹³ Again, such reorientations will encourage some and chagrin others.

Finally, religious charter schools will blur boundaries among school, church, and public sector, institutions which in a Progressive era were more nearly discrete. Parents and broader society will increasingly understand the choice of religious schooling not as opting out but as one way of fully participating in the civic enterprise of education.³⁹⁴

What religious charters do not portend is any substantial shift in Americans’ understanding of the First Amendment or its application to schools. When it prohibited formal school prayer in 1963, the Supreme Court declared that “[t]he 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.”³⁹⁵ These principles are fully respected in a neoliberal world where religious and secular groups alike charter schools that they desire and that they believe consumers in the educational marketplace will prefer.

³⁹² See GORDON, *supra* note 15, at 56–57.

³⁹³ See *id.* at 59–80; JONES, *supra* note 12, at 101–10; David Sikkink, *Conservative Protestants, Schooling, and Democracy*, in 1 EVANGELICALS AND DEMOCRACY IN AMERICA 276, 279 (Steven Brint & Jean Reith Schroedel eds., 2009).

³⁹⁴ See Richard W. Garnett, *The Right Questions About School Choice: Education, Religious Freedom, and the Common Good*, 23 CARDOZO L. REV. 1281, 1299–1302 (2002); *supra* note 5 and accompanying text.

³⁹⁵ *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 226 (1963) (citing *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).