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## Legal Aspects of Charter School Oversight: Evidence from California

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# LEGAL ASPECTS OF CHARTER SCHOOL OVERSIGHT: EVIDENCE FROM CALIFORNIA

*Kelsey W. Mayo\**

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## INTRODUCTION

The growth of charter schools as a prominent educational reform strategy nationwide and within the majority of states has turned the attention of scholars and policymakers to the issue of charter quality.<sup>1</sup> While the academic performance of charter schools is, in the

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1. PRISCILLA WOHLSTETTER ET AL., CHOICES AND CHANGES: CHARTER SCHOOL PERFORMANCE IN PERSPECTIVE (Harvard Educ. Press, 2013).

aggregate, on par with that of traditional public schools,<sup>2</sup> this finding is complicated by the fundamental decentralization of the organizational environment of education and its oversight. The charter landscape boasts distinct charter authorizers across hundreds of state and local jurisdictions, a still-evolving federal policy; significant internal diversity, both in school organizational type and quality; and high levels of political advocacy and philanthropic activity. Non-renewal and revocation measures, common administrative actions to ensure baseline charter quality, are not uniformly applied across jurisdictions.<sup>3</sup> When these measures are employed, they take place within a complicated legal environment and densely populated social field.<sup>4</sup>

While scholars have examined the legal requirements of charter oversight policies and the regulatory relationships between charter schools and their authorizers,<sup>5</sup> they have glossed over the importance of these oversight fora, and have thus failed to consider the implications of a discretionary and ambiguous law on the development of sound and equitable charter policy within states and local districts. This Article emerges from a larger project examining the role of law in the processes of charter oversight in California, the state with the largest and most diverse population of charter schools in the nation.<sup>6</sup> While the project directly engages only one state's experience with charter schools, California's nearly twenty-five year history with the organizational form and well-developed charter organizational environment make it a consequential site of study,<sup>7</sup> particularly for states and policymakers interested in improving charter school performance and oversight structures.

To orient the reader, I review the charter oversight and accountability processes in California in Part I, and provide justification for a sociolegal approach to studying these actions. Next, in Part II, I treat the broader legal environment in question, focusing

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2. CAROLINE M. HOXBY, *ACHIEVEMENT IN CHARTER SCHOOLS AND REGULAR PUBLIC SCHOOLS IN THE UNITED STATES: UNDERSTANDING THE DIFFERENCES* (2004).

3. Suzanne E. Eckes et al., *Charter School Accountability: Legal Considerations Concerning Nonrenewal and Revocation Procedures*, 2006 BYU EDUC. & L.J. 551, 580 (2006).

4. *Id.* at 558–80.

5. See Sandra Vergari, *The Regulatory Styles of Statewide Charter School Authorizers: Arizona, Massachusetts, and Michigan*, 36 EDUC. ADMIN. Q. 730 (2000).

6. *The Condition of Education: Charter School Enrollment*, NAT'L CTR. FOR EDUC. STAT., [http://nces.ed.gov/programs/coe/indicator\\_cgb.asp](http://nces.ed.gov/programs/coe/indicator_cgb.asp) (last visited Feb. 11, 2015).

7. See generally RON ZIMMER ET AL., *CHARTER SCHOOL OPERATIONS AND PERFORMANCE: EVIDENCE FROM CALIFORNIA* (2003).

on the spaces of charter authorization and oversight as dynamic sites of law in action. Drawing on three sources of data—(1) the California Department of Education’s database of traditional public and charter schools,<sup>8</sup> (2) interviews with charter operators, lawyers, and charter advocates, and (3) analysis of charter documents and local school board proceedings—I identify and examine four legal aspects that emerge from the structure of charter oversight and the participation of school operators, local authorizers, and charter school advocates. In Part III, the findings section, I trace these four aspects (compliance-related, legitimating, aspirational, and democratic legal strands) through the bureaucratic structures and processes of charter school oversight. Discussion thus moves beyond the “black box” of school board decision-making concerning charter school reforms, connecting charter oversight to themes in regulatory law and democratic participation in administrative rulemaking.

The Article concludes by considering implications of a multivalent and often ambiguous legal environment for effective regimes of charter oversight. While the research contributes to the practical development of sound and equitable charter authorization and oversight policies, it is also an endeavor of legal sociology—disentangling the multiple threads of law in an increasingly complex educational field.<sup>9</sup>

### I. CHARTER OVERSIGHT IN CALIFORNIA

Charter schools are publicly funded, tuition-free schools that operate according to the provisions of a charter granted by a legally recognized authorizer.<sup>10</sup> Charter authorizers oversee charter schools within their jurisdiction—their powers include initial approval, renewal, and revocation, and provide funding streams and, often, facilities for approved charters.<sup>11</sup> Following the Charter Schools Act of 1992,<sup>12</sup> California became the second state, after Minnesota, to permit charters, and as of 2014, the charter school population numbered 1180 schools, the largest in the nation and nearly eleven

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8. *Public Schools Database*, CAL. DEP’T EDUC., <http://www.cde.ca.gov/ds/si/ds/pubschls.asp> (last visited Feb. 11, 2015).

9. See Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes that Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349, 370 (2003).

10. *The Condition of Education: Charter School Enrollment*, *supra* note 6.

11. *Id.*

12. CAL. EDUC. CODE § 47600–47604.5 (West 2013).

percent of all public schools in the state.<sup>13</sup> Fifty-four of California's fifty-eight counties have charter options, and charters now serve more than 500,000 students, approximately seven percent of public school enrollment in the state.<sup>14</sup> Although introduction of the charter form remains a contentious political issue in many local districts and counties, as a matter of state policy California has embraced the aspirational statement of its legislature that charter schools are, and should remain, an integral component of the K–12 educational landscape.<sup>15</sup> It is now reasonable to assume that charter schools and their political advocates are permanent features of the state's educational system. Inquiry into charter quality and the legal context of oversight is thus a timely endeavor, and one that follows recent shifts toward market forms in the educational field. In order to understand the legal cast of charter school accountability, this section first outlines the structure of charter oversight in California.

### A. Charter School Authorizers

The California Education Code grants three entities the power to authorize and oversee charter schools: boards of local school districts, county school boards, and the State Board of Education.<sup>16</sup> As of 2014, there were 332 distinct charter authorizers in operation; the majority (282) were local school districts.<sup>17</sup> Thirty-five county offices of education also authorized charters; only fifteen schools (or school networks) received authorization directly from the State Board.<sup>18</sup> The presumption of local control is also reflected in patterns of initial petitions: local school districts receive the vast majority of initial charter petitions, while schools applying to counties or the State Board for initial authorization must provide compelling evidence in the original petition as to why county or state oversight is more suitable than control by the local school district.<sup>19</sup> Common reasons

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13. *Public Schools Database*, *supra* note 8.

14. *Id.*

15. CAL. EDUC. CODE § 47605(b) (West 2013) (“In reviewing petitions for the establishment of charter schools pursuant to this section, the chartering authority shall be guided by the intent of the Legislature that charter schools are and should become an integral part of the California educational system and that establishment of charter schools should be encouraged.”).

16. *Id.* §§ 47605(a)(1), 47605(j)(1).

17. *Public Schools Database*, *supra* note 8.

18. *Id.*

19. *See* Cal. Sch. Bd. Ass'n v. State Bd. of Educ., 186 Cal. App. 4th 1298, 1318, 1326 (Cal. Ct. App. 2010) (holding that the Education Code required the State Board to issue written findings that a statewide benefit could not be achieved through

for seeking county or statewide benefit status include the operator's intent to open multiple school sites within a jurisdiction, or to provide services to populations typically served by countywide programs, including foster youth and students with disabilities.<sup>20</sup>

### B. Initial Authorization and Renewal

Applicant charters in California fall primarily into two categories: (1) new “start-up” charters, which include single-sited schools run both by a group of individuals (colloquially known as “mom and pop” charters) and those under the supervision of charter management organizations (CMOs);<sup>21</sup> and (2) traditional public schools that convert to charter status, or “conversion” charters.<sup>22</sup> For proposed start-up charter schools, the initial petition submitted to the authorizer must identify the proposed location of the school and include the signatures of fifty percent of the parents of the potential student body, or fifty percent of the likely faculty (these categories are routinely subject to uncertainty and speculative exaggeration).<sup>23</sup> For conversion of a traditional public school to charter status, fifty percent or more of a school's current teachers must endorse the petition.<sup>24</sup> Upon receiving the petition, the school district convenes a public hearing on the proposed charter within thirty days, and then either approves or denies the charter within sixty days.<sup>25</sup>

In order to deny a charter petition in the first instance, the governing board of the school district must issue written findings detailing the reasons for the denial.<sup>26</sup> These findings at times challenge the validity of parent or faculty signatures, but are more likely to address the quality of the educational program, the financial or governance plan of the school, or the other material requirements of the charter petition.<sup>27</sup>

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locally approved charters before granting state-wide benefit status; also limiting board discretion post-revocation measures in finding that discretion “does not preclude an action in mandamus to compel the board to take correction action.”).

20. EDUC. § 47605.5.

21. *See id.* § 47605(a)(1).

22. *See id.* § 47606.

23. *Id.* § 47605(a)(1)(A)–(B).

24. CAL. EDUC. CODE § 47606 permits that entire districts may convert to charter status upon approval of the petition by the Superintendent of Public Instruction and the State Board of Education.

25. EDUC. § 47605(b).

26. *Id.* § 47605(b)(1)–(5).

27. For further explanation, see *infra* app. A.

The primacy of local authorization is problematic for those interested in national or even state-level rates of charter outcomes or applicant characteristics. The California Department of Education does not keep records of petitions denied by local school districts, and differences in local record-keeping make it difficult to calculate aggregate rates of denial in the first instance. The matter is further complicated by the fact that some districts collaborate with charters to remedy flaws in a denied petition, actively assisting charters on the path toward approval, while other districts do not.<sup>28</sup> Previous research estimates that ten percent of applicant charters are denied authorization by local school districts,<sup>29</sup> though in light of political pressure favoring charter applicants this figure is likely too low.

If approved, charters are granted a maximum term of five years, after which they must renew their charter with the authorizer.<sup>30</sup> The renewal process is a more in-depth performance review than the required annual reports, and obliges charters to demonstrate compliance with the educational, financial, and operational criteria required for initial authorization.<sup>31</sup> Student academic performance (as measured by the state-issued academic performance index (API) scores over time and by sub-group) is cited in the Education Code as the “most important factor” in determining renewal.<sup>32</sup>

The legal requirement to privilege student academic performance during renewal and revocation proceedings has led to significant confusion over proper procedure when charters perform well academically but struggle financially or operationally. In 2013, the Oakland Unified School District revoked the high performing American Indian Model Schools (AIMS) after a state audit found evidence of significant fiscal mismanagement by the schools’ former director.<sup>33</sup> After the Alameda County Board of Education upheld the district’s decision to revoke the schools’ charter, AIMS did not wait for the next administrative appeal to take place before the State

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28. “Last year we had two denials, and then we had one that was at first denied, but then the Superintendent had asked that we work again with him, and then it was ultimately accepted.” Telephone Interview with Anonymous Employee, District Charter Office (July 21, 2014).

29. ZIMMER ET AL., *supra* note 7.

30. CAL. EDUC. CODE § 47607(a)(1) (West 2013). Terms shorter than five years are also possible, depending on the performance record of the school in question and the school’s initial agreement with the authorizer. *Id.*

31. *See generally* EDUC. § 47607.

32. *Id.* § 47607(a)(3).

33. Chip Johnson, *Oakland Charter School a Cautionary Tale*, SFGATE (Apr. 29, 2013), <http://www.sfgate.com/bayarea/johnson/article/Oakland-charter-school-a-cautionary-tale-4474075.php>.

Board of Education, but immediately challenged the revocation in court.<sup>34</sup>

The Superior Court granted AIMS a preliminary injunction, allowing the school to remain open pending appeal to the State Board of Education, and ruled that Oakland Unified did not properly consider the schools' record of high academic achievement as the most important factor in the decision to revoke.<sup>35</sup> Oakland's response that they had considered the charters' academic performance was deemed insufficient.<sup>36</sup> This decision was upheld in *American Indian Model Schools v. Oakland Unified School District*,<sup>37</sup> and the three AIMS schools continue to operate under Oakland District supervision. The lack of legal guidance as to what constitutes proper consideration of academic criteria (particularly in light of operational and financial trouble) continues to flummox local school districts charged with charter oversight. As a charter consultant affiliated with Oakland Unified who worked on the AIMS case stated:

There are no steps, no process for showing how you [considered academic performance as the most important criteria]. Of course it was considered! It's a really high achieving school. We talked about it a lot. There's nothing in law that states how you consider it, or to prove that you considered it. It just was considered.<sup>38</sup>

The prolonged controversy and court involvement of the AIMS revocation in Oakland is not typical. Most charter renewal actions are routine: they take place during regularly scheduled school board meetings, as the Education Code intends, not in the courtroom. Districts with large charter populations have dedicated office staff, procedures, and seasonal submission cycles to guide applicants or established charters through initial submission and renewal, and the outcome does not usually come as a shock to either party.<sup>39</sup> Based on my observation, local boards of education and the State Board frequently rely on the researched recommendations of the charter support offices or personnel (at the state level, the Advisory

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34. *Id.*

35. *Am. Indian Model Sch. v. Oakland Unified Sch. Dist.*, No. RG13680906 (Alameda Cnty. Super. Ct. June 6, 2013).

36. *Am. Indian Model Sch. v. Oakland Unified Sch. Dist.*, 227 Cal. App. 4th 258, 265 (Cal. Ct. App. 2014) (explaining the basis for the Oakland Unified School District's appeal).

37. *Id.*

38. Telephone Interview with Charter School Consultant to Charter Authorizers (Sept. 23, 2014).

39. *Id.*



Commission on Charter Schools fills this role),<sup>40</sup> or even the expertise of independent charter school consultants.<sup>41</sup>

While written reports of these support offices are critical resources for busy board members, their recommendations are not always followed.<sup>42</sup> In practice, authorizers have discretion to approve a school that has not satisfied the legal requirements or to deny one that has.<sup>43</sup> This conflict between formal recommendation and board action, while commonly smoothed over or normalized as politically motivated calculation, is an important site of legal contestation and a place where alternative legal justifications for charter existence and performance emerge and gain legitimacy. These aspects will be discussed in further detail later in the Article.<sup>44</sup>

The structure of charter authorization in California provides a framework for a robust organizational appeals process. Charters denied initial authorization at the local level may petition the relevant county board of education for review, and if the county upholds the denial, they may also appeal to the State Board of Education.<sup>45</sup> This system is not without controversy: charter advocates have asked the courts for review boards independent from the established educational bureaucracy, arguing that local school boards are

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40. Telephone Interview with Board Member, Advisory Commission on Charter Schools (June 5, 2014).

41. A charter liaison in a suburban district in Northern California with a small charter population described her work as follows:

I gather our team of experts together, and I help facilitate that process. I hold the meetings; I review the charter myself. I work with the whole team; we put together our recommendations, and we send them off to the board. I help arrange the public hearings. All the documents that go to the board, I will do a board communiqué to let the board know that it's coming and what the experts have recommended.

Telephone Interview with Charter School Liaison (July 21, 2014).

42. The recent approval of New Joseph Bonnheim Community Charter School by the Sacramento City Unified School District after district staff recommended its rejection, and the State Board's renewal of Anahuacalmecac University Prep High School after recommended non-renewal by Los Angeles Unified School District, Los Angeles County Office of Education, and the advisory staff of the California Department of Education provide examples of instances where authorizers did not follow recommendations. See *Approve Resolution No. 2796: Charter School Petition: New Joseph Bonnheim Cmty. Charter School*, SACRAMENTO CITY UNIFIED SCH. DIST. BOARD EDUC. (June 19, 2014), [http://www.scusd.edu/sites/main/files/file-attachments/11.1\\_njb.pdf](http://www.scusd.edu/sites/main/files/file-attachments/11.1_njb.pdf); *Final Minutes: May 7-8, 2014*, CAL. STATE. BD. OF EDUC. (May 8, 2014), <http://www.cde.ca.gov/be/mt/ms/documents/finalminutes0708may2014.doc>.

43. See, e.g., *supra* note 42.

44. See *infra* Part III.

45. CAL. EDUC. CODE § 47605(j) (West 2013).

structurally biased against charter schools and likely to privilege traditional public schools over charters in competition for scarce resources.<sup>46</sup> In *Today's Fresh Start vs. Los Angeles County Office of Education*, the California Supreme Court ruled that the current charter appeals process located in the existing system of K–12 educational governance did not present an arrangement inherently biased against charter schools, and declined to provide the independent monitor requested by plaintiffs.<sup>47</sup>

Local school boards are also keen to keep charter authorization and oversight squarely in their territory through relevant legal action. A recent appellate decision, *California School Board Association v. State Board of Education*,<sup>48</sup> reaffirmed the presumption of local control of charters. This decision required the State Board, when authorizing charters under state aegis, to issue written findings as to why these charters could not be carried out under local oversight.<sup>49</sup> In a field with an increasing number of private and profit-seeking actors, these decisions speak directly to democratic oversight of public education, even as school choice and market forms gain traction within the educational field.<sup>50</sup>

As with charter petitions denied in the first instance, charters denied renewal by the local school district may be appealed to the county board, to the Advisory Commission on Charter Schools (ACCS), and the State Board.<sup>51</sup> These organizational appeal fora operate in a quasi-adversarial manner, with varying levels of formality and bureaucratic procedures based on geographic location and the size and structure of the district.<sup>52</sup> Often, board members receive contested charter actions akin to appellate judges, weighing arguments from the charter school in question, the recommendations of the county or state charter support staff, and claims of the initial authorizer that has denied or moved to close a school. Like appellate review, per the Education Code these fora are not supposed to

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46. *Today's Fresh Start, Inc. v. L.A. Cnty. Office of Educ.*, 57 Cal. 4th 197, 205 (Cal. 2013).

47. *Id.*

48. 186 Cal. App. 4th 1298 (Cal. Ct. App. 2010).

49. *Id.* at 1318.

50. See BETWEEN PUBLIC AND PRIVATE: POLITICS, GOVERNANCE, AND THE NEW PORTFOLIO MODELS FOR URBAN SCHOOL REFORM (Katrina E. Bulkeley et al. eds., 2010).

51. For more information on the role of the ACCS, see *Advisory Commission on Charter Schools*, CAL. ST. BOARD EDUC., <http://www.cde.ca.gov/be/cc/cs/> (last updated Aug. 13, 2014).

52. This claim is based on observation of six different charter authorizing fora.

consider new evidence concerning the school in question, yet observation of these spaces reveals that new evidence is routinely considered, and at times actively solicited. For example, the adoption of the new state local control funding formula in 2013 cast existing charter school budgets and financial operation into confusion, requiring authorizers to skirt or ignore legal requirements regarding proper evidence in appeal actions to accommodate a changed policy environment.<sup>53</sup> At the state level, lengthy lines of questioning between board members and legal counsel (for the state, authorizers, and charter school in question) are a common occurrence.

### C. Charter Closure

California has a high rate of charter school closure. Three hundred ninety-two charter schools have closed in the state since 1992, nearly twenty-five percent of the entire charter population.<sup>54</sup> While this statistic does not capture the specific reasons for closure nor the complexities of a school's relationship with its authorizer, it does indicate that many charter school experiments do end in a failure of sorts, with significant consequences for the students and teachers in those schools. There are several common reasons for charter closure, which mirror the financial, operational, and educational criteria specified in initial charter petitions. Charters will close if they fail to locate suitable facilities,<sup>55</sup> if they cannot attract a sufficient number of students or qualified teachers, if they underperform academically, or if they are negligent in matters of school governance and operation.

The California Department of Education (CDE) collects data on charter closure throughout the state, and informally identifies the following routes to closure:<sup>56</sup>

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53. The new local control funding formula represented a significant overhaul to the state's school finance model and made explicit provisions for the financial resources of charter schools. See *Local Control Funding Formula*, CAL. DEP'T EDUC., <http://www.cde.ca.gov/fg/aa/lc/> (last updated Jan. 27, 2015).

54. *Public Schools Database*, *supra* note 8.

55. Proposition 39, passed by California voters in 2000, reduced the level of democratic agreement required to pass local school district bonds from a two-thirds to a fifty-five percent supermajority, it also stated that "public school facilities should be shared fairly among all public school pupils, including those in charter schools," and required districts to make reasonably equivalent facilities available for a fee to qualifying charters based on a projection of average daily attendance. See *Proposition 39 and Charter Schools*, CAL. DEP'T EDUC., <http://www.cde.ca.gov/sp/cs/as/proposition39.asp> (last updated Feb. 11, 2015).

56. See *Charter School Closure Process*, CAL. DEP'T EDUC., <http://www.cde.ca.gov/sp/cs/lr/csclosuresrules.asp> (last updated Dec. 12, 2014).

1) **Abandonment.** An abandoned charter received initial approval from its authorizer yet never opened to students. Common reasons for charter abandonment include an inability to secure start-up funds or facilities, or failure to enroll students or retain qualified teachers. While abandonment of a charter does not directly affect students (who have not yet enrolled), it reflects the considerable logistical challenges faced by all new charters, and particularly by stand-alone schools unconnected to the resource base and organizational expertise of charter management organizations or other established charter networks.

2) **Voluntary Non-Renewal.** Voluntary non-renewals, the largest category within charter closures, occur when a school declines to apply for renewal upon expiration of the term.<sup>57</sup> (For conversion charters, this means a return to the status of a traditional public school; for regular charters it means closure, or sometimes merger with another existing charter.) Most voluntary non-renewals occur after the first five year term has elapsed; common reasons for non-renewal include those mentioned above, yet also include governance problems or problematic academic performance.<sup>58</sup> It is questionable, however, how many actions in this category are truly voluntary decisions on the part of the charter.

3) **Denied Renewal.** This straightforward designation pertains to charters whose renewals have been formally denied by the authorizer. As discussed previously,<sup>59</sup> charters under local school district authority may pursue appeals of denials through the county office of education and the State Board of Education. Since 2010, fewer than fifty schools have been denied renewal.<sup>60</sup>

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57. Given the frequency of communication between a school and authorizer required in annual reports and informal communication, many of these actions likely occur in the “shadow of the law,” when unfavorable academic or operational performance data suggest that the renewal will be denied if it moves forward. Of the twenty-nine closures in 2012–2013, twenty-one were voluntary. *See 2013–14 New Schools Press Kit*, CAL. CHARTER SCH. ASS’N (Nov. 7, 2013), <http://www.calcharters.org/blog/2013/11/2013-14-new-schools-press-kit.html> (follow “List of schools that closed in 2011–12” hyperlink located in the “More information” section).

58. *See id.*

59. *See infra* Part I.B.

60. *Public Schools Database*, *supra* note 8.

4) **Revocation.** Revocation is a rare and contentious form of charter closure. It occurs when an authorizer formally revokes a school's charter, requiring the school to cease operations immediately. The legal criteria for revocation are found in the Education Code, which premises revocation on written findings that the school: (1) materially violated any of the conditions, standards, or procedures set forth in the charter; (2) failed to meet or pursue any of the pupil outcomes identified in the charter; (3) engaged in fiscal mismanagement or failed to meet generally accepted accounting principles; or (4) violated any provision of law.<sup>61</sup> In addition to these requirements, the section also states that academic achievement of all relevant subgroups served by the charter shall be the most important factor in determining whether or not to revoke a charter, leading to problems discussed in the previous section.<sup>62</sup> While revocation is rare (and to be avoided),<sup>63</sup> its disruptive and often traumatic effect on students and teachers within these schools makes it well worth studying. In practice revocation has occurred following criminal action or negligence on the part of the charter—including embezzlement or fraud, sexual abuse of students, blatant use of religious curricula, continued and intentional violation of proper governance practices, etc.<sup>64</sup> Yet revocation also represents an irreparable breakdown in communication between the school and its authorizer, a departure from the due process protections and the usual collaborative orientation of school/authorizer relations.

To this point, this Article has examined the legal structure and requirements of charter school oversight in California. It has discussed the position of petitioner charter schools in relation to potential local, county, and state authorizers, and considered the frequency of and reasons for charter school closure. Following a brief discussion of the project's conceptual approach and methods in Part

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61. CAL. EDUC. CODE § 47607(c)(1) (West 2013).

62. *Id.* § 47607(c)(2).

63. Telephone Interview with Charter School Lawyer (Sept. 16, 2014).

64. On the point of religious instruction in public charter schools, see the unpublished California appellate decision *Liberty Family Charter Sch. v. N. Monterey Cnty. Unified Sch. Dist.*, No. H034551, 2012 WL 129821 (Cal. Ct. App. Jan. 12, 2012). The charter was revoked by the local authorizer for failure to form a non-profit corporation to administer the school, and for continued recalcitrance in using and purchasing religious materials as curricula. The court also stated that the group lacked standing to bring an action against the district since its charter had been revoked and it had ceased to exist. *Id.*

II, I examine the multiple legal aspects of charter review and their consequences for charter outcomes, and for public participation and democratic oversight.

#### D. A Sociological Approach

Consideration of the role of law in educational policy circles has been limited traditionally to the products of courthouse and statehouse, judicial opinions, and statutes that set the ground rules for local implementation.<sup>65</sup> This project proceeds from an alternative set of assumptions, one that focuses on law and legal understandings found outside traditional legal institutions.

A social approach to law is not a new phenomenon; generations of sociologists and anthropologists going back to Marx, Weber, and Durkheim have explored the connections between law and social life.<sup>66</sup> Within the American legal academy, the legal realists of the early twentieth century criticized a legal scholarship that they viewed as overly doctrinal and instead advocated attention to the practical life of law.<sup>67</sup> More recently, the law and society movement has brought new depth and empirical rigor to law's social aspects, drawing interdisciplinary attention to the connection of law and social life by considering disputing practices, legal consciousness and meaning making, social movements, law and organizations, and many other topical areas.<sup>68</sup>

These approaches remain relatively rare in the legal academy and in mainstream educational policy, a fact that reflects the different emphases and epistemologies of each field. Investigating the social context of law requires social science methods not typical of doctrinal or normative legal inquiry, and an initial reluctance (though not outright refusal) to offer the prescriptive recommendations and evaluative commentary that characterize traditional policy analysis.

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65. See, e.g., MARK YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* (5th ed. 2012).

66. See ROGER COTTERRELL, *THE SOCIOLOGY OF LAW: AN INTRODUCTION* (2nd ed. 1992).

67. See Bryant Garth & Joyce Sterling, *From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State*, 32 *LAW & SOC'Y REV.* 409 (1998). For a response to these schools of thought, see Richard Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 *CASE W. RES. L. REV.* 179 (1986).

68. See Carroll Seron & Susan S. Silbey, *Profession, Science, and Culture: An Emergent Canon of Law and Society Research*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 30 (Austin Sarat ed., 2004).

Sociolegal perspectives have considerable potential to enrich the study of law in matters of education policy and reform. They expand disciplinary boundaries and the breadth of legal source material while kindling debate between practitioners and academic researchers. They are able to uncover and to trace legal ideas lurking in unexpected places, far from the province of case law, statutes, and lawyers. These approaches build theories of law and social life, while also contributing to sound policy recommendation. The project's conceptual approach takes its cue from this broadening of legal concern into social and organizational spaces, and approaches the fora of charter authorization as rich and untapped sites of law in action.

## II. DATA AND METHODS

In order to identify legal aspects of charter oversight in California, this project relies on three primary sources of data: (1) publicly available demographic and operational records of charter schools from the California Department of Education's database of public schools;<sup>69</sup> (2) semi-structured interviews with the parties to charter authorization (including lawyers, charter operators, authorizers, and advocacy organizations); and (3) written records of authorizer meetings and observation of these sites.<sup>70</sup> While local and county school board meetings are not the only places in which legal ideas of charter oversight and accountability surface,<sup>71</sup> they are perhaps the most significant, as they provide a legitimate and accessible public forum for relevant actors to come together to put forward and defend claims regarding school quality and performance.

The first data source for the project is the California Department of Education database of public schools.<sup>72</sup> Entries for charter schools include information on school location and the authorizing entity (local, county, or state level), opening date, current operational status, and, if relevant, the closure date, a brief statement of the reasons for closure, and the particular mechanism employed (voluntary non-renewal, denied renewal, revocation, etc.).<sup>73</sup> I used

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69. *Public Schools Database*, *supra* note 8.

70. Sites included meetings of local school boards, county offices of education, the Advisory Commission on Charter Schools, and the State Board of Education.

71. While this project does not draw on it directly, the legislative history of charter-related actions would shed additional light on how charter schools came to be selected and privileged among other proposed educational reforms.

72. *Public Schools Database*, *supra* note 8.

73. *Id.*

the database to determine the number and characteristics of charter populations in the state (Appendix B),<sup>74</sup> and to construct the universe of official reasons for closure and the frequency of appealed closure decisions (especially rich sites of law and legal contestation), as well as the most common closure mechanisms. Focusing on contested or appealed charter actions is a methodological choice designed to maximize exposure to legal aspects and arguments that emerge in the oversight process. While this emphasis runs the risk of normalizing conflict and disagreement, it permits the researcher to access the foundational legal motivations and arguments that undergird the practice of charter oversight more generally, and to uncover important assumptions regarding school operation and quality that frequently go unstated.

The second data source consists of interviews with the parties to charter school authorization, which include school board members, charter school personnel, and lawyers representing charter schools and school authorizers. This set of twelve interviews is taken from a larger qualitative data set focused on the legal issues of charter governance and school operation. Respondents were initially selected at random from school and authorizer contacts provided in the public charter school database,<sup>75</sup> as well as from the population of public sector/education law firms and advocacy organizations statewide.<sup>76</sup> These contacts were supplemented by purposive sampling in the case of specific charter actions with higher levels of legal involvement (multi-level appeals through the state educational bureaucracy or formal legal intervention by the courts). Particularly knowledgeable or experienced respondents were also selected on the recommendation of previous participants.<sup>77</sup> Interview questions focused on the role of the respondent in both “routine” and “typical”

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74. Although charter schools have been operating in California since 1992, this project examined only the past ten years of charter actions in order to limit the sample and to account for major legal and policy changes to charter governance and oversight since that time. See generally Priscilla Wohlstetter et al., *Charter Schools in California: A Bruising Campaign for Public School Choice*, in *THE CHARTER SCHOOL LANDSCAPE* 32 (Sandra Vergari ed., 2002) (explaining the origins of the California charter school system).

75. *Public Schools Database*, *supra* note 8 (follow “Public Schools Data in Microsoft Excel Format” hyperlink).

76. Most participants requested to remain anonymous, and in written accounts or quotations from interviews I have referred to participants by either their role or title. Names of schools or districts have not been changed.

77. This snowball strategy was selected to target especially knowledgeable individuals with significant experience in the spaces of charter oversight, as well as with appealed actions.



charter actions (so judged by the respondent herself), and they probed the structure and practice of the authorization process, as well as the frequency and nature of the person's participation in charter oversight actions. Interviews were professionally transcribed and coded by the author using qualitative data analysis software.<sup>78</sup> Following from the sociolegal approach described in the previous section,<sup>79</sup> coding of the qualitative data focused on references to law and legal ideas made in different spaces and among differently situated participants, with distinct legal aspects emerging over multiple readings.

To supplement the interview data, I also observed charter oversight fora in person, including meetings of local and county school boards, the ACCS, and the State Board of Education. Key sources in this area included meeting agendas and minutes, as well as formal legal sources such as the Education Code and legal decisions on point. These were examined and coded for legal aspect in a manner similar to the interview transcriptions.<sup>80</sup>

### III. TYPOLOGY OF LEGAL ASPECT

Though often ambiguous and discretionary, the formal legal requirements of school operation clearly matter in the context of charter oversight. Assertions of legality and illegality are particularly consequential when we consider the implications of authorizer decisions on communities facing the disruption of school closure. These formal legal requirements stipulated within the state Education Code and judicial opinions provide not only the basic structure of charter school oversight, but also the substantive and procedural criteria for use by local and county authorizers in approving and renewing applicant charter schools.<sup>81</sup> Yet limiting the scope of inquiry to the formal statutory provisions neglects the alternative legal understandings of charter schools and education reform that bubble up from the communities themselves, ideas that shape the nature of participation, certain findings of inequality, and the tenor of oversight proceedings.<sup>82</sup>

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78. Atlas TI and Dedoose qualitative coding software were used.

79. *See supra* Part II.

80. *See* KRISTIN LUKER, SALSA DANCING INTO THE SOCIAL SCIENCES: RESEARCH IN AN AGE OF INFO-GLUT, 198–216 (2008).

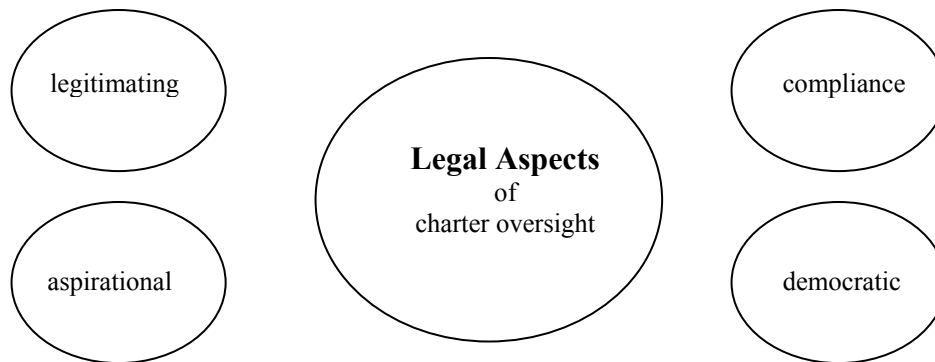
81. *See infra* app. A; *see also* CAL. EDUC. CODE § 47605(b)(5) (West 2013).

82. Even procedural and substantive understandings of law in this context are ripe for sociolegal attention to consider the discretion, confusion, and open debate that

In this section, I discuss four legal aspects that emerge from consideration of the charter school authorization and oversight in California. These legal currents appeared again and again across oversight fora and among diverse participants, and included *compliance-related*, *legitimizing*, *aspirational*, and *democratic* strands. These strands do not stand alone, nor are they equally situated. This section identifies points of particular connection and/or friction, chiefly through analysis of contested charter actions. Ultimately, I use the divergent legal aspects to argue that the current oversight structure privileges the arguments of professionals and “repeat players” in the process, and that these imbalances have consequences for many applicant charter schools, as well as for the legitimacy of the authorizing process itself.

While typologies are useful in building theory and identifying areas for future empirical inquiry,<sup>83</sup> this section addresses specific problems of policy that result when these legal strands conflict with one another, and also considers potential solutions.

### A. Legal Aspects of Charter Oversight



#### 1. Compliance

Compliance is a central legal aspect of charter school oversight; all participants interviewed for this study cited compliance with the state Education Code and other relevant laws when asked about law in the context of charter oversight. These compliance concerns encompass clear material and technical demands in the areas of school facilities,

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can occur over the procedural mechanisms and substantive terms of charter oversight.

83. See D. Harold Doty & William Glick, *Typologies as a Unique Form of Theory Building*, 19 ACAD. MGMT. REV. 230 (1994).

financial and governance responsibilities, curriculum, instruction, and accountability for student academic performance. Participants' accounts of compliance are confirmed by observations of the charter authorization sites themselves, in which charter operators routinely refer to specific sections of the Education Code, submit evidence and testimony to illustrate a school's compliance, and even bring legal counsel with them to corroborate school records and fact-finding. In a similar way, official district procedures for petition review, charter renewal, and revocation employ the regulatory language of compliance and compliance failure,<sup>84</sup> downplaying the political and personal aspects of the process in favor of a highly rational and technical compliance with the law.

Compliance concerns also flow both ways. Charters must demonstrate to authorizers that they meet relevant requirements, yet they are eager to hold authorizers accountable for fair process and the proper consideration due them.<sup>85</sup> While authorizers at all levels voice concerns about their own internal processes,<sup>86</sup> local school boards are the first stop for applicant charter schools. My observational data of local boards reveal multiple instances of significant authorizer confusion in the face of legal arguments put forward by charter schools. Board members have wondered out loud in public hearings what the law actually requires for charter petitions and renewals, and they routinely route complicated compliance questions to district or state staff, legal counsel, representatives of charter advocacy groups, and even members of the general public in attendance.<sup>87</sup>

Persisting confusion over what constitutes proper compliance is understandable, given the vague and discretionary language of many legal provisions of charter operation. Consider, for example, what it

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84. While compliance language is perhaps expected when things go awry, legal compliance is also emphasized from the very beginning of the charter process. As the Los Angeles Unified School District stated in a memo to applicant charters planning to submit an initial charter: "the charter schools division will determine whether the charter school petition is likely to be successfully implemented . . . and ascertain whether the proposed charter school will be run in a financially, operationally, and educationally sound manner." L.A. UNIFIED SCH. DIST., CHARTER SCHOOL GOVERNING BOARD MEMBER QUESTIONNAIRE (2013), *available at* <http://notebook.lausd.net/pls/ptl/url/ITEM/B7193A6E718F3032E0430A0002103032>.

85. This concern was voiced by all of the charter principals who were interviewed for the project. Many principals complained that no one from the authorizing district or California Department of Education ever visited their school.

86. *See, e.g.*, Meeting of the Advisory Commission on Charter Schools, Sacramento, CA (Apr. 9, 2014), *available at* [http://cde-ca.granicus.com/TranscriptViewer.php?view\\_id=4&clip\\_id=122](http://cde-ca.granicus.com/TranscriptViewer.php?view_id=4&clip_id=122).

87. *Id.*

means to comply with the charge to grant charters consistent with “sound educational practice” or to evaluate potential charters based on their future or imagined ability to “successfully implement the program set forth in the petition.”<sup>88</sup> The Education Code requires applicant charters to state in their petition “what it means to be an educated person in the 21st century” and detail “how learning best occurs,”<sup>89</sup> yet it then charges authorizers to evaluate petitions and requests for renewal almost exclusively on projected or achieved academic performance.<sup>90</sup> As the experience of the American Indian Model Schools in Oakland illustrates, the explicit requirement to privilege a school’s projected or achieved academic performance in approving or renewing a charter or renewal raises serious questions about the consideration due to legal requirements in other areas, and how authorizers are meant to understand and evaluate financial and operational data alongside academic performance.<sup>91</sup>

Authorizer discretion also extends to the procedural requirements of charter oversight. I witnessed several appeals of charter denials that reached the ACCS, the body that advises and recommends actions regarding charters to the State Board of Education. When reviewing charter denials or revocations on appeal, the ACCS is technically prevented from considering new facts (similar to the limitations faced by appellate courts), but must focus deliberation on the testimony and procedure that transpired at local and county-level hearings. Yet based on my observation, the ACCS routinely considered new facts: permitting schools to update financial information and school enrollment estimates, and to offer new thoughts from school and community leaders.<sup>92</sup> While members of

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88. CAL. EDUC. CODE § 47605(b)(1)–(2) (West 2013).

89. *Id.* § 47605(b)(5)(A)(i).

90. After the passage of California Senate Bill 1290 in 2012, Section 47607(a)(3) of the Education Code was amended to read, “[t]he authority that granted the charter shall consider increases in pupil academic achievement for all groups of pupils served by the charter school as the most important factor in determining whether to grant a charter renewal.” CAL. EDUC. CODE § 47607(a)(3)(A) (West 2013). Acceptable metrics for increases in student performance are detailed in 47607(b). See *Id.* § 47607(b).

91. *Am. Indian Model Sch. v. Oakland Unified Sch. Dist.*, 227 Cal. App. 4th 258, 270–73 (Cal. Ct. App. 2014).

92. There is evidence that discretion supports even more departure from the law in local contexts. As one state official related:

I’ve seen this happen in many cases—the districts say, “We don’t care what the law says, we’ve got a bunch of constituents that are angry about charter schools being so prevalent. So we’re going to deny based on the fact that there is a group of constituents angry about the large impact of charter

the commission voiced concern over the legality of this extended consideration (evidenced by lengthy back and forth between board members and legal counsel on both sides), it was their discretion to accept or reject these updates, with clear implications both for the charter and local authorizers in question.<sup>93</sup>

Local school board members, particularly in districts with significant charter populations, rely heavily on the research and recommendation of charter office support staff to assess compliance and to inform resulting decisions on charter actions.<sup>94</sup> In the authorizing meetings I observed, a district staff person was frequently present to interpret the recommendations and answer questions for the board; legal counsel was also present (and held a prominent role in state-level fora and for actions on higher appeal). Larger districts in Los Angeles, San Diego, and Oakland have special divisions dedicated to charter oversight, though most authorizers oversee a small number of charters and rely on one or two charter point people and more informal board procedures for receiving charter testimony.<sup>95</sup> The variable structure of charter oversight across the state has consequences both for applicant charters and for the legal cast of the process: the routines of larger districts streamline yet formalize the process (inviting and sometimes requiring professional legal participation), while smaller districts deal with charter oversight more informally, on a case by case basis where formal legal representation might appear strangely out of character.<sup>96</sup>

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schools on the district . . .” I can tell you that you hear this on a regular basis.

Telephone Interview with Comm’r, Advisory Comm’n on Charter Sch., and Principal, Anonymous Cal. Charter Sch. (June 5, 2014).

93. See *State Board of Education Meeting*, CAL. ST. BOARD EDUC. (May 7, 2014), [http://cde-ca.granicus.com/MediaPlayer.php?view\\_id=2&clip\\_id=135](http://cde-ca.granicus.com/MediaPlayer.php?view_id=2&clip_id=135).

94. Telephone Interview with Charter School Consultant to Charter Authorizers (Sept, 23, 2014).

95. See, e.g., *Charter Schools Division*, L.A. UNIFIED SCH. DIST., available at <http://lausd.schoolwires.net/page/397> (last visited Feb. 11, 2015).

96. As one principal stated:

It would absolutely be odd [if lawyers came to the meetings]. . . . I think the superintendent would be shocked if we brought in a lawyer. She’d probably ask me why we’re wasting our money, because they really wanted to sponsor us. There was a school up here that at one point, the superintendent recommended not renewing and the board went against her and voted them in. That was mostly due to very small enrollment, financials that were in dire straits. They’re still hanging on, but it’s by a thread. I don’t think that was an issue of we don’t want charters. I think it was more specifically that I’m not sure this charter is going to survive.

Telephone Interview with Principal, Anonymous rural Nevada Cnty. Charter Sch. (Aug. 22, 2014).

The story of charter oversight as primarily one of rational compliance with clear legal requirements is challenged by the fact of ambiguous law relevant to charters and by the natural variation in process and local custom found among 332 individual charter authorizers.<sup>97</sup> Yet emphasis on compliance in the formal record minimizes the legal discretion in charter actions and downplays the variation empirically observed. The compliance strand has the additional effect of reifying material inequalities between participants and legitimating the arguments of some groups over others, phenomena discussed in the following sections.

## 2. *Legitimizing*

The second legal aspect to emerge from charter school oversight is that of law as a legitimating and finite resource. In this sense, law and legal arguments confer material advantages on charter schools with the resources and sophistication to access them, and thus privilege the position and arguments of some groups over others. This legal aspect encompasses the professional knowledge base and experience of the charter school board, as well as the school's social network and ability to afford legal counsel and support services. Use of law and legal language in oversight fora thus signal certain resources; professional and organizational sophistication; and general competence on the part of charter operators and the specific charter school in question.

Interviews with charter operators reveal a spectrum of schools' relationships to law in this context: renewal packets accomplished months in advance and the in-house legal teams of CMOs contrast sharply with the experience of many individual charters, who hire lawyers only to handle serious actions such as denied renewals or revocations, if at all, and who even resort to last-minute Internet searching of the legal criteria for authorization or renewal requirements.<sup>98</sup> The prominence of "voluntary closures" within the larger category of charter closures illustrates one important consequence of this legal and material disparity: struggling or under-resourced schools who cannot afford to commit fully to the

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97. See ZIMMER ET AL., *supra* note 7.

98. "I started to talk to legal counsel early on in January and ask them—make sure that everything we need to change or write or whatnot meets the legal requirement. That was the primary charge to the legal team." Interview with Board President, Anonymous Charter School that was denied renewal (June 27, 2014).

adversarial process of contesting potential closures may be actively discouraged from trying.<sup>99</sup>

Advocacy organizations recognize that legal assistance is critical to the success of both the petitioner and established charter schools, and they have attempted to fill the gap by providing legal plans and services for their members (even offering pro bono representation to charters serving disadvantaged populations).<sup>100</sup> Yet these organizations have their own agendas, which include maintaining and growing their reputations as legal experts in authorizer decisions, advocating for state-level policy change, and “replicating and scaling up” high performing charters and charter networks.<sup>101</sup> Stepping into the role of “Civil Gideon” for struggling charter schools would likely compromise many of these positions.

The legitimating aspect of law can also be seen in the structure of charter oversight fora themselves, and particularly in the deference shown to lawyers and legal arguments in these spaces. In the contested charter actions I observed, lawyers for both charter schools and school districts were received far more positively and with greater attention by board members, evidenced by the frequency and substance of follow-up questions from the board to lawyers following presentation, in the extension of time limits for their testimony, and by the level of follow-up cross talk between the board, staff, and legal representatives.

By contrast, public testimony from parents, students, and community members was always time-limited and received passively by the board members. Despite formal legal protections to ensure community input and voice in charter decisions, board members did not engage or question individuals during public comment,<sup>102</sup> and they seemed to distance themselves from the pathos and public display of

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99. See *Charter School Closures Fiscal Year 2013–14*, CAL. DEP’T EDUC., <http://www.cde.ca.gov/sp/cs/lr/chclosures1314.asp> (last updated Feb. 4, 2015).

100. The California Charter Schools Association (CCSA) and the Charter School Development Center (CSDC) offer legal help and templates for member schools. CCSA maintains a legal defense fund and offers grants to fund items such as incorporation expenses. See *Legal Defense Fund*, CAL. CHARTER SCH. ASS’N, <http://www.calcharters.org/advocacy/legal/ldf.html> (last visited Feb. 11, 2015).

101. For an example of an organization advocating for policy change, see *CCSA Calls for the Closure of 6 Charter Schools as a Result of Academic Underperformance*, CAL. CHARTER SCH. ASS’N (Dec. 17, 2013), <http://www.calcharters.org/blog/2013/12/ccsa-calls-for-the-closure-of-6-charter-schools-as-a-result-of-academic-underperformance.html>.

102. Exceptions to this statement are considered *infra* Part III.A.3, concerning the aspirational aspects of law in charter oversight.

emotion this portion of the meeting frequently inspired.<sup>103</sup> In the board meetings I observed, public comment was also typically set apart from the business portion of meetings, thus decontextualized from the administrative consideration and decision-making that came both before and after.

An understanding of law and legal argument as lending legitimacy to those able to purchase and employ it is certainly not new,<sup>104</sup> yet in the case of charter oversight it raises questions about the depth of commitment to democratic participation in these actions, as well as the proper register of argument for debate about school reform. While this strand makes clear that legal concerns are respected and understood by authorizers, it opens the door to more normative questions of public participation in decision-making: what value should authorizers ascribe to the experiences of parents and students in failed or denied charter schools? How could the focus on compliance better accommodate local knowledge and alternative sources of authority?<sup>105</sup>

### 3. *Aspirational*

A third legal aspect present in charter oversight actions involves the aspirational use of law, primarily by teachers, parents, and students in charter schools. Although there is an aspirational, even hortatory cast to all legal argument, this legal aspect reaches beyond competing interpretations of charter policy or technical issues of compliance. By claiming new rights and resurrecting old ones not recognized by courts (such as the right to equal school funding or the right to choose a particular charter school), these individuals address foundational questions of school governance as well as the communal project of public education.

The language of rights and discrimination is particularly common in actions involving potential charter closure, yet the framework also critiques accountability practices more generally, decoupled from any

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103. This finding was most evidenced in transitions between meeting sections. Professional staff at times left the room during public comment, and transitions back to board motions and official recommendations were punctuated by statements that set apart student, community, and teacher experience from school oversight—“okay then,” “back to business,” etc.

104. *See generally* DEBORAH L. RHODE, ACCESS TO JUSTICE (2004).

105. One answer to these questions may be glimpsed in the new LCFF model, which requires school districts to incorporate sustained local input and co-creation of goals through the Local Control Accountability Plan (LCAP). *See Local Control Funding Formula, supra* note 53.



action affecting a specific school. A few examples from the data will illustrate these points.

A student in a Los Angeles charter school that was denied renewal by the local district and county traveled with fellow parents and students to Sacramento to attend the appeal hearing before the State Board of Education.<sup>106</sup> During public comment he related his experience in traditional public schools, where he struggled due to his status as a special education student and English language learner.<sup>107</sup> Imploring the Commission to renew his school's charter, he departed from a prepared statement to state his rights as he understood them:

I have the right to be a Native American. I have a right to learn addition. I have a right to learn my own culture. I have a right to dignity. I have a right to graduate. I have a right to go to college. And I have a right to pick my own school, and I pick this school. And that's why I want you to renew our charter.<sup>108</sup>

Parents and community members present at the hearing criticized the charter oversight process as systematically biased against poor communities of color, citing discrimination against Native Americans as the reason for their school's denial by the local district and county.<sup>109</sup> Current educational oversight policies, they argued, do not respect the rights of ethnic minorities and the need for diverse forms of instruction in these communities.<sup>110</sup>

Aspirational statements such as these do not constitute formal legal claims, and they are unlikely to result in large-scale policy change. Yet when offered in the context of authorizer hearings, they suggest a proto-form of legal mobilization and reflect a common legal consciousness well worth attending to. When spoken aloud, these statements can have measurable consequences: altering the form and tenor of oversight proceedings and at times influencing specific decisions made there. In the aforementioned meeting of the State

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106. *See State Board of Education Meeting, supra* note 93.

107. *Id.*

108. *Id.* During the period of public comment before the State Board of Education, many individuals affiliated with the charter school in question—including teachers, students, parents, lawyers, and community members—expressed a variety of legal opinions regarding the denial of the school's charter, both by the district and the County Office of Education. *See id.* These ranged from accusations of due process violation to charges of racism and decades of discrimination resulting in neglect of a population in need. *See id.*

109. *Id.*

110. *Id.* From two parents: "Discrimination by Los Angeles Unified School District and Los Angeles County Office of Education is why we are here today." *Id.* From two students: "Please find it in your hearts, look deep in your hearts. I don't want to say prejudices, but often they are because we are not aware of them." *Id.*

Board regarding the Los Angeles charter school, for example, board members adopted a noticeably more accommodating and collaborative stance toward the school's case after public comment, minimizing the previous conflict and seeking common ground.<sup>111</sup> After the student's emotional testimony, a member of the State Board responded with the following:

There have been lots of conversations about this school, and lots of conversations about the importance of their mission—both from a cultural perspective as well as an academic perspective . . . what came out of that was perhaps a route toward common ground. A route that would provide an opportunity for this school to continue to educate children in this interesting and profound way, but also for us to feel comfortable about the technical bits and pieces—about running charter school successfully in this day and age . . . . This motion is about trying to find the sweet spot between what will make this board and the Department of Education feel good about the compliance of this school and at the same time give them a chance to move forward.<sup>112</sup>

Aspirational references to law are also made in oversight spaces by parties not directly involved in the charter action in question. Representatives of teachers' unions attend charter hearings to speak against the petition or renewal of a specific charter school (and the spread of charter schools in general) in the name of preserving traditional public education and core values of democratic accountability.<sup>113</sup> Local community organizations and groups like the "Brown Berets" (a Chicano activist group that also advocates for educational equity) offer a more radical critique of process, advocating the full replacement of a broken legal and education system that fails large numbers of poor Latino children.<sup>114</sup> Members of charter advocacy organizations such as the California Charter Schools Association occasionally give public testimony in an aspirational manner (what the law may one day be), yet these

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111. This was an unusual occurrence (particularly when compared to the reception of similar testimony at the local school district and county level), and also contrasts with implications of legal aspects presented elsewhere in this Article.

112. *State Board of Education Meeting*, *supra* note 106.

113. For an example of these views, see the California Teachers Association's statement on charter schools, with particular emphasis on their framing of charters as innovations that emphasize meaningful local participation. *Issues & Action: Charter Schools*, CAL. TEACHERS ASS'N, <http://www.cta.org/en/Issues-and-Action/Education-Improvement/Charter-Schools.aspx> (last visited Feb. 24, 2015).

114. Mary Romero, *Brown is Beautiful*, 39 *LAW & SOC'Y REV.* 211, 215–16 (2005).

established organizations are more likely to receive deference from the board and a more prominent place on the board's agenda.<sup>115</sup>

While the effects of aspirational legal claims on charter decisions are worthy of additional empirical attention, preliminary evidence suggests that they may diffuse the adversarial orientation of the process while reminding authorizers of the values of fairness and equal participation.

#### 4. *Democratic*

The fourth legal aspect to emerge in this study is the democratic character of law, and specifically law as retaining local control over public education. This aspect exists in considerable tension with trends in the current organizational environment of educational reform and charter school operation: strong state legislative support for charter growth through non-profit and for-profit actors, increased autonomy of charters, and the growing influence of market ideas on school operation and reform.<sup>116</sup> The democratic aspect surfaced in the data in many ways: in the formal legal disputes requiring court involvement,<sup>117</sup> in the aforementioned public testimony in charter hearings, and also in interviews with lawyers for school district authorizers, who reaffirmed the strong desire of their district and county clients to keep charter approval in their purview.<sup>118</sup>

The democratic aspect of law in this context pushes back against charter advocates' claims that discretionary legal language in the Education Code can easily accommodate fundamental reforms to the structures of school accountability.<sup>119</sup> It also provides a battery of arguments for charter advocacy organizations when arguing for

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115. This claim is based on observational evidence of six charter authorizing fora, and an in-depth review of several charter denials that progressed from local and county boards to the State Board. *See generally* Michael M. Amir et al., *Charter Fights*, L.A. LAW., July-Aug. 2008, at 24.

116. BETWEEN PUBLIC AND PRIVATE: POLITICS, GOVERNANCE, AND THE NEW PORTFOLIO MODELS FOR URBAN SCHOOL REFORM, *supra* note 50.

117. *See, e.g.*, *Today's Fresh Start v. L.A. Cnty. Office of Educ.*, 57 Cal. 4th 197 (Cal. 2013); *Cal. Sch. Bd. Ass'n v. State Bd. of Educ.*, 186 Cal. App. 4th 1298 (Cal. Ct. App. 2010).

118. *See* Telephone Interview with Charter School Lawyer (Sept. 11, 2014); Telephone Interview with Charter School Lawyer (Sept. 16, 2014); Telephone Interview with Charter School Consultant to Charter Authorizers (Sept. 23, 2014).

119. These claims are voiced in many of the advocacy activities of state-wide charter organizations, including the CCSA. To see these arguments used in legal cases, see *Cal. Sch. Bd. Ass'n v. State Bd. of Educ.*, 186 Cal. App. 4th 1298 (Cal. Ct. App. 2010), and *Am. Indian Model Sch. v. Oakland Unified Sch. Dist.*, 227 Cal. App. 4th 258 (Cal. Ct. App. 2014).

reforms that restructure traditional democratic authority over schools: reforms to decouple charter oversight from the existing system of educational governance, or to create independent review boards to distribute resources, assess charter quality, and review appeals.

Yet charter advocacy organizations and charter networks also rely on democratic arguments to bolster legitimacy and deflect the critique that they seek to dismantle public institutions.<sup>120</sup> Advocates claim that charters reflect true democratic localism by fulfilling the community's desire for increased educational choice.<sup>121</sup> In this view, long waiting lists for charter schools in certain areas are evidence of public desire for school options and dissatisfaction with the bureaucratic forms of educational governance. Advocates for expanding charter schools thus frame decentralized governance as the democratic answer to an unresponsive educational system.

The legal aspects identified in this section are not mutually exclusive, nor are the boundaries between them always clearly distinguishable. After all, certain actors reap the benefits of legal connections and resources while simultaneously touting the democratic orientation of the process; charter operators make aspirational rights claims while attending to the material requirements of compliance. Nor do all local school boards receive each of these legal arguments in the same way—district size, location, and historical experience with the charter form are important variables to think about when considering the role of law and legal argument in charter oversight.<sup>122</sup>

## CONCLUSION

Charter oversight takes place in a complicated legal environment and dynamic social field. This paper has sought the role of law within the established school oversight structure, and has examined the diversity of legal argument that emerges. The rough typology of legal aspect presented here—encompassing compliance-related, legitimating, aspirational, and democratic elements—reveals charter oversight to be considerably more than a tiered bureaucratic process focused on rational, technical compliance with the letter of the law. In practice, charter oversight spaces entertain many types of legal

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120. Telephone Interview with Dir., CMO (June 17, 2014); Telephone Interview with Principal, Anonymous L.A. Charter Sch. (June 5, 2014).

121. Telephone Interview with Dir., *supra* note 120; Telephone Interview with Principal, *supra* note 120.

122. Vergari, *supra* note 5.

argument from professional and non-professional sources, and as such are fertile sites of informal legal mobilization both for and against traditional forms of educational governance and current reform logics.

An expanded attention to law in charter oversight regimes has considerable implications for sound charter and school choice policy. When state legislatures pass legislation or when local school boards adopt policy guidelines regarding charter oversight criteria, they should consider carefully the implications of multiple, weighted elements for evaluation, as well as the potential effects of discretionary statutory language on the project of local interpretation. Since charter oversight is likely to remain the responsibility of local school districts, greater clarity concerning the recognized sources of authority in public hearings, participation by the affected community, and consideration of appealed decisions are necessary. Also, local, county, and state boards of education ought to consider implementing procedural protections in the charter appeals process in order to level the playing field between well-resourced charter management organizations and stand-alone charter schools.

Legislatures and local boards of education must also consider what should happen when the bureaucratic appeals process is interrupted by court intervention, as well as how they might exercise democratic control over charters in ways beyond the traditional memoranda of understanding or the divisive, “nuclear option” of revocation.<sup>123</sup> Clear policies governing the participation of third parties in authorization and appeal spaces (lawyers, charter advocacy organizations, teachers unions, and private foundations) are necessary to provide consistency and to ensure a fair hearing for all charter schools facing board action.

While charter oversight mechanisms outside California are beyond the scope of this paper, recent experiments in expanding authorizing and oversight power to mayors and universities raise additional questions about the role of law and the viability of traditional

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123. Interviews with school district personnel and charter lawyers reveal them to be especially keen for policy that more clearly defines the relationship between authorization and problems meriting non-renewal or revocation:

The law doesn't give the district any hammer to do anything except revocation. The district can't go in and make changes . . . and you can understand why district might want to do that — you're displacing a lot of kids, and families are going to be upset . . . Lots of districts are hesitant to push that nuclear button [of revocation]. It's very frustrating from the authorizer perspective that there are no other steps that can be taken.

Telephone Interview with Charter School Consultant to Charter Authorizers (Sept. 23, 2014).

democratic oversight in an increasingly hybridized educational system.<sup>124</sup> Increased empirical attention to these governance innovations and their efficacy, as well as to the oversight structures employed in other states, will clarify the law's role in current charter school educational reforms, and will assist lawmakers and school officials in developing a charter policy that respects local autonomy and addresses the critical matter of charter quality and performance.

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124. New York City, Milwaukee, and Indianapolis are three cities that have experimented with mayoral authorization of charter schools, and twelve states have institutions of higher education as authorizers of K–12 charter schools. *See State-by-State Authorizer Contact Information Map*, NAT'L ASS'N FOR CHARTER SCH. AUTHORIZERS, [http://public.tableausoftware.com/views/NACSAAuthorizerContactInformation91914/Map?amp;embed=y&:display\\_count=no&:showVizHome=no](http://public.tableausoftware.com/views/NACSAAuthorizerContactInformation91914/Map?amp;embed=y&:display_count=no&:showVizHome=no) (last visited Feb. 24, 2015).

**APPENDIX A****Required Elements of a Charter Petition in California<sup>125</sup>**

1. A description of the educational program of the school. If the proposed charter school will serve high school pupils, a description of how the charter school will inform parents about the transferability of courses to other public high schools and the eligibility of courses to meet college entrance requirements must be included in the charter petition.
2. The measurable pupil outcomes identified for use by the school.
3. The method by which pupil progress in meeting those pupil outcomes is to be measured.
4. The schools governance structure, including parental involvement.
5. The qualifications to be met by individuals employed by the school.
6. Procedures to ensure health and safety of pupils and staff.
7. The means by which the school will achieve racial and ethnic balance among its pupils, reflective of the general population residing in the district.
8. Admission requirements, if applicable.
9. The manner in which annual financial audits will be conducted, and the manner in which audit exceptions and deficiencies will be resolved.
10. The procedures by which pupils may be suspended or expelled.
11. Provisions for employee coverage under the State Teachers Retirement System, the Public Employees Retirement System, or federal social security.
12. The public school alternatives for pupils residing within the district who choose not to attend charter schools.
13. A description of the rights of any employee of the school district upon leaving the employment of the school district to work in a charter school, and of any rights of return to the school district after employment at a charter school.
14. A dispute resolution process.
15. A declaration whether or not the charter school will be the exclusive public school employer of the charter school employees.
16. The procedures to be used if the charter school closes.

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125. CAL. EDUC. CODE § 47605(b)(5) (West 2013).

## APPENDIX B

California Charter School Operational Status, 2010–2015<sup>126</sup>

| Year      | Total Charters | Opened | Closed |
|-----------|----------------|--------|--------|
| 2010–2011 | 912            | 115    | 27     |
| 2011–2012 | 982            | 100    | 28     |
| 2012–2013 | 1063           | 109    | 29     |
| 2013–2014 | 1130           | 104    | 34     |
| 2014–2015 | 1184           | 87     | n/a    |

CALIFORNIA COUNTIES WITH LARGEST CHARTER POPULATIONS, 2015<sup>127</sup>

| County         | Number of Charters | Number of Authorizers |
|----------------|--------------------|-----------------------|
| Los Angeles    | 373                | 29                    |
| San Diego      | 127                | 29                    |
| Santa Clara    | 59                 | 12                    |
| Sonoma         | 56                 | 26                    |
| Alameda        | 52                 | 10                    |
| Sacramento     | 48                 | 14                    |
| San Joaquin    | 40                 | 11                    |
| San Bernardino | 38                 | 20                    |
| Fresno         | 26                 | 14                    |
| Riverside      | 25                 | 15                    |

126. *2010–11 New Schools Press Kit*, CAL. CHARTER SCH. ASS'N (Nov. 10, 2010), <http://www.ccsa.org/blog/2010/11/new-schools-press-kit.html>; *2011–12 New Schools Press Kit*, CAL. CHARTER SCH. ASS'N (Nov. 22, 2011), <http://www.ccsa.org/blog/2011/11/2011-12-new-schools-press-kit.html>; *2012–13 New Schools Press Kit*, CAL. CHARTER SCH. ASS'N (Oct. 23, 2012), <http://www.ccsa.org/blog/2012/10/2012-13-new-schools-press-kit.html>; *2013–14 New Schools Press Kit*, CAL. CHARTER SCH. ASS'N (Nov. 7, 2013), <http://www.ccsa.org/blog/2013/11/2013-14-new-schools-press-kit.html>; *2014–15 New Schools Press Kit*, CAL. CHARTER SCH. ASS'N (Nov. 17, 2014), <http://www.ccsa.org/blog/2014/11/2014-15-new-schools-press-kit.html>; *California Charter Schools by the Numbers*, CAL. CHARTER SCH. ASS'N, <http://www.calcharters.org/understanding/numbers/>.

127. Information collated in February 2015 from *Charter Schools Database*, CAL. DEP'T EDUC., <http://www.cde.ca.gov/ds/si/cs/ap/lists.asp> (last modified Apr. 10, 2013).