Is it Unconstitutional to Prohibit Faith-Based Schools from Becoming Charter Schools?

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Abstract

This article argues that it is unconstitutional for state charter school programs to preclude faith-based schools from obtaining charters. First, the “school choice” movement of the past 50 years is described, situating charter schools in that movement. The current state of play of school choice is documented and the roles of charter schools, private schools (primarily faith-based schools), and public school choice options are elaborated. In this setting I argue a) based on the current state of the law it would not be unconstitutional (under the First Amendment’s Establishment Clause) for states to elect to make faith-based schools eligible for charters, and b) in light of that, the current practice of formal discrimination on the basis of religion against families and school founders who want faith-based charter schools would be deemed unconstitutional by the current U.S. Supreme Court. Put differently, this is not the sort of issue in which the “play in the joints” between the Free Exercise and Establishment Clauses should apply so as to give states the option of restricting charter schools to secular schools.

Key words: charter schools, education, school choice, vouchers, religion, faith-based schools, Establishment clause, Free Exercise clause, First Amendment, constitutional law
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The legal issue addressed in this article is whether state laws that preclude religious schools from becoming “charter schools” violate the U.S. Constitution. Currently, all of the 40 states that have embraced the charter school movement explicitly restrict charter schools (described in detail below) to non-sectarian schools. On the face of it, this deliberate discrimination on the basis of religion seems legally suspect.
But two alternative principles might justify the restriction. The first is that to publicly fund charter schools that are parochial schools might itself be an unconstitutional “establishment” of religion in violation of the First Amendment. The second is that the broad notion of the “separation of church and state” might give states the legal discretion (if they choose to exercise it) to restrict charter schools to non-parochial schools.

In this article, in contrast with others who have examined the issue, I take what some might term the bold position that the current discrimination against faith-based charter school applicants (and families seeking to send their children to such schools) is unconstitutional.

Before discussing in Part II the legal arguments relevant to the issue posed here, Part I will present a general picture of the school choice movement over the past 50 years with special attention given to both charter schools and private faith-based schools. This picture is critical to my constitutional argument because, as I explain, charter schools arose out of and are deeply embedded in the broad push for “family choice” in education.\(^2\) Seen in this light, charter schools are very different from, say, alternative and magnet schools created by school districts to serve the district’s purposes. Charter schools, by contrast, are (almost entirely) created and run by private actors seeking to offer families something other than the regular public school for their children. And for families wanting to make a choice of what they think is best for their children, the preclusion of faith-based schools from obtaining charters leaves some families (those seeking a religious education) particularly discriminated against in their desires to match their values with their children’s schooling.

If you favor empowering working class and poor families with the ability to choose how their children are educated – just as well-to-do families have long been able to do so by either paying for private education or moving to high-price communities with exclusive public schools – then you can see how charter schools, that are privately run but publicly regulated on terms that favor lower income families, can be a sound pathway to that empowerment. And indeed about two and half million children are currently enrolled in such schools based on their family’s
choice as to what is best for them – or at least what is better for them given the public school alternatives.

But for families of modest means wanting a religious education for their children, the charter school option is not presently available. Those families are typically forced to a) scrape together a little money to pay tuition at a very underfunded private religious school, b) rely on the charity of some more established religious schools, sometimes run by a faith other than theirs, c) home school their children at a great burden to the family, d) select a charter school that isn’t really what they prefer, or e) give up and send their children to a public school – where the parents now often find themselves battling with school officials and other parents over curriculum content, reading material, and the like that run contrary to their religious values.

Liberals and others on the left often are instinctively opposed to any sort of government program that would wind up funding the sorts of religious schools that conservative fundamentalists want for their children. I find this troubling coming from those who otherwise champion the interests of the poor and who often talk about empowering the “have-nots” in our society to take better charge of their own lives.

But this article is not centrally about why, as a moral matter, or as an expedient matter, or even as a matter of best educating children, a family’s preference for a faith-based charter school should be respected. It is rather, first, a portrayal of the school choice movement and the place of charter schools in that movement, and then second a legal argument as to why the current U.S. Supreme Court might very well decide that de jure exclusion of faith-based schools from the charter school schemes of all the states with charter schools is unconstitutional.

I. School Choice: The State of Play

a. The School Choice Movement

Starting in the 1960s a range of scholars and other advocates began arguing for government-funded “school choice.” They generally depicted the public school system as involuntarily assigning children in grades kindergarten through high school to attend a specific school, usually the one located nearest to where they lived (although some pupils
were assigned to out-of-neighborhood schools as part of school desegregation plans). The critics often portrayed the public school system as resting on a myth of the “common school” in which all public schools are understood to be essentially the same – training all youngsters to become good Americans and ready for either the workforce or higher education -- thereby making it largely irrelevant which one any child attended. But, of course, in the real world public schools have long differed from one another in many ways. In terms of the basic education they deliver, some are much better (or worse) than others. Moreover, regardless of any law on the books regarding curriculum, the values taught in public schools varied from district to district, school to school, and classroom to classroom. On top of that, children differ in their needs and in their parents’ desires for them so that even if any specific school might be well-suited for some children, it might not be for others. The upshot, in this stylized presentation of things, is that while some parents were quite happy with what their children were given, others were not.

But, the only ways unhappy parents could “choose” a school they preferred for their child were 1) to move into the attendance catchment area of a public school they liked or 2) to opt out of the public school system by sending their child to a private school (which in the U.S. generally meant paying tuition in contrast to the free public schools). In the 1960s families with about 12% of America’s schoolchildren did the latter. Obviously, as a general matter, both of those “choice” options were practically far more plausible for well-to-do families as compared to most lower-income families, especially when many of the most highly desired public schools were located in suburban neighborhoods with substantially higher-than-average housing costs.

For Catholic families wanting a religious education for their children, however, the tuition burden at parochial schools at that time tended to be light -- perhaps most importantly because so many of the teachers in Catholic schools then were nominally-paid members of religious orders, and perhaps also because, at least at the elementary school level, the local parishioners made charitable contributions that helped support the parish school regardless of whether their own children were currently enrolled there. And at that time the private school sector in the U.S. was dominated by Catholic schools, whose roots go back to the 19th century
when Catholic leaders, viewing the “public” schools as Protestant schools, created an elaborate system of schools for Catholic children.\textsuperscript{7}

i. Opening up the Private Sector

Many of the critics in the 1960s and 70s who helped generate the “school choice” movement looked to the private sector to remedy the regime of restricted choice. The central vision of most of them was that if government would offer to fund families, instead of just funding schools, then all (or more) families would (at least in principle) have a choice between what the public school system offered to them and what would be provided by the private sector. Although the language used by some critics envisioned a system of school “scholarships,” the label that stuck to this policy approach is school “vouchers” -- largely because that was the term used by the conservative Nobel-Prize-winning economist Milton Friedman who appears to have initially championed the idea in 1955\textsuperscript{8} and then later more prominently in 1962 in his book \textit{Capitalism and Freedom}.\textsuperscript{9}

From the start it was clear to school choice insiders that, in their details, the voucher proposals of various advocates differed enormously and that the choice movement was quickly becoming comprised of strange bedfellows. Friedman actually wanted to do away with public schools, privatizing the system entirely. Moreover, he wanted to reduce substantially public funding for elementary and secondary education by giving all families vouchers worth much less than was then being spent on public education. He was motivated largely by an ideological commitment to capitalism and competition, confidently predicting that education could be delivered both cheaper and better via the private market. Friedman also noted that while there were public benefits that flowed from having an educated population (thereby justifying some public subsidy), being educated also conferred very substantial private benefits to students who (in his view of the world) should pay for those benefits (or in this case their parents should). Under Friedman’s approach, there would be a market in elementary and secondary education that would become much more like the markets for food or clothing. And the private sector would become flooded with new schools, many of which – probably most of which – would not be
religious schools (especially as existing public schools became privatized).

During the 1960s, however, arguments for school choice and school vouchers were initially tainted by the South’s “massive resistance” to school desegregation. In Prince Edward County, Virginia, for example, the public schools were closed and white families were given vouchers to pay for the education of their children in all-white “segregation academies.” The U.S. Supreme Court invalidated this program in 1964 in the case of *Griffin v. Prince Edward County*.\(^\text{10}\) Under the banner of “family choice” private segregated schools were established to varying degrees throughout the South in that period, and states responded with a variety of financial support strategies. Grant-in-aid plans (e.g. in Alabama) were struck down by federal courts (e.g., in *Lee v. Macon County*),\(^\text{11}\) and the U.S. Supreme Court returned to the problem in *Norwood v. Harrison* in 1973 and invalidated Mississippi’s textbook aid to such schools.\(^\text{12}\)

In New Kent County, Virginia the school board embraced school choice by declaring that both of its two public schools (one previously all-white and one previously all-black) were to become open to everyone. But unless a family opted out, the child’s default assignment would be to the all-white or all-black schools the child was already attending (or would have attended) under the de jure segregation regime. Unsurprisingly, after three years – on a one-by-one basis – no whites opted to send their children to the black school and only 15% of the district’s African-American families chose the white school for their children. While the school board claimed that this result simply reflected family preferences, in 1968 in the case of *Green v. New Kent County*\(^\text{13}\) the U.S. Supreme Court struck this “choice” plan down and ordered the district to create what in fact were non-racially identifiable schools.

In the Northeast during this same era (the late 1960s), many Catholic schools found themselves facing growing financial difficulties. Legislatures in states like New York, Pennsylvania and Rhode Island (all of which had substantial Catholic-school going populations) enacted measures designed to bail out the Catholic schools (at least to some extent). A range of financial support schemes was adopted – with the money sometimes going directly to the religious schools, sometimes to
the teachers, sometimes to pay for curriculum materials that were then presented to the schools, and sometimes to the parents in the form of small value vouchers. But even the latter were not really aimed at financially helping parents. Rather, the legislative assumption was that with this direct financial support families could then pay somewhat higher tuition thereby allowing the schools to shore up their finances.

Put differently, supporters of these aid schemes did not intend that they would result in large number of additional families leaving public schools for Catholic schools or that a large number of new private schools would be created in response to these measures; that is, they were not aimed at expanding choice to more households. Rather, they were essentially designed to help keep the existing Catholic schools afloat (and thereby support the private school choices that families had already made).

For some legislators this goal reflected their own belief in and support of Catholic schools and what they provided for their constituents. For other more pragmatic legislators, these measures were seen as ways of staving off what they feared would be a large flow of children from the private sector into the public sector (were lots of Catholic schools to close), a flow that would cost the taxpayers far more than what these modest financial shore-up plans would cost.

The U.S. Supreme Court, however, struck down most of these schemes as invalid aid-to-religion in violation of the “Establishment Clause” (discussed below). And many liberal supporters of a “high wall of separation” between church and state applauded this result.

At the same time, however (i.e. starting in the late 1960s and into the 1970s), a small set of liberal school choice advocates began to see things very differently. They believed that the public schools – especially in urban areas -- were failing to serve well so many of the children from low-income households (many of whom were non-white). Their thinking was that if the government offered substantial-value scholarships (or vouchers) to children in those families, this would create the possibility of enhanced educational opportunities where they were most needed. These children might at least be able to escape the worst public schools (something they otherwise probably could not do, especially if they lived in public housing with no financial ability to
move elsewhere). They would escape by shifting their children to more desirable private schools that these families could now afford. Absent the creation of new private secular schools, advocates realized that most of these options would be religious schools. This did not trouble them.

Indeed, by the 1970s observers began to point to the fact that many inner-city Catholic schools already were no longer catering to white Catholics (so many of whom had moved to the suburbs) but instead, at least in many urban areas, to low-income African-American Protestants (not an effort to generate converts, but rather as part of a religious mission to help educate children of the poor). Black families who made these choices (typically paying little or sometimes no tuition) were getting something that they thought was far better for their children, even if it meant exposing them to a different form of Christianity. But these Catholic schools could afford to take on only so many low-income families. Moreover, those who viewed this development as a strong positive for school choice feared that in many cities a large share of these schools would eventually have to close as Catholic parishes and Bishops had only so much money available for this sort of social justice project.\textsuperscript{16}

These liberal “school-vouchers-for-the poor” advocates viewed such a reform as way to help the poor via the non-public sector – just as had been envisioned by the newly adopted “food stamps” program (in 1964)\textsuperscript{17} and the newly created “Medicaid” program (in 1965).\textsuperscript{18} Both of those also, in effect, provided service-specific vouchers (for food and for medical care) to low-income families. Some of these liberal school voucher reformers believed (or at least hoped) that the enhanced competition created by the scholarship plan they advocated would prompt improvements in the poorly-performing urban public schools. Unlike Friedman, they did not favor a wholesale closure of even currently low-performing urban public schools, but instead they favored increased options for the poor.

Still other liberal voucher/scholarship supporters sought to occupy ground between Friedman and those focused only on the poor. This group included Professor John Coons (my mentor) and me.\textsuperscript{19} School choice advocates like us were happy to support income-based scholarship plans aimed at the poor. But, more importantly here, we also proposed universal school scholarship schemes in which all families
were offered an option to go other than to public schools. In our proposal the scholarships would be worth a lot (albeit somewhat less than what was then being spent in public schools). Yet our universal scholarship plan would carry with it a number of regulatory features. For example, participating schools would have to either provide lottery-access among applicants or else make available a substantial share of their places for low-income families. In addition, voucher-accepting schools would not be allowed to charge families extra tuition or fees that would price low-income families out. Reasonable transportation assistance would have to be provided (so as to make more schools practically accessible to more families); independent counselors trained to help families choose would have to be made available (at least to low-income parents); schools would have to provide due process rights to students in their charge; and while faith-based schools could participate in the plan, they could not compel students to profess a commitment to the faith of the school (although they could require students to take and pass exams given in religious courses and perhaps require students to quietly attend “chapel”).

We envisioned the creation of many new private schools, both faith-based and secular, in both cities and suburbs. But, unlike Friedman, we assumed that public schools would structurally continue as before – albeit with fewer students as some families of all income levels opted for vouchers. Friedman, of course, opposed all of the regulatory controls we proposed for the voucher-accepting schools, and, as noted already, he opposed setting the value of the scholarship as we did at, say, 85% of what was spent in public schools (his proposal instead having settled on about 50%).

Despite powerful rhetoric from libertarian Friedmanites on the right, proposals based on his vision so far have had no political traction. Even when the idea of selling off all existing public schools was dropped and instead modest value vouchers were simply to be offered to all families with virtually no strings attached, few rallied round. Indeed, twice when his idea was put to a vote in California it was very soundly defeated. Nor has Coons and my universal scholarship plan with a heavy finger on the scale in favor of the poor been anywhere embraced in the U.S. (although it is, in effect, the regime in most other economically developed nations).

By contrast, the liberal approach to enhanced private school choice for low-income families has made some modest headway in a few states.
Milwaukee, Cleveland, and the District of Columbia are home to the most well known private school voucher programs. They have been in place from some time now, with Milwaukee having initiated the idea in 1990. The Cleveland plan has been expanded to the rest of Ohio, and newer voucher plans have been more recently adopted in Indiana, Louisiana and North Carolina. Together by now these voucher plans serve about 75,000 children who generally come from lower-income households (some laws focus on children who are in “failing” public schools, although these also tend to be children from low-income households).

Voucher plans aimed at low-income families were politically adopted for the most part through the combined efforts of inner-city African-American Democrats (who sought better options for their constituents) and state-wide Republicans (who generally favored a smaller role for government and often sought to reduce the budgets and power of teachers’ unions). The voucher plans for low-income families were attacked in court (in cases often lead by teachers’ unions and liberal non-profit groups who opposed this way of helping such families). A variety of legal arguments were made against these plans – most importantly for our purposes here is the claim that giving vouchers to children to attend faith-based private schools violated the First Amendment’s “Establishment Clause.” But, in the Cleveland case (Zelman, discussed below), while it was true and remains so that most of the children using vouchers attend religious schools, this legal argument was rejected by the U.S. Supreme Court which upheld the voucher plan.

Because only a small share of low income families attending public schools in inner cities like Cleveland, Milwaukee, and the District of Columbia are whites, these plans work very differently from the southern state segregation schemes that had sought to enable more whites to flee to all-white segregation academies. So, too, unlike the plans providing modest aid designed to hold together the Catholic school system in the east coast in the late 1960s and early 1970s, these vouchers-for-the-poor plans were clearly meant to facilitate the actual movement of children from public schools into private schools, and most of the users of these programs are African-Americans. Hence, this sort of reform – on the ground – can be
sharply distinguished from the invalidated publicly-funded school choice plans of prior years.\textsuperscript{31}

More recently, a new political strategy for public funding of the private school choice of lower income families has come into play.\textsuperscript{32} This is the “tax-credit school scholarship plan,” pioneered in Arizona and now most robust in Florida. Under these schemes, which vary in details from state to state, taxpayers (sometimes corporations, sometimes individuals, sometimes both) are given the option of making contributions to specialized non-profit organizations that help lower-income families pay for the private school education of their children. Donors are given a tax credit (often but not always, a 100\% credit which makes their donation costless to them) for their contribution. The recipient organizations consolidate these contributions and award scholarships to be used at private schools.

In Florida in 2015 about 65,000 children were receiving such scholarships in the amount of about $4000 a year (unless their school’s tuition is less).\textsuperscript{33} By now, more than a dozen states have such programs in operation and together they are already serving more than 150,000 children\textsuperscript{34} – a number that is considerably larger than the number of low-income children being aided with vouchers. Again, a huge majority of them attends private religious schools.

These tax-credit programs too have been, and continue to be, attacked in court on a variety of grounds (largely unsuccessful so far). Most importantly for our purposes, the U.S. Supreme Court refused to address the constitutionality of the Arizona plan, which those suing claimed violated the Establishment Clause, on the ground that plaintiff taxpayers had no standing to make such claims.\textsuperscript{35} This holding seemingly completely isolates such programs from legal attack in federal courts.

Adding together the number of children participating in the voucher programs and the tax credit-scholarship programs, that still amounts to less than one half of 1\% (i.e., less than .5\%) of the nation’s school children.\textsuperscript{36} Nonetheless, the “voucher threat” (and now the newer “tax credit scholarship plan threat”) has very long worried, and continues to worry, supporters of public education, especially the teachers’ unions.
ii. Opening up the Public Sector

In response to the voucher threat, in response to the general push for the broad idea of school choice, and for several other practical and political reasons, public education itself has changed so that over time more and more children have been given options within the public school system. Hence, even as it was a bit mistaken 50 years ago to describe the public school system exclusively as a system of assigned schools, it is decidedly un-nuanced to describe it that way today.

To be sure, lots of families who use public schools today still have no choice but their local schools – although many are happy with that option, and as noted above, many middle class and wealthier families have long exercised their school choice through their decision as to where to live. And to be sure, at the same time, a large number of public-school-using families remain stuck in a single school that is not well serving their children with no practical alternative available to them. But it is important to emphasize that many public-school-using families today do have choices and they exercise them by opting for a school for their child rather than simply taking what is assigned to them.

First, many school districts have created “magnet” and “alternative” schools. These schools were often initially created as part of efforts in the 1970s and 1980s to reduce racial and ethnic isolation in public schools. These schools typically purport to offer up something distinctive – something arguably different from the routine public school. And families are invited to apply (with a range of criteria used to select among applicants if demand exceeds supply). In many places the motivation behind this school choice option was to try to retain white families in urban districts who might otherwise flee to the suburbs. Chosen integrated schools were also seen as more palatable to the community than “forced bussing” that provoked resistance throughout the nation (not only in the South). In any event, these magnet and alternative schools give families new choices, and as districts learn about what is in high demand, they sometimes respond by enlarging the programs – e.g., adding more alternative or magnet schools, increasing the size of those in existence, etc. This further expands school choice.37
Second, in recent years a number of urban districts have broken up their large and unsuccessful public schools into a number of smaller schools with families (sometimes including out-of-neighborhood families) being given choices among them, in effect creating several alternative schools inside of existing buildings. This “small schools” movement was significantly promoted, among other things, by the Bill and Melinda Gates Foundation, which more recently appears to have abandoned this reform strategy as not providing the solution to urban education’s problems that the Foundation had hoped for. Yet, many smaller urban schools (and schools within schools) continue to operate and are frequently attended by children whose families choose to send them there.

Third, some states have adopted programs promoting attendance across school district lines. These plans have been motivated not only to promote racial balance (sometimes), but also, say, to allow rural families to opt for larger city high schools for their children for whom this may give far greater access to Advanced Placement courses, for example. Furthermore, in some places, children are allowed to enroll in out-of-district schools located where one parent works (ostensibly to promote family convenience). Other sorts of inter-district transfer arrangements also exist (sometimes above-board with sending and receiving districts approving the placement, and sometimes “illegally” with families using false or dubious addresses in order to enroll their children in a preferred school).

Fourth, some school districts have in various ways opened up their traditional neighborhood public schools to school choice. In its weak form, seats that are unfilled by children from the local catchment area become available to other living children in the district (e.g. Oakland CA). In its strong from, there are no longer any catchment areas in the district so that where one lives in the district gives one no priority access to any school. Instead, all district schools (or perhaps packages of the district’s schools) are made available to all (or a set of) local families from which to choose. These latter regimes, in some places termed “controlled choice” programs, often have been run with a finger on the scale designed explicitly or indirectly to promote school integration along racial and/or economic lines. Regardless of the motivations, these programs broadly embrace the “school choice” mantra – but within the conventional public sector (e.g. Berkeley CA).
It is estimated that nationwide 10-15 percent of school age children attend school by family choice through one or another of these four mechanisms.\textsuperscript{45}

\textit{b. Charter Schools}

In the 1980s, some critics of the monolithic public school system called for the creation of a special type of school choice that they promoted as being within the public sector, by which they most importantly meant that these would be public-funded newly-created schools that would be attended only by children whose families selected them. Ted Kolderie and Joe Nathan from Minnesota are often credited as playing the key roles in launching this idea.\textsuperscript{46} They called the new type of school they were inventing a “charter school.”

They strongly supported the core principle of family choice. They rejected the Friedman approach because it left schools unregulated, the voucher amount was too small to support high quality schools, and in the extreme Friedman’s wish to privatize public schools was viewed as irresponsible as many families were very happy with the education their children were currently receiving. Because the “voucher” idea was being commandeered by those on the Right and touted mainly on the basis of the abstract benefits of capitalism, these new supporters of school choice sought to distance themselves from the Friedman wing.

Through their efforts, the Minnesota legislature embraced the idea, and the first charter school was launched in 1992. By 2015 there were more than 6000 charter schools nationwide located in 40 states plus the District of Columbia.\textsuperscript{47} Together their enrollment was estimated to be about 2.5 million students (a substantial number, yet still just about 5\% of the nation’s school age youths).\textsuperscript{48} More than half of these charter school enrollees live in but six states: Arizona, California, Florida, Michigan, Pennsylvania, and Texas.

Charter schools are clearly not the same as traditional public schools. To be sure, charter schools have many “public” characteristics, and they are often explicitly called “public charter schools” both in the legislation that created them and, at least some of the time, in common discourse. First,
charter schools are publicly funded (although not necessarily exclusively so). Second, they may not charge tuition to any enrolled students (like public schools and unlike traditional private schools). Third, they must admit all who apply and if there are more applicants than spaces, admission must largely be by lottery (thereby making these schools actually rather more public than, say, exclusive “public” schools located in wealthy suburbs which are, as a practical matter, reserved for the children of well-off local residents). By contrast, many conventional private schools jealously guard their control over admissions. Fourth, because they are “chartered” by public bodies (more below) and in that way answerable to the public, these schools may be said to be publicly accountable (indeed, in some instances, even more so than many conventional public schools). Furthermore, in many states, a formal legal reason that charter schools are termed public schools is that their public funding would otherwise be illegal in light of state Constitutional language restricting school funding to public schools (more on that below). 49

On the other hand, as envisioned by their inventors, most charter schools are in many key respects “private” schools. They are usually owned by private non-profit tax-exempt organizations – and not by the local school district.50 While most charter schools are “free-standing,” a growing number now have contracts with independent companies who manage the schools (and some of these are actually profit-making enterprises). Today more than 30% of charter schools are actually operated by either non-profit or for-profit management companies (with the former having about 20% and the latter about 12% of the market).51

The mission of the charter school is privately set (e.g., it is a college prep school, a road to certain technical vocations, a fine arts school, and so on). The pedagogical style is up to the school to determine (does the school drill its students on skills, emphasize group inquiry, employ “master” teachers, and so on). The teachers are privately hired (in some places without necessarily having formal teaching credentials required of public school teachers). And the charter school curriculum is privately determined at least to the extent that fully private schools can control their curricula (since state law and the practices of universities often impose certain curriculum features on all schools).
To be sure, the “charter” (in effect a “contract”) that the school signs with its public sponsor can, and sometimes does, mandate certain aspects of its operation, and if there is a serious breach of the terms of the charter the public sponsor can cancel its sponsorship and shut the school down (unless a different public sponsor is found). Still, generally speaking, the teachers in such schools have rights (subject to what might additionally be provided in the charter) like those in private schools. As to whether the teachers are unionized, this varies from state to state and charter school to charter school. But as of 2009 it appeared that only about 12% of charter schools had unionized teachers (and many of those were former neighborhood public schools that had been converted to charter schools and were still owned and in many ways run by the local district). As for student rights, things are more complicated. Sometimes the terms of the school’s charter (or perhaps state law) requires students to be given due process right before being expelled or suspended – like public schools. On the other hand, it seems clear that, in many places around the nation, charter schools are permitted to, and do, demand certain behaviors from students, which, if not performed, can and sometimes do lead to dismissal. In this respect these charter schools are much more like private schools than traditional public schools.

Initially some teachers’ unions and leaders supported the idea of charter schools, and in the early days many envisioned that groups of existing public school teachers would be prominent creators of charter schools. And indeed, in some places, charter schools have been created by unions and/or started by groups of public school teachers who were union members. But that initiative has floundered. For many groups of teachers, organizing and fund raising for a new charter school is daunting. From the union perspective, there is a tension in creating a charter school since the teachers’ unions ideologically position themselves as representing workers against management so that becoming management can be an uncomfortable role.

In any event, early union support for charter schools was probably most importantly motivated as a strategy to politically cut off the voucher movement. Indeed, the ultimate threat of a politically revitalized school voucher (or expanded tax credit) movement is one of the things that appears to best protect the ongoing existence of charter schools.
Nonetheless, over time, several teachers’ unions have become hostile to non-unionized charter schools, arguing that they are harming our public school system. Although President Obama and his Secretary of Education Arne Duncan have been strong supporters of charter schools, the two major national teachers’ unions have recently denounced Duncan and his support for what the unions now characterize as a corporate and marketplace driven approach to schooling.

Most charter schools are chartered by the local school districts in which they are geographically located and tend to serve local children (although not necessarily exclusively so). But in some states other public bodies are allowed to be, and are, active in sponsoring (and then supervising) charter schools. These most importantly include county boards of education, state boards of education (and/or other specially created state-level chartering organizations), and public universities.

Many of those wishing to start a charter school will begin by seeking a charter from the local school board, but if turned down they sometimes successfully look elsewhere for a sponsor. Yet, in some states applicants may well prefer to go first to specialized school chartering institutions. State laws differ in the discretion that charter school authorizers may exercise in approving or turning down a charter applicant. In states with what charter school supporters call “strong” charter school laws, any applicant that meets the basic filing requirements for obtaining a charter must presumptively be granted one (subject only, say, to having a coherent educational plan and an adequate business plan for the school).

To be sure, some states have numerical caps on the number of charters that may be issued and when the cap bites the charter school authorizers may have to choose among applicants, although it appears that the typical practice is just to charter qualified applicants in order of application until the cap is reached with subsequent applicant schools put on hold until either the legislature raises the cap and/or existing charter schools drop out of the system creating new room under the cap.

Chartering bodies officially are “gatekeepers” and generally view the fact that a proposed school has attracted families who promise to enroll their children by itself as insufficient to award a charter. The charterers also want the school actually to succeed in educating its pupils. Hence,
before giving out a charter they want to know about how the school will be run, what it will teach and how. Yet, at the same time, one of the main ideas behind the charter school movement is that it will produce new ways of teaching and learning and new ways of delivering education. Hence, many chartering bodies are eager to encourage experiments, knowing that if the school fails families are likely to cease attending, and that if need be the charter could be withdrawn or at least not renewed. Besides, as many charter schools have been formed in communities in which the public schools are seen to be badly failing many children, it is difficult to resist chartering a new school that has enthusiastic parental support.

Once chartered, these schools are generally free from all (or at least most) of the state regulations applicable to public schools; they are much more like private schools in this respect. Indeed, because a centerpiece of the political case for charter schools is that they will be held accountable by parents who chose to send their children to such schools (or not), the accepted corollary in most states is that much of the regulation governing monopolistic public schools is not needed. And, because many hope to see charter schools develop innovative reforms that might well otherwise be blocked by existing regulation of conventional public schools, this is a further reason it is thought wise to treat them in this respect more like private schools.

Charters typically last a fixed number of years and then must be renewed, although in practice – apart from financial mismanagement (or worse) or manifest educational failure -- most charter schools have had their charters readily renewed if their enrollment is robust. Nonetheless, the time of renewal provides an opportunity for the sponsor to evaluate the progress of the charter school. There is no such parallel for traditional private schools (or for traditional public schools).

To give a little feel for the variety of charter schools, I note that in Oakland, California where I live the Oakland Unified School District’s Office of Charter Schools currently lists about three dozen schools chartered by the district (including some to begin enrollment in 2015-2016) plus a half dozen more that are located in Oakland but chartered by the Alameda County Board of Education. In 2013-14 the
approximately 40 charter schools in Oakland together enrolled more than 12,000 students, as compared with 37,000 students enrolled in the public schools operated by the Oakland Unified School District. Some of the charter schools in Oakland are part of a national chain of charter schools; e.g., the KIPP Bridge Charter School. Seven of the schools are Aspire schools; Aspire operates more than three dozen charter schools in the states of California and Tennessee. Some of the schools, like Lighthouse and American Indian, hold separate charters for different grade levels (e.g. k-8 and 9-12). Many of the schools serve only limited grade levels like ASCEND k-8 and Oakland Unity 9-12. Many have different emphases, e.g., Oakland School of the Arts (including dance, theater, visual arts and theater), Oakland Military Institute, Conservatory of Vocal/Instrumental Arts, Yu Ming School (bilingual), and Bay Area Technology School (BayTech) (STEM – science, technology, engineering and math). Some charter schools emphasize drill and high test scores, like Oakland Charter Academy-Amethods; others emphasize portfolio assessment and securing four year college acceptance for all graduates, like ARISE. There are pedagogical differences among the schools as well; e.g, Urban Montesorri.

Across the nation a number of charter schools have failed and voluntarily gone out of business (some in scandalous ways). Some have had their charters revoked (or not renewed) and could not find a new sponsor and hence had to close their doors. In 2012-13, for example, about 4% the charter schools in operation closed that year. Charter school critics point to the disruption and the lack of appropriate educational progress often endured by students in charter schools that close. Charter supporters point to this churning as inevitable, and in a sense desirable, arguing that failing charter schools will and should disappear – a fate they would like to apply to all schools, but which has not generally applied to conventional public schools.

To be sure, in recent times other strategies have been employed to deal with failing public schools – including the “reconstitution” movement under which (at least in its stylized form) a school is symbolically dissolved, its principal replaced, its staff let go (although the new
executive team can and often does ask the best teachers to stay on and sign contracts with the “new” school), and a new beginning is announced. Whether this has been, or could become, a successful “turn around” strategy remains to be seen.\textsuperscript{70}

As in Oakland, elsewhere in the country as well a number of charter school operators now manage more than one school – often running a chain of schools in the region or even nationally. Like fast-food franchises or supermarket chains, this holds out the promise of continued rapid growth. And so far, the charter school system has rapidly grown and indeed, as noted above, is far more robust than the publicly funded systems facilitating private school choice (i.e., voucher plans and tax credit scholarship plans combined). Yet, whether the charter school system, as presently designed, can grow to, say, 10\% of the market remains unclear – in part because of the difficulty new schools (or existing charter schools wanting to expand) now face in finding suitable physical plants in which the schools can operate. Over the past half-dozen years, for example, the number of charter schools appears to be growing, on a net basis, at a rate of less than 10\% a year.\textsuperscript{71} At that rate it would take more than a decade from now for charter schools to capture 10\% of the overall market.

In the earlier years of the movement, many charter schools benefitted from their ability to locate in what were shuttered schools – e.g., private schools (especially inner-city Catholic schools) that had closed down and public schools that had been abandoned in the face of declining enrollments (where local public school districts were willing, or sometimes required, to provide this space for charter schools). But in many cities now, there are no more venues like that available, and where to locate a new charter school is often a very big hurdle to getting it launched.

One potential source of new charter schools could be existing private schools. But in some states like California (although not in all states) charter schools must be, in effect, start-ups (or possibly former public schools converted to charter schools).\textsuperscript{72} That is, in those states, by law, a functioning private school may not convert to a charter school. There are a number of possible justifications for this restriction, the most important of which is that the charter school movement was sold in the
political process as a way of giving families using public schools a new choice option. Hence, the picture charter school advocates had in mind is that students attending charter schools would be students who otherwise would be attending public schools. And, on that assumption, the claim could further be made that the charter school plan merely shifts the way public money is being spent. In effect, dollars would follow the child, and he or she would take them from the traditional local public school to the charter school with no new cost to the public.

From the start, this description has been somewhat naïve on the funding side. First, there is the question of just how many dollars the pupils attending charter schools take with them. In practice, in most states this is rather less than is spent per pupil in regular public schools. For example, one 2009 study found that charter schools (across the nation and on average) tended to receive $7000 to $8000 per pupil in public funding, whereas regular public schools tended to receive and spend in the $9,000 to $11,000 range.73 Hence, and especially because charter schools often have to pay rent or interest to cover the cost of their facilities (something not required of public school principals), those running charter schools have consistently claimed that they are short-changed and that the public is inappropriately saving money via its inadequate funding of charter schools.74

Second, at the same time, conventional public school supporters often respond that charter schools are draining off public school money and that this is very harmful to conventional public schools. That money is being diverted does not alone support this claim since, after all, students are being diverted too. The main question here is what share of the costs in public schools is fixed and what share is variable. Unsurprisingly, public-school supporters claim that nearly all costs are fixed, arguing, for example, that losing two children from every grade saves schools virtually no money. Charter school supporters tend to argue the opposite, claiming, for example, that if, say, 350 children disappear from the public schools (that being the average enrollment in charter schools), this surely saves the salaries of many classroom teachers, and, they argue, in districts faced with population increases having children go to charter schools allows districts to avoid building what would be very expensive new public schools thereby saving enormous sums.
The truth surely lies somewhere in between these claims. Over the longer run, especially with states funding districts on a per pupil basis, and districts funding schools in a similar way, one would expect that the loss of, say, 100,000 children from public schools would save state government an amount equal to a substantial share of what on average is spent annually on educating 100,000 children in public schools. Of course, it is possible that at the school level, the reduced revenue from the loss of funding from, say, 5% of its pupils going to charter schools could have a negative program impact because of loss of economies of scale. Whether or not this occurs will depend on where the school is on its supply/cost curve when the enrollment reductions occur.

Third, even in states where existing private schools cannot become charter schools, it seems that charter schools are drawing a not insignificant share of their enrollment from families who either previously enrolled them in private schools or would have so enrolled them were the charter school option not available to them. Indeed, studies in New York and XX suggest that perhaps as many as one-third of the children attending charter schools in those states would otherwise be enrolled in private schools were there no such thing as charter schools.\textsuperscript{75}

These children come from families who seemingly prefer the private school to the conventional public school but prefer the charter school to either of the others. Perhaps they like the special mission or success of the charter school; perhaps they like saving the tuition cost of private school; or it may be a combination. This influx of private school students surely costs the public taxpayers more money. Nevertheless, these are children who the state has a legal obligation to educate at public expense, children who the state had been (or would have been) saved from satisfying its obligation to under prior arrangements where the families opt out.

It should be emphasized here once more that in most other economically developed nations public money completely or substantially pays for the education of most of the children attending private schools whether faith-based or not (and so the financial reason to shift from being a private school to a charter school -- if there were such schools -- would not generally come into play).\textsuperscript{76} The U.S. is very much the exception.
I want next to emphasize that the American charter school system, in many respects, turns out to be very much like the universal scholarship/voucher plan promoted by liberals like Jack Coons and me in the 1970s. The “choice” schools are mostly created through the initiative of private actors as we envisioned. The per-child funding of these schools is substantial (often not much different from the 85% of public school spending we initially proposed). Access to participating schools is universal (by lottery if there are too many applicants, which was one of the options we endorsed). There is substantial public regulation of the sort we favored (important aspects of which are meant to help assure fair access by children from low-income families), and yet these privately managed schools have a great deal of autonomy. And as with our proposal, regular public schools are formally left in place and untouched.

Yet, there is one very large difference. That is, it bears re-emphasizing what was said at the outset: no state currently allows a charter school to be a religious school (whereas under our liberal universal voucher proposal, faith-based schools could accept voucher-carrying students). So, while the “no conversion of a private school to a charter school” rule that exists in some states would by itself make it impossible for existing, private, faith-based schools simply to become charter schools, given current state law, that rule is not needed to keep charter schools from being religious schools.

Put differently, it is the explicit ban on religious schools that blocks start-up religious schools that might seek a charter from gaining one (and that ban of course also blocks existing religious schools from becoming charter schools in states that do not prevent other existing private schools from becoming charter schools). And again recall that in so many other nations, there would be no strong need for religious schools to seek to become a new thing like a charter school in order to obtain public funding. Said otherwise, in many other nations, many religious schools are very much like our charter schools in terms of both public funding and public regulation – except, of course, they are faith-based.

c. Private Faith-based Schools Today

In 1960 Catholic schools overwhelmingly dominated the world of private schools in the U.S. and enrolled more than 5 million students.
This is no longer true for a number of reasons— including the facts that Catholic families are smaller, many Catholics have moved to suburbs where there may not be convenient Catholic schools for their children to attend, and more Catholic families now prefer public schools over faith-based schools. Moreover, Catholic schools are often no longer inexpensive to faith members, as they used to be, because the available supply of minimally-paid Brothers and Sisters to teach in these schools has shrunk dramatically. Today just over 3% of Catholic school teachers belong to religious orders. Since 1990 alone, Catholic schools dropped in number from 8700 to 7400. At the same time, however, schools sponsored by (or tied to) many other faiths have been growing in number and enrollments.

By 2009-10 there were more than 20,000 faith-based schools in the U.S. serving about 4.3 million children. About a third of those schools were Catholic schools and they together served just over half of all children enrolled in faith-based schools. In 2010, there were 4300 Evangelical Protestant schools and 2100 Lutheran (Missouri Synod) schools. In terms of enrollment, about 700,000 students were enrolled in Evangelical-Protestant schools, about 300,000 students were enrolled in Baptist schools, and about 220,000 in Jewish schools. Most of the remaining students in faith-based schools attended a miscellany of Protestant schools such as Lutheran, Episcopal, Seventh Day Adventist, Assembly of God, Presbyterian, and Methodist schools. Just over 30,000 students were enrolled in Muslim schools.

Some people think of non-public schools as havens for children of the wealthy. But, however true this might be (see below) for high-priced private non-religious schools, when the focus turns to faith-based schools, this picture is off the mark. On the whole, they are not schools for children of the well-to-do (although there are exceptions). It is difficult to determine reliably what share of faith-based school enrollment is composed of children from low-income families since many of these schools do not participate, say, in federally-funded school lunch programs. Yet it appears that, at a minimum, the median share of children eligible for subsidized lunches across faith-based schools is roughly the same as in public schools. Of course, children from low-income families are not evenly distributed among faith-based schools, which is, of course, true as well for public schools.
Private non-religious schools are perhaps another matter. But they remain a small share of the private school market. Today they enroll a little below 20% of private school pupils, or 1 million of America’s school children (i.e., about two percent of all school-age children). These schools tend to be fairly high-priced, and therefore often catering primarily to financially well-off families who prefer to exercise their choice of school for their children this way rather than via their choice of residence. This seems particularly true of families that, for other reasons, want to live in cities (rather than fancy suburbs). But it is also wrong to think of these private schools as the first choice of most well-off families. Indeed, 85% of families with annual household incomes of more than $75,000 use public schools for their children (and 3% use both public and private schools), leaving only about 12% of more well-off families using exclusively private schools.

In any event, these private non-religious schools are not the focus here, since in many states they could become charter schools now if they wanted to (although many would find that inconsistent with their financial model which requires higher tuition than the funding they would receive per pupil as charter schools, which status would also preclude them from asking for tuition supplements – to say nothing of the loss of their control over admissions that would come from charter school status). What is perhaps worth mentioning is that some charter schools have become strong competitors to these private non-religious schools, as families might well prefer the free charter school to the private high-tuition schools (even if they might prefer the private school were it free).

Some people imagined that the voucher programs in places like Milwaukee and Cleveland would stimulate the creation of lots of new private non-religious schools in those jurisdictions – schools that would essentially be funded by the vouchers. But this appears not to have happened, perhaps in large part because those wanting to start new non-religious schools in those communities usually find it financially more attractive to become charter schools than voucher-accepting schools. Put simply, the higher financial support that comes via the charter school route apparently outweighs what are probably viewed as minimal extra regulatory burdens.
The picture of the racial aspects of faith-based schools is a complex one. About 12 percent of students attending faith-based schools are Hispanic and about 9 percent are African-American. These are broadly in the range of numbers that one sees in public schools. But what is the racial balance at the school level? In general, faith-based schools tend to be less racially isolated than public schools. But, of course, because of residential housing patterns, public schools remain heavily racially segregated even 60 years after Brown v. Board of Education. Hence, often if an inner city minority child moves from a public school to a faith-based school, this might marginally promote racial balance in both schools, and yet both would remain predominantly minority schools. Sometimes, a faith-based school might have the proportions of minority students noted above – 12 percent Hispanic and 9 percent African-American. How should one feel about this if the public schools in the area are more than 80 percent minority? On the one hand, surely the minority students in the faith-based school will be having what many would call an integrated experience. On the other hand, some see the private school as having pulled out non-minority students who, had they gone to public schools would make the local public schools less racially isolated.

The share of limited English learners enrolled in faith-based schools varies enormously from school to school (and faith to faith) just as in public schools. Overall, however, it appears that ELL students comprise about the same share of faith-based enrollments as they do public school enrollments.

Some people claim or fear that those attending faith-based schools will be taught to be intolerant, especially of people of other faiths. This appears to be a misconception. Notwithstanding (or perhaps because of) the faith-based content of their educational programs, and despite students being taught in many of these schools that their religion is the one true faith, surveys suggest that students in and graduates of faith-based schools (Catholic and Evangelical) are more tolerant (and more likely to engage in civic activities) than their public school counterparts (i.e., children from Catholic and Evangelical families attending public school).
Nonetheless, for many liberals the expanding place in the American education system of private fundamentalist religious schools (of whatever faith) is distressing because of what they see as the broader ‘culture war’ in the country. Families using these schools are often understood to be socially very conservative, often anti-abortion, anti-homosexuality, and the like -- the same sort of people who are trying to reintroduce prayer into the public schools and to ban the teaching of evolution from public schools or to force the teaching of ‘intelligent design’ at the same time. Yet, it is difficult for at least some liberals to favor empowering low-income families to take more control over their and their children’s lives but not with respect to their religious values.

Many appear to solve this tension by retreating the idea of a “wall of separation” between church and state. The ACLU seems to be a good example of this. One might have imagined that the Free Exercise clause would be nearly as important to the ACLU as the Free Speech clause, but by tying the organization to its own interpretation of the Establishment clause, the ACLU has often turned away from the interests of poor families with religious values.

Coons and I had a telling experience with this once in Kansas City, Missouri. There a federal judge had imposed a choice-oriented desegregation remedy on the school district based on its history of racial discrimination. One aspect was the creation of new magnet schools in the city that were to meant to be state of the art in terms of facilities and instruction – hoping that whites would join with blacks in seeking to enroll. A different feature was to require the district to offer to pay for African-American children to attend public schools in the suburbs when the family decision to enroll its children there would be integration-promoting. But none of the suburban public schools was willing to take any of the African-American children from the city.

With the support of local groups, and backed by the enthusiasm of a large number of families whose children were part of the plaintiff class, Coons and I tendered to the court an additional option. On the same terms offered to the suburban public schools, the district should be ordered to pay for the education of African-American children whose parents wanted to switch them to private schools. We then put forward a list of private schools that in the aggregate were willing to take several
thousand of these children on those terms. To be sure, a very substantial majority of these offering private schools were faith-based schools.

To give our proposal the best chance of serious consideration by the courts we sought voluntary intervention into the case at the remedy stage. But the lead lawyer for the plaintiffs, who was an ACLU activist, told us that he would oppose our intervention (which he did) on the ACLU view of the Establishment clause. Hence, a significant number of his clients were stuck with an advocate who opposed the remedy they sought. And when we were denied our motion for mandatory intervention, this opportunity to try out choice for the poor in a pro-integration setting evaporated.

While many liberals continue to have this seeming automatic aversion to public money for education going anywhere near faith-based groups, as the next section demonstrates, faith-affiliated groups are in fact already taking advantage of the charter school system.

d. Faith-based Schools that Seek to Become Charter Schools by Shedding Their Religious Nature

By 2007, investigators had already identified a number of charter schools that had strong religious roots. There is every reason to believe that there are more now. As described in a book by Lawrence D. Weinberg devoted to the topic, to survive in the face of existing state law, “parents can create charter schools that accommodate their religious belief, but not such schools that endorse their religion.”

As Weinberg sees it, charter schools can adopt a cultural mission and curriculum that nicely fits with the school sponsors’ religious values. And the school can in various ways accommodate the faith(s) of its students. This can include: scheduling school holidays to fit its students’ religious holidays – just as public schools do; having released time programs for children to leave the grounds during the day to attend worship service – as some public schools do around the nation; and perhaps making time during the school day for students voluntarily to pray and carry out other religious acts on their own if they want to do so. Such a school may also teach languages tied to the interest of religious faiths (e.g. Hebrew for Jews and Arabic for Muslims). But it may not be a faith-based school. Moreover, such schools may not select students on
the basis of their family’s religious faith, although, of course, there is likely to be substantial faith-based self-selection into such schools.

Not being a religious school means, among other things, there may be no required or school-led prayer, no teaching of religion as a creed for students to follow (in contrast to, say, bible history classes that even public schools can offer), no religious symbols all around the school, and, more generally, religion may not permeate the curriculum in ways that private religious schools often argue is a central feature of what they offer.

According to Weinberg, these faith-inspired schools should probably be (and generally are) formed and managed by independent non-profit organizations and not by religious organizations. But their initial sponsors and the board members who run the non-profit organization can be a pre-existing group of religious people of one faith, even religious pastors.\footnote{99} If they are scrupulous about their independence, these charter schools could probably rent space from churches and the like as the venue for their school (just as a number of non-faith-connected charter schools have from the start rented from faith groups the buildings of what were formerly religious schools that have closed). The space might even be physically inside, say, a church building, but the school space must be separate and freed from religious symbolism.\footnote{100} More recently, some charter schools have begun to offer on-line secular programs, and it is easy to see how families might have their children learn conventional school subjects on-line while simultaneously having them enrolled in a part time private religious school.\footnote{101}

For a number of families and faith-leaders, this development of the religiously-affiliated charter school is good enough. That is, some people are very happy to have this sort of charter school that isn’t formally a religious school but which, as a practical matter, largely brings together children from the same faith and structures itself so that the teaching and practice of the family’s faith is readily accommodated, say, through organized and conveniently located after-school programs. As the word gets around about how this sort of charter school is formed and functions, there is every reason to expect that more of them will be created. Given existing state law, public bodies chartering such schools currently have reason to include specific provisions in the charter to make sure that the school does not actually operate as a religious school.
But this is by no means an impossible task. After all, because of religious-group residential clustering, many regular public schools all over America find that nearly all of their students’ families belong to the same faith (think, for example, Mormons in many parts of Utah or Baptists in some parts of the South); and yet, on the whole, these public schools have shed themselves of school prayer and the like and are decidedly not religious schools. Moreover, some of these faith-affiliated charter schools actually trumpet the fact that the students in their schools are religiously diverse.

Nonetheless, this solution of the faith-accommodating charter school is not ideal for families who want to choose schools that are truly religious schools. They can, of course, do that now via the private sector. But such families are unhappy to have to pay local property taxes and relevant state taxes to support a public service they would not use, especially when they have to pay again for that service privately. Moreover, a large number of families simply cannot afford the private option. They would probably most prefer a reform that provides them with school vouchers they can use to pay for all (or most) of the cost of their children’s education in the conventional private sector (although some current private school operators and family users are so fearful of public regulation that might come with voucher funding that they are willing to forego any public support to retain their freedom). But the political prospects for the rapid expansion of school voucher programs currently look slim – and especially slim for those wanting universal vouchers (of either the liberal or conservative sort).

Another possible strategy, in theory, for those favoring government-funded faith-based schools would be for them to create (or become) charter schools – assuming that the regulatory burden was acceptable. But, of course, in practice that is currently legally off the table in all charter school states.

This then brings us to the legal question to be explored here: is the current discrimination against would-be religious charter schools and their religious family users unconstitutional?

II. Religious Schools as Charter Schools?
Until now, most people have assumed that the most that faith-based groups could hope for is to obtain charters for wholly secular schools that are in various ways affiliated with religious groups and that are accommodating of the religious practices of the families whose children are in the school – as just discussed.\textsuperscript{104}

At least a few legal scholars have examined aspects of the legal question addressed here\textsuperscript{105} although only Professor Aaron Saiger has directly considered the precise charter schools question. From these writings emerges a distinction that will be elaborated below: possibly, states could constitutionally elect to allow religious schools to obtain charters but, possibly, they might be able to constitutionally exclude those schools from the charter school system (as, of course, all states so far have done). I try to cast some doubt here on that latter conclusion.

\textit{a. Facial Discrimination on the Basis of Religion}

To be crystal clear about it once again, the laws of every state creating charter schools discriminate on their face against religious schools. This means that people who want to start every imaginable sort of school are entitled to ask for a charter (and in many states they are presumptively entitled to one after meeting very basic requirements) -- except those proposing religious charter schools. To be sure, as noted above, charters are not automatically awarded and in some states there are limits on how many charter schools can exist at any one time. But at stake here is not a claim for priority or special treatment for faith-based schools, but rather a desire to be considered in the same way that other charter school applicants are considered.

But current state law does not allow for that and so it necessarily means that while many parents seeking a charter school to which to send their children may well find one they like – those seeking religious charter schools will not find what they are seeking as a matter of law. Instead, unlike all other parents, they necessarily must use the traditional private sector for the choice school they prefer (if they can afford it). Doesn’t this discrimination against religion presumptively violate the equal protection clause of the Fourteenth Amendment and/or the free exercise clause of the First Amendment?
There is no obviously close analogy in the case law here. But think of these hypothetical examples. Suppose a state government decides that it will provide welfare (financial assistance) to poor single mothers but only those who are atheists (arguing, say, that those who are religious should be taken care of by others of their faith). Perhaps such a policy might be implemented by denying welfare to otherwise eligible single mothers who attend church. Wouldn’t that be unconstitutional?

Or suppose a state decides that its Medicaid benefits (that is, payment for health care) are available to Medicaid participants at any hospital in the state except for medical care provided to them at religiously-affiliated hospitals (e.g. St. Francis or Mt. Sinai). Perhaps such a policy might be implemented by refusing to pay for care at hospitals where clergy of one faith are on the payroll and available to patients in the hospital, one faith’s religious services are held at a chapel in the hospital, the hospital board is dominated by clergy, and/or the hospital has adopted policies concerning what services it will provide that are faith-based (e.g. no abortions), etc. (These are meant to be indicators that it is a religious-based hospital, or not.) Of course, some hospitals with faith-based histories have become wholly secular institutions today apart from their name, and a policy of excluding religious hospitals from participation in Medicaid might be designed to prompt the remaining religious hospitals to become secular. But would not this exclusion from the program of religious hospitals and Medicaid users who seek care in religious hospitals be unconstitutional?

Or suppose a state government announces that any bakery can compete for a contract to provide bread for government food halls (including, say, public school lunchrooms) except bakeries run by religious orders such as the Sisters of the Poor or the Christian Brothers. While bread is bread, some might find it symbolically tainted if supplied by religious groups. Yet, would not this open discrimination against religiously-based bakers be unconstitutional?

Or suppose the federal government decides that food stamps it provides to low income people are not valid for kosher or halal food (arguing, say, that people who buy those sorts of often more expensive products should not be depending on food stamps). Could the government constitutionally exclude from the program, not all costly food, but simply
food whose consumption is required by the faith of poor people receiving food stamps? I doubt it.

While these hypothetical examples all suggest nearly unimaginable scenarios today in the U.S., they also seem—at least on their face—to be highly suspect as a matter of constitutional law. In each instance, the individual and/or organizational participant involved is being singled out for worse treatment on the basis of religion. The hospital, grocer, and baker are offering secular products—health care, food, and bread—but may not participate in the program because of a religious attachment to what they provide. So, too, the individual participants are unable to satisfy a secular need they have—to cash because they are poor, to medical care, to the food they want to eat—because either they or those with whom they wish to deal are engaged in a faith-based activity.

To me, these hypothetical scenarios would appear to violate both the Free Exercise clause of the First Amendment and the Equal Protection clause of the Fourteenth Amendment. In Fourteenth Amendment lingo, they involve a “suspect classification” that would have to be justified on the basis of a “compelling state interest.” And as the First Amendment makes clear, it is very difficult to see how the state can have a compelling state interest in penalizing the free exercise of religion.

If this way of looking at the issue is correct, then it would provisionally seem to follow as well that it is unconstitutional to single out religious schools and deny them the right to be charter schools. After all, they are offering to provide the secular service of educating children, but they are precluded from participating in the government’s charter schools program because they are simultaneously engaging in religious activities. So too the families who wish to have their children educated in a school that re-enforces the parents’ faith are denied that choice (when families seeking to combine the education of their children with something else that is not about faith are able to make that selection). Can this open discrimination against families wanting to make a faith-based choice and providers wanting to offer a faith-based public service be justified?

If the state were only to operate and fund traditional public schools, the same exclusion of funding for those seeking faith-based schooling for their children would follow. But in that scenario, one might argue, the state is speaking through its regular public schools, seeking to educate
children in a publicly-determined way, promoting publicly-reached values, and so on. This is how public education has been traditionally understood. And when the government uses the purse to fund the way it speaks, it may well have no obligation to fund other speakers.\textsuperscript{107} In this respect I agree with the conclusion of Professor Laycock, Dean Minow and others that just because we have a compulsory education system that offers families government-funded public schools, this does not constitutionally require government also to provide scholarships/vouchers for families that prefer religious schools (although not everyone agrees).\textsuperscript{108}

But once the institution of charter schools has been established, things look and feel very different. Now, any private party who can make a showing that it will pursue the basic secular goals of education – e.g., teaching reading, writing and arithmetic to elementary school age children; provide college prep education and/or vocational training for secondary school children – is (at least in many states) presumptively entitled to a charter (and with that public funding) pretty much regardless of the rest of the trappings of the school. That is, the school will be funded and willing parents may choose it for their children regardless of other values the school seeks to impart to its pupils, the teaching style it adopts, the rest of the curriculum it offers, the nature of its teaching force (at least in some states), and so on. Except: the trappings of the school may not be such that it is a faith-based education that is being offered along with the secular education of those enrolled.

Of course, as discussed above, a charter school is not completely free from public control and must in some sense have its overall program blessed (so to speak) by the public body that gives it the charter. Charter-granting organizations are gatekeepers and as noted above their role gives them an interest in approving schools they think will be successful. Nevertheless, at the level of principle this sort of oversight does not seem different from the regulation of clearly private schools that we see in many states and whose regulation is clearly constitutionally valid – even in a constitutional regime such as ours that guarantees parents the right to choose private schools in lieu of public schools for their children.\textsuperscript{109} After all, aspects of the curriculum, the school year (and day) length, aspects of teacher qualifications, standardized test-taking requirements, and the like are matters that states
in some cases do, and certainly could, validly require of the private school sector. Indeed, in some states charter schools are little different from traditional private schools with respect to the degree of their regulation.

To be sure, the charter school is always at risk of losing its charter – unlike the private school which has no charter to lose – but if the school satisfies its secular educational goals and obligations to its chartering body, it would not have its charter withdrawn (nor could that legally happen) just because its sponsor decided that it disapproved of some other aspect of its operation (putting aside findings of criminal misconduct, abuse of the children, fraud, etc.). Put differently, if the children are learning, then having given a charter to, say, a Waldorf-inspired (or Montessori-inspired) charter school, the school will be able to carry on with public funding notwithstanding a claim by the funding board that on second-thought it now believes that the educational theory underlying Waldorf (or Montessori) schools is nonsense. To me, this is strongly parallel to the point that, in the same way, the state could not successfully prosecute parents for failing to comply with the compulsory attendance law if their children were learning at a suitable pace while attending a private Waldorf (or Montessori) school on the ground that public officials decided that those sorts of schools were using goofy learning theories.

Of course, not everything that calls itself a school necessarily is the sort of institution that should count as a school for purposes of the charter school law. So, for example, if twelve year olds at a “charter school” are going to do nothing but read and recite liturgy all day, the “school” probably could not get away with claiming that through this “reading and speaking” training it would be providing minimally adequate secular education, to say nothing of its failure to offer the educational curricular variety generally appropriate for children of that age like math and science. Such a pretend “school” should not be granted a charter. But it seems to me that parents sending their children to a conventionally private “school” (or “home school”) of this very same sort could (and should be) also be prosecuted for violating their obligations under the compulsory attendance laws.110

In sum, if the exclusion of faith-based schools from the charter school system seems presumptively impermissible under the principle that
government may not discriminate on the basis of religion, are there other principles that can trump that presumption?

\[ b. \text{ Do States have a Compelling Interest in Not Awarding a Charter to a Religious School because to do so would Violate the Establishment Clause?} \]

Suppose a state voluntarily agreed that charters could be granted to religious schools that meet all of the normal requirements for charter schools. Would the funding of such schools violate the Establishment Clause? If so, then it would seemingly follow that the Free Exercise/Equal Protection claim raised in the prior section would fail. That is, under this line of analysis, states that refused to fund faith-based charter schools could successfully assert a compelling state interest in support of their decision – not to violate the First Amendment.

But I don’t believe that the current U.S. Supreme Court would reach such a result. On this question, I agree with Professor Saiger.111

The \textit{Pierce} case makes clear that in the U.S. government may not require parents to satisfy the compulsory attendance law only by sending their children to conventional public schools.112 Attendance at private schools (including religious private schools) must also be recognized (although, as noted above, states can impose reasonable regulation on those private schools to be sure that children are indeed being educated there.)

As we have seen in recent U.S. Supreme Court cases, it is also legally permissible for state government, if it chooses to do so, to provide financial support to these conventional private schools and the users of these schools – at least in certain ways.113

But we also know that government may not provide financial aid in ways that violate the Establishment Clause of the First Amendment. Hence, it follows that government financial support of religious charter schools (and their users) might also violate the Establishment Clause, and if it does that would be unconstitutional. To say it once more, this becomes a “compelling state interest” that would justify not giving charters to religious schools.
So, the question now is whether funding religious schools through the state charter school program violates the Establishment Clause. Some would say that this clearly is the case and for that reason it cannot be unconstitutional to exclude faith-based schools from the charter school program. Indeed, they would say this is why states wisely choose from the outset to exclude religious schools from the program for otherwise the failure to do so would have them engaging in unconstitutional acts. But is this correct?

For some the answer is simple, and the legal analysis would go like this: Charter schools are public schools. Public schools may not be religious schools. Therefore, funding public religious schools is forbidden. But this is too simple because it simply assumes that charter schools are public schools for Establishment Clause purposes. And that might not be correct.

In 1982 in *Rendell-Baker v. Kohn*\(^1\) the U.S. Supreme Court made clear that just because a school is 100% funded by the government that does not necessarily make it a public actor for constitutional law purposes. The school there was a private school that had a contract with the Boston public schools to provide education to certain difficult students. The school district paid the private school for this service. Some teachers at the school brought an action against the school alleging constitutional violations of their rights. The U.S. Supreme Court held that this school did not engage in “state action” and hence the claims were dismissed (as the constitutional rights alleged did not apply against a private actor.) Although the contract with the school in *Rendell-Baker* looked very much like the charter that charter schools receive these days, this decision should not be taken to fully resolve the issue before us, since that case did not involve the Establishment Clause.

Professor Robert O’Neil indirectly explored this question in 1999. In a chapter centrally about whether acts by voucher-funded schools constitute “state action” and thereby trigger various constitutional rights, he notes in passing that charter schools (in contrast, at the other extreme, to home-schooling parents and in contrast with *Rendell-Baker*) do engage in state action.\(^1\) But for purposes of his analysis O’Neill made certain explicit assumptions about public control over charter schools, and he acknowledged that a charter school system of a more decentralized and autonomous sort might be different. And while he then
said that schools in such a decentralized plan would not be charter schools as we know them (in 1999), he wrote when only a dozen initial states had adopted charter schools and the overall picture was arguably quite different from what it is today. O’Neil also pointed out that courts might well find state action to exist more quickly when the action at issue involves racial discrimination than when it involves the behaviors of teachers or students. He did not at all address the religious discrimination issue before us here.

At about that same time, a student note that focused on Texas’ charter school system largely came to the opposite conclusion, finding that courts would probably not consider charter school operators as engaging in “state action” – especially when the issues before the court concerned matters such as teacher and student rights (matters that the charter school system in Texas left largely to schools to decide – although the Texas statute did forbid certain sorts of discrimination in admissions.) Like O’Neil, the student note did not examine the issue of the nature of charter schools in the context of the Establishment Clause.

In May 2014 the Office of Civil Rights of the U.S. Department of Education distributed a “Dear Colleague” letter that simply announced that charter schools are public schools and therefore subject to federal civil rights statutes just as are regular public schools. The letter says nothing about whether charter schools are engage in state action so that teachers and students have constitutional rights against charter schools, although that would seemingly follow from the letter’s assumption. Moreover, of course, the letter understandably pays no attention to the Establishment Clause.

When a school district creates a magnet or alternative school with a new and distinctive curriculum or values orientation or the like, that is a public choice of what sort of school the public institution (here the school district) wants to provide. And it seems correct that under our Constitution the school district could not choose to create and operate a Catholic school (even if it were willing also to create and operate schools teaching/following other faiths if there were family demand for them).

But, as I have been arguing, that is not necessarily the right way to look at charter schools. States and school districts don’t advertize, for
example, “we are looking to award a charter to a school that will emphasize training in science, or a school that will be bilingual, or a school that will have strict discipline, or a school that will evaluate its pupils on the basis of a portfolio assessment rather than standardized tests.” That may be how districts go about creating alternative/magnet schools. But for the charter school process (putting aside the small number of conversions of public schools to charter schools that are still owned and run by the district), the chartering bodies wait for those seeking charters to come forward and propose what they want to offer. And, as noted above, these proposing institutions are private organizations (usually formally non-profit organizations), not public institutions. Viewed in this way, the funding of charter schools looks and feels very much like the funding of voucher schools – in the sense that in both instances the government is putting up money so as to facilitate the choice by families of privately-run schools they prefer for their children that are not public schools run by the public school district.

Put differently, although awarding a school a “charter” and calling it a “public charter school” may suffice to make it a public school for state law purposes where state constitutions restrict financial support to “public” schools and prohibit aid to non-public schools, this does not resolve the question of how to treat the school for Establishment Clause purposes. For that, the fact that the initiation of the school comes from private parties and the fact that families are never assigned to the school but only attend by their own private choice arguably makes a great deal of difference. After all, the underlying point of the Establishment Clause is to prevent government from “establishing” a religious institution.

We know from Zelman, the Cleveland school-voucher case, that merely providing funding which benefits a religious institution cannot by itself be enough to violate that principle. There is every reason to believe that religious organizations benefit from a voucher program that provides publicly funded scholarships that families sign over to religious schools to pay for their children’s tuition. The same would be true if the Sisters of the Poor Bakery were allowed to bid for and win a government contract to provide bread to the schools, or when Catholic hospitals are allowed to participate in Medicaid. It is also clear that the Cleveland voucher plan enabled families to pursue their religious faith just as our current rules that allow food stamp recipients to spend them on kosher or halal food does. These benefits to the exercise of religion are collateral
side effects to the use of public funding to satisfy other secular objectives – to keep poor people healthy and fed, to provide nourishing food in public cafeterias at low cost, and, of course, to help children become educated.

Still, this does not necessarily mean that the formal arrangements by which the money goes to the religious organization are irrelevant for constitutional law purposes. Justice O’Connor’s concurring view in *Zelman*\(^{118}\) was that it made a great deal of difference that the voucher went to the parents and then they made their own genuine free choice to use it as they wish (and it seemed also relevant to her that there were other choice programs in the Cleveland system, including charter schools). For her, then, the payment of a lump sum directly to a religious charter school based on the number of students it enrolls would probably be unconstitutional. For her, this would probably make the connection between government and religion too tight. More specifically, she would probably conclude that the connection would be seen to be too tight by the average informed citizen who thought about the program – a matter that she felt was central to deciding the First Amendment question. It is not that she believed that no direct payment from the state to private schools could be tolerated. But such payments would have to be clearly earmarked for exclusively secular purposes – like paying for the books that are also used in public schools, like paying for bus rides, like paying for secular special education services needed by disabled children, etc. A lump sum transfer to a religious school, however – even if said to be for the secular education it provides (the value of which clearly is enough to justify the payment made)\(^{119}\) – is something that Justice O’Connor would probably have found impermissible. Indeed, because charter schools are so often talked about as public schools and are so identified in many state laws, that alone might, for Justice O’Connor, be sufficient that make it too much appear to be aid to religion and hence in violation of the Constitution were religious schools to be given charters.

But, of course, Justice O’Connor is no longer on the Court. And, in my view, a majority of the present Court membership is likely to see things differently. Three justices from the five-member majority in *Zelman* are still on the Court -- Justices Scalia, Thomas and Kennedy. I believe that they would join with at least Justice Alito and Chief Justice Roberts in
looking at the First Amendment differently from the way Justice O’Connor did. This majority of the Court is likely to conclude that there is no economic difference between the direct funding of a charter school but which only gets the money if parents decide to send their children there, and the indirect funding of a voucher school which only gets the family’s voucher signed over to it if parents decide to send their children there. Hence, I believe these Justices would conclude that the “primary effect” of both the programs is the same – to help educate the nation’s young. Moreover, the “primary purpose” of both plans is also the same – to expand family choice in education by allowing for the government funding of privately-created and managed schools that parents select for their children (“primary effects” and “primary purpose” being two tests the Court has deployed on many occasions including Zelman in its application of the Establishment Clause).\textsuperscript{120}

Or put differently, I believe at least a current five Justice majority would likely adopt the broad approach of Chief Justice Rehnquist in Zelman: 1) would parents be making a “genuine and independent private choice” by selecting religious charter schools for their children, and 2) would a charter school program that includes religious charter schools be “neutral”? Surely they would answer “yes” to both of those queries.

Don’t forget that this majority of Justices has also been very supportive of religious accommodation in recent years in a wide variety of settings,\textsuperscript{121} and including faith-based schools among the schools that can qualify for charters is certainly a form of accommodation.

Furthermore, in contrast the school voucher plans that have been created to date, there is every reason to believe that even if faith-based schools could become charter schools, most of the schools participating in the plan will be non-religious schools. Certainly if one faith-based school were to sue to become a charter school, then at that point it would be seeking to become a single parochial school in a sea of secular schools. Hence, the symbolic connection of government with what were overwhelmingly religious private schools in the Cleveland voucher plan would be absent. Moreover, not just at the start, but over the longer run, one would expect that non-religious schools would remain not only a substantial core but probably the majority of the participants in the charter school scheme. Hence a feature of both the Cleveland plan and
all of the prior aid-to-private school programs that came before it that bothered at least some of the Justices would be absent.\textsuperscript{122}

There might arguably be more “entanglement” between the public and charter schools than between the public and voucher schools (“entanglement” being another test the Court has frequently pointed to in the past in Establishment Clause cases, although it appears to have put that aside more recently).\textsuperscript{123} Entanglement has always been a complicated and slippery concept. The symbolic entanglement between the state and religious charter schools would primarily be a matter of how one “sees” the two systems. Voucher plans clearly enable families to choose private schools. I have been arguing that, on close examination, charter school plans do the same thing. But others may see it differently.

Yet, merely to say that there is a difference because charter schools are “labeled” for some purposes as public schools seems the wrong way to look at things. For just as charter schools are seen by some observers as obviously public schools, if you listen to supporters of conventional public schools you will hear the opposite. They regularly loudly complain that charter schools drain funds and desirable families from the public schools (by which they must mean that charter schools to them are not truly public schools); and they regularly complain that charter schools are run by private entrepreneurs and hence do not at all have the central characteristics that they ascribe to being a truly public school.

In the end, charter schools are best understood to be somewhere in between regular public schools and traditional wholly private schools and therefore plausibly labeled either way. My belief is that a majority of the Court would view charter schools as private for this purpose.

As for actual bureaucratic entanglement between the state and charter schools, it might be in many places that there is more regulatory interface between government and charter schools than between government and traditional private schools. But it seems clear that this sort of additional connection by itself does not run afoul of the Establishment Clause. After all, detailed regulatory requirements that are imposed before hospitals can be reimbursed for Medicaid payments are hardly sufficient to result in making it unconstitutional to include
Catholic hospitals in the Medicaid (which is the rule today, unlike my hypothetical). To be sure, the payments there are made for what appear to be exclusively secular services, whereas charter schools are paid for services that, it is assumed here, inextricably mix secular and religious goals. Yet, there appears to be no reason for the state to examine the religious aspect of the education that would be provided by religious charter schools – just as there would be no reason for the government to investigate whether certain food was truly kosher or halal when food stamp recipients are allowed as they are today (unlike my hypothetical) to use their food stamps to buy the food commanded by their religious faith. Moreover, as already noted, the state is already somewhat entangled with traditional private schools through their “reasonable regulation” and that of course does not make the compulsory attendance laws unconstitutional. And don’t forget that private schools participating in voucher plans are subject to substantial restrictions as a condition of accepting public money, a factor that clearly did not prevent the Court from upholding the Cleveland plan.

In *Widmar* (1981), *Lamb’s Chapel* (1993), and *Good News Club* (2001) public authorities defended their decision to exclude religious groups from using public facilities on equal terms with other groups on the ground that to do so would violate the Establishment Clause, in part because this would entangle the state and religion. The U.S. Supreme Court rejected this argument in all three cases, finding that including such groups among those who are allowed to use the facilities would not be unconstitutional.

In the *Rosenberger* case (1995), the University of Virginia had denied student religious groups funding which was otherwise available to other student groups. The university again argued that to fund religious groups would violate the Establishment Clause. The U.S. Supreme Court rejected this argument once more. Viewed this way, *Rosenberger* is a clear precursor to *Zelman*. The Court’s view was that the relevant student activities fund was used to pay for communications initiated by various student groups. This was not government speaking, but rather the government promoting speech within its student body. In such a setting, it would not amount to an establishment of religion to include student religious groups in the program. If the charter school program is seen in the same way, then *Rosenberger* provides a strong analogy for the issue under discussion here.
To distinguish *Rosenberger* it would seem that the charter school system would have to be viewed as a mechanism by which the state seeks to offer exclusively non-sectarian schooling in innovative settings. Perhaps analogous to a non-profit charitable foundation that has sent out a “request for proposals” along a certain line, the state by adopting a charter school program would be understood to be announcing that it will receive petitions by those seeking to serve the state’s own agenda of secular education through the use of a private non-profit vehicle. But, Establishment Clause concerns (or hostility to religion) aside, it seems inconsistent with the state’s central objective of promoting family choice in education to then automatically reject educational programs that some parents want for their children because the program is proposed to be offered through a religious school. Moreover, to the extent that charter schools are viewed as vehicles for improving the educational attainments of America’s children, it would seem bizarre on that ground to exclude religious schools when the educational accomplishment of faith-based schools has been quite strong as compared with public schools.\textsuperscript{128}

To be sure, the on-the-ground politics behind the launching of the charter school movement may have then required that charter schools be non-religious schools for advocates of the plan to achieve the needed majority vote. But, it seems to me that a similar argument if made in *Rosenberger* that the student activities fee could only have been adopted if student religious groups could not receive any of the proceeds would surely not have saved the restrictive nature of the University of Virginia program.

In Maine, Vermont and New Hampshire there are some small school districts that do not operate their own schools.\textsuperscript{129} Instead they pay for their students to attend elsewhere, sometimes at private schools. This program, which goes back a very long time, is functionally equivalent to a voucher plan in those communities where families are given a number of private choices as to where their children may attend at public expense. (In some communities, by contrast, the local town contracts with a single provider – perhaps a nearby public school district – to teach its students.)

In 1981 the Maine legislature voted to exclude private religious schools from the program on the ground that including them would violate the
Establishment Clause. Some years later the town of Raymond, which did not operate a high school and paid for local students’ education at a variety of private schools but not faith-based schools, was sued by a group of families seeking to have their children’s education at a Catholic high school paid for by the town. The attack on the exclusion of religious schools from the family options was based (for purposes relevant here) on the claim that this violated the Equal Protection Clause. This exclusion was defended on the ground that to include those schools would violate the Establishment Clause. And in a 1999 decision the Maine Supreme Court agreed with the latter claim. This decision came after the Rosenberger case but before Zelman. The Maine Supreme Court adopted what became Justice O’Connor’s position in Zelman, saying that the Maine approach of paying the private school’s tuition directly to the school that participating children attended, rather than via a voucher given to parents who would sign that voucher over to the school, would make it unconstitutional to allow religious schools to participate in the program. Although Justice O’Connor would probably agree, this case makes vivid the thinness of the formal distinction between direct and indirect payments. Of course, were this Maine decision as to the meaning of the Establishment Clause still good law, it would imply that religious schools could not be charter schools. But, as I already argued above, there is good reason to believe that a majority of the justices on the current U.S. Supreme Court would not see things this way.

The Maine court distinguished Rosenberger (which also involved direct funding) because, as Justice O’Connor in her concurring opinion in that case made clear, there technically were no state funds at issue there – as the student activities fund was not financed by taxes. Yet, again, I think it unlikely that Rosenberger would come out differently today if the University of Virginia (a public university) were to fund its student groups out of a general allocation of state money.

In sum, I agree with Professors Saiger and Laycock (seemingly) that the current U.S. Supreme Court would likely conclude that it would not be a violation of the Establishment Clause for a state to choose to award a charter to a religious school.

c. **Even if States May Award Charters to Religious Schools, Must They?**
Here is where I offer a position different from that of Professors Saiger and Laycock. In the *Witters* case, decided by the U.S. Supreme Court in 1986, a blind college student in the state of Washington applied to the Washington Commission for the Blind for financial aid. He was attending a Christian college, studying to become a pastor, missionary or youth director (of a religious organization). His application was denied and the Washington Supreme Court upheld the decision on the ground that to award him funding for this sort of education would violate the Establishment Clause. The U.S. Supreme Court unanimously reversed.\(^{131}\) Although the facts there involved higher education, this decision clearly paved the way for the *Zelman* decision. Based on *Witters*, so far as the federal constitution is concerned, Washington could have granted financial aid to that student.

But just because Washington could elect to support such a student without violating the federal constitution, must it? This issue returned to the U.S. Supreme Court in *Davey v. Locke*.\(^{132}\) Like many other states (some put the count at around 37),\(^{133}\) Washington has a provision in its constitution that bars funding of religious schools. Many of these provisions were adopted in the later part of the 19th century as part of an anti-Catholic school movement that tried (but failed) to achieve a similar amendment to the federal constitution.\(^{134}\) These so-called Blaine Amendments (after the Congressman who headed the national effort) are phrased differently from state to state and their words have been interpreted differently by state supreme courts.\(^{135}\) Sometimes the no aid to religious school provision is joined with a provision prohibiting aid to any school not under the control of the state.\(^{136}\) As mentioned earlier in this article, the existence of Blaine Amendments is one reason why charter school advocates initially were keen to term charter schools public schools (and why they argued that the “charter” feature satisfied the “control” requirement of some state constitutions).

Given its interpretation of the Washington constitution, the Washington Supreme Court determined that it would be unconstitutional under its law for the state’s generally available Promise Scholarship program to provide financial aid to support Joshua Davey because he was studying devotional theology at a religious college.\(^{137}\) Since *Witters* had made clear that Washington *could* aid Davey without violating the Establishment Clause, Davey believed he had a strong case that the state
was violating his Free Exercise rights by excluding him from the program (that applying the Washington Blaine Amendment in this way was unconstitutional under the federal constitution). But he lost.

Writing for the Court, Chief Justice Rehnquist concluded that there is some “play in the joints”\(^\text{138}\) between the Establishment Clause and the Free Exercise Clause. Rehnquist cited the \textit{Walz} case which long earlier upheld as \textit{not} violating the Establishment Clause a “neutral” law that allowed churches along with other non-profit organizations to be exempt from property taxes.\(^\text{139}\) The idea the Chief sought to convey in his opinion was that while the opponents of the churches’ tax exemption (who brought the case before the Court) did not have a valid Establishment Clause claim against the exemption, the churches in \textit{Walz} also had no Free Exercise claim that constitutionally entitled them to a property tax exemption if it had been extended only to other non-profit organizations. Put differently, according to the Chief not every matter involving religion in some way has to be resolved by the Court by applying one or another of the clauses of the First Amendment.

But notice that the \textit{Walz}-based argument advanced by the Chief in \textit{Locke} was not based on the holding in \textit{Walz}. There, the Court was not actually called upon to decide whether excluding religious groups from among all other non-profit groups from the tax exemption would or would not violate the Free Exercise Clause.\(^\text{140}\)

Putting aside this hypothetical analogy, what Chief Justice Rehnquist specifically concluded was that while Washington could have awarded aid to Davey if it wished, it was not constitutionally obligated to do so. In its details, \textit{Locke} may look to some like a very narrow and special case. The applicant wanted to obtain a “devotional theology degree” so as to be trained to be a minister. So, it is perhaps understandable that a program of purely religious instruction for a religious career is something that the justices felt states should not be \textit{required} to support even if they could. But is \textit{Locke} really only narrowly restricted to this sort of case, or does \textit{Locke} suggest that the Court believes there should be this “play in the joints” as a general matter – especially when it comes to state funding decisions?

In a very thoughtful 2004 article Professor Douglas Laycock (who actually thinks the Court came to the wrong decision in \textit{Locke}) argues
that the Court is likely to apply *Locke* broadly in cases involving public funding,\(^{141}\) and Professor Saiger agrees with this.\(^{142}\) I am not so sure.

Some might initially think that *Locke* is simply incompatible with *Rosenberger*. But *Rosenberger* was decided not as a violation of Equal Protection or the Free Exercise clause but of the Free Speech Clause – on the grounds that refusing funding for the promotion and publication of papers by a religious student group amounted to “viewpoint discrimination” in violation of this part of the First Amendment. And while those who seek to gain approval for a religious charter school might argue that they too are attempting to exercise their free speech rights, it is not at all clear that they can make out a “viewpoint discrimination” claim. Funding schools and funding pamphlets may not be understood to be the same thing, a point that seems to underlie *Locke*, although Professor Laycock is not convinced of the distinction.\(^{143}\) And recall, as an aside, that Justice O’Connor emphasized that it was not government money (but student fee money) that was formally involved in *Rosenberger*.\(^{144}\)

But, of course, by now neither Justice O’Connor nor Chief Justice Rehnquist sits on the Court. The vote in *Locke* was 7-2 with Justices Scalia and Thomas dissenting. Even if Chief Justice Roberts and Justice Alito were to join them, *Locke* would presumably remain good law because Justice Kennedy voted with the majority in that case. Yet, the question is how broadly or narrowly Justice Kennedy, Justice Alito and the current Chief would interpret *Locke*. That is not self-evident.

Lower courts have grappled with *Locke*. Then Judge Michael McConnell, now a Stanford Law professor, writing for the 10\(^{th}\) Circuit in the *Colorado Christian University* case (2008)\(^{145}\) distinguished (or avoided) *Locke* by finding that Colorado’s college scholarship program (not initially self-evidently different from Washington’s) actually discriminated among religious groups and therefore was unconstitutional regardless of what *Locke* might otherwise imply.\(^{146}\)

But in *Eulitt v. Maine Deparment of Education* (2004)\(^{147}\) fast on the heels of *Locke*, the 1\(^{st}\) Circuit read *Locke* far more sweepingly and upheld the Maine law that allows non-operating school districts to pay for the education of their students in private schools but not in religious
private schools. Regardless of whether it might be permissible to make such payments (after Zelman, see the discussion above), the panel concluded that Locke clearly gave Maine the right to decide not to fund students attending religious schools.

Following language in Locke, the opinion says that there is no religious animus behind the Maine program. Rather, the opinion states, the reasons for limiting the schools where students may attend with public support “include Maine's interests in concentrating limited state funds on its goal of providing secular education, avoiding entanglement, and allaying concerns about accountability that undoubtedly would accompany state oversight of parochial schools' curricula and policies (especially those pertaining to admission, religious tolerance, and participation in religious activities).”¹⁴⁸ There is a certain irony here because, at least as a nationwide matter, Blaine amendment limits on funding children attending private schools are undoubtedly rooted in animus towards Catholics and Catholic schools. But, as Professor Laycock points out, the way the U.S. Supreme Court dealt with the Blaine amendment history in Locke case makes it highly doubtful that actions taken in the 19th century will come back to strike down state political choices made in the late 20th or early 21st centuries.¹⁴⁹

Moreover, the 1st Circuit panel correctly pointed out that when the U.S. Supreme Court in Locke talked about animus (which it agreed might serve to invalidate a state law) it asked whether “the state action in question imposes any civil or criminal sanction on religious practice, denies participation in the political affairs of the community, or requires individuals to choose between religious beliefs and government benefits.”¹⁵⁰ Of course, neither the Maine plan nor the Washington scholarship plan in Locke criminalized attending private religious schools. This serves to distinguish the Babalu case where a specific religious rite was criminally outlawed.¹⁵¹ Nor, of course, do the Washington or Maine regimes prevent those who attend religious schools from, say, voting.

Whether these plans require individuals to choose between religious beliefs and receiving benefits is a harder question, however. To be sure, the students are free to accept the government benefit by attending non-religious schools, and that seemed enough for the 1st Circuit, which saw
itself as just following the *Locke* opinion in this respect. Is this convincing in the setting before us involving religious charter schools?

In some faiths there may well be a duty to send your children to religious schools and under current charter school rules those families surely are directly forced to choose between violating their faith and giving up the benefit of subsidized education for their children. Even those who are not compelled by their faith but wish, in pursuance of their faith, to give their children a religious education are in a genuine sense financially penalized. Indeed, the parents in this setting seem to me to be more directly burdened than those in the college scholarship plans who are seeking training in religion. Getting trained so that you can later be hired in a religious role may be the educational goal of those college students, but it is not quite the same as the *practice* of their faith. By contrast, providing one’s children with religious education is. Nonetheless, the *Eulitt* panel clearly read *Locke* to permit states, via spending choices, to decide not to expand their programs to include religious schools. And if this is correct, then it would also seem to follow that states could as well choose to exclude religious schools from their charter school plan, even if it would be constitutional to include them. And this is exactly how Professor Laycock reads *Locke*: when it comes to state funding, very little is required by the Free Exercise Clause (or the Equal Protection Clause) -- even though he agrees that “Refusing state funding for math and reading, because the school also teaches religion, is clearly a penalty on teaching religion and on attending a school that does so.”

Yet, not too much should be made of a 2004 Circuit Court panel in predicting how Justices Roberts, Alito and Kennedy would see *Locke* today in the context of the issue raised here. Moreover, Professor Laycock also wrote more than ten years ago when there were other justices on the Court, and his primary focus was on a hypothetical refusal by the state to provide vouchers to private religious schools (although in passing at one point he mentions the possibility of religious charter schools, but in a context in which he emphasizes what I have emphasized above that this is hardly the same as funding the training of clergy). Moreover, Professor Laycock mostly seems to be asking whether the Court might require the funding of vouchers for private religious school users who object to the state exclusively funding traditional public schools (a fact pattern I above suggested could be distinguished on
government speech grounds). But at least once in his article he imagined a statute by which that the state might provide vouchers but provide that they could only be used at private secular schools (which, of course, is not what jurisdictions adopting voucher plans to date have done).

So, how should we think about *Locke* today? Let’s turn back to the hypothetical examples of religious-based restrictions I gave at the beginning of this article. It still seems to me that in the great unlikelihood they would be enacted, at least some of them (and probably all of them) would be stuck down by the current U. S. Supreme Court notwithstanding *Locke*. Giving welfare only to atheists? Surely that makes poor single mothers choose between money and going to church and financially penalizes those who make the latter choice. That this is a state spending choice designed only to help certain mothers seems to me unlikely to save the provision. As I suggested earlier it is possible that legislators might honestly think that religious groups will take care of their own faith members, which means they are perhaps not acting with the sort of animus towards religion that the Court had in mind in *Locke*. But the plaintiff will be someone who is poor despite her faith, and I cannot see such a blatant discrimination being upheld.

What about preventing food stamp recipients from using those food stamps to buy the food their religious beliefs require them to eat? I can’t see how or why there would be “play in the joints” for this restriction, either. Of course, Congress can decide that food stamps may not be used to buy sugar-sweetened beverages. But to attach a condition (on improvidence grounds) that prevents poor Muslims and Orthodox Jews whose faiths require them to eat only (albeit often more expensive) halal and kosher food from buying that food seems indefensible even under *Locke* (especially because food stamp users are otherwise now entitled to use their benefits for other high-cost foods if they wish).

Both the welfare and food stamps examples seem to me to involve explicit penalties arising from the exercise of religious beliefs. And it seems to me that, notwithstanding either *Locke* or the 1st Circuit in *Eulitt*, this is true as well if a family signed its child up for a religious school (in furtherance of or perhaps even as compelled by its faith) but the school then was denied a charter for the sole reason that it was a religious school. Now the family would have to pay tuition for its child.
It would seem therefore to come down to whether, in retrospect, *Locke* will be understood as being about a historic avoidance of public funding of ministry training. But even if so, that does not necessarily end the matter. For even if not using taxes to fund the training of ministers is special, perhaps the tradition of not aiding private religious schools would somehow also be seen as special, thereby allowing some play in the joints for the rules concerning charter schools as well (in contrast to our not having a tradition of penalizing poor people for exercising their religious beliefs). Yet, as Professor Laycock points out, our “long history” of a high wall of separation between church and state in the school funding realm, is actually a rather short history, and clearly not the universal practice in the early days of the Republic (when religious schools did receive public funding), and, indeed, through the first half of the 20th century the “public” schools were decidedly “Protestant” schools, in terms of school prayer and the Protestant nature of school readers, etc. And, of course, the upholding of financial aid to (or through those using) private religious schools has now become clearly permissible over the past two decades and is now in place in a substantial number of states.

Notice again that the argument for allowing religious schools to become charter schools is not the same as arguing that private school users have a constitutional right to vouchers. As I argued earlier, that would be a much larger reach. Remember that charter schools are subject to some restrictions that religious schools would also have to comply with were they to become charter schools. Indeed, some religious schools, just like some private non-religious schools, would not want to become charter schools even if they could. For example, they might not want to give up their control over admissions (and their right to charge as much as they wish). They might also object to other standard terms imposed on charter schools including opening up their financial records to public officials, for example.

Indeed, these private religious schools might actually oppose allowing any religious schools to become charter schools because if others did and they did not that would create competition that they might well not appreciate. (For this same reason some private schools oppose voucher plans – knowing that they would never accept vouchers in light of the regulation that did or might come along with the voucher, and not
wanting private school competitors to have the advantage of public funding.

But for those religious schools willing to accept the charter school program on the same terms as other charter schools with their own distinctive curricula, it is difficult to come up with a justification as to why they should be automatically excluded. Professor Saiger observes that states have political and financial reasons not to include religious schools as charter schools.\textsuperscript{154} This perhaps helps us understand why the current laws are drawn to exclude faith-based schools.\textsuperscript{155}

But, and Professor Saiger agrees, political and economic reasons cannot automatically constitutionally justify the discrimination. After all, political or financial reasons for, say, keeping churchgoers off of welfare, or religious hospitals out of Medicaid, or religious bakeries out of the government contracting business would, to me, seem insufficient arguments to justify such exclusions. If charter schools are really about giving families the ability to choose among privately-created schools that are willing to meet certain basic educational criteria, then on what basis constitutionally acceptable basis are schools that educate children in a context permeated by religion to be excluded?

Many ordinary citizens will respond by saying that they don’t want their tax dollars going to schools that conduct prayers, teach children that sex outside of a heterosexual marriage is a sin, teach intelligent design as an alternative to evolution, and have children learn that the Bible the school uses is the word of God, etc. Many of these people who point to an objectionable use of their tax dollars don’t really like wholly private schools teaching these things either, but they have come to accept \textit{Pierce}. To have public money and public sponsorship associated with such schools, however, would be very distasteful to them – even if the children attending these schools learn the basic secular education skills (reading, writing, arithmetic, etc.) that all charter schools undertake to teach. Ultimately, these people are troubled by the whole notion of “family choice” – fearing that this could turn America into a religious battleground of the sort they have seen in Northern Ireland, the former Yugoslavia, Lebanon and elsewhere in the Middle East.\textsuperscript{156}

Others, of course, see family choice in education quite differently and would point to countries throughout Europe, Canada, Australia and the
like where public funding of religious schools has been in place for ages, as well as many former Soviet-dominated nations that, once having obtained their freedom, promptly put in place schemes to fund family choice of religious schools. These supporters of family choice argue that empowering parents to choose what they think is best for their children is not only good for families but also a way of making more families appreciate the tolerance America shows for differing points of view. For many parents, teaching values to their children is, in practice, their very most important exercise of their Free Speech rights. Family choice proponents believe that when people realize that they are supported in expressing their rights, they will support that in others as well (a position that seems very Pollyanna-ish to others, who perhaps privately worry that poor people will be enticed into fanaticism in ways that current users of private schools in the U.S. seem not to be).

Another point made by family choice advocates is that if faith-based schools could become charter schools, some of the most contentious religion-based battles in our traditional public schools might fade away. Those who are so keen on prayer, bible study and the like and so opposed to certain matters they now find present in our public schools (like sex-education classes) could move their children to charter schools that are more in line with their values. They further argue that this is an important dimension of the diversity that the charter school movement is supposed to be about.

This brings us to a final distinction to be made between the problem before us and the one presented in Locke. There, the plaintiff chose a job-related course of higher education to pursue. When it comes to elementary and secondary education, however, parents are compelled to force their children to participate (on pain of criminal prosecution and/or child neglect proceedings). For many low income parents who cannot afford private religious schools, but who want a religious education for their children, this means they must forego the exercise of their faith and send their children to a traditional public school whose value teachings the parents may well find in conflict with their faith. The failure to permit religious schools to be charter schools, therefore, imposes a real religious deprivation on those families.
So, it might come down to this. If charter schools are really about empowering families to choose from a wide range of options as a way of finding the sort of school that parents believe is best for their child, then to allow states to exclude the preferences of a significant number of families because of what appears to many to be a hostility towards religion seems unacceptable. But if instead charter schools are seen as a way of delivering modest variations on what conventional public schools try to do and all too often fail to do, then in light of many people’s acceptance of the idea of a high wall of separation between church and state, perhaps a choice to exclude religious schools from the game might be thought acceptable. Put differently, are charter schools about liberty or about bureaucracy? For Justice Kennedy, who could well be the key vote on this issue as with so many others, the “freedom” or “liberty” to direct you children’s education in ways that are in harmony with your family’s religious faith is likely to be seen as part of the individual freedom in intimate matters that Justice Kennedy has been supporting in a range of other important decisions.\textsuperscript{158}

Ironically, as faith-affiliated charter schools become more common – schools that emphasize values that align with their constituents’ religious beliefs and which broadly accommodate the largely uniform religious beliefs of their participating families – the view that charter schools are just about new ways of creating better versions of public schools seems increasingly insupportable.

\section*{III. Conclusion}

Under the U.S. Internal Revenue Code, taxpayers are allowed to take deductions for contributions made to qualifying charitable organizations.\textsuperscript{159} At present these qualifying donees include religious institutions. Could Congress constitutionally change the law and exclude religious institutions, providing tax deductions only for donations to other non-profit groups that provide charitable or educational services? The dictum in Chief Justice Rehnquist’s opinion in \textit{Locke} asserts that Congress could do this. Although I am not convinced this is correct, let us assume for these purposes that contributions made directly to churches to support the salaries of their pastors and/or the upkeep of the
buildings used for prayer and other religious worship could be denied tax-deductible status if Congress chose to do so.

But what if Congress also denied tax deduction status to donations made to religiously-affiliated organizations which provided social services, medical services, or educational services as part of their religious mission? For example, could Congress legally distinguish in this way between donations made to the Red Cross and the March of Dimes on the one hand and Catholic Charities and the YMCA on the other? And closer to the problem examined here, could Congress legally distinguish between contributions to Stanford University and to Santa Clara University? I don’t think so.

If I am right, this means that the “play in the joints” emphasized in *Locke* ought to be restricted to legislative decisions regarding public financial support of wholly/centrally religious activities. On this analysis, I believe that religious charter schools should be outside that category because, in addition to their religious mission, they are also squarely about educating children in core skills that schooling is fundamentally about – reading, writing, arithmetic and the like. Put differently, a church and a church school are not the same thing if the school is really a school.

Suppose I am correct that it is unconstitutional to adopt a pro-family choice charter school program and then to exclude religious charter schools from the menu of schools from which families are allowed to choose. I will assume here that two important things will follow from such a legal decision. First, I will assume that such a ruling would not invalidate a state’s entire charter school program under state law even if the state has a Blaine provision in its constitution. The easy way to get to this result is for state courts to conclude that, for purposes of the state constitution, faith-based schools that receive charters are “public” schools since they, like all other charter schools in the state, must take all comers, may not charge tuition, are subject to the terms of the charter, and are publicly funded. Second, I will assume that, as a political matter, states will not entirely repeal their charter school programs once they learn that faith-based schools must be allowed to apply. I base this on the combination of the growing political power of the existing non-religious charter schools and their constituents who would fight hard to
prevent their demise and the ongoing desire by the unions and others to block voucher and tax credit programs from gaining more ground.

On these assumptions, if the U.S. Supreme Court were to invalidate the de jure discrimination against faith-based charter schools, would existing private religious schools seek to become charter schools in droves (at least in states that permit existing private schools to covert to charter schools)? I am skeptical that would occur right at the outset. Many existing religious schools, like other existing private schools, would at least initially conclude that they want to retain features of their operation that would be disallowed by becoming a charter school – perhaps most importantly giving up the right to be selective in which applicants they admit to the school. Others would be nervous about trying to get into the charter school game, fearing that bureaucrats might be hostile to applicants whose right to a charter was won only through litigation.

Nonetheless, some private schools, I predict, would seek to convert to charter schools. I have in mind, for example, inner-city Catholic schools that may well today be serving a substantially or even largely non-Catholic student body, composed primarily of children from low-income families. These schools may well be happy to comply with the charter school rules in order to gain public funding so long as they can remain Catholic schools. I also have in mind, for example, some under-funded Christian (or Jewish or Muslim) fundamentalist schools that currently enroll children of modest income families with strong religious beliefs. While some of these sorts of schools and the families affiliated with them would have nothing to do with government for fear of intrusion on their religious goals, others, I predict, would seek to become charter schools in order to gain the funding that would allow them to provide a much stronger education to their students than they are able to afford on their own. These schools would be happy to agree to accept all applicants, realizing that, as a practical matter, few families without similar and strong religious beliefs are likely to apply; and, unlike private schools appealing to well-to-do families, such schools would have no felt need, say, to charge tuition beyond the charter school funding level.

As yet another example, I predict that some of the existing faith-affiliated charter schools discussed earlier would convert to religious charter schools because that is what they would have preferred in the first place but believed it was impossible to be. Indeed, other groups
thinking of starting or converting to a faith-affiliated charter school would likely be more inclined to take up charter school status if they could be openly religious schools. Moreover, other existing charter schools that are not currently faith-affiliated might have been started by people who would prefer to be running a faith-based school and believe that the families whose children are currently enrolled in the school, on the whole, would prefer that as well. If faith-based charter school applications come from the ranks of existing (and successful) charter schools, there should be little doubt that the school is achieving and will continue to achieve its secular educational goals, and that should make it relatively easy for the relevant charter school authorizers to approve a new or renewed charter for this change in the school’s emphasis.

After this modest/moderate rush to take advantage of religious charter school status, I imagine that the remaining existing private religious schools would wait and see how things turn out. Would religious charter schools be regulated in ways that religious groups find intolerable? Would religious charter schools thrive? That could well depend on politics, and the politics could well be changed if religious schools are allowed to be part of the system.

Of course, in states that neutrally preclude all existing private schools from becoming charter schools, a holding that it is unconstitutional to prevent religious schools from achieving charter school status would only enable new religious schools to apply for charters. In those states it is difficult to predict just who would come forward with such proposals and from where they would draw their students. But it seems clear that, at the start at least, fewer religious schools would come forward to become charter schools than if the state rules permitted conversions from existing private schools to charter schools.

Still, I would expect some religious families now unhappy with the public schools their children attend, but unable to afford to start private schools, would create religious charter schools. I would also imagine that some inner-city Catholic schools would close and lease their facilities to new faith-based charter schools. These new schools might well appeal to some of the families whose children attended the former school.
Regardless of the initial take-up rate, were faith-based schools permitted to be charter schools, then the structure of school choice in place in the states with charter school programs would be remarkably similar to the school choice plan that Jack Coons and I advanced more than forty years ago.
1 Cite to CER and give some state law examples.

2 Coons and Sugarman *Education by Choice* 1978

3 For that see Coons and Sugarman supra

4 Discussed below

5 Coons and Sugarman; David Tyack; E West

6 Cite

7 Catholic schools at that time cite C Glenn

8 Friedman

9 Friedman, *Capitalism and Freedom*

10 Case Cite

11 Case Cite

12 Case Cite

13 Case Cite

14 Cite cases including *Lemon, Nyquist*, etc.

15 Cite articles by Levin, Jencks, and Sizer. See Coons and Sugarman

16 Cite Coons and Sugarman and Glenn

17 Cite Food Stamps USC

18 Cite Medicaid USC

19 Cite our 1971 and 1978 books


21 Cite to Friedman’s funding proposal (NYTimes) and our support level proposal (e.g., CLR article)
22 Cite to Friedman Foundation, CER, Alliance for School Choice and related centers

23 Cite to the two CA initiative propositions and our opposition to them.

24 Cite Glenn and Mason re other nations. Nor has our proposal been put to the voters of any state via initiative process – something we tried to do in CA in the past but were unable to launch effectively. Cite to proposed initiative.

25 Cite material on Milwaukee plan

26 Cite to Friedman Foundation. Other states?

27 Cite to Friedman Foundation. In addition, a number of states have adopted or expanded long-in-place plans that allow parents of disabled children to send them to private schools at public expense, sometimes to specialized schools serving only substantially disabled children, a development that will be put aside here.

28 Cite to Kemerer book chapter on politics – e.g. Kirp.

29 Cite to lawyers representing opponents in Milwaukee case, Cleveland case, etc.

30 Cite Zelman

31 Although on-the-ground it also turns out that a modest share of these inner city voucher users would somehow have managed to attend private schools even without the program.

32 Sugarman 2014 article

33 Cite newest Step Up for Students Florida data

34 Cite Sugarman 2014 article and newest data

35 Cite USSC AZ case

36 Cite Sugarman 2014 article. It should also be noted that as of now, only a small share of children currently attending private schools do so with the help of public funding from these two types of plans -- a little under 5%.

37 Cite something about magnet/alternative schools and # of kids being served – see Henig and Sugarman chapter in School Choice and Social Controversy

38 Cite to Gates Foundation
Cite to small schools data

Cite to data on inter district choice

Cite to early Cambridge choice plan Glenn.

Cite to Oakland plan

Cite to Cambridge MA and Glenn

Cite to Berkeley plan. NYC high schools also fit this pattern. Cite.

Cite Henig and Sugarman and newer data.

Cite to Kolderie and Nathan work and Paul Hill

(http://dashboard.publiccharters.org/dashboard/students/page/overview/year/2014)

Cite US DOE data

Cite Kemerer and Glenn on Blaine Amendments

To the extent that some charter schools are but branches of the local school district, they are put aside here.

Cite US DOE data

Cite Sugarman American Law Review gatekeeper article

Cite US DOE data

But note DOE letter re charters and the arguable application of the constitution to charter schools as public schools (or as state action). Cite. More and that below.

Cite to unions starting charter schools

Cite Paul Hill, Viteriti, and others on politics.

Cite more recent union opposition

Cite material on Obama support for charter schools

Cite union opposition to Obama/Duncan agenda
Cite Sugarman charter school gatekeeper article

E.g. Arizona Cite.

National Alliance for Public Charter Schools, Measuring up to the Model: A Ranking of State Charter School Laws, 2015, p. 9 Available at: http://www.publiccharters.org/wp-content/uploads/2015/01/model_law_2015.pdf. Cite CER. In “weak” charter school states, there is likely to be a cap on the total number of charter schools that are allowed to exist, and those that do form tend to be substantially more closely regulated than elsewhere.

Cite evidence on chartering organizations’ practices

Although in some states there is hardly any formal legal freedom from regulations governing public schools.

Cite Oakland Unified Charter School Website

Cite Oakland data

KIPP website

Aspire website

Cite US DOE

Cite to reconstitution experience.

Cite US DOE data

And in practice about 90% of all charter schools now in place are start-ups. Cite CER

Cite. This lower funding level in turn has forced many charter schools to seek supplemental grant-funding from philanthropic foundations and the like in order to augment their revenues – recalling that charging tuition to their families is forbidden.

Cite CER

Cite. Glenn

Cite Coons, Clune and Sugarman Public Wealth and Private Education and our 1971 book
In the first ten years of the 21st Century, enrollments increased substantially over prior numbers in Evangelical, Methodist, Presbyterian, Lutheran, Episcopal, Muslim and Jewish schools.

But, of course, were there no private faith-based option, it seems reasonable to surmise that many of those white and Asian-American families would move to the suburbs.

Cite studies, see ACSC report. Refer also to forthcoming research from Charles Glenn about private Muslim schools having the same positive effect.

Cite material on liberal qualms. Some who favor public funding of faith based schools argue that this would reduce the pressure to bring religion into public schools.
97 Cite book chapter on this saga

98 Religious Charter Schools: Legalities and Practicalities, p. xxiii

99 Ibid Cite. Some states specifically preclude charters from being run by religious organizations or religious leaders – a potentially unconstitutional rule.

100 But cite to Muslim tied school in MI that was too faith-based and lost its charter. McConnell case

101 Some states have sought to preclude this dual enrollment strategy. For more recent descriptions of these religiously-related charter schools, see Saiger and Hillman.

102 Cite to court of appeals case example of Mormon schools in Utah with released time “sanctuary” and the case that challenged that and lost.

103 Cite to current political prospects material.

104 This is not the first time that someone has thought about whether religious schools should be able to become charter schools. Chester Finn, for example, raised the possibility as early as 2003cite.

105 Laycock, Saiger, McConnell, Minow

106 See Church of the Lukumi Babalu Aye Inc. v Hialeah (1993) in which the U.S. Supreme Court struck down a local ordinance clearly aimed at preventing a religious group from practicing its faith.) Of course a compelling state interest may be to avoid violating the establishment clause – a point addressed in the next section.

107 Discuss Rust v. Sullivan and Pleasant Grove City here

108 Compare Aarons and Lawrence books

109 Cite Pierce case

110 Cite to recent NYT piece on ultra orthodox Jewish “schools”?

111 Cite. Contra Minow

112 Cite Pierce

113 Zelman, Helms, Agostini, etc.

114 Case Cite

James Wren, Charter Schools: Public or Private? An Application of the Fourteenth Amendment’s State Action Doctrine to These Innovative Schools, 19 Rev. of Litig. 135 (2000).


Cite Choper book on his first amendment test

Cite to Zelman and prior cases like Lemon but note that not all 5 would apply this test.

E.g. cite cases involving prayer at public meetings, Ten Commandments in the park, Hobby Lobby, etc.

The majority in Zelman, as noted, emphasized the full range of “choice” programs in Cleveland besides the voucher plan, including magnet and charter schools as a way of characterizing the Cleveland plan as not centrally about religious schools.

Cite absence of continued focus on entanglement.

Case Cite

Case Cite

Case Cite

Case Cite

Cite research by Schwab and others

Cite Sugarman Law and Contemporary Problems article and relevant case

Raymond v. Bagley

Cite Witters

Cite Davey
And the argument I advance here would seemingly lead to a contrary result that Rehnquist was suggesting and would invalidate, say, a change to federal tax law that would generally grant tax deductions for charitable contributions but not for faith-based charities.

Cite Laycock

Cite Saiger

The commission administering the plan had, by its criteria, determined the college to be “pervasively sectarian” and hence its students ineligible for the scholarship program under state law, even though the Colorado commission did assist students attending other religious colleges.

Cite Babalu
Cite Glenn

Cite Saiger. Although Professor Saiger is not convinced that in the future all charter school states will maintain their legislative exclusion of such schools. See Choper’s 1968 article in CLR.

See Minow and Breyer dissent in Zelman

Cite Glenn.

Cite Lawrence, gay marriage cases, etc.

USC Cite

I am assuming here that such a law would not be held unconstitutional by the current court even though the impact/effect of this preclusion overwhelmingly impacts on religious schools and families seeking faith-based education for their children. This is because the rule is neutral on its face and the “impact” approach of Sherbert v. Verner has been abandoned. Moreover, the state can put forward an understandable non-religious reason for this exclusion – it wanted primarily charter schools to draw from existing public schools rolls – children who were or otherwise would be funded by the state anyway. This is a financial perspective, not a religious one, since the schools intended to be excluded from becoming charter schools by such law were private non-religious schools, inasmuch as religious schools were otherwise precluded by statute from obtaining a charter.

Provided that this process was not viewed as a violation of the “no conversion” rule, as it might well be if the new school simply hired as its staff the teachers from the closed school.

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