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## Is There a Place for Religious Charter Schools?

**ABSTRACT.** Recently, religious groups have sought to become charter school providers. Scholarship and popular commentary dispute the desirability of this prospect. Religious charter schools can address unmet needs of religious groups and keep them invested in the public school system. But the balkanization of school districts, oppression of nonadherents, and entanglement between church and state remain important concerns. This Note argues that there is a place for religious charter schools primarily in districts best able to ameliorate these concerns—those that have sufficient resources and the diversity of religious groups necessary to create a variety of religious and nonreligious school options.

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## INTRODUCTION

Religion has long played a divisive role in American education. Since America's Founding, political leaders have worried about how to create an American educational system free of sectarian strife.<sup>1</sup> The plural system of sectarian schools that existed at the Founding was supplanted with publicly funded "common schools" by the mid-nineteenth century.<sup>2</sup> Promoters billed these schools as offering children a secular education free from the pressures of religious conflicts. Yet from the start, common schools drew their ideology from the teachings of mainline Protestantism.<sup>3</sup> The creation of the common school, therefore, did not lead to the disappearance of religious schools or of the conflict over the role of religion in education.<sup>4</sup> Catholics perceived the Protestant influence and created their own school system in the late nineteenth century. Protestants, in turn, successfully advocated for "Blaine Amendments" to state constitutions that prevented any state funding of religious schools.<sup>5</sup>

In the second half of the twentieth century, advocates of secular education and religious traditionalists alike turned to the courts to arbitrate their disputes over the proper role of religion in public education.<sup>6</sup> Although a legacy of Protestant influence remains, these Supreme Court decisions have helped to secularize American public education. By the end of the twentieth century, a robust constitutional regime governing religious expression in public schools appeared to be in place.

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1. See *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212-16 (1948) (Frankfurter, J., concurring).
  2. JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 146-48 (1999).
  3. Common schools, under the "pretense that religion has no legitimate place in public education," in reality "promoted a religious orthodoxy of [their] own that was centered on the teachings of mainstream Protestantism and was intolerant of those who were non-believers." Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 666 (1998). Contemporaries also recognized this flaw; thus, a late nineteenth-century commentator not only spoke against the "notorious[]" efforts of the Catholic clergy to obtain taxpayer dollars for their schools, but also acknowledged Protestant monopolization of the public school system, contending that "[i]f the public schools are sectarian, sects unrepresented in their management have as good a right as those represented to a share of the public money." *Fanatics and the Schools*, N.Y. TIMES, Nov. 9, 1891, at 4.
  4. See sources cited *supra* note 3.
  5. See Viteritti, *supra* note 3, at 670-73. Many states retain these restrictions. *Id.* at 674-75.
  6. A majority of the Supreme Court cases interpreting the First Amendment's Religion Clauses have involved education. See Elizabeth Reilly, *Education and the Constitution: Shaping Each Other & the Next Century*, 34 AKRON L. REV. 1, 13-14 (2000); *infra* note 160.

Over the past several decades, however, school choice has significantly changed the structure of American schooling.<sup>7</sup> In particular, publicly funded, privately managed charter schools have made the school offerings of many urban districts unprecedentedly diverse.<sup>8</sup> No longer must those attending urban public schools go to a neighborhood school or choose only between undifferentiated generalist schools; today, a menu of specialized offerings exists, from Afro-centric schools to those with a focus on art or social change.<sup>9</sup>

Charter schools continue to cause controversy even as their numbers increase and the first charter schools approach the start of their third decade.<sup>10</sup> Each state defines “charter school” somewhat differently, but under the laws of most states, charter schools are publicly funded, privately run, and organized as nonprofits or similar entities, subject to only limited oversight and exempt from most of the state statutes and regulations governing public schools.<sup>11</sup> Proponents of charter schooling see this autonomy as charter schools’ main benefit, while opponents lament the loss of public accountability that accompanies privatization. Both sides debate whether charter schools improve educational outcomes or merely drain money from resource-starved traditional public schools.<sup>12</sup>

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7. See Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417, 430 (2000).
  8. Caroline M. Hoxby, *The Supply of Charter Schools*, in CHARTER SCHOOLS AGAINST THE ODDS 15 (Paul T. Hill ed., 2006) (discussing trends in charter school growth); see Aaron Jay Saiger, *School Choice and States’ Duty To Support “Public” Schools*, 48 B.C. L. REV. 909, 961 (2007) (highlighting the diversity of options that choice schools create).
  9. See, e.g., CHESTER E. FINN, JR., BRUNO V. MANNO & GREGG VANOUREK, CHARTER SCHOOLS IN ACTION: RENEWING PUBLIC EDUCATION 161 (2000) (discussing Sankofa Shule, an Afro-centric charter school in Michigan); ArtSpace Charter School, <http://www.artspacecharter.org/> (last visited Nov. 24, 2008); The César Chávez Public Charter Schools for Public Policy, School History, <http://www.cesarchavezhs.org/homeoffice/history/> (last visited Nov. 24, 2008).
  10. See Eric A. Hanushek et al., *Charter School Quality and Parental Decision Making with School Choice*, 91 J. PUB. ECON. 823, 824 n.1 (2007); Bruno V. Manno et al., *Charter Schools: Accomplishments and Dilemmas*, 99 TCHRS. C. REC. 537 (1998); Minnesota passed the nation’s first charter school law in 1991. See Hanushek et al., *supra*, at 824.
  11. See, e.g., THE RES. DEP’T. OF THE MINN. HOUSE OF REPRESENTATIVES, MINNESOTA’S CHARTER SCHOOL LAW (2005), available at <http://www.house.leg.state.mn.us/hrd/issinfo/sschtsch.pdf>. Blurring the line between public and private schooling is a general feature of charter school statutes. Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes that Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349 (2003); see Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice*, in SCHOOL CHOICE AND SOCIAL CONTROVERSY 13, 23-24 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).
  12. FINN ET AL., *supra* note 9.

Given that charter schools provide private groups the chance to get involved in public education, it was only a matter of time before religious groups sought to provide educational services—whether to their own adherents or to others—at public expense. In recent years, charter schools that are self-consciously centered around Muslim, Jewish, and Christian values have sprung up.<sup>13</sup> These “religious charter schools” differ significantly from private religious schools in that they purport to comply with the Establishment Clause’s requirements for public schools, while simultaneously reflecting the values and culture of a particular religious group.<sup>14</sup> Religious charter schools raise difficult constitutional, social, and political questions, which courts and the legal academic literature have only begun to explore.<sup>15</sup>

Allowing religious groups to become charter school providers complicates the controversy surrounding charter schools. Americans have long been suspicious of public funding for religious education.<sup>16</sup> After funding overtly religious schools for half a century, mid-nineteenth century America decided against public funding.<sup>17</sup> Religious charter schools, then, stir deep social and constitutional anxieties. We fear that giving charters to religious organizations will undermine public schools as incubators of democracy<sup>18</sup> or erode the wall of separation between church and state.<sup>19</sup> We also fear that religious charter

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13. See *infra* Part I; *infra* Section II.C.

14. See *infra* Part I.

15. Cf. PRESTON C. GREEN III & JULIE F. MEAD, CHARTER SCHOOLS AND THE LAW: ESTABLISHING NEW LEGAL RELATIONSHIPS 208 (2004) (“[C]harter schools are a relatively new phenomenon in public education. As such, the legal issues associated with them have only begun to evolve.”).

16. The United States has taken a different path from other Western democracies, which provide public funding to private religious schools. See Viteritti, *supra* note 3, at 665 & n.34 (listing eleven such countries).

17. CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780-1860, at 166-67 (1983).

18. See Nathaniel Popper, *Chartering a New Course*, WALL ST. J., Aug. 31, 2007, at W11; cf. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring) (“The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny.”).

19. The idea that the Constitution requires strict “separation of church and state” has deep roots in the American psyche, though the reality has never quite accorded with the rhetoric. James Madison, the original advocate of separation, articulated a twofold danger of excessive state involvement in religion. First, Madison claimed, state sponsorship of religion risks religion’s “establishment” and the oppression of members of other religions. Second, state sponsorship risks the corruption of religion. James Madison, *Memorial and Remonstrance Against Religious Assessments*, in JAMES MADISON: WRITINGS 29, 31, 32 (Jack N. Rakove ed., 1999). In Supreme Court jurisprudence, the heyday of strict separation came in the

schools will indoctrinate students with religious dogma rather than just teach values and culture, and that they will promote intolerance, oppress nonadherent teachers and students, discriminate against potential attendees and employees, and segregate public schooling along religious lines.<sup>20</sup>

Religious charter schools also pose administrative problems with constitutional implications. Districts that can afford to support only a few religious charter schools risk violating the First Amendment if they favor some religious groups over others in the provision of charters. Districts may also feel pressure to police religious charter schools more closely than other charter schools to ensure that they comply with the First Amendment and nondiscrimination requirements.<sup>21</sup>

This Note explores what place, if any, religious charter schools should have in American education. Districts that cannot meet constitutional constraints with certainty should avoid creating religious charter schools. Nonurban or small districts in particular may not have the resources to fund a plethora of religious charter schools or to monitor their compliance with constitutional requirements.<sup>22</sup>

On the other hand, allowing religious groups to participate as educational providers within a broad program of choice makes sense in large urban districts with failing schools and an existing charter school program. These districts are best equipped to overcome the ideological, pragmatic, and constitutional objections to religious charter schools. As the districts most likely to have a diversity of religious groups coupled with a high rate of religious participation,<sup>23</sup> urban districts also stand to benefit most from religious charter

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mid-twentieth century, see *McCullum*, 333 U.S. at 211; *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947), but even at the time it had its critics, see *McCullum*, 333 U.S. at 247 (Reed, J., dissenting) (“A rule of law should not be drawn from a figure of speech.”).

20. See *infra* Section III.A.

21. See, e.g., Hannah Sampson, *Hebrew Charter Ruled Kosher*, MIAMI HERALD, Sept. 12, 2007, at B1 (quoting a school board member who worried about Ben Gamla Hebrew Charter School “more so than any other [school] because there is that constitutional issue that exists”).

22. Cf. Hoxby, *supra* note 8, at 32, 35 (explaining that charter schools are more difficult to run “in an area with dispersed population than one with a dense population,” and that the greatest concentration of charter schools can be found in “densely populated central cities of urban areas,” though many rural areas also have charter schools).

23. See Kevin D. Breault, *New Evidence on Religious Pluralism, Urbanism, and Religious Participation*, 54 AM. SOC. REV. 1048, 1050 (1989) (noting that in contrast to urban areas, nonurban areas disproportionately include areas where “religiously conservative or traditional religions are strongly represented [with] very high religious participation and low religious diversity”; some nonurban places, like the “unchurched West,” are religiously pluralistic but have a low religious participation rate).

schools. Religious charter schools enable members of religious minority groups to receive an education that reflects their own values. They give students the chance to benefit from the energy that religious groups bring to education and foster diverse educational opportunities within urban public school systems. The existence of a diversity of religious groups can help districts prevent any one religious group from becoming too dominant in its charter school program. The large number of schools in urban districts suggests that the threat of limited choice or of undermining other schools will be minimized.<sup>24</sup> Finally, the presence of an existing charter school program suggests that neutral criteria for charter school selection can be put into place.

This Note proceeds in several parts. Part I explores the concept of religious charter schools by setting forth definitional frameworks and examining two religious charter schools in depth. Part II explains that in today's diverse, choice-based educational universe, many of the ideological and legal objections to religious charter schools have little force. It first discusses the increasing acceptance of a role for religious entities in public education and the decline of universal public schooling. It then questions the assumption that the creation of religious charter schools represents a significant departure from a value-neutral ideal of public education, arguing that public education has always embodied majoritarian values. Finally, it articulates affirmative benefits that religious charter schools can provide in the appropriate setting. Part III addresses practical objections and considers how district size and diversity determine the feasibility and desirability of religious charter schools.

## I. DEFINING AND EXAMINING RELIGIOUS CHARTER SCHOOLS

This Part examines the religious charter school concept. Section I.A details the meaning of "religious charter school" and other important terms employed throughout the Note, highlighting the areas of law that shape these definitions. Sections I.B and I.C illustrate these definitions through the examples of Tarek ibn Ziyad Academy in Minnesota and Ben Gamla Charter School in Florida.

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24. See ERIC ROFES, *HOW ARE SCHOOL DISTRICTS RESPONDING TO CHARTER LAWS AND CHARTER SCHOOLS?* 1-2 (1998) (noting that as compared with suburban or rural districts, urban districts suffer less of a negative impact on existing schools when charter schools are created).

### A. *Definitional Frameworks*

Because the concept remains new and continues to evolve, it is important to precisely define the meaning of “religious charter school.” This Note uses “religious charter school” to mean a charter school operated by a religious organization or by a group of people bound by a common religious viewpoint.<sup>25</sup>

Whether religious organizations can legally operate charter schools is primarily a question of state law and policy. Some state constitutions and statutes prohibit it.<sup>26</sup> Additionally, federal law requires that charter schools receiving federal funding be nonsectarian and not affiliated with religious institutions, so religious charter schools run by churches, synagogues, mosques, or other formal religious entities would be ineligible to receive federal funding.<sup>27</sup> In many areas chartering agencies, relying on the definitions in federal law as well as state laws and policies, have denied charters to religious organizations or groups of religious individuals.<sup>28</sup> Existing religious charter schools have bypassed these provisions by avoiding any official affiliation.

The First Amendment also poses challenges to religious charter schools. Whether charter schools must comply with the First Amendment is unsettled,<sup>29</sup> but courts have thus far treated charter schools as public schools,

25. In creating this definition, I draw upon the work of Lawrence Weinberg. See LAWRENCE D. WEINBERG, *RELIGIOUS CHARTER SCHOOLS: LEGALITIES & PRACTICALITIES*, at xix-xxi (2007). Scholars have only recently begun to treat religious charter schools distinctly. Complicating matters, the schools themselves, seeking to avoid the connotations of the “religious” label, do not necessarily identify themselves this way.
26. See Preston Green, III, *Charter Schools and Religious Institutions: A Match Made in Heaven?*, 158 EDUC. L. REP. 1, 4, 15-17 (2001); Frank R. Kemerer, *The Legal Status of Privatization and Vouchers in Education*, in *PRIVATIZING EDUCATION: CAN THE MARKETPLACE DELIVER CHOICE, EFFICIENCY, EQUITY, AND SOCIAL COHESION?* 39, 43 (Henry M. Levin ed., 2001).
27. See 20 U.S.C. § 7221i(1)(E) (Supp. 2005) (“The term ‘charter school’ means a public school that . . . is nonsectarian in its programs, admissions policies, employment practices, and all other operations, and is not affiliated with a sectarian school or religious institution.”); U.S. DEP’T OF EDUC., *CHARTER SCHOOLS PROGRAM: TITLE V, PART B: NON-REGULATORY GUIDANCE 6-7* (2004), available at <http://www.ed.gov/policy/elsec/guid/cspguidance03.pdf> (explaining that “the definition of a ‘charter school’ under State law is a matter of State policy” but to receive federal funds, the school must meet the criteria of 20 U.S.C. § 7221i(1)).
28. See GREEN & MEAD, *supra* note 15, at 166-67; Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 PENN. ST. L. REV. 43, 89-90 (2004).
29. See Martin, *supra* note 28, at 54-55.



including for the purposes of constitutional regulation.<sup>30</sup> Accordingly, lawyers have advised religious charter schools to comply with restrictions on public schools rooted in the Establishment Clause and statutory law.<sup>31</sup> This Note therefore assumes that religious charter schools are subject to the strictures of the First Amendment. In this way, religious charter schools are distinct from private or voucher-funded religious schools, which do not face similar constraints.<sup>32</sup>

Simply saying that religious charter schools must comply with the First Amendment, however, does not exhaust the challenge of defining these unique entities. Religious charter schools seek to structure themselves around the values of a particular religion, to teach the culture associated with that religion, and to accommodate religious observance, while remaining in the good graces of chartering entities and avoiding constitutional challenges. These challenges have forced religious charter school pioneers to travel a largely unworn path, though the extensive First Amendment jurisprudence governing public schools provides some guidance. The subsequent Sections of this Part highlight the paths taken by two existing religious charter schools to demonstrate how such schools have addressed these challenges.

To explain how religious charter schools walk this tightrope, this Note makes use of an analytical distinction between accommodation and promotion of religious observance. Religious observance refers to efforts to comply with the tenets of one's faith, such as praying daily, studying religious texts, not eating forbidden foods, or not attending school on religious holidays. Efforts of a religious charter school to actively promote students' religious observance would most likely violate the Establishment Clause, because the activity would have a religious purpose, would have the effect of promoting religion, and would potentially compel nonpracticing students to participate.<sup>33</sup> On the other

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30. See *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897 (W.D. Mich. 2000); *Porta v. Klagholz*, 19 F. Supp. 2d 290 (D.N.J. 1998). States, however, vary in how they statutorily treat charter schools. See GREEN & MEAD, *supra* note 15, at 31 (“[C]harter schools have been variously described as ‘quasi-public,’ ‘other non-public,’ and ‘hybrid public schools.’” (citation omitted)); Henig & Sugarman, *supra* note 11, at 23-24.

31. See, e.g., WEINBERG, *supra* note 25, at 2.

32. See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); Henig & Sugarman, *supra* note 11, at 23-24, 27-28.

33. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); see also *infra* Section II.B (discussing the application of the First Amendment to religious charter schools). Religious education providers could partner with religious charter schools to offer “released time” programming. To be constitutional, released time programming must be offered only to students that have parental permission and affirmatively choose to participate. Individuals not formally part of

hand, religious charter schools—consistent with the First Amendment and like traditional public schools—can choose to accommodate the religious observance of religious minorities, including their own decisions to wear religious clothing, eat permissible foods, miss school on religious holidays, or engage in prayer or text study not conducted by the school.<sup>34</sup> Courts have concluded that “permissive” accommodations do not violate the Establishment Clause, since they do not directly promote religion but rather respect and indirectly facilitate a student’s own choices.<sup>35</sup> Although the distinction is admittedly a fine one and constitutional jurisprudence continues to evolve,<sup>36</sup> it assists in analyzing the benefits of religious charter schools and restrictions on them.

This Note also makes extended use of the term “values.” A group’s values are the principles, qualities, and commitments that members of that group collectively consider worthwhile as guideposts in their lives. As the Note will discuss, values play a fundamental role in shaping all forms of public education. The chance to have the education they provide reflect the values that they hold provides a singular motivation for would-be founders of charter schools, including religious organizations and groups, to seek charters.

Finally, the Note employs the term culture, referring to activities in which members of a group engage and the accompanying meanings that give that group a collective identity. These include social norms, morals, art, dress, rituals, myths, and history. As noted above, religious charter schools cannot teach religious practices, like how to pray or the study of religious texts as such, without running afoul of the First Amendment. But they can teach about their group’s culture.<sup>37</sup> Of course, the two cannot always be disentangled,<sup>38</sup> particularly in the minds of critics who see teaching culture as merely a subterfuge for teaching religion.<sup>39</sup> For example, the history and cultural practices of certain Middle Eastern countries may be intertwined with Islam,

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the school must run it, and it cannot receive public funding. It may also need to take place off-site. See *Zorach v. Clauson*, 343 U.S. 306 (1952).

34. See WEINBERG, *supra* note 25, at xvii, xix; Sarah M. Isgur, Note, “Play in the Joints”: The Struggle To Define Permissive Accommodation Under the First Amendment, 31 HARV. J.L. & PUB. POL’Y 371, 373-79 (2008) (discussing the current state of the law on “permissive accommodation”).

35. See Isgur, *supra* note 34, at 375.

36. *Id.* at 378.

37. See WEINBERG, *supra* note 25, at xix-xxi.

38. See *id.*

39. See, e.g., Charles C. Haynes, *Can Arabic, Hebrew Public Schools Turn Backs on God?*, TUCSON CITIZEN, Sept. 17, 2007, <http://www.tucsoncitizen.com/daily/opinion/63155.php>.

and those of Jews with the Jewish religion. This dilemma provides a central challenge for religious charter schools.<sup>40</sup> In the jurisprudence, too, the boundaries between cultural and religious practices, and between permissible state accommodation and impermissible state support of religion, remain contested.<sup>41</sup>

In the past half-decade, a few chartering agencies have permitted groups of religious individuals to establish charter schools.<sup>42</sup> These schools endeavor to disentangle cultural practices from their religious contexts so that they can promote their values and culture without violating the First Amendment. They also seek to accommodate religious observance. To aid understanding of these terms and the context in which conflicts over religious charter schools have operated, the remainder of this Part considers two such religious charter schools in depth.

*B. Tarek ibn Ziyad Academy, Inver Grove Heights, Minnesota*

A visitor to the website of Tarek ibn Ziyad Academy (TIZ), a charter school in Minnesota, would search in vain for the words most commonly used to describe the religious affiliation of its leader and most of its attendees, “Muslim,” or their religion, “Islam.”<sup>43</sup> Instead, the visitor would comprehend the values that the school seeks to nurture as the “innate human values of brotherhood, equality, justice, compassion and peace,”<sup>44</sup> the ethic it tries to cultivate as one of “each human being [as] a significant creature entrusted with

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40. *See id.*

41. *Compare* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 705-10 (1994) (opinion of Souter, J.) (arguing that a specially drawn school district to accommodate Hasidic Jews constituted establishment), *with id.* at 732-35, 738-41, 743-45 (Scalia, J., dissenting) (arguing that the district validly accommodated cultural distinctiveness).

42. In recent years, districts have also created noncharter public schools centered in cultures associated with religions, like the Khalil Gibran International Academy. Run by the New York City Department of Education, Khalil Gibran focuses on the study of Arabic language and Middle Eastern culture. The school has emphatically denied that religion or political ideology play any role, but critics have nevertheless associated it with “radical Muslim religious schools” and denounced it as a “terrorist training camp.” Kim Ghattas, *New York Arabic School Sparks Row*, BBC NEWS, Sept. 6, 2007, <http://news.bbc.co.uk/2/hi/americas/6980966.stm>; *see* Andrea Elliott, *Her Dream, Branded as a Threat: How a Chorus of Critics Cost a Muslim Educator Her School*, N.Y. TIMES, Apr. 28, 2008, at A1. Similarly, public schools that primarily serve members of a single religious group, like Carver Elementary School in San Diego, have caused controversy with their attempts to accommodate religious students. *See* Isgur, *supra* note 34, at 379-84.

43. Tarek ibn Ziyad Academy, <http://www.tizacademy.com/> (last visited Nov. 24, 2008).

44. *Id.*

the weighty role of steward of Earth,”<sup>45</sup> and the environment as one that “recognizes and appreciates the traditions, histories, civilizations and accomplishments of Africa, Asia and the Middle East.”<sup>46</sup> Consistent with its charter school status, TIZ is officially secular. Although headed by an imam and featuring instruction in Arabic language and Middle Eastern history, it does not teach Islamic religious texts or mandate daily prayer. The school also does not discriminate on the basis of religion in admission or hiring, nor does it inquire into or document the religious affiliations of its students.<sup>47</sup>

On the surface, though, the school resembles a Muslim religious school. Almost all female students and female Muslim staff members wear “headscarves and modest dresses,” although such clothing is not required.<sup>48</sup> Children fast during Ramadan, and the cafeteria serves halal food throughout the year. Vacations take place on Muslim holidays. Students avoid stepping on the carpeted prayer area at the school’s center as they walk to class. Most significantly, classes break for early afternoon prayers; almost all students participate, although the school does not officially conduct them.<sup>49</sup>

As a religious charter school, TIZ actively fosters an environment conducive to the religious observance of its Muslim families; it also furthers religious-cultural norms by excluding non-Muslim elements hostile to its families’ values. The school maintains a strict environment. As the principal of TIZ’s second campus, which opened in the fall of 2007, stated, “[w]e don’t allow anything outside the boundaries of the culture.”<sup>50</sup> The environment appeals to religious Muslim families. As one writer has noted, “For many religious parents the most important part of a religious school is what it *does not* teach.”<sup>51</sup> TIZ has successfully created an environment where, according to one teacher, “children feel comfortable . . . asking questions about their own

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45. Tarek ibn Ziyad Academy, *Our School*, [http://www.tizacademy.com/Our\\_School.html](http://www.tizacademy.com/Our_School.html) (last visited Nov. 24, 2008).

46. Tarek ibn Ziyad Academy, *supra* note 43.

47. Tammy J. Oseid, *A Place To Belong: At Tarek ibn Ziyad Academy, Students Can Study Arabic, Stay in Touch with Their Culture and “Just Be Themselves,”* ST. PAUL PIONEER PRESS, Nov. 7, 2004, at B1.

48. *Id.*

49. *Id.*

50. Liala Helal, *Arabic Charter School Opens Second Campus*, ST. PAUL PIONEER PRESS (local ed.), Aug. 24, 2007, at B1.

51. Popper, *supra* note 18.

religion.”<sup>52</sup> Not surprisingly, the school is popular—TIZ received 765 applications for 215 spots in its second year.<sup>53</sup>

The popularity of TIZ reflects demand among Twin Cities-area Muslim families for schools that serve their needs. Before the school’s creation, their choices included a Muslim private school that created an appropriate environment but charged tuition, and public schools that cost nothing but created obstacles to observing one’s Muslim faith.<sup>54</sup> As a free, publicly funded school sensitive to the needs of Muslim students, TIZ provides an important resource for the Muslim community, particularly for families who cannot afford private schooling.

TIZ appears to be an ideal religious charter school. It accommodates religious observance without promoting it, and grounds its teaching in Muslim values and culture without indoctrinating religion. Critics have nevertheless charged that TIZ has not succeeded in making daily prayer and after-school religious education optional and separate from school programming,<sup>55</sup> as case law requires.<sup>56</sup> They have called it a “madrassa,” accusing it of “merg[ing] mosque and state” and identifying behaviors at the school that they allege make it unconstitutionally religious.<sup>57</sup> A substitute teacher claimed that after-school religious education was listed as a “subject” on the school’s daily schedule and that the midday prayer appeared mandatory rather than optional.<sup>58</sup> The school has refuted these allegations and defends its practices, including giving vacation on Muslim holidays and having a break in its schedule at prayer times, as a means of accommodating the religious

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52. Oseid, *supra* note 47.

53. *Id.*

54. Obstacles might include a schedule that makes it difficult to pray daily, a calendar that ignores Muslim holidays, the teasing of Muslim students for wearing religious garb, harassment of Muslim students as “terrorists,” food that does not meet Muslims’ dietary restrictions, and neglect of the history and culture of the Middle East. See Neil MacFarquhar, *Resolute or Fearful, Many Muslims Turn to Home Schooling*, N.Y. TIMES, Mar. 26, 2008, at A14. As TIZ’s director contended, “Our kids were not being served at other schools.” Oseid, *supra* note 47.

55. See Katherine Kersten, *Teacher Breaks Wall of Silence at State’s Muslim Public School*, STAR TRIB. (Minneapolis), Apr. 9, 2008, at B1.

56. See *Wallace v. Jaffree*, 472 U.S. 38, 67 (1985) (O’Connor, J., concurring in the judgment) (“Nothing in the United States Constitution . . . prohibits public school students from voluntarily praying at any time before, during, or after the schoolday.”); *Zorach v. Clauson*, 343 U.S. 306 (1952) (approving off-site, separately provided “released time” religious education).

57. Editorial, *Minnesota Madrassa*, INVESTOR’S BUS. DAILY, Apr. 11, 2008, at A12.

58. Kersten, *supra* note 55.

observance of its students.<sup>59</sup> An investigation by the Minnesota Department of Education found the school to be in substantial compliance with state and federal law.<sup>60</sup> As a result of the investigation, however, the state required that the school provide busing at the end of the school day rather than at the end of after-school programming, and that Friday prayers be conducted off site.<sup>61</sup>

Because culture and religion can be difficult to separate, critics also claim that the school's focus on the traditions of countries where Islam dominates is a subterfuge for teaching religion.<sup>62</sup> Although the Minnesota Department of Education has approved TIZ's curriculum and operations,<sup>63</sup> these claims have raised public doubt over TIZ's constitutional legitimacy. While judicial precedent suggests TIZ's mission could withstand challenge,<sup>64</sup> a court could conceivably accept expert testimony that the school's emphasis on "brotherhood" and on human beings as "steward[s] of Earth" makes it particularly Muslim in orientation.<sup>65</sup> Given that many female students and staff members wear headscarves, the visual perception of the school alone could make a court inclined to view TIZ as religious—especially given an American context in which wearing headscarves may make one look "foreign," "religious," and far outside the American mainstream.<sup>66</sup> As the next Part contends, many criticisms of TIZ reflect a double standard whereby the public

59. See *Oscid*, *supra* note 47.

60. See Andy Birkey, *Education Department Findings on Tarek ibn Ziyad Academy Contradict Published Reports*, MINN. MONITOR, May 20, 2008, <http://minnesotaindependent.com/3960/education-department-findings-on-tarek-ibnziyad-academy-contradict-published-reports>. A journalist has suggested that the teacher, a conservative education activist, may have fabricated her claims after having read a newspaper column in advance of her visit that detailed supposed violations. David Brauer, *How Favoritism Fueled a TV News Fracas*, MINNPOST.COM, May 29, 2008, [http://www.minnpost.com/davidbrauer/2008/05/29/2016/how\\_favoritism\\_fueled\\_a\\_tv\\_news\\_fracas](http://www.minnpost.com/davidbrauer/2008/05/29/2016/how_favoritism_fueled_a_tv_news_fracas); David Brauer, *Kersten's Arabic-School Source: Even More to the Story*, MINNPOST.COM, Apr. 18, 2008, [http://www.minnpost.com/davidbrauer/2008/04/18/1564/kerstens\\_arabic-school\\_source\\_even\\_more\\_to\\_the\\_story](http://www.minnpost.com/davidbrauer/2008/04/18/1564/kerstens_arabic-school_source_even_more_to_the_story).

61. See Birkey, *supra* note 60.

62. See, e.g., Katherine Kersten, *Are Taxpayers Footing Bill for Islamic School in Minnesota?*, STAR TRIB. (Minneapolis), Mar. 9, 2008, at B1.

63. See Sarah Lemagie, *2 Changes Ordered at Charter School*, STAR TRIB. (Minneapolis), May 20, 2008, at B1.

64. See *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897 (W.D. Mich. 2000); *infra* notes 169-177 and accompanying text.

65. See *supra* note 45 and accompanying text.

66. See, e.g., Neil MacFarquhar, *For Muslim Students, a Debate on Inclusion*, N.Y. TIMES, Feb. 21, 2008, at A14 (noting that the appearance of "ranks of bearded young men and veiled women" in the Muslim Student Association chapters of certain American universities "might come across as 'way Muslim' or even extremist" to an outsider).

perceives the culture, values, and practices of members of minority religions as “religious” and problematic, without passing similar judgment on the cultures, values, and practices of Christian or secular Americans.<sup>67</sup>

C. *Ben Gamla Charter School, Hollywood, Florida*

In contrast to the TIZ website’s emphasis on the school’s distinctive mission, including the placement of Arabic characters in its logo and on its homepage, the website of Ben Gamla Charter School in Florida blandly emphasizes its “first-class academic program,” “loving, caring, and supportive educational environment,” and graduates’ “belief in their own efficacy.”<sup>68</sup> Nevertheless, Ben Gamla, too, is a religious charter school. A casual observer might notice the school’s Jewish-sounding name, and an exceptionally knowledgeable observer might realize that the school is named for Joshua Ben Gamla, an obscure historical figure who provided children’s schools throughout the ancient land of Israel.<sup>69</sup> Ben Gamla has been billed as “the nation’s first English-Hebrew charter school”<sup>70</sup> and its website notes that it has a “unique bilingual, bi-literate, and bi-cultural curriculum.”<sup>71</sup> The website attributes the reason for its dual language curriculum not to any cultural or religious purpose, but merely to “prepare[] students to have an edge in global competition through the study of Hebrew as a second language.”<sup>72</sup> Most photos of students and staff do not show them wearing any distinctively religious garb.<sup>73</sup>

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67. See *infra* Section II.C.

68. Ben Gamla Hebrew Charter School, School Administration & Philosophy, <http://www.bengamlacharter.com/welcome/> (last visited Nov. 24, 2008).

69. See BABYLONIAN TALMUD BAVA BASRA 21a (Mesorah Publ’ns 1989). Critics seeking to portray Ben Gamla Charter School as religious have noted that Joshua Ben Gamla’s ancient schools provided a religious education. Arguably, the Talmud confirms the criticism, noting that the schools enabled people to remember the Torah’s teachings. See *id.* The criticism, however, is anachronistic, as Jewish sources of the time did not draw distinctions between secular and religious.

70. Abby Goodnough, *Hebrew Charter School Spurs Florida Church-State Debate*, N.Y. TIMES, Aug. 24, 2007, at A1.

71. Ben Gamla Hebrew Charter School, *supra* note 68.

72. *Id.*

73. Posted photographs reveal a few staff members and the occasional student to be wearing *kippot*, the skullcaps worn by observant Jews, but only a small minority is wearing the distinctive clothing of strictly observant Jews. See Ben Gamla Hebrew Charter School, Our Photos, <http://www.bengamlacharter.com/our-photos/> (last visited Nov. 24, 2008).

The school's purpose, however, clearly goes beyond preparing its students for "global competition" to promoting Jewish culture and values. An Orthodox rabbi directs the school.<sup>74</sup> The school's founder, an Orthodox Jew, has recognized publicly that Hebrew language teaching cannot happen outside of a cultural context.<sup>75</sup> The school cannot ask students about their religion, but it is required to ask parents if they are native English speakers.<sup>76</sup> Unsurprisingly, a high percentage of parents self-disclose as being native speakers of Hebrew,<sup>77</sup> suggesting that the school likely has a large Jewish population. The school's founder speaks of creating Ben Gamla Charter School to tap into a market for dual-language, Hebrew-English schools.<sup>78</sup> Though the exact contours of the market are unclear, schools like Ben Gamla can provide a Jewish cultural education to children who might not enroll in Jewish day schools or in areas where Jewish day schools are not financially sustainable. As evidence that Ben Gamla Charter School competes in a similar niche, two hundred children have left Jewish day schools for Ben Gamla, though the school also enrolls a minority of non-Jewish students.<sup>79</sup> Overall, Ben Gamla has been a success and appears to have tapped into unmet demand; in its first year, eight hundred students applied for four hundred spots.<sup>80</sup>

Some critics have seized on these facts in charging Ben Gamla Charter School with indoctrinating religious Judaism at taxpayer expense.<sup>81</sup> Critics emphasize the difficulty of separating the Jewish religion from the Hebrew language, and fear that the school "crosses the line between church and state."<sup>82</sup>

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74. Larry Luxner, *Hebrew at Florida Charter School Approved, Challenges Remain*, JEWISH J. (L.A.), Sept. 21, 2007, at 27, available at <http://www.jewishjournal.com/home/preview.php?id=18228>.
75. *Weekend Edition Sunday* (NPR radio broadcast Sept. 16, 2007) ("This is a public school. You know, the language—the second language is Hebrew. You can't teach a language outside of a cultural context. So clearly there is Jewish culture that goes along with teaching the Hebrew language."), available at <http://www.npr.org/templates/story/story.php?storyId=14453541>; see also Haynes, *supra* note 39 (suggesting that teaching Arabic or Hebrew isolated from their religious context may be not only difficult, but absurd).
76. Telephone Interview with Peter Deutsch, Founder, Ben Gamla Charter School (Dec. 2, 2008).
77. *Id.*
78. *Id.*
79. See Goodnough, *supra* note 70; Luxner, *supra* note 74.
80. Goodnough, *supra* note 70.
81. See Luxner, *supra* note 74.
82. Sampson, *supra* note 21; see Luxner, *supra* note 74; Mary Ann Sorrentino, Op-Ed., *Adding More Hebrew Schools a Mistake*, S. FLA. SUN-SENTINEL, Sept. 20, 2007, at 23A.



The school has endeavored, however, to make its operations transparent and has relied on the Becket Fund for Religious Liberty to advise it on the legality of its operations.<sup>83</sup> Ben Gamla Charter School studied TIZ as a model,<sup>84</sup> but has gone further in avoiding the facilitation of religion. In contrast to Jewish private schools, teachers do not lead prayer services (*minyanim*) at the school; *mezuzot*<sup>85</sup> do not hang on the doorways; and the school does not close on Jewish holidays, following the official Broward County calendar instead.<sup>86</sup> Before the school began to teach Hebrew, an outside academic reviewed the Hebrew curriculum to confirm that it contained no religious content.<sup>87</sup> The school facilitates religious observance by serving kosher food, and teaches about Jewish culture and history, but it does not otherwise promote religion and has scrubbed the curriculum of specifically religious content.<sup>88</sup>

Even more than TIZ, therefore, Ben Gamla Charter School avoids behavior that might subject it to the charge that it promotes religion. Shaped by a leadership that sees its school as a model, and owing in part to considerable criticism and extensive monitoring,<sup>89</sup> Ben Gamla's practices have tended to fall safely on the constitutional side of the First Amendment line.

Ben Gamla's model, more focused on promoting Jewish culture and values than on facilitating religious observance, appears to reflect the different population upon which it draws. The American Muslim community upon which TIZ draws has historically supported fewer day schools, and tends to be both more religiously observant and less affluent.<sup>90</sup> Schools like TIZ can educate students who would be uncomfortable or unable to observe their

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83. See Avi Frier, *Speaking Out of School*, FLA. JEWISH NEWS, July 27, 2007, [http://www.floridajewishnews.com/site/a/Speaking\\_Out\\_of\\_School/](http://www.floridajewishnews.com/site/a/Speaking_Out_of_School/); Popper, *supra* note 18.

84. See Popper, *supra* note 18.

85. Mezuzot are small pieces of parchment containing biblical verses that many Jews and Jewish institutions mount on their doorframes, usually in a decorative case, to fulfill a Biblical commandment. See JewFAQ.org, Judaism 101: Signs and Symbols, <http://www.jewfaq.org/signs.htm> (last visited Nov. 24, 2008).

86. See Luxner, *supra* note 74; Telephone Interview with Peter Deutsch, *supra* note 76; Ben Gamla Hebrew Charter School, School Forms, School Calendar 2008-2009, <http://www.bengamlacharter.com/school-forms/School%20Calendar%202008-09.pdf> (last visited Nov. 24, 2008).

87. Telephone Interview with Peter Deutsch, *supra* note 76.

88. Luxner, *supra* note 74; *Weekend Edition Sunday*, *supra* note 75.

89. See Frier, *supra* note 83; Sampson, *supra* note 21.

90. See Kersten, *supra* note 62.

religion in public school and appeal to families who could not afford private schooling. Jewish communities, by contrast, tend to feature a wide spectrum of religious observance, and Jewish day schools have historically sustained themselves not only with observant Jews but also with less observant Jews and secular Israeli immigrants whose parents want them to get an education in Jewish culture and the Hebrew language. Able to offer an education in both, Ben Gamla Charter School draws members of the latter two groups away from Jewish day schools and traditional public schools. Yet because schools like Ben Gamla provide an education devoid of religious content, some Jewish leaders have called the school a threat to Jewish continuity.<sup>91</sup> The distinctions between TIZ and Ben Gamla suggest some of the various forms a religious charter school might take, and the varying sources of criticism suggest the challenges that religious charter schools face in appealing to a skeptical public and even their own assumed constituencies.

## **II. THE EROSION OF IDEOLOGICAL AND LEGAL OBJECTIONS TO RELIGIOUS CHARTER SCHOOLS**

This Part contends that in today's diverse, choice-based educational universe, many of the ideological and legal objections to religious charter schools have little force. Section II.A discusses increasing public acceptance of a role for religious entities in publicly funded education alongside the decline of the traditional model of public schooling. Section II.B focuses on the Supreme Court's evolving Establishment Clause jurisprudence, which has mirrored the evolution in the public's view of the proper role of religious entities. Section II.C argues that values, including religious values, play an important role in traditional public education and that it is inequitable to exclude the values of religious minorities. Section II.D discusses the benefits that religious charter schools provide their attendees.

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91. Some Jewish leaders believe that a Jewish person's likelihood of perpetuating the Jewish religion through subsequent generations correlates with his level of Jewish observance, *see, e.g.*, ALAN M. DERSHOWITZ, *THE VANISHING AMERICAN JEW* 24-46 (1997), and they fear that schools like Ben Gamla, which cannot promote Jewish observance, will draw students away from Jewish day schools. Of course, these fears may underestimate the extent to which Jewish students who would otherwise have attended public schools may develop their Jewish identity more strongly as a result of having attended culturally Jewish schools like Ben Gamla.

### A. Changes in Public Schooling and Religious Group Participation in the Public Sphere

Over the past half-century, America has become unprecedentedly diverse,<sup>92</sup> mainstream suspicion of religion-state involvement has diminished,<sup>93</sup> and confidence in urban schools has declined.<sup>94</sup> Visions of public schools as incubators of democracy have given way to imperatives of improving schools' teaching of basic skills necessary for economic survival.<sup>95</sup> At the same time, wealthy Americans increasingly have sent their children to private schools or economically segregated suburban public schools, further undermining public schools as democratic incubators.<sup>96</sup>

Recent years have seen the rise of new public school options in many of America's metropolitan areas,<sup>97</sup> as reformers have responded to dismay over urban public school quality and legal and social pressure generated by the segregation of minority and low-income students in city public schools. Charter schools are one such choice-based option. Reformers have created several types of charter schools, and media attention has focused on centrally run networks of charter schools targeted at improving the academic performance of low-income students through a rigorous and lengthy school day.<sup>98</sup> Still, reformers originally conceived of charter schools as harnessing the

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92. See PETER SCHUCK, *DIVERSITY IN AMERICA* 87-94, 264-71 (2003) (discussing expansion of ethnic and religious diversity wrought by recent immigration).
93. See Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1063, 1075, 1077 (2000).
94. C.H. Edson, *Detroit's Demise*, 23 EDUC. RESEARCHER 34, 34 (1994).
95. Paul T. Hill, *The Supply-Side of School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY*, *supra* note 11, at 140, 143, 149-52.
96. See THOMAS M. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* 167 (2004) (discussing the economic stratification between families of public and private school attendees).
97. See Heritage Foundation, *School Choice: Choices in Education*, <http://www.heritage.org/research/education/schoolchoice/> (last visited Nov. 24, 2008) (discussing the status of school choice in each state); Heritage Foundation, *School Choice: Types of School Choice*, <http://www.heritage.org/research/education/schoolchoice/typesofschoochoice.cfm> (last visited Nov. 24, 2008) (detailing various forms of school choice).
98. See, e.g., Sam Dillon, *2 School Entrepreneurs Lead the Way on Change*, N.Y. TIMES, June 19, 2008, at A16; Jodi Wilgoren, *Seeking To Clone Schools of Success for Poor*, N.Y. TIMES, Aug. 16, 2000, at A1. The most prominent such network is the Knowledge is Power Program (KIPP), which has drawn attention for its ability to turn low-income students into high achievers. See Jay Mathews, *New Report from KIPP Charters*, Wash. Post Class Struggle, Apr.

energies of local parents and teachers to create a school oriented toward the needs of a particular set of students. The majority of charter schools remain locally run institutions, reflecting the values of a specific culture, ethnicity, or educational philosophy, and seeking to appeal to like-minded individuals.<sup>99</sup> Creating charter schools and other school choice options reflects districts' decisions to meet the needs of different students in different schools, and to abandon a "one size fits all" approach.<sup>100</sup>

As charter schools and other choice-based options have become accepted as part of the educational landscape, Americans' understanding of what a public school looks like has widened accordingly. The idea of having a religious group or any private entity run a traditional public school offends Americans' sense that a public school should be democratically run, featuring the interplay of various constituencies with an elected school board in charge of setting policy for a diverse district. The availability of choice, on the other hand, creates a different situation where "like-minded teachers and students can affirmatively choose to invest themselves in one school instead of another based on distinct normative claims embodied in the schools' respective missions."<sup>101</sup> Charter schools therefore have a greater warrant than traditional public schools to maintain a particular normative mission in support of their constituency. The traditional contest of values that takes place in the electoral process and at school board meetings gets partially replaced by giving students a choice of schools, each with a distinct normative identity.

Paralleling these developments in education has been an erosion of the line between the religious and secular spheres. Americans have endorsed the participation of religious organizations in the public sphere; religious groups

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20, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/20/AR2008042001762.html>.

99. See Bruce Fuller, *The Public Square, Big or Small? Charter Schools in Political Context*, in *INSIDE CHARTER SCHOOLS: THE PARADOX OF RADICAL DECENTRALIZATION* 12, 14-15, 30 (Bruce Fuller ed., 2000) (discussing grassroots and specific nature of charter schools); NAT'L CHARTER SCH. RESEARCH PROJECT, *QUANTITY COUNTS: THE GROWTH OF CHARTER SCHOOL MANAGEMENT ORGANIZATIONS* 9-13 (2007), <http://education.tulane.edu/documents/QuantityCounts.pdf> (discussing the shift from locally run to management organization-run charter schools); *infra* notes 178-185 and accompanying text.
100. Hill, *supra* note 95, at 140, 143, 149-52. Choice, however, has critics. The National School Boards Association, for example, has argued that vouchers will "lead to the balkanization of American education and culture" and that "the public interest in promoting an American culture and identity will be ignored or diminished." See MICHAEL J. KAUFMAN, *EDUCATION LAW, POLICY, AND PRACTICE: CASES AND MATERIALS* 194 (2005) (discussing MICHAEL A. RESNICK, NAT'L SCH. BDS. ASS'N, *WHY VOUCHERS WON'T WORK* (1998)).
101. Robert K. Vischer, *The Sanctity of Conscience in an Age of School Choice: Grounds for Skepticism*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 81, 83 (2006).

also exhibit “growing comfort . . . regarding their participation in a pluralist society.”<sup>102</sup> Alongside other community groups, religious groups have become involved in improving schools over the past two decades.<sup>103</sup> According to sociologist of education Mark Warren, religious groups “can bring a certain energy and passion” to education, “which aligns with their beliefs: taking care of a community or acting for social justice,” and do so in a noncontroversial manner by distinguishing between appropriate behavior in the “congregation” versus “public arena.”<sup>104</sup> As communities allow religion into the public sphere and experiment with narrower, privately run public schools with the hope of better serving diverse communities, the traditional suspicion of religious group involvement in public education may diminish as well.

### B. *The Supreme Court’s Evolving Establishment Clause Jurisprudence*

Over the past three decades, the Supreme Court’s Establishment Clause jurisprudence has mirrored the shift in public opinion by becoming more accommodating of relationships between religious groups and public entities. Two components of this trend have facilitated the creation of religious charter schools. First, the Supreme Court has allowed states increasing flexibility to direct funding to schools run by religious groups. Second, it has reduced the importance of the “entanglement” prong in First Amendment jurisprudence. Because the supervision of religious groups by chartering agencies raises potential entanglement concerns, this change has made it easier for the two to work together.

The Supreme Court set out the current doctrinal test governing Establishment Clause challenges in *Agostini v. Felton*<sup>105</sup> and *Mitchell v. Helms*,<sup>106</sup> modifying the longstanding test first articulated in *Lemon v. Kurtzman*.<sup>107</sup> A challenged law passes *Agostini*’s test if it “has a secular purpose” and does not have the “effect of advancing or inhibiting religion.”<sup>108</sup> The effect inquiry has

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<sup>102</sup> Minow, *supra* note 93, at 1077.

<sup>103</sup> See Mark R. Warren, *Communities and Schools: A New View of Urban Education Reform*, 75 HARV. EDUC. REV. 133, 158–62 (2005); Amelia E. Lester, *Improving Instruction Through Community Organizing*, HARV. GRADUATE SCH. OF EDUC. NEWS, May 1, 2004, <http://www.gse.harvard.edu/news/features/warren05012004.html>.

<sup>104</sup> Warren, *supra* note 103.

<sup>105</sup> 521 U.S. 203, 222–23, 232–33 (1997).

<sup>106</sup> 530 U.S. 793, 807–08 (2000) (plurality opinion).

<sup>107</sup> 403 U.S. 602, 612–13 (1971).

<sup>108</sup> 521 U.S. at 222–23 (internal quotation marks omitted); see *Mitchell*, 530 U.S. at 807–08.

three subparts: courts must evaluate whether the aid results in government indoctrination, defines recipients by reference to religion, or creates an excessive entanglement between government and religion.<sup>109</sup> *Agostini* applied these tests and held that a school board could fund remedial education teachers for disadvantaged children in parochial schools.<sup>110</sup> In *Mitchell v. Helms*, a four-Justice plurality made *Agostini*'s effect inquiry even easier to satisfy.<sup>111</sup> *Mitchell* held that the federal government could bankroll states' lending of materials and equipment to local schools, including parochial schools.<sup>112</sup>

In earlier cases, the Supreme Court had applied a rule that "all government aid that directly assists the educational function of religious schools is invalid"<sup>113</sup> in order to hold unconstitutional direct monetary or in-kind aid of the type at issue in *Agostini* and *Mitchell*.<sup>114</sup> It had, however, upheld aid that indirectly supported religious schools.<sup>115</sup> *Agostini* and *Mitchell* rejected the direct-indirect distinction. Addressing the first subpart of the effect test, whether aid results in government indoctrination, the *Mitchell* plurality<sup>116</sup> concluded that where the "private choices of individual parents . . . determine what schools ultimately benefit from the governmental aid, and how much," the means of funding was "neutral[]" and thus did not result in government indoctrination.<sup>117</sup> On the second subpart, whether aid defines recipients by

109. *Agostini*, 521 U.S. at 234.

110. *Id.* at 234-35.

111. 530 U.S. 793.

112. *Id.*

113. *Agostini*, 521 U.S. at 225-26 (describing the rule of *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), in which the Court held that a remedial education program similar to the one at issue in *Agostini* violated the Establishment Clause).

114. See, e.g., *Aguilar v. Felton*, 473 U.S. 402, 411-14 (1985) (holding unconstitutional a program that paid public school teachers to provide remedial education for disadvantaged children in parochial schools). *Agostini* overturned *Aguilar*. See *Agostini*, 521 U.S. at 207, 237.

115. Examples include *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), which rejected an Establishment Clause challenge to a federal program funding sign-language interpreters for deaf children, including those attending religious schools; *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), which rejected an Establishment Clause challenge to a scholarship program that included funding for a student studying to become a pastor; and *Mueller v. Allen*, 463 U.S. 388 (1983), which rejected an Establishment Clause challenge to a state tax deduction for educational expenses including religious school tuition.

116. Although *Mitchell* commanded the support of only four Justices—with Justice O'Connor concurring in the judgment to emphasize that she continued to perceive a distinction between direct and indirect aid, see 530 U.S. at 842-43 (O'Connor, J., concurring in the judgment)—changes in the Court's composition since *Mitchell* suggest that its holding might today command the support of a majority.

117. 530 U.S. at 810, 830.

reference to religion, the plurality quoted *Agostini* in explaining that “where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis,” it does not define its recipients by reference to religion.<sup>118</sup> These related principles of “private choice” and government neutrality toward competing religious and secular aid seekers have replaced the distinction between direct and indirect aid that characterized the Court’s earlier jurisprudence.<sup>119</sup> This shift has made choice-based direct aid programs, such as funding for religious charter schools, more likely to survive an Establishment Clause challenge.

The recent case of *Zelman v. Simmons-Harris*,<sup>120</sup> which upheld the constitutionality of a school voucher program in Ohio, suggests how courts might apply the *Agostini-Mitchell* test to examine the constitutionality of a charter school program that includes religious charters. Applying the doctrinal purpose prong, the *Zelman* Court found a secular purpose in a voucher program that responded to a crisis situation facing the Cleveland public schools, benefitted a broad class of individuals, provided incentives to nonreligious schools to participate, and constituted just “one aspect of a broader undertaking to assist poor children in failed schools.”<sup>121</sup> Similarly, a court would likely find a secular purpose in a school choice authorization statute that funded religious charter schools among other viable options, did so in response to educational needs, and did not favor religious charter schools.<sup>122</sup>

Applying the doctrinal effect prong, the *Zelman* Court looked to “whether Ohio [was] coercing parents into sending their children to religious schools,” and required an evaluation of “all options Ohio provides Cleveland schoolchildren.”<sup>123</sup> The Court considered the various nonreligious alternatives available to students in a failing public school, including alternative community

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118. *Id.* at 813 (internal quotation marks omitted) (quoting *Agostini*, 521 U.S. at 231).

119. *Id.* at 814-16. The Supreme Court still refers to the test as the *Lemon* test, though the current formulation of the test comes from *Agostini* and *Mitchell*. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 668-70 (2002) (O’Connor, J., concurring).

120. 536 U.S. 639.

121. *Id.* at 653, 655.

122. Cf. *Bowen v. Kendrick*, 487 U.S. 589, 602-03 (1988) (finding a “legitimate secular purpose” in a statute that provided funding to grantees, including religious organizations, to counsel adolescents about “premarital sexual relations, pregnancy, and parenthood”); *Mueller v. Allen*, 463 U.S. 388, 401 (1983) (upholding a state tax deduction for educational expenses under which ninety-six percent of the benefits went to parents of religious school attendees).

123. *Zelman*, 536 U.S. 655-56.

schools and magnet schools.<sup>124</sup> Even though ninety-six percent of voucher funds went to private religious schools,<sup>125</sup> the Court concluded that the voucher program did not have the impermissible effect of promoting religion because of the variety of options available under the program, and because state aid flowed to private religious schools “wholly as a result of” the “genuine and independent private choice” of individual attendees.<sup>126</sup>

Similarly, a comprehensive charter school program that includes religious options satisfies the first two *Agostini* effect requirements—that the program not result in governmental indoctrination or define its recipients by reference to religion. Existing state policies make funding for charter schools dependent on the number of students who choose to attend.<sup>127</sup> A charter school program that includes adequate nonreligious options, does not incentivize parents to choose religious charter schools, and funds religious charter schools on this per pupil basis should qualify as a form of “genuine and independent private choice”<sup>128</sup> that does not result in government indoctrination. The school district also needs to ensure neutrality in awarding charters to religious groups. If awarded on the basis of standardized secular criteria that neither favor nor disfavor religious charter applicants,<sup>129</sup> the program would not define its recipients by reference to religion.

The third of the *Agostini* effect requirements—that the program not create an excessive entanglement—also no longer poses an obstacle to religious charter schools. The Supreme Court gave entanglement a prominent role in the *Lemon* test it adopted for Establishment Clause cases in 1971,<sup>130</sup> drawing upon the Founders’ fear that state sponsorship of religion risked its corruption by introducing “pride and indolence in the Clergy” and “ignorance and servility in the laity.”<sup>131</sup> But over time, various Justices criticized the continued necessity for a distinct “entanglement” prong.<sup>132</sup> In *Agostini*, the Court formally reduced

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124. *Id.* at 658-59; *id.* at 663-64 (O’Connor, J., concurring).

125. *See id.* at 647.

126. *Id.* at 652.

127. *See* Pearl Rock Kane & Charles J. Lauricella, *Assessing the Growth and Potential of Charter Schools*, in *PRIVATIZING EDUCATION*, *supra* note 26, at 203, 216.

128. *Zelman*, 536 U.S. at 649-54.

129. *See id.* at 653-54.

130. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

131. *Madison*, *supra* note 19, at 32.

132. *See* *Bowen v. Kendrick*, 487 U.S. 589, 616 (1988) (“[T]he ‘entanglement’ prong of the *Lemon* test has been much criticized over the years.”).



entanglement's importance, collapsing the *Lemon* test's once independent "entanglement" prong into the test's effect inquiry.<sup>133</sup>

Until recently, a court might have struck down districts' efforts to fund religious charter schools, holding that their creation risked impermissible state entanglement with the religious entities running the schools.<sup>134</sup> In *Aguilar v. Felton*, which involved state aid to parochial schools, the Supreme Court found excessive entanglement in part because the program would require "pervasive monitoring by public authorities."<sup>135</sup> A court could perceive religious charter schools as needing a similar level of monitoring.<sup>136</sup>

*Agostini* overturned *Aguilar's* finding of excessive entanglement, however, and cited *Bowen v. Kendrick* for the proposition that "we have not found excessive entanglement in cases in which States imposed far more onerous burdens on religious institutions than the monitoring system at issue here."<sup>137</sup> *Bowen* involved an Establishment Clause challenge to a program of grants to nonprofits, including religious organizations, for the provision of "prevention" and "care" services to adolescents with regard to premarital sexuality and pregnancy.<sup>138</sup> The Court held that provision of these services constituted a legitimate secular purpose, and that the statute's provision for religious group participation alongside public or nonprofit organizations did not result in the impermissible effect of advancing religion.<sup>139</sup> The Court reiterated that it "has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs" and that courts should not adopt a presumption that religiously affiliated grantees are "not

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133. *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997); see *Lemon*, 403 U.S. at 612-13. In *Agostini*, Justice O'Connor claimed that "[w]hether a government aid program results in such an entanglement has consistently been an aspect of our Establishment Clause analysis," 521 U.S. at 232, but her supporting citations came mostly from the 1970s—the short-lived heyday of entanglement analysis.

134. See *Bowen*, 487 U.S. at 615-16 (discussing the "Catch-22" of entanglement-based arguments that "the very supervision of the aid to assure that it does not further religion renders the statute invalid").

135. *Aguilar v. Felton*, 473 U.S. 402, 412-13 (1985); see also *Bowen*, 487 U.S. at 615-17 (discussing *Aguilar*).

136. As *Bowen* noted, the Supreme Court has found the entanglement prong most relevant in cases involving aid to parochial schools. 487 U.S. at 616.

137. *Agostini*, 521 U.S. at 234 (citing *Bowen*, 487 U.S. at 615-17).

138. 487 U.S. at 593-94; see Michele Estrin Gilman, *Fighting Poverty with Faith: Reflections on Ten Years of Charitable Choice*, 10 J. GENDER RACE & JUST. 395, 405-09 (2007) (discussing *Bowen*, the schools cases, and charitable choice).

139. *Bowen*, 487 U.S. at 602-03, 606-08.

capable of carrying out their functions . . . in a lawful, secular manner.”<sup>140</sup> The purposes and effects of the statute in *Bowen* closely parallel those of a statute authorizing religious charter schools, which receive funding as part of a broader secular program of improving educational opportunity.

The diminished relevance of the entanglement prong facilitates the creation of religious charter schools by enabling appropriate supervision consistent with the First Amendment. The *Bowen* court found that the government’s review of the programs’ operations and materials and site visits to confirm that the grantees complied with statutory and constitutional requirements did not amount to “excessive entanglement.”<sup>141</sup> Similarly, chartering agencies can legally engage in extensive, regular review of the curriculum and practices of religious charter schools.<sup>142</sup> Provided that agencies avoid excessive meddling in the internal affairs of the religious group operating the school, entanglement concerns should not prevent districts from including religious charter schools in a charter school funding program.

In short, First Amendment jurisprudence has evolved in ways that make it easier for states to create religious charter schools. *Agostini*, *Mitchell*, *Bowen*, and *Zelman* provide a roadmap for a district wishing to create a formally neutral, constitutional school choice program that includes the possibility of funding religious charter schools.<sup>143</sup> Provided the program satisfies the criteria outlined in these cases, a court should find it constitutional.

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140. *Id.* at 609, 612.

141. *Id.* at 617.

142. See *Agostini*, 521 U.S. at 232-35; *Bowen*, 487 U.S. at 615-17.

143. Some scholars would go even further, arguing that charter schools should be subject to few constitutional restraints. The underlying premise of this argument is that “[a]lthough . . . states treat charter schools as public schools . . . the lack of regulation, private control, and management of the schools suggests charter schools may not be state actors.” Jason Lance Wren, Note, *Charter Schools: Public or Private? An Application of the Fourteenth Amendment’s State Action Doctrine to These Innovative Schools*, 19 REV. LITIG. 135, 147 (2000). It remains unsettled if constitutional safeguards apply to charter schools, but many observers consider charter schools to be state actors (and hence subject to constitutional requirements) because they are usually designated as public schools, required to be nonsectarian, publicly financed, and tuition-free. See Martin, *supra* note 28, at 54-55.

Others have argued that excluding only religious organizations from receiving school funding might constitute impermissible viewpoint discrimination. See, e.g., Joshua Edelstein, Note, *Zelman, Davey, and the Case for Mandatory Government Funding for Religious Education*, 46 ARIZ. L. REV. 151 (2004). Yet in *Locke v. Davey*, the Supreme Court held that a state’s refusal to fund devotional theology instruction as part of an “otherwise inclusive” scholarship program did not violate the First Amendment. 540 U.S. 712, 715 (2004). The Court explained that there were certain “state actions permitted by the Establishment Clause but not required by the Free Exercise Clause,” and that the state’s refusal to fund devotional

### C. *The Myth of Value Neutrality*

Critics frequently frame objections to religious charter schools in federal constitutional terms, but the main barriers lie elsewhere. These obstacles include federal and state statutory bans on funding sectarian charter schools, state constitutional bans on directing public funds to religious groups, and chartering agencies' refusal to give charters to religious groups or their members.<sup>144</sup> These legal barriers reflect a belief that allowing religious organizations to start charter schools threatens to corrupt the charter school movement and public schooling by introducing religious values into education. Opponents of religious group participation fear that religious charter schools will undermine the separation of church and state and turn schools into balkanizing forces.<sup>145</sup> These objections do not take into account the fact that public schools are not value-neutral, but in fact embody majoritarian values that may alienate members of minority religious groups. Since their inception, public schools have embodied values, some grounded in Protestantism and others in secularism, that members of religious minority groups have perceived

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training fell within the "play in the joints" between the two clauses. *Id.* at 718-19. Without conclusively answering the question of whether a state could exclude only religious organizations from receiving charter school funding, *Locke* makes clear that the Supreme Court recognizes a distinction between *Zelman's* holding that states may fund religious education in certain circumstances, and the idea that they *must* do so. For now, it appears that the Federal Constitution neither requires nor prohibits states from funding religious charter schools.

Several state courts have interpreted state constitutional provisions forbidding aid to religious institutions *not* to violate the First Amendment's Free Exercise Clause, and have used those provisions to strike down the inclusion of religious schools in voucher programs. *E.g.*, *Bush v. Holmes*, 886 So. 2d 340, 344, 364-65 (Fla. Dist. Ct. App. 2004) (looking to *Locke* in construing state constitution's "no aid" provision to not violate Free Exercise Clause, and concluding that a school voucher program that included religious schools violated the "no aid" provision), *aff'd in pari*, 919 So. 2d 392, 412-13 (Fla. 2006) (declining to consider the "no aid" provision, but striking down the program on other grounds); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 541-42, 562-64 (Vt. 1999) (finding that state constitution's "compelled support clause" forbids a school district from reimbursing students for sectarian school tuition where the funds might support religious worship, and that the exclusion of sectarian schools from a reimbursement program "plainly does not" violate the Free Exercise Clause). State constitutions play an important role in this area: the skepticism of publicly funded religious schools articulated by the Florida courts in *Bush* may help account for the precautions Ben Gamla Charter School takes.

144. See sources cited *supra* note 27.

145. See, *e.g.*, Editorial, *supra* note 57; Popper, *supra* note 18; Sorrentino, *supra* note 82. Some critics fear that religious fanatics will use public money to pursue an objectionable agenda. See, *e.g.*, Daniel Pipes, *From Sea to Shining Sea*, JERUSALEM POST, Sept. 6, 2007, at 16.

as opposed to their own religious values.<sup>146</sup> Charter schools, which tend to appeal to particular constituencies, can help public education reflect the realities of American religious pluralism.<sup>147</sup>

One cannot make schools value-neutral; education inherently involves normative and therefore contestable principles. As ethicist Richard Baer points out, “Every curriculum that is more than simple technical instruction . . . rests on fundamental understandings and commitments regarding the nature of reality itself, the nature of the good life and the good society, and how one ought to live. These commitments are not neutral for various religious claimants . . . .”<sup>148</sup> Throughout the nineteenth century and into the twentieth, public schools employed the King James Bible as a teaching tool and taught social and cultural values grounded in Protestantism; public education was “intolerant” of the beliefs of non-Protestants.<sup>149</sup> Nationally, the influence of Protestantism in public schools has faded over time with the rise of American religious diversity and judicial enforcement of the Establishment Clause.<sup>150</sup> Few public schools today attempt to teach the Bible from a religious perspective.<sup>151</sup> Yet the legacy of Protestant influence<sup>152</sup> remains in other respects. For example, some public schools teach creationism or Christian-based “intelligent design” alongside evolution.<sup>153</sup> Even in religiously diverse

146. See *infra* notes 149-159 and accompanying text.

147. See Saiger, *supra* note 8, at 948-51, 961, 969.

148. Richard A. Baer, Jr., “Strict Neutrality” and Our Monopoly System, in *THE SCHOOL-CHOICE CONTROVERSY: WHAT IS CONSTITUTIONAL?* 15, 15 (James W. Skillen ed., 1993); see also Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 *CORNELL L. REV.* 62, 69 (2002) (“It would be both practically and theoretically impossible to completely prevent the governmental values inculcation that occurs in the educational process . . .”).

149. See Viteritti, *supra* note 3, at 666-68.

150. See Joanne M. Marshall, *Nothing New Under the Sun: A Historical Overview of Religion in U.S. Public Schools*, 39 *EQUITY & EXCELLENCE IN EDUC.* 181, 183-85, 190 (2006).

151. A few do still try, at least until challenged. See, e.g., Press Release, Am. Civil Liberties Union, Texas School Board Agrees To Stop Teaching Unconstitutional Bible Class in Public Schools (Mar. 5, 2008), <http://www.aclu.org/religion/schools/34356prs20080305.html>.

152. See Marshall, *supra* note 150, at 183-85, 190.

153. See ANNE MARIE LOFASO, *AM. CONSTITUTION SOC'Y, THE CONSTITUTIONAL DEBATE OVER TEACHING INTELLIGENT DESIGN AS SCIENCE IN PUBLIC SCHOOLS* (2005), [http://www.acslaw.org/pdf/Intelligent\\_Design\\_White\\_Paper.pdf](http://www.acslaw.org/pdf/Intelligent_Design_White_Paper.pdf). But see *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 765 (M.D. Pa. 2005) (holding that the teaching of intelligent design violates the Establishment Clause). The Supreme Court has not considered intelligent design, but did strike down a law requiring the teaching of “creation science” alongside evolution because the law lacked a secular purpose and promoted religious belief. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

cities, public schools often conduct Christmas or “holiday” assemblies featuring Christmas carols, an activity for which they face no sanction.<sup>154</sup> Members of minority religions frequently perceive these activities to be religious and find them alienating, though Christian or secular Americans who find them innocuous have a hard time comprehending the complaint.<sup>155</sup>

The public schools in many American locales feature none of these practices. Yet secular values, too, may prove alienating to members of religious minority groups. In *Wisconsin v. Yoder*, the Supreme Court accepted the argument of Amish parents that requiring their children to continue in public school past eighth grade would undermine the parents’ ability to transmit their distinct religious and cultural values to their children.<sup>156</sup> The Court recognized the parents’ interest in shielding their children from the antipathetic values that they perceived public schools to be imparting.<sup>157</sup> The significant minority of evangelical Christian parents that turn to home schooling or private schools employ a similar refrain: their primary motivation is not to have schooling impart their religious values, which they can do at home or church, but to avoid exposure to what they perceive as harmful “secular values” espoused by

154. See, e.g., News Release, Denver Pub. Sch., West High School To Hold 64th Annual Singing Christmas Tree Concert (Dec. 1, 2004), <http://www.dpsk12.org/news/press/2004/12/1c.shtml>. In fact, schools sometimes face criticism for secularizing their assemblies. See *Hannity & Colmes* (Fox News television broadcast Dec. 11, 2003) (transcript available at <http://www.foxnews.com/story/0,2933,105603,00.html>).

155. See FRANKLYN S. HAIMAN, RELIGIOUS EXPRESSION AND THE AMERICAN CONSTITUTION 63-64 (2003) (explaining that at Christmas assemblies, non-Christians may consider “Jingle Bells” fine but “Silent Night” offensive, while Christians have trouble seeing the distinction as more than “picayune”); see, e.g., Charles Haynes, *How To Handle Religious Holidays in Public Schools*, FREEDOM F., Dec. 9, 2001, <http://www.freedomforum.org/templates/document.asp?documentID=15470> (“Generally, courts view Santa Claus and Christmas trees as secular in nature. But keep in mind that many people still view these symbols as coming from a religious tradition. So while it may be constitutional to put up trees and Santas everywhere in the school, it might not be the right or sensitive thing to do.”); Shira D. Kieval, *Tree for Some, Thorn for Others*, HARV. CRIMSON, Dec. 4, 2001, at 6, available at <http://www.thecrimson.com/article.aspx?ref=160975> (articulating the author’s objections to the placement of a Christmas tree in her college dining hall, and the disbelief of others that anyone could be offended by a “simple Christmas tree”).

156. 406 U.S. 205 (1972).

157. See *id.* at 210-11 (“They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life . . .”). The parents in *Yoder* sought to keep their children out of school; where religious minorities challenge a public school’s secular values as a violation of their religious beliefs and seek to change the school’s curriculum, they almost invariably lose. See, e.g., *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008) (rejecting claims that a school’s use of books promoting tolerance of gay persons and couples violated parents’ free exercise or due process rights).

public schools.<sup>158</sup> For similar reasons and to facilitate religious observance, Muslims have recently joined the trend toward home schooling.<sup>159</sup>

Although relatively few American families leave public schools for religious reasons, the majority of Religion Clause cases to reach the Supreme Court have involved schools, reflecting broad discord over the role of religion in education.<sup>160</sup> Decisions purporting to settle these conflicts have not caused divisions to disappear, and local variations persist. The strong localist structure of American public education means that decisions get made—and contestation of normative values happens—predominantly at the local level.<sup>161</sup> In areas where there is minimal diversity among the religious tenets held by students

158. See, e.g., James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547, 560 (2007) (discussing a broad “trend among evangelical Christians during the 1970s, 1980s, and 1990s” to exit public schools “because they objected to the values being taught there”); Charles J. Russo, *Same-Sex Marriage and Public School Curricula: Preserving Parental Rights To Direct the Education of Their Children*, 32 U. DAYTON L. REV. 361, 381 (2007) (“[M]ore than 1 million children . . . are home schooled, often due to parental concerns over the treatment of religion and issues associated with values formation in public schools.”); see also *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1060 (6th Cir. 1987) (discussing plaintiffs who left their school system because of practices offensive to their religious beliefs).

159. MacFarquhar, *supra* note 54.

160. These conflicts have involved: whether schools may feature prayer or moments of silence, see *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Engel v. Vitale*, 370 U.S. 421 (1962); whether students can be required to say the Pledge of Allegiance or salute the flag, see *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940); whether a school may teach creationism, see *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968); whether a public university must fund a religious student periodical in the same manner as a secular periodical, see *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); whether a school may remove an “objectionable” book from the school library, see *Bd. of Educ. v. Pico*, 457 U.S. 853, 856 (1982); whether religious groups must be allowed access to school facilities on equal terms, see *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981); whether public entities can fund transportation, textbooks, teachers of secular subjects, or aides for disabled students in religious schools, see *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Cochran v. La. State Bd. of Educ.*, 281 U.S. 370 (1930); and whether schools can cooperate with religious organizations as part of a “released time” arrangement, see *Zorach v. Clauson*, 343 U.S. 306 (1952); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

161. See Karen W. Powe, *Values Education and the Local School Board*, UPDATING SCH. BOARD POL’YS (Nat’l Sch. Bds. Ass’n, Alexandria, Va.), 1993, at 3. Local variation has decreased recently, although American public education still exhibits greater variation than education elsewhere. See Thomas B. Timar, *The Institutional Role of State Education Departments: A Historical Perspective*, 105 AM. J. EDUC. 231, 231–35 (1997).

and teachers, religious values may continue to infiltrate education, as students and teachers face little overt objection to bringing religion into the classroom.<sup>162</sup> Even if a minority of students would be inclined to object, social pressures and a lack of resources to bring a lawsuit make objections unlikely.<sup>163</sup> In other areas, public schools are religiously diverse and secular, yet individuals with a religious worldview may nevertheless find those schools' values to be hostile to their religious beliefs.<sup>164</sup>

Not all values inculcation is of like kind. Martin Redish and Kevin Finnerty have argued that courts should target indoctrination efforts, preventing schools from gratuitously influencing "the future political, social, or economic views of their students," but should allow schools wide latitude to convey values that are the "inherent by-product of pedagogical choices."<sup>165</sup> Under their theory, a school could teach about the Holocaust, with the effect of promoting religious tolerance, but a teacher could not espouse the "evils of capitalism" in math class.<sup>166</sup> This distinction, however, does not assist members of religious minority groups. Because mainline Protestant values have been domesticated into American life, judges are unlikely to perceive schools' advocacy of such values as indoctrination, or even religious.<sup>167</sup> These and other "American values" may nevertheless contradict the beliefs of religious minorities in the school.<sup>168</sup>

The case of *Daugherty v. Vanguard Charter School Academy*, in which parents sued a charter school for violating the Establishment Clause,<sup>169</sup> provides an

162. See, e.g., Kristi L. Bowman, *An Empirical Study of Evolution, Creationism, and Intelligent Design Instruction in Public Schools*, 36 J.L. & EDUC. 301, 358-59, 366-67, 375-76 (2007).

163. See Brenda Lee, *Kitzmiller v. Dover Area School District: Teaching Intelligent Design in Public Schools*, 41 HARV. C.R.-C.L. L. REV. 581, 584-88 (2006) (explaining that because courts cannot mend America's "huge cultural divide" "prophylactically," only individually targeted lawsuits will curb the teaching of creationism, and even that might not succeed).

164. See Forman, *supra* note 158, at 561 ("By the end of the 1980s, the evangelical Christian critique of the public school system was fully articulated. Public schools had become so committed to secularism that they were necessarily hostile to religion. . . . For many, these changes together amounted to state establishment of the religion of secularism in the public schools."); see, e.g., *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1063 (6th Cir. 1987).

165. Redish & Finnerty, *supra* note 148, at 103.

166. *Id.* at 108-09.

167. See Marshall, *supra* note 150, at 190; Viteritti, *supra* note 3, at 666-69 (explaining that in the nineteenth century, courts rejected challenges to schools' ubiquitous use of the King James Bible, as "[m]ost judges at the time refused to recognize the Bible as a sectarian book").

168. See *supra* note 155 and accompanying text.

169. 116 F. Supp. 2d 897 (W.D. Mich. 2000).

example of how courts are ill equipped to evaluate the sources of values that schools promote. The plaintiffs alleged that their children had “been subjected to numerous and various Christian influences” by the actions of “school administrators, teachers, volunteers, other students’ parents, and students.”<sup>170</sup> One of their objections focused around Vanguard’s use of a “Moral Focus Curriculum,” ostensibly based on the “four Greek cardinal virtues” of “prudence, temperance, fortitude and justice.”<sup>171</sup> The school associated the virtues with “key words,” including “merciful, compassion, kindness, forgiveness, and grace” for “justice,” and “moral strength, conscience, faith and self-sacrifice” for “fortitude.”<sup>172</sup> The parents challenged the use of “Greek virtues” as the teaching of Christian morality in disguise, and indeed, as they alleged, certain of the word associations align much more closely with Christian morality than with Greek philosophy.<sup>173</sup> But the court rejected the challenge, holding that “[t]he fact that the curriculum employs words and concepts in service of character development that happen to coincide or harmonize with the tenets of some or all religions, does not necessarily betoken endorsement.”<sup>174</sup>

The court’s grounding in American Protestantism likely interfered with its ability to understand that the school’s moral teachings reflected a Christian foundation. By contrast, efforts by minority religious groups to introduce their values into classrooms are not likely to go unnoticed.<sup>175</sup> As Justice Scalia suggests in his dissent in *Board of Education of Kiryas Joel Village School District v. Grumet*, throughout American history, groups with a common “religious and

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170. *Id.* at 903. Vanguard’s founder, J.C. Huizenga, claims that his “faith does not influence in any way what I do in public education,” but he also describes himself as a Christian with a “deep and abiding faith.” Karen Oprea, *National Heritage Academies: The Good Is the Enemy of the Great*, COMPASSION & CULTURE, May 2003, at 1, 3, available at <http://www.capitalresearch.org/pubs/pdf/x3773143532.pdf>. He explained in an interview that he was persuaded to “imbu[e] students with morality” by his encounter with an “atheist” social scientist who told him that “the longest-lasting societies were those that adhered to absolutes,” in particular “the Ten Commandments.” *Id.*

171. *Daugherty*, 116 F. Supp. 2d at 913 (internal quotation marks omitted).

172. *Id.* (internal quotation marks omitted).

173. The plaintiffs presented expert testimony that the school’s allegedly secular virtues did not have a Greek foundation and had a Christian foundation, but the judge did not credit this testimony. *Id.* at 913; see Affidavit of Sara Rappe, Ph.D., *Daugherty*, 116 F. Supp. 2d 897, available at <http://www.seaverlink.com/nha/rappe.htm>; Declaration of H. Coleman McGehee Jr., *Daugherty*, 116 F. Supp. 2d 897, available at <http://www.seaverlink.com/nha/mcgehee.htm>.

174. *Daugherty*, 116 F. Supp. 2d at 913.

175. See *supra* Part I.



cultural heritage” have built communities and civic institutions that accommodate their distinct cultural characteristics; courts take notice only when those groups’ customs appear “unusual” to the majority.<sup>176</sup> Thus, attempts to “neutrally” apply a vision that charter schools should be religion-free will lead to discriminatory treatment of minority religions, insofar as proposed schools grounded in Christian values will more likely get charters than those grounded in the values of minority religions. Because we overlook the sources of values grounded in Christianity or American secularism, taking a vision of state neutrality toward religion seriously requires giving members of minority religions who wish to found charter schools the same deference that the *Daugherty* court gave to the Christian founder of Vanguard.<sup>177</sup>

#### D. Benefits of Religious Charter Schools

Charter schools have empowered communities dissatisfied with traditional public schooling to bring their long-ignored values, culture, and history into the public school system.<sup>178</sup> Unlike traditional, diverse urban public schools, charter schools direct themselves toward a narrower segment of the

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176. 512 U.S. 687, 735-41 (1994) (Scalia, J., dissenting).

177. Banning values from the educational process entirely would also take neutrality seriously, but that, of course, is impossible. See Redish & Finnerty, *supra* note 148, at 104 (“To prohibit schools from conveying values, then, would effectively preclude schools from teaching anything.”).

178. See, e.g., Patty Yancey, *We Hold on to Our Kids, We Hold on Tight: Tandem Charters in Michigan*, in INSIDE CHARTER SCHOOLS, *supra* note 99, at 66. Charter schools also provide other educational benefits. Freed from bureaucratic controls, they can experiment with reforms such as block scheduling and interdisciplinary teaching, see U.S. DEP’T OF EDUC., EVALUATION OF THE PUBLIC CHARTER SCHOOLS PROGRAM: FINAL REPORT 22 (2004), available at <http://www.ed.gov/rschstat/eval/choice/pcsp-final/finalreport.pdf>, and serve as laboratories for innovative philosophies of education. For examples of ideologies underlying charter schools, see Chester E. Finn Jr., *Chartering and Innovating*, in CHARTER SCHOOLS AGAINST THE ODDS, *supra* note 8, at 159, 162-68. Charter schools can target their efforts to needy students like those from low-income communities or dropouts; alternatively, they can target gifted students who would not otherwise have the opportunity to realize their talents. See U.S. DEP’T OF EDUC., *supra*, at 84 app. C-3. While aggregate data on charter school performance remains mixed, *id.* at 53-54, some charter schools have shown remarkable results. See, e.g., Ellen R. Delisio, *Who Are We Proud To Be? Amistad Academy*, EDUC. WORLD, Sept. 9, 2004, [http://www.education-world.com/a\\_issues/schools/schoolso22.shtml](http://www.education-world.com/a_issues/schools/schoolso22.shtml) (discussing accomplishments of Amistad Academy and the founding of a charter school network to replicate its model); Mathews, *supra* note 98 (discussing impressive results achieved by the Knowledge Is Power Program schools, though acknowledging that challenges remain).

population.<sup>179</sup> The charter school process itself “provides an institutional mechanism for the natural formation of public schools within the bosom of real communities.”<sup>180</sup> As Bruce Fuller discovered, “[C]harter founders and families talk mostly about creating or preserving their *community*, eager to draw boundaries around their new schools within which like-minded parents and teachers can reside.”<sup>181</sup> In forming confined communities, charter schools reflect the shift in American public life from all-inclusive, “melting pot” civic institutions to narrower civic institutions “bounded by ethnicity, social class, or religion.”<sup>182</sup> The widespread failure of urban public schools alongside political change and unprecedented social diversity has fueled acceptance of this shift and experimentation with new forms of public schooling.<sup>183</sup> Although they have faced profound administrative and logistical challenges,<sup>184</sup> locally run charter schools can provide communities underserved by large, diverse public school districts with an opportunity to better meet their needs.<sup>185</sup>

A community’s decision to fund religious charter schools reflects the fact that the secular consensus governing the typical urban public school may not create the appropriate school environment for all students and all communities. Creating them takes America’s diversity and commitment to religious pluralism seriously, by allowing schools with differing values, including values sensitive to the concerns of religious minorities, to compete with one another for students.<sup>186</sup>

Religious charter schools also facilitate religious observance. Not every family who wants its children to be religiously observant can afford parochial

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179. See Fuller, *supra* note 99, at 30 (“[C]harters usually invite just certain types of families to participate, whether they be classified by race, religious affiliation, or philosophical commitment to strict discipline or innovative pedagogy.”).

180. VITERITTI, *supra* note 2, at 205.

181. Fuller, *supra* note 99, at 14.

182. *Id.* at 15.

183. Robert C. Bulman & David L. Kirp, *The Shifting Politics of School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY*, *supra* note 11, at 36-40; Minow, *supra* note 93, at 1075-79.

184. See NAT’L CHARTER SCH. RESEARCH PROJECT, *supra* note 99, at 12-13.

185. See Bruce Fuller, *Introduction: Growing Charter Schools, Decentering the State*, in *INSIDE CHARTER SCHOOLS*, *supra* note 99, at 1, 6-10; see, e.g., Elliott, *supra* note 42 (recounting how the founder of charter-like Khalil Gibran International Academy conceptualized the school as providing unique opportunities for children of Arab descent).

186. See Saiger, *supra* note 8, at 969 (arguing that by subsidizing public schools, the state inevitably shapes those schools’ point of view, and that it is therefore “no less public” to have “vouchers or charters that subsidize individual parental preferences about schools while impartially aggregating them using a market mechanism”).

school.<sup>187</sup> Others prefer that their children receive a general education rather than the devotionally oriented education in a nondiverse environment that many private religious schools are perceived as offering.<sup>188</sup> Religious charter schools provide a means for children in such families to receive a public, general education that is also sensitive to their values and permits them to observe their religion.

Religious institutions play an important role in many communities, and their desire to become charter school providers should surprise no one. In communities comprised of religiously observant individuals, religious institutions are often the most fundamental social institution.<sup>189</sup> When New York first passed a charter school law, for example, several black ministers in New York City announced their intention to start charter schools.<sup>190</sup> This announcement led to a “furor” over the idea that public money might support churches.<sup>191</sup> Yet the government has long funded social service provision through religiously affiliated charities,<sup>192</sup> and these ministers were acting in their traditional role as social service providers to their communities. Legislatures, failing to appreciate this complexity, have made sectarian institutions ineligible for charter school funding, or denied charters to religious individuals or organizations, even when the Establishment Clause does not pose a barrier. By contrast, states have permitted museums,<sup>193</sup> university schools of education,<sup>194</sup> and representatives of local manufacturers<sup>195</sup> to run charter schools.

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187. See Kersten, *supra* note 62.

188. See Hubert Morken, Family Research Council, Witherspoon Lecture (Sept. 10, 1999) (transcript available at <http://www.frc.org/get.cfm?i=WT99G1>) (“Many religious families prefer public schools . . .”).

189. See VITERITTI, *supra* note 2, at 206.

190. *Id.* at 205.

191. *Id.* at 205-06.

192. See Macedo, *supra* note 7, at 442-45.

193. See, e.g., *Children’s Museum Charter School Among Highest in State API Scores*, SAN DIEGO METROPOLITAN, May 2005, at 62, available at <http://www.sandiegometro.com/2005/may/museum.php>.

194. See Will Oremus, *Univ. Takes Over EPA Charter School*, STAN. DAILY, Apr. 11, 2005, at 1, available at <http://ed.stanford.edu/suse/news-bureau/displayRecord.php?tablename=susenews&id=110>.

195. University of Wisconsin-Madison, Center on Education and Work, Intermediate School Sponsorship of Charter Academies, <http://www.cew.wisc.edu/charterschools/TEC2practice.asp> (last visited Nov. 24, 2008).

The sorts of institutions that create charter schools and provide social and cultural services in other communities are often absent from lower-income communities.<sup>196</sup> As a result, religious groups are particularly likely to serve as social service providers in these communities.<sup>197</sup> Allowing religious groups to start charter schools permits these communities and wealthier religious communities alike to draw upon the material, spiritual, and cultural wealth of their dominant social institution to better educate their children.

By encouraging members of religious minority groups to participate in the public sphere, religious charter schools foster empowerment of minority religious communities in a way that benefits American democracy.<sup>198</sup> Empowerment improves democracy by incorporating previously marginalized groups into the political system. A seminal study on African-American empowerment, drawing upon earlier research showing that “a strong sense of ‘ethnic community’ . . . was the stimulus to heightened black participation,” demonstrated that the election of an African-American mayor triggered significantly increased sociopolitical participation by the black community in general.<sup>199</sup> More concretely, blacks’ feelings of efficacy and trust in the political system increased, and they became more engaged in politics and civic life through voting, campaigning, participation in local problem-solving organizations, and contacting elected officials.<sup>200</sup>

By engaging parents in the communal and political act of creating a school grounded in their values, religious charter schools can similarly give members of religiously observant communities that have long felt disempowered the ability to meet their children’s needs.<sup>201</sup> More broadly, they help communities

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196. VITERITTI, *supra* note 2, at 206.

197. Churches in poor communities play a “unique and complex role . . . beyond the religious mission.” *Id.*

198. The leader of Tarek ibn Ziyad Academy considers its potential to foster the political and cultural incorporation of its predominantly immigrant families as a primary benefit. As he told a reporter, “Tarek can be a steppingstone for some families to learn more about American culture in a safe environment . . . . ‘What does it mean to be an American citizen? To us, citizenship means involvement. . . . [and part of the school’s mission is to build] a diverse, virtuous, and moral America . . . .’” Oseid, *supra* note 47 (quoting Asad Zaman).

199. See Lawrence Bobo & Franklin D. Gilliam, Jr., *Race, Sociopolitical Participation, and Black Empowerment*, 84 AM. POL. SCI. REV. 377, 377-80 (1990).

200. *Id.* at 380, 381 tbl.1, 383-85 & tbl.3.

201. See STEVE P. JEFFERSON, CHARTER SCHOOLS: A DESCRIPTIVE STUDY OF EMPOWERMENT WITHIN THE OPERATION OF CHARTER SCHOOLS (2004) (describing how charter schools foster empowerment in minority and other communities by giving families a greater stake in their school); see, e.g., Heather Kroger Devich, Education as a Tool for Social Change: Case Study of an Arizona Inner-City Charter School 86-90 (May 20, 2000) (unpublished Ed.D.

gain a stake in urban public school systems and therefore in public life.<sup>202</sup> Voluntary associations foster democracy by bringing people together for community building and the achievement of common purposes.<sup>203</sup> Like other voluntary associations, religious charter schools<sup>204</sup> contribute to collective well-being by giving individuals a means to privately affirm personal identities and publicly articulate shared commitments.<sup>205</sup>

In other Western democracies that have funded religious groups' provision of education, that funding has secured those groups' stake in the public system and ensured that system's continued viability. In Britain, where the state gives education funding to the Church of England and also Catholic, Methodist, Jewish, and Muslim groups,<sup>206</sup> schools run by religious organizations have proven popular, appealing to parents interested in their "ethos, discipline and academic achievements."<sup>207</sup> Their appeal often transcends their own religious affiliates; in areas without Muslim schools, Muslim parents prefer to send their children to Church of England schools as opposed to secular public schools.<sup>208</sup> In France, Muslims have flocked to state-subsidized (and thus affordable) Catholic schools, appreciative of their greater spirituality, academic rigor, and willingness to accommodate Islam.<sup>209</sup> Similarly, if American localities fund

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dissertation, University of San Francisco) (on file with author) (discussing the development of "political consciousness" among poor families at an Arizona religious charter school).

202. See Elliott, *supra* note 42 (noting that creation of Khalil Gibran has been viewed as part of a wider effort by "Muslim citizens who are seeking an expanded role in American public life").
203. See ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 18-19 (2000).
204. See VITERITTI, *supra* note 2, at 217 (conceptualizing schools as voluntary associations).
205. See PUTNAM, *supra* note 203, at 22. Admittedly, religious charter schools could reinforce boundaries between religious groups. Cf. *id.* at 22-23 (noting that alongside its benefits, inward-looking "bonding social capital" can reinforce "exclusive identities and homogenous groups"). But any such harm comes as a byproduct of religious charter schools' potential to empower their members politically.
206. Muslim schools did not always receive funding and had to fight for inclusion against fears that they would promote fundamentalism. See Marie Parker-Jenkins, *Equal Access to State Funding: The Case of Muslim Schools in Britain*, 5 RACE ETHNICITY & EDUC. 273, 276-80 (2002). In Canada, where the state also funds selected religious schools, Muslims have faced similar challenges. See Faisal Bhabha, *Don't Fear Religious Schools*, Nat'l Post Full Comment Blog, Aug. 24, 2007, <http://network.nationalpost.com/np/blogs/fullcomment/archive/2007/08/24/faisal-bhabha-don-t-fear-religious-schools.aspx>.
207. Tariq Modood, *Muslims and the Politics of Difference*, 74 POL. Q. 100, 112 (2003).
208. Tariq Modood, *Establishment, Multiculturalism and British Citizenship*, 65 POL. Q. 53, 62 (1994).
209. Katrin Bennhold, *French Muslims Find Haven in Catholic Schools*, N.Y. TIMES, Sept. 30, 2008, at A6.

religious charter schools, it may increase the diversity of stakeholders in the public school system. Ben Gamla Charter School, for example, has already drawn two hundred students out of Jewish day schools, increasing the overall socioeconomic and ethnic diversity of the public system in Broward County, and—because Ben Gamla itself enrolls a minority of African-American students—the diversity of each student’s classmates as well.<sup>210</sup>

Keeping members of religious groups invested in the public school system has additional social benefits. As discussed earlier, Muslim families have increasingly turned to home schooling, finding that public schools “clash[] with their religious or cultural traditions.”<sup>211</sup> As the collective wealth of Muslim Americans continues to grow, we can expect that more Muslim families will take this route if public schools remain hostile to their values and unaccommodating of their religious observance. Others have also made the choice to abandon collective schooling. At present, some ninety thousand American children attend “full-time online charter school[s],” meaning that their entire education takes place online, usually at home.<sup>212</sup> In California, a group of predominantly religious Christian parents has ingeniously created an organization, Valley Charter School (VCS), that pays them to home school their children.<sup>213</sup> VCS provides parents with secular educational materials and the support of consulting teachers, and requires some limited accountability of parents.<sup>214</sup> However, students do not attend school at the VCS site, parents

210. See Luxner, *supra* note 74.

211. MacFarquhar, *supra* note 54.

212. Sam Dillon, *Online Schooling Grows, Setting Off a Debate*, N.Y. TIMES, Feb. 1, 2008, at A1; see also LAUREN MORANDO RHIM & JULIE KOWAL, NAT’L ASS’N OF STATE DIRS. OF SPECIAL EDUC., DEMYSTIFYING SPECIAL EDUCATION IN VIRTUAL CHARTER SCHOOLS (2008), [http://www.uscharterschools.org/specialedprimers/download/special\\_report\\_rhim.pdf](http://www.uscharterschools.org/specialedprimers/download/special_report_rhim.pdf) (discussing characteristics of virtual charter schools).

213. See Luis A. Huerta, *Losing Public Accountability: A Home Schooling Charter*, in INSIDE CHARTER SCHOOLS, *supra* note 99, at 177-180. A recent California court decision appeared to call the legal status of schools like VCS into question, holding that the California Education Code’s requirement that minor children enroll in a public school unless they attend a private school, receive tutoring from a state-credentialed teacher, or meet another statutory exception does not permit uncredentialed parents to home school their children. *In re Rachel L.*, No. B192878, 2008 Cal. App. LEXIS 292, at \*1-2, \*16 n.5 (Ct. App. Feb. 28, 2008). However, under pressure, the court subsequently vacated its decision. It determined that while statutes appeared to prohibit home schooling by uncredentialed parents, it would conclude that home schools qualified as “private full-time day school[s]” because the legislature had consistently “acted as though home schooling is, in fact, permitted in California.” *Jonathan L. v. Superior Ct.*, No. B192878, 2008 Cal. App. LEXIS 1219, at \*28-29, \*40 (Ct. App. Aug. 8, 2008).

214. See Huerta, *supra* note 213, at 182-83, 190-93.

retain control over the curriculum, and parents may employ religious materials in instruction.<sup>215</sup> Both home-based and virtual charter schools enable parents, with state funding, to educate their children in isolation. Religious charter schools, by contrast, provide a means for adapting American public education to the needs of religious minorities while still ensuring that education promotes social interaction, democracy, and shared values, even if those values are not precisely those of the Protestant majority.

### III. PRACTICAL OBJECTIONS AND THEIR CONSEQUENCES

Despite the erosion of ideological and legal objections to religious charter schools, districts have rejected proposals for them, reasoning that religious persons or institutions should not run charter schools. For example, in rejecting the attempt of an ethnically diverse mega-church<sup>216</sup> to start a charter school in Colorado, the school board “observed that the [charter school’s] operating board would have been composed primarily of church officials,” “even though the curriculum would have been religiously neutral.”<sup>217</sup> Chartering agencies have also rejected proposals on the grounds that schools should not embody religiously based values. For example, proposals for “Waldorf-method” charter schools, which embody beliefs about human development that proponents label a “philosophy of education” but critics denounce as “inherently religious,” have been rejected in Utah.<sup>218</sup>

This Part focuses on objections to religious charter schools, and assesses conditions under which districts should want to create religious charter schools. Section III.A discusses objections. Section III.B concludes that, in light of these objections, large urban districts are the best candidates for religious charter schools.

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215. *Id.* at 181-83, 188.

216. See Heritage Christian Center, Our Vision, <http://www.heritagechristiancenter.com/newhere/vision.htm> (last visited Nov. 24, 2008).

217. GREEN & MEAD, *supra* note 15, at 166.

218. *Id.* at 166-67. California, however, has allowed the creation of Waldorf schools. See Mel Huff, *Waldorf Educator Visits Orchard Valley*, TIMES ARGUS (Barre-Montpelier, Vt.), Dec. 1, 2007, at B1, available at <http://www.timesargus.com/apps/pbcs.dll/article?AID=/20071201/NEWS02/712010385/1003/NEWS02>.

### A. *Objections to Religious Charter Schools*

Critics question why public schools should accommodate different religions.<sup>219</sup> Some say public schools should teach shared American values and promote the assimilation of immigrants and religious minorities into American life; religious charter schools seem to work against this goal.<sup>220</sup> Yet in creating school choice, urban districts have already abandoned the historical presumption that traditional public schools can serve everyone.<sup>221</sup> Failing to accommodate religious minorities forces them to choose between participating in public education and maintaining their religion. When faced with this choice, many will abandon public education for home, virtual, or private schooling.<sup>222</sup> Localities should consider these trends in deciding whether to accommodate religious minorities.

Religious charter schools also face accusations that their efforts to teach values and culture and accommodate religious observance cross the constitutional line into promoting religion.<sup>223</sup> Critics claim that religious charter schools cannot maintain this line, and districts cannot police it, because the distinctions are unclear or cover up covert promotion of religious practice. Initially, districts can address this concern by scrutinizing proposed religious charter schools to ensure that they can comply with the First Amendment.<sup>224</sup> They may wish to require safeguards, such as a curriculum committee that includes nonadherents who can vet the school's curriculum and practices. Once in operation, districts can, consistent with the Constitution, conduct regular on- and off-site reviews of a charter school's operations and materials.<sup>225</sup> Religious charter schools also have a strong incentive to self-police, because they want to retain their funding. If they push the line, as TIZ has, they risk

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219. See Richard Just, *Why School Choice Could Demolish National Unity*, in PUBLIC SCHOOL CHOICE VS. PRIVATE SCHOOL VOUCHERS 97 (Richard D. Kahlenberg ed., 2003).

220. See, e.g., *id.*; Popper, *supra* note 18 (contending that religious charter schools may foster an "unhealthy atomization of American culture").

221. See Hill, *supra* note 95, at 143-44.

222. See *supra* notes 158-159, 211-215 and accompanying text.

223. See *supra* Part I.

224. Cf. Stephen D. Sugarman & Emlei M. Kuboyama, *Approving Charter Schools: The Gate-Keeper Function*, 53 ADMIN. L. REV. 869 (2001) (discussing the charter school approval process).

225. See *supra* notes 137-141 and accompanying text.



community criticism, court challenges, and potentially revocation.<sup>226</sup> Books like Lawrence Weinberg's guide, which applies First Amendment jurisprudence to hypothetical religious charter schools, make compliance easier.<sup>227</sup>

Critics also fear that religious charter schools will discriminate against prospective attendees and employees, selecting them on the basis of religion. But charter schools must comply with Title VII in hiring teachers.<sup>228</sup> Like other employers whose jobs have disproportionate appeal to members of a particular group, religious charter schools must search broadly for employees to avoid disparate impact discrimination.<sup>229</sup> They appear to do so; both Ben Gamla Charter School and Tarek ibn Ziyad Academy have teachers from varied religious backgrounds.<sup>230</sup>

Charter schools, under most states' laws or if they receive federal funds, are required to admit students by lottery.<sup>231</sup> This requirement should preempt potential discrimination and ensure that publicly funded schools remain open to attendees from all backgrounds. Self-segregation could lead to religious charter schools only serving their affiliated religions. Still, the example of Ben Gamla—where a significant minority of non-Jewish students has enrolled—demonstrates that parents may enroll their children in a religious charter school affiliated with a different religion. Religious private schools, especially

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226. See Suzanne E. Eckes, Jonathan A. Plucke & Sarah A. Benton, *Charter School Accountability: Legal Considerations Concerning Nonrenewal and Revocation Procedures*, 2006 BYU EDUC. & L.J. 551; *supra* notes 55-63.

227. See WEINBERG, *supra* note 25.

228. See 42 U.S.C. § 2000(e) (2000) (defining coverage). In the voucher context, scholars have debated whether states can constitutionally require observance of nondiscrimination requirements as a condition of participation. Compare Mark Tushnet, *Vouchers After Zelman*, 2002 SUP. CT. REV. 1, 22-29 (suggesting nondiscrimination requirements might violate groups' right of expressive association), with Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 977-78 (2003) (contending that applying antidiscrimination laws to voucher schools comports with long-held public policy and is constitutional), and Michael Kavey, Note, *Private Voucher Schools and the First Amendment Right To Discriminate*, 113 YALE L.J. 743, 744, 764-72 (2003) (same). Given that arguments for the constitutionality of antidiscrimination requirements are even stronger for charter schools due to their quasi-public status, states should feel confident imposing these requirements.

229. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

230. See Oseid, *supra* note 47; Telephone Interview with Peter Deutsch, *supra* note 76.

231. See U.S. DEP'T OF EDUC., *supra* note 27, at 11-15; see, e.g., MASS. GEN. LAWS ANN. ch. 71, § 89(n) (West Supp. 2008); DC Public Charter School Board, Enrollment/Lottery Guidelines, <http://www.dcpubliccharter.com/pcschools/enrollguidelines.html> (last visited Nov. 24, 2008).

Catholic schools, have long enrolled nonadherents whose parents felt that the schools offered a superior education,<sup>232</sup> so it seems unwarranted to assume that religious charter schools will become de facto segregated.

Finally, the difficult question arises of the extent to which religious charter schools should be able to teach values explicitly at odds with majority values. For example, should a religious charter school be able to teach that homosexuality is wrong, where other public schools in the district teach tolerance? To maintain neutrality, districts should allow religious charter schools the same latitude given other choice-based schools, which could conceivably be greater than what they allow traditional public schools.<sup>233</sup> The autonomy of charter schools makes them unique within the public school system; if religious charter schools lose the ability to embrace their community's values, a key virtue will be lost.

The government cannot restrict the First Amendment rights of grant recipients as a condition of funding, provided that the protected conduct occurs "outside the scope of the federally funded program."<sup>234</sup> But the government can constitutionally prohibit a grantee from using public funds toward specific purposes, and in the process decline to subsidize the exercise of a constitutional right.<sup>235</sup> Applying this doctrine to the aforementioned example, in which a legislature has formalized nondiscrimination against gays and lesbians as public policy, the state may require that religious charter schools *not* teach disapproval of homosexuality during the school day. Less clear is whether the state could require that a religious charter school teach tolerance as a condition of participation in a charter school program, where such teachings would contradict the school's values. A court's analysis will depend on whether it perceives the teaching as the government's use of private speakers to transmit

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232. In fact, some urban Catholic schools are majority non-Catholic. See Samuel G. Freedman, *A Young Teacher Combines His Religion and Desire To Serve in the Classroom*, N.Y. TIMES, Mar. 22, 2008, at A14; cf. Bennhold, *supra* note 209 (estimating that ten percent of Catholic school students in France are Muslim, a figure that rises to eighty percent in some urban Catholic schools).

233. See *supra* note 101 and accompanying text.

234. *Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (discussing *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984)).

235. See *Rust*, 500 U.S. 173; *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983) ("Congress could, for example, grant funds to an organization dedicated to combating teenage drug abuse, but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures.").

the government's educational message ("government speech"),<sup>236</sup> or instead as the expenditure of public funds to facilitate the message of private speakers ("private speech").<sup>237</sup> If it views the message as private speech, it may strike down restrictions as viewpoint discrimination in violation of the First Amendment.<sup>238</sup> On the other hand, if it views a charter school program as government speech transmitted through the medium of private speakers, or it views the message itself, even if private speech, as contrary to the very purposes for which the government funds charter schools, then it might uphold restrictions against a First Amendment challenge.

The hybrid public-private nature of charter schools makes it difficult to anticipate how a court would decide. Because the private operator typically chooses the curriculum, courts will most likely consider a charter school's speech as private speech funded by the government. As such, courts will likely prevent states from requiring that charter schools present a particular state-sanctioned viewpoint on controversial issues. Yet because charter schools operate as part of the public school system, courts will most likely uphold states' power to ensure that charters operate within the outer bounds of state public policy.<sup>239</sup> Thus, on controversial subjects, religious charter schools could say something that does not conflict with state public policy or refrain from speaking entirely. This approach would be consistent with current practice, as many states already permit public schools and districts to take diverse approaches to controversial social or curricular issues like same-sex relationships or sex education.<sup>240</sup>

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236. See *Rust*, 500 U.S. at 194-200 (upholding the constitutionality of a federal family planning program as government speech); see also *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (discussing *Rust*).

237. See *Rosenberger*, 515 U.S. at 834-37 (striking down a public university's restrictions on funding of religiously oriented student newspapers).

238. See *id.* at 828-30.

239. The considerable freedom that states permit charter schools is a matter of legislative grace, and state law regulates the contours and extent of that freedom. See *In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 753 A.2d 687, 689-91 (N.J. 2000) (noting that charter schools' freedom from many state and local regulations stems from legislative authorization, with the result that the schools remain accountable to "the charter schools' governmental approving authority, the individuals who organize the schools and the public that funds them").

240. See, e.g., *Parker v. Hurley*, 514 F.3d 87, 91-92 (1st Cir. 2008) (discussing the relationship between statewide standards and district autonomy); cf. Powe, *supra* note 161, at 3; Timar, *supra* note 161, at 231-35.

### B. Finding Appropriate Spaces for Religious Charter Schools

Each school district will want to choose independently whether to have religious charter schools. Generally, religious charter schools will be most appropriate in large districts with significant numbers of religious minorities; in these districts, religious charter schools will help the state maximize the availability of satisfactory options while minimizing the chances of oppressing nonadherents. Smaller districts that cannot afford to support a variety of school choice options, or that do not have a diverse array of religious groups willing to create charter schools, may find direct accommodation of religious observance more feasible.

The *Zelman* Court cited neutrality among religions and a broad availability of religious and nonreligious choices as prominent factors in approving a voucher program.<sup>241</sup> Districts that can support only a few religious charter schools should exercise caution before creating any. They otherwise risk favoring particular religious groups, which might exacerbate the paucity of schools conducive to the needs of religious minorities.<sup>242</sup> Having only religious charter schools would also impinge on the conscience of students whose beliefs—religious or otherwise—conflict with those of religious charter schools in the district, and would violate *Zelman*'s requirement that publicly funded schooling include viable nonreligious options.<sup>243</sup> Larger districts that can support many types of schools are best equipped to create religious charter schools and still avoid discriminating against those who are not members of participating religious groups.

Similarly, religious charter schools are most appropriate in larger districts with a diverse array of religious groups willing to participate. Ensuring state neutrality among religious groups, as the Establishment Clause demands,<sup>244</sup> requires chartering agencies to evaluate prospective religious and nonreligious charter schools using identical, religiously neutral standards. Ongoing

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<sup>241.</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 651-55 (2002).

<sup>242.</sup> Districts favor awarding charters to “[w]ealthier, more popular, and longer established religious communities” since they have “greater resources.” Macedo, *supra* note 7, at 447. To avoid discrimination against less wealthy religious groups, districts should only establish religious charter schools if they can afford to charter schools run by religious groups across the socioeconomic spectrum. Of course, a school run by a religious group different than one’s own might still offer a more suitable education than a secular public school. See *supra* notes 206-210 and accompanying text.

<sup>243.</sup> See *Zelman*, 536 U.S. at 655-56.

<sup>244.</sup> See *id.*

evaluation also must take place.<sup>245</sup> Larger districts are capable of uniformly applying neutral standards to a diversity of religious groups, enabling them to avoid the entanglement concerns that arise when the government works with only a few religious groups.

Larger, heterogeneous districts may also be able to accommodate more efficiently the needs of their religious minority communities in religious charter schools. Constitutionally, traditional public schools can choose to accommodate attendees' needs.<sup>246</sup> Parents cannot force public schools to furnish accommodations,<sup>247</sup> however, and schools' willingness to accommodate varies. When public schools are unwilling to accommodate, or if religious groups' values are too diverse to adequately serve everyone in one school, religious charter schools can help. Smaller districts tend to be more homogeneous and in such districts, it may be easier and more cost-effective to accommodate the values and observance of a few religious minority attendees within a traditional public school.

Finally, only large districts with a diverse system of school choice at the district level can ameliorate the fear that schools with religiously defined normative frameworks will oppress nonadherents. Because all charter schools are based upon choice and the option of exit, charter schools arguably have a greater warrant than traditional public schools to maintain a particular normative mission.<sup>248</sup> As discussed earlier, the availability of choice creates a situation in which "like-minded teachers and students can affirmatively choose to invest themselves in one school instead of another based on distinct normative claims embodied" in each school's mission.<sup>249</sup> Additionally, in a choice-based system, schools must openly publicize their values so that families can make informed choices; as *Vanguard* illustrates, having dissatisfied parents breeds litigation. Such a system of choice, featuring schools with open and competing normative missions, only works if there are a varied selection of

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245. See Eckes et al., *supra* note 226; Sugarman & Kuboyama, *supra* note 224, at 917-28.

246. See *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990); Isgur, *supra* note 34.

247. See *Parker v. Hurley*, 514 F.3d 87, 103-07 (1st Cir. 2008) (declining to require a school district to accommodate parents who objected to books promoting tolerance of gay persons and couples); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1063-70 (6th Cir. 1987) (declining to require a school district to exempt children from reading books that parents claimed taught values contrary to their religious beliefs).

248. Vischer, *supra* note 101, at 83, 86; see also *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) (noting the Court's vigilance over Establishment Clause compliance in "elementary and secondary schools" in part because students' "attendance is involuntary" and the State therefore "exerts great authority and coercive power").

249. Vischer, *supra* note 101, at 83.

schools from which to choose. Offering this type of selection is not feasible in most smaller districts.

## **CONCLUSION**

Like other charter schools, religious charter schools consciously ground themselves in the values and culture of a particular community. For students and families who find the values underlying public school education to be alienating, they can offer a more appealing environment. For religiously observant students, religious charter schools provide the opportunity to maintain one's religion without sacrificing the benefits of a general education and a diverse environment. More broadly, they give religious minority groups the opportunity to design charter schools that reflect their values. Families benefit from the energy that religious groups bring to education. In today's pluralistic society, religious charter schools promote democracy by empowering members of religious minority groups to participate in the public sphere.

In an era of widespread public school failure and unprecedented diversity, religious charter schools have the potential to foster increased investment in the public school system among members of religious groups. Ultimately, by empowering religious groups to bring their values and culture into a public school system that may otherwise ignore them, religious charter schools further the ability of urban public schools to meet their students' needs.



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