CHURCH, CHOICE, AND CHARTERS: A NEW WRINKLE FOR PUBLIC EDUCATION?

In late August 2007, the Ben Gamla Charter School opened its doors to approximately 400 students in Hollywood, Florida.[1] Funded by public dollars and named for a first-century Jewish high priest who sought to introduce universal education,[2] the school aimed to provide "a first-class academic program" featuring "a unique bilingual, biliterate, and bi-cultural curriculum, which prepares students to have an edge in global competition through the study of Hebrew as a second language."[3] Ben Gamla's director, Rabbi Adam Siegel, was unequivocal in explaining that the school was by no means religious.[4] Despite some raised eyebrows[5] and a brief suspension of Hebrew classes by the Broward County school district,[6] the charter school appears to be thriving, and its founder plans to open additional Hebrew-language charter schools in the coming years.[7]

The media attention it garnered notwithstanding, the Ben Gamla experiment is far from unique. Since the advent of the charter school movement in the early 1990s, a number of start-up schools have adopted similar, culture-oriented models.[8] These controversial schools straddle longstanding disputes over religion, pedagogy, and the public fisc that date to the earliest incarnations of the public school system.[9] From bitter conflict over the anti-Catholic character of the first common schools[10] to modern controversies over school

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[1] *See* Abby Goodnough, *Hebrew Charter School Spurs Florida Church-State Dispute*, N.Y. TIMES, Aug. 24, 2007, at A1.

[2] *Id.*

[3] Ben Gamla Charter School, School Administration & Philosophy (Aug. 10, 2007), http://www.bengamlacharter.org/admin.htm.

[4] Hannah Sampson, *Will School Cross Religion Line?*, MIAMI HERALD, July 13, 2007, at 1A (Rabbi Siegel asserted: "This is not Jewish day school . . . . If you're looking for a religious education, this is not the place for you").

[5] *See, e.g.*, Noah Feldman, *Universal Faith*, N.Y. TIMES, Aug. 26, 2007, § 6 (Magazine), at 13 ("Ben Gamla seem[s] poised to teach religion as a set of beliefs to be embraced rather than as a set of ideas susceptible to secular, critical examination."); Hannah Sampson, *Charter School's Hebrew Lessons Approved*, MIAMI HERALD, Sept. 12, 2007, at 6B ("[Ben Gamla's critics] have argued that it crosses the line between church and state because it is impossible to separate religion from the Hebrew language.").

[6] Sampson, *supra* note 5.

[7] *See id.*

[8] *See, e.g.*, Nathaniel Popper, Op-Ed., *Chartering a New Course*, WALL ST. J., Aug. 31, 2007, at W11 (describing a surge in culturally based charter schools); *infra* section I.B, pp. 1755–57.

[9] *See generally* NOAH FELDMAN, DIVIDED BY GOD 57–99 (2005).

[10] *See* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 219–29 (2002); DIANE RAVITCH, THE GREAT SCHOOL WARS 33–76 (1974).

prayer[11] and vouchers,[12] public education has historically been a flashpoint of the hoary church-state debate.

Against this backdrop, the potential for religiously themed charter schools — charters that carry the Ben Gamla model several steps further — offers a new wrinkle for consideration. Steeped in notions of educational choice, charter schools are publicly funded independent schools whose capacity for flexibility and entrepreneurship affords the possibility of "more innovative, effective, and accountable" leadership than that offered by traditional school districts.[13] Less than two decades old, the movement has garnered its fair share of skepticism,[14] while quickly establishing itself among the latest fixtures of public education reform.[15]

To date, charter schools that have tested the church-state line remain in the extreme minority. However, Ben Gamla and others of its ilk may represent the bleeding edge of a brewing constitutional controversy.[16] Indeed, the apparent consonance between the role of choice in the charter school model and in the Supreme Court's evolving interpretation of the Establishment Clause suggests that it is only a matter of time before the looming legal question is vigorously pressed.[17]

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[11] *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962) (holding official prayers at public school unconstitutional).

[12] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (permitting educational voucher use for parochial schools).

[13] Bruce Fuller, *Introduction* to INSIDE CHARTER SCHOOLS: THE PARADOX OF RADICAL DECENTRALIZATION 1, 6–7 (Bruce Fuller ed., 2000) [hereinafter INSIDE CHARTER SCHOOLS]; *see also* JONATHAN SCHORR, HARD LESSONS: THE PROMISE OF AN INNER CITY CHARTER SCHOOL xvii–xxiii (2002) (tracing the origins of the charter school movement).

[14] *See, e.g.*, THOMAS L. GOOD & JENNIFER S. BRADEN, THE GREAT SCHOOL DEBATE: CHOICE, VOUCHERS, AND CHARTERS 177 (2000) ("[A]t present[,] . . . the charter school movement remains a disorganized and wasteful experience . . . ."); Bruce Fuller, *The Public Square, Big or Small? Charter Schools in Political Context*, *in* INSIDE CHARTER SCHOOLS, *supra* note 13, at 12, 65; Amy Stuart Wells, *Why Public Policy Fails To Live Up to the Potential of Charter School Reform*, *in* WHERE CHARTER SCHOOL POLICY FAILS: THE PROBLEMS OF ACCOUNTABILITY AND EQUITY 1, 3 (Amy Stuart Wells ed., 2002) ("[I]t is the ambiguity, the lack of support, and the complete absence of equity provisions within the charter school laws in most states that have led to the beginning of the end of yet another school reform movement.").

[15] By 2001, just ten years after Minnesota passed the first charter school legislation, *see* BRYAN C. HASSEL, THE CHARTER SCHOOL CHALLENGE 8 (1999), more than 2400 charter schools had been founded in thirty-four states, SCHORR, *supra* note 13, at xvii. Today, forty states and the District of Columbia are home to more than 4000 charter schools serving over one million students. NAT'L ALLIANCE FOR PUB. CHARTER SCH., NUMBER OF CHARTER SCHOOLS AND STUDENTS IN THE 2006–07 SCHOOL YEAR 1–2 (2007).

[16] *See, e.g.*, Lawrence D. Weinberg & Bruce S. Cooper, Commentary, *What About Religious Charter Schools?*, EDUC. WK., June 20, 2007, at 39, 39–40 ("Is the stage set for a range of government-financed religious/cultural charter schools?").

[17] Similar arrangements have already been targeted for litigation. *See, e.g.*, Stark v. Indep. Sch. Dist., No. 640, 123 F.3d 1068 (8th Cir. 1997) (holding that a public school's adoption of rules in compliance with the belief system of the religious denomination that owned its facility did not

This Note explores the constitutional feasibility of religious charter schools.[18] Part I tracks the evolution of the charter school movement, relating the steady advance of the charter idea and noting the development of culture-specific charter schools. Part II turns to emerging Supreme Court doctrine on this issue, paying particular attention to the increasing centrality of private choice in the Court's Establishment Clause jurisprudence. Part III evaluates these trends in concert, offering an assessment of the constitutional concerns surrounding explicitly religious charter schools and observing that recent voucher decisions may have opened the door to religious charters. Part IV briefly concludes.

Although neutrality may well be "at times a graver sin than belligerence,"[19] it is worth stating at the outset that this Note deliberately eschews normative questions as to the desirability of religiously themed public education. This is not to understate the significance of an issue that will surely continue to be discussed and debated in the media outlets, courtrooms, and town squares that serve as the cathedrals of American civic religion. It is only to limit this Note's focus to a question that can be introduced in the space available: might religious charter schools pass constitutional muster?[20]

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violate the Establishment Clause); *see also infra* note 48 and accompanying text. (noting pending suit against Arabic charter school).

18 For a far-reaching, alternative effort to articulate and assess the varied legal issues facing religiously themed charter schools, see LAWRENCE D. WEINBERG, RELIGIOUS CHARTER SCHOOLS: LEGALITIES & PRACTICALITIES (2007). Although Weinberg concludes that expressly denominational religious charters are unconstitutional, he offers a detailed framework for constitutionally permissible accommodation of religion in charter schools. *Id.* at 137–49; *see also* Weinberg & Cooper, *supra* note 16 (observing that "religiously sensitive charter school[s]" — in line with Weinberg's framework — may be founded as faith communities recognize "an opportunity to open schools with a clear cultural and ethical mission, a general pedagogy, and attractiveness to members of their religious group").

19 THE WORDS OF JUSTICE BRANDEIS 46 (Solomon Goldman ed., 1953) (quoting Justice Louis Brandeis).

20 Among the many statutory issues and state constitutional issues beyond the scope of this Note are the implications of the so-called "Blaine Amendments," which have been adopted in more than thirty states and purport to restrict state governments' capacities to fund sectarian education. *See generally* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 576–602 (2003). Narrow construction of these amendments has allowed many school choice programs — including voucher programs that provide money to parochial schools — to survive legal challenge. *See, e.g.*, Simmons-Harris v. Goff, 711 N.E.2d 203, 212 (Ohio 1999); Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57, 73–74 (2005). Moreover, the list of states that do not have Blaine Amendments includes the charter-heavy state of Louisiana. *See* TODD ZIEBARTH, NAT'L ALLIANCE FOR PUB. CHARTER SCH., TOP 10 CHARTER COMMUNITIES BY MARKET SHARE (2008); James A. Peyser, Op-Ed., *The Schools that Katrina Built*, BOSTON GLOBE, Oct. 14, 2007, at E1 (noting the prevalence of charter schools in post-Katrina New Orleans).

I. UNDERSTANDING CHARTER SCHOOLS

Before proceeding with the constitutional questions facing religiously themed charters, it is important to clarify the features of most charter school legislation. This Part outlines these signature characteristics. It then turns to an overview of schools that, some would argue, have already begun to blur traditional educational boundaries.

A. Defining Charter Schools

Although the details of charter legislation vary substantially by state,[21] the basic features of charter schools are fairly easy to describe. Charters are public schools run by government-authorized independent operators.[22] Successful applicants for charters can be drawn from a broad spectrum of interested parties,[23] including educators and parents, community organizations and for-profit companies.[24] The schools are funded by a share of the per-pupil dollars allocated by school districts for their students and are subject to periodic reauthorization by the bodies that granted their charters.[25] With certain key exceptions — prominent among them the need to remain nonsectarian[26] — charters may operate autonomously, circumventing the reams of regulations to which traditional public schools are subject[27] and exercising near-complete discretion over teacher hiring, curriculum development, and sundry other school policies.[28] Significantly, all charters are "school[s] of choice: no student is required to attend."[29]

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[21] For instance, Mississippi, whose charter legislation has been ranked as the least permissive in the nation, allows a maximum of fifteen charters, which can only be formed by converting existing public schools. *See* CTR. FOR EDUC. REFORM, EDUCATION IN AMERICA: STATE-BY-STATE SCORECARD (2007); Ctr. for Educ. Reform, Charter Law, http://www.edreform.com/index.cfm?fuseAction=claw (last visited Mar. 7, 2009). In contrast, Minnesota allows an unlimited number of charters, which can be converted public or private schools or new start-ups. *See* CTR. FOR EDUC. REFORM, *supra*; Ctr. for Educ. Reform, *supra*.

[22] *See* HASSEL, *supra* note 15, at 5.

[23] *See id.*

[24] *See* Fuller, *supra* note 13, at 6–7.

[25] HASSEL, *supra* note 15, at 5.

[26] *See, e.g.*, CHARTER SCH. PROGRAM, U.S. DEP'T OF EDUC., TITLE V, PART B: NON-REGULATORY GUIDANCE 15 (2004) [hereinafter DOE GUIDANCE], *available at* http://www.ed.gov/policy/elsec/guid/cspguidance03.doc ("As public schools, charter schools must be non-religious in their programs, admissions policies, governance, employment practices and all other operations, and the charter school's curriculum must be completely secular.").

[27] *See, e.g.*, Scott S. Greenberger, *Charter Schools' Influence Surveyed*, BOSTON GLOBE, July 8, 2001, at B9 (noting that charter schools are free from "bureaucratic shackles that may be holding back teachers and students" in traditional public schools); James Traub, *A School of Your Own*, N.Y. TIMES, Apr. 4, 1999, § 4A, at 30 (quoting veteran Los Angeles schoolteacher — and charter school founder — Yvonne Chan's assertion that traditional public schools "handcuff your hands with so many policies, so many rules and regulations").

[28] HASSEL, *supra* note 15, at 6.

[29] *Id.* at 5.

Charter advocates assert that these institutional features free charter schools to serve a variety of salutary purposes on both a school-by-school and a systemic scale. Disentangled from red tape and overseen by a tight leadership team with a unified focus, charters can quickly develop and implement innovative teaching techniques and experiment with a dynamic range of educational programs.[30] The need for schools to renew their charters after a period of years fosters accountability, with independent boards conducting critical evaluations of student progress.[31] Faced with the entrepreneurial, results-oriented example of charters, traditional public schools are spurred to compete for students and are free to adopt programs pioneered in charters.[32] Meanwhile, charter schools offer increased choice to parents, help fill gaps in the public education system, and in particularly pressed districts, can help alleviate capacity issues.[33]

Charter critics counter that many of these effects are chimerical, if not outright counterproductive. Some note that despite glowing rhetoric, charter schools have often achieved limited results.[34] Others assert that charters are at best an incomplete solution, constrained to serve a small segment of the population.[35] Still more argue that by attracting away the best students — or at least the ones with the most motivated parents — charters undermine traditional public schools and threaten to exacerbate existing inequalities.[36] Finally, there are those who are

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[30] *See, e.g.*, *id.*; Jay Mathews, *School of Hard Choices: In the KIPP Academy Program, It's Motivation That's Fundamental*, WASH. POST, Aug. 24, 2004, at C1 (detailing novel features of the resoundingly successful KIPP charter schools — including longer school days and student incentive programs — which have produced substantial learning gains as evidenced by dramatic improvements in standardized test scores).

[31] *But see* SCHORR, *supra* note 13, at 305 ("Experience . . . teaches that closures over academic quality (rather than financial or legal problems) are quite rare."). As a practical matter, the apparent spottiness of charter oversight in some states may have negative implications for religious charters' capacity to comport with constitutional requirements.

[32] *See, e.g.*, Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes that Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349, 350 (2003) ("[C]ompetition, choice proponents argue, will encourage traditional public schools to be more responsive to parents in order to retain students and, therefore, will provide an impetus to school improvement.").

[33] *See, e.g.*, SCHORR, *supra* note 13, at 4 (describing the vastly overcrowded Jefferson Year-Round Elementary School, from which many new charter pupils were drawn). For a poignant discussion of one Oakland community's struggle to launch several charter schools, see *id*.

[34] *See, e.g.*, GOOD & BRADEN, *supra* note 14, at 177 (noting charters' "uneven, and in some cases dismal, performance records"); *see also* Mathews, *supra* note 30 (citing a federal study indicating that "charter schools are no better and in some cases [are] worse than regular public schools").

[35] *See, e.g.*, SCHORR, *supra* note 13, at 308. *But see* Peyser, *supra* note 20 (arguing that the emergent decentralized school system in New Orleans, more than half of which is comprised of charter schools, may reflect the future of American education).

[36] *See, e.g.*, Fuller, *supra* note 14, at 65 ("If the thousand points of light represented by charter schools illuminate only the affluent suburbs and fail to shine a light on more opportune pathways for poor families, then charter schools will simply reproduce our society's deep ruts of inequal-

concerned that the niche focus of some charter schools may combine with the cream-skimming phenomenon to encourage self-segregation.[37] Insofar as they reflect some of the same ideological issues at stake in religious charter schools, it is to such niche-focused, culture-oriented charters that this Note next turns.

B. Culture-Oriented Charters

Although charter schools are purportedly nondiscriminatory and nonsectarian,[38] schools like the Ben Gamla charter discussed above often seem carefully crafted to cater to a particular community. A complete survey of such schools (which remain a small minority of charters nationwide) is beyond the scope of this project.[39] However, along with Ben Gamla, the three examples below illustrate the variety of approaches embraced by culture-oriented charter schools — approaches that may prove illuminating in considering the constitutional status of religious charter schools.

1. Betty Shabazz International Charter School. — The Betty Shabazz International Charter School (BSICS) in Chicago was founded in 1998 with the mission of delivering an "Afrocentric curriculum" to students in grades K-8.[40] Named for a determined advocate for African American advancement (and wife of Malcolm X), the school self-consciously seeks to supplement black students' education in traditional academic subjects with cultural affirmation in the form of "consistent references to the contributions of Africans and African Americans to these fields: from George Washington Carver in science class, to Dizzy Gillespie in music, to the ancient Egyptians in mathematics and engineering."[41] Shabazz's principal emphasizes that "African-centered does not mean African-exclusive," but the school does ca-

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ity."). *But see* James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839, 879 ("[T]he fear that charters would threaten traditional public schools by cream-skimming the privileged has not borne out.").

37 *See, e.g.*, Martha Minow, Lecture, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 269 (1999) ("Rather than generating a desirable pluralism of methods and values, vouchers and charters could instead produce self-segregation that exacerbates intergroup misunderstandings along the familiar fault-lines of race, class, gender, religion, disability, and national origin.").

38 *See, e.g.*, DOE GUIDANCE, *supra* note 26, at 15.

39 The National Charter School Research Project, housed at the University of Washington, collects and disseminates a broader range of data on charter schools nationwide. *See, e.g.*, NAT'L CHARTER SCH. RESEARCH PROJECT, HOPES, FEARS, AND REALITY: A BALANCED LOOK AT AMERICAN CHARTER SCHOOLS IN 2008 (Robin J. Lake ed., 2008).

40 *See* Rosalind Rossi, *School Bd. Approves Plans for Final 2 Charter Schools*, CHI. SUN-TIMES, Apr. 30, 1998, at 20.

41 Ed Finkel, *African Ed*, CHI. REP., May 2007, *available at* http://www.chicagoreporter.com/index.php/c/Cover_Stories/d/African_Ed.

ter to a predominantly black student body.[42] In its relatively brief existence, BSICS has achieved notable academic success,[43] while garnering some high-profile endorsements.[44]

2. Tarek ibn Ziyad Academy. — Less than five years old, the Tarek ibn Ziyad Academy (TIZA) in Minnesota has already been recognized as a pioneer in efforts to communicate respect for Muslim culture and knowledge of the Arabic language alongside the traditional cornerstones of a public school education.[45] The school "aims to help students integrate into American society, while retaining their identity."[46] Firmly planted in "the gray area that separates church and state," TIZA serves a student body comprised almost entirely of Muslim pupils, whose "families simply want to ensure their children learn their culture's values and history."[47] Despite having generated some controversy,[48] TIZA boasts improved reading and math scores for its largely low-income students and maintains a 1500-student waiting list; it recently opened a second campus.[49]

3. "Valley Charter School."[50] — "Valley Charter School" (VCS) was founded in 1994 to complement the educational opportunities offered to home-schooled students in a central California community.[51]

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[42] *Id.*

[43] *See id.* ("Shabazz ranked first in composite test scores among 10 public schools in the Greater Grand Crossing neighborhood, where Shabazz is the only charter."); Rosalind Rossi, *Charters' Scores Don't Tell Whole Story, Activist Says*, CHI. SUN-TIMES, Nov. 15, 2001, at N11 (counting BSICS as one of the schools posting "the biggest gains compared to the city or state among Illinois charter schools").

[44] *See, e.g.*, Maudlyne Ihejirika, *Shabazz School a Hit with Glover*, CHI. SUN-TIMES, Nov. 3, 2005, at 25; Maudlyne Ihejirika, *Students, Alicia Keys Delighted with Each Other*, CHI. SUN-TIMES, Apr. 1, 2005, at 20.

[45] *See* Popper, *supra* note 8.

[46] Tarek ibn Ziyad Academy, Our School, http://www.tizacademy.com/Our_School.html (last visited Mar. 7, 2009).

[47] Tammy J. Oseid, *A Place To Belong*, ST. PAUL PIONEER PRESS, Nov. 7, 2004, at 1B. The school's distinctive features include a calendar arranged around the cycle of Muslim holidays and breaks in instruction that coincide with noontime prayer. *Id.*

[48] *See, e.g.*, Katherine Kersten, Op-Ed., *Are Taxpayers Footing Bill for Islamic School in Minnesota?*, STAR TRIB. (Minneapolis, Minn.), Mar. 9, 2008, at 1B.. In January of 2009, the American Civil Liberties Union announced plans to file suit against the school, as well as the Minnesota Department of Education, for allegedly sponsoring "what is, in essence, a private religious school." Randy Furst & Sarah Lemagie, *ACLU To Sue Twin Cities Charter School that Caters to Muslims*, STAR TRIB. (Minneapolis, Minn.), Jan. 22, 2009, at 3B (quoting the executive director of the Minnesota ACLU).

[49] Kersten, *supra* note 48.

[50] "Valley Charter School" is the pseudonym used by Luis Huerta to describe an actual charter school in the essay that serves as the basis for this example. *See* Luis A. Huerta, *Losing Public Accountability: A Home Schooling Charter*, *in* INSIDE CHARTER SCHOOLS, *supra* note 13, at 177, 177.

[51] *See id.* For a wider discussion of government oversight of home schooling, see Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75 (2002).

The vast majority of students affiliated with the school are conservative Christians, although VCS also serves a smaller group of secular, libertarian families.[52] State-financed "education coordinators" provide training and supplementary material to participating families, who are eager to have their private home-schooling decisions "publicly validated, legitimized, and fully funded."[53] Although VCS is careful to provide only secular material, an evaluation of students' learning records reveals that VCS families often "use . . . religious materials in daily instruction."[54] This includes the reading and memorization of Bible verses.[55] In just its first year of operation, the school surged to a capacity enrollment of 750 students.[56]

The preceding are only three examples of charter schools that test the traditional boundaries associated with public schooling. Together they reflect the uncertain line that many schools already walk in balancing their presumed constitutional obligations against narrower, community interests. Such curricular juggling acts are far from the only point of constitutional tension facing some charter schools.[57] Yet, they are sufficient to indicate the muddy constitutional waters in which a small subset of charter schools already opt to swim.

II. RELIGION AND PUBLIC SCHOOLS: AN EMERGENT JURISPRUDENCE OF CHOICE

This Part offers a limited history of relevant Establishment Clause jurisprudence. Its central contention is that recent Supreme Court rulings reflect a receptiveness to the constitutional claims necessary to permit religious charter schools. In key Establishment Clause cases, the Court has evinced flexibility toward the separation between church and state, particularly when state funding of religious institutions is an indirect product of private choices.[58] This increased emphasis by the Court on the role of parental choice in the church-state calculus in educational settings suggests a constitutional opening for religious charter schools.

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[52] Huerta, *supra* note 50, at 187, 189.

[53] *Id.* at 180. "Education coordinators" function as VCS's teachers. *Id.* at 182–83.

[54] *Id.* at 187–88.

[55] *See id.*

[56] *Id.* at 178.

[57] For instance, many avowedly secular schools rely on church communities for facilities and enrollment. *See, e.g.*, BRIAN GILL ET AL., RHETORIC VERSUS REALITY: WHAT WE KNOW AND WHAT WE NEED TO KNOW ABOUT VOUCHERS AND CHARTER SCHOOLS 49 n.14 (2007); SCHORR, *supra* note 13, at 104 ("To [one parent] it was a church school, no matter the public label. And indeed, the wide community of the church led the school to recruit many families in tough circumstances.").

[58] *See infra* pp. 1759–62.

A. Public Education and the Establishment Clause

Since the advent of the modern system of public schools thrust questions of government-funded sectarian education into the constitutional limelight,[59] the Supreme Court has pursued an evolving approach to Establishment Clause issues.[60] In *Everson v. Board of Education*,[61] the Court famously applied the First Amendment's Establishment Clause to the states, echoing Thomas Jefferson's landmark metaphor in asserting that "the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"[62] The Court also held that the measure at issue, a local resolution providing for the reimbursement of busing expenses, including those of students attending parochial schools, did not breach the "high and impregnable" barrier between church and state formed by the First Amendment.[63]

Over the next thirty-five years, the Court's commitment to the "impregnable" wall between religion and government shaped its reasoning on a variety of education-related cases.[64] To facilitate their assessment of the thorny questions involved in such decisions, the Justices devised a three-part Establishment Clause inquiry under which an acceptable statute "must have a secular legislative purpose," cannot have the "principal or primary effect" of advancing or inhibiting religion,[65] and "must not foster an excessive government entanglement with

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[59] For a concise history of American public education's legal and ideological interplay with religion, see KENT GREENAWALT, DOES GOD BELONG IN PUBLIC SCHOOLS? 13–22 (2005).

[60] *See* Zelman v. Simmons-Harris, 536 U.S. 639, 688–95 (2002) (Souter, J., dissenting) (dividing the Court's modern Establishment Clause jurisprudence into four distinct stages). For more on evolving understandings of church-state separation, see Steven D. Smith, *Separation As a Tradition*, 18 J.L. & POL. 215 (2002).

[61] 330 U.S. 1 (1947).

[62] *Id.* at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1879)). For a discussion of heated public responses to *Everson*, see ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES 35–36 (1990).

[63] *Everson*, 330 U.S. at 18. This decision is only one illustration of the occasional permeability of the "impregnable" church-state barrier, which can be understood as a function of the reality that "[w]alling out religion from public activities, political debate, and even participation in government programs could reflect the kind of hostility to religion that the First Amendment guards against." Martha Minow, Lecture, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1086 (2000).

[64] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (holding that allowance for silent prayer in public schools violated the Establishment Clause); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (holding religious exercises at public school unconstitutional). *But see* Bd. of Educ. v. Allen, 392 U.S. 236 (1968) (permitting the loan of district-owned textbooks to students enrolled in parochial schools). The Court evinced similar commitment to preserving a firm separation between church and state in non-education-related cases. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970) ("The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches.").

[65] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

religion."[66] On its face, this "*Lemon* test," maligned though it may be,[67] would seem to disqualify religious charter schools. However, beginning with *Mueller v. Allen*,[68] and culminating nineteen years later in *Zelman v. Simmons-Harris*,[69] an often-divided Court has developed and reinforced a line of reasoning that indicates a potential amenability to religious charters.

B. Respecting Private Choice

In the early 1980s, *Mueller v. Allen* presented the Court with a Minnesota statute that allowed parents to claim a state income tax deduction for expenses incurred in service of their children's education.[70] A number of Minnesota taxpayers sued, arguing that the statute violated the Establishment Clause by effectively allocating government money to support religious institutions.[71] Writing for a 5–4 majority, then-Justice Rehnquist noted the broad class of parents who benefited from the statute, observing that the deduction's availability to taxpayers whose children were enrolled in nonsectarian private schools rendered the program "not readily subject to challenge under the Establishment Clause."[72] The majority further emphasized the "numerous private choices of individual parents" that interposed themselves between the state's allocation of funds and those funds' arrival in the coffers of religious schools.[73] Rejecting consideration of the comparative frequency with which parochial school parents claimed the deduction,[74] the Court affirmed the constitutionality of the disputed statute.[75]

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[66] *Id.* at 613 (quoting *Walz*, 397 U.S. at 674) (internal quotation marks omitted).

[67] Most of the Justices have indicated dissatisfaction with the *Lemon* test "as a comprehensive test for all establishment cases." GREENAWALT, *supra* note 59, at 152. However, the test has never been expressly discarded, and "a majority of [J]ustices continues to suppose that either a purpose to promote religion or a direct effect of advancing religion may render a program unconstitutional." *Id.* at 153. Justice Scalia in his concurrence in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), penned a particularly colorful indictment of the sporadically invoked test: "The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will." *Id.* at 399 (Scalia, J., concurring in the judgment).

[68] 463 U.S. 388 (1983).

[69] 536 U.S. 639 (2002).

[70] *Mueller*, 463 U.S. at 390.

[71] *Id.* at 392.

[72] *Id.* at 398–99.

[73] *Id.* at 399.

[74] *Id.* at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.").

[75] *Id.* at 404.

In *Witters v. Washington Department of Services for the Blind*,[76] the Court again articulated the importance of private choices in determining the constitutionality of government funding of sectarian education. Larry Witters, a blind student enrolled at a Christian college, sought state-provided vocational rehabilitation services to address his educational needs.[77] Although he declined to invoke *Mueller* directly,[78] Justice Marshall expressly highlighted the significance of the fact that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients."[79] A majority deployed similar reasoning in *Zobrest v. Catalina Foothills School District*,[80] finding that the state's placement of a sign-language interpreter in a Catholic school to serve a deaf student did not run afoul of the Establishment Clause.[81] The Court used similar analysis in *Agostini v. Felton*,[82] overruling earlier precedent and affirming the constitutionality of dispatching public school teachers to religious schools to provide remedial education to disadvantaged students,[83] and yet again in *Mitchell v. Helms*,[84] in which a divided Court found that state and local agencies' use of federal funds to supply educational materials to schools — including parochial schools — did not violate constitutional protections.[85] Despite apparent internal discord,[86] the Court seemed inclined to acknowledge personal choice as to the distribution of government funds and services as a crevice in the otherwise secure wall between church and state in educational contexts.

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[76] 474 U.S. 481 (1986).

[77] *Id.* at 483.

[78] *See id.* at 490 (Powell, J., concurring) (arguing that, despite the majority's failure to invoke it, "*Mueller* strongly supports the result we reach today").

[79] *Id.* at 487 (majority opinion).

[80] 509 U.S. 1 (1993).

[81] *Id.* at 12–14 ("James' parents have chosen of their own free will to place him in a pervasively sectarian environment. The sign-language interpreter they have requested will neither add to nor subtract from that environment, and hence the provision of such assistance is not barred by the Establishment Clause.").

[82] 521 U.S. 203 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985); and *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985)).

[83] *Id.* at 240.

[84] 530 U.S. 793 (2000).

[85] *Id.* at 836; *see also id.* at 810 ("[I]f numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment.").

[86] *See, e.g.*, *Zobrest*, 509 U.S. at 23–24 (Blackmun, J., dissenting) (concluding that the Court's ruling strayed "from the course set by nearly five decades of Establishment Clause jurisprudence," *id.* at 23, by inviting "exactly [the] sort of conflict" between individual liberty and religious autonomy that the clause was meant to avert, *id.* at 24).

Zelman v. Simmons-Harris[87] put the Court's emergent approach to a long-awaited test,[88] evaluating the Establishment Clause's implications for the school choice movement. The widely disputed case[89] involved a challenge to an Ohio voucher program under which tuition vouchers were made available to parents of students with demonstrated financial need.[90] Although these vouchers could be used to finance tuition at any private school, an overwhelming majority of the participating students — fully ninety-six percent — enrolled in religiously affiliated schools.[91]

The controversial nature of the Court's ruling was reflected in the six opinions it produced.[92] Writing for the majority, Chief Justice Rehnquist drew on the precedents discussed above in support of the proposition that:

> [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.[93]

Recognizing the dangers inherent in government endorsement of religious practices, Chief Justice Rehnquist nonetheless asserted that "no reasonable observer" would interpret the indirect flow of funds from the government to religious institutions via a series of individual choices as "carr[ying] with it the *imprimatur* of government endorsement."[94] Despite vigorous dissents assailing the ruling as a dangerous

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87 536 U.S. 639 (2002).

88 *See, e.g.*, Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 124 n.417 (1997) ("In the wake of *Agostini*, the looming question of foremost practical importance involves the constitutionality of 'voucher' programs, through which school districts might help to fund the choices of parents and students who prefer religious to public, secular education.").

89 *Compare, e.g.*, Editorial, *A Matter of Church and State*, N.Y. TIMES, Feb. 20, 2002, at A20 ("The Supreme Court cannot permit cities like Cleveland to violate the Establishment Clause in order to improve education any more than it could allow them to deprive citizens of their free-speech rights, if that were seen as a boon to public education."), *with* Rod Paige, Op-Ed., *A Win for America's Children*, WASH. POST, June 28, 2002, at A29 ("In *Zelman*, the court recognized . . . the importance of parents' being able to do something when their children's schools don't work. And the court correctly reasoned that sectarian institutions providing a nonsectarian education can be among the options made available to parents.").

90 *Zelman*, 536 U.S. at 644–47.

91 *Id.* at 645, 647. The program also authorized enrollment in community charter schools, which, the Court noted, must "have no religious affiliation and are required to accept students by lottery." *Id.* at 647.

92 Chief Justice Rehnquist wrote the majority opinion, which Justices O'Connor, Scalia, Kennedy, and Thomas joined. Justices O'Connor and Thomas also filed separate concurring opinions, and Justices Stevens, Souter, and Breyer each authored dissents.

93 *Zelman*, 536 U.S. at 652.

94 *Id.* at 655.

departure from long-established precedent[95] and a spark that threatened to ignite "religiously based social conflict,"[96] the majority upheld the constitutionality of religion-neutral voucher programs.[97]

The decision was greeted enthusiastically by proponents of school choice,[98] and provoked a wave of scholarship assessing the state of voucher programs post-*Zelman*.[99] But notwithstanding evidence that at least one Justice was cognizant of the emergence of culturally themed charters when *Zelman* was decided,[100] the Court has yet to provide any indication of its view of these charter schools — let alone weigh in on the implications of its Establishment Clause jurisprudence for explicitly religious charter schools. The next Part takes up this question.

III. ASSESSING THE CONSTITUTIONALITY OF RELIGIOUS CHARTERS

Although charters and vouchers are certainly not identical, there are sufficient similarities between the programs to suggest that the *Zelman* line of cases could embrace religious charters. At the very least, manifest flexibility in other educational contexts that touch on constitutionally protected issues reinforces the potential viability of religious charters. The legal arguments in their favor are far from conclusive. However, as this Part explains, religious charters might survive constitutional testing in the courtroom.

A. Charters vs. Vouchers

A comprehensive comparison of the many varieties of charter and voucher programs employed in states across the country is beyond the scope of this effort.[101] However, for the purpose of assessing the appli-

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95 *See, e.g.*, *id.* at 686–87 (Souter, J., dissenting).

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

97 *Id.* at 663 (majority opinion). For an intriguing analysis of the *Zelman* dissents and their implications for the long-term constitutional health of school choice, see Charles Fried, *The Supreme Court, 2001 Term—Comment: Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 183–98 (2002).

98 *See, e.g.*, Linda Greenhouse, *Supreme Court, 5–4, Upholds Voucher System that Pays Religious Schools' Tuition*, N.Y. TIMES, June 28, 2002, at A1 (quoting voucher advocate's claim that "[*Zelman*] allows the school choice movement to shift from defense to offense"); Paige, *supra* note 89.

99 For an early, comprehensive evaluation of vouchers' status in *Zelman*'s aftermath, see Mark Tushnet, *Vouchers After* Zelman, 2002 SUP. CT. REV. 1.

100 *See Zelman*, 536 U.S. at 726 (Breyer, J., dissenting) (citing an article from a California newspaper "describing increased government supervision of charter schools after complaints that students were 'studying Islam in class and praying with their teachers,' and Muslim educators complaining of 'post-Sept. 11 anti-Muslim sentiment'").

101 For an extended analysis of the theoretical roots and empirical results of both modes of education reform, see GILL ET AL., *supra* note 57. The authors include the prohibition on religious

cability of the *Zelman* line of cases to religious charters, it is important to highlight some key similarities and differences between charters and vouchers as they relate to the roles of private choice and government involvement. Perhaps the most obvious difference is one of perception: voucher schools are "private," whereas charters are widely considered "public." This distinction accounts for charters' broader base of support, as they do not stoke the same fears that vouchers do with regard to the undermining of the public school system.[102] Yet, popular understanding aside, this divergence is far more complicated than one might imagine; both "charters and vouchers demand a reconsideration of what makes a school public."[103]

Of course, the perceived distinction is not entirely without basis. Charters do require authorization and periodic reapproval from a government body — a factor to which their inability to offer religious instruction is often attributed.[104] However, they are otherwise free to operate under the oversight of independent leadership.[105] And although charters are bound to comply with increasingly demanding state educational standards,[106] courts have long recognized states' rightful role in ensuring that private schools also meet exacting state standards.[107] Moreover, although charters are generally required to admit all applicants whom they have space to accommodate, voucher schools are often themselves obligated by the terms of the voucher program to adopt a nondiscrimination policy, under which they will not, for example, deny applicants on "the basis of race, religion, or ethnic background, or . . . 'advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.'"[108] In short, the public-private distinction between charters and vouchers is not nearly as stark as it may appear. As the above examples indicate, a comparison along this axis suggests many significant similarities.

One potentially compelling distinction may lie in the flow of funds to the respective school-choice programs. In the voucher program at

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charter schools in their classification of differences, but observe that "some charter school operators may bring religion in through the back door." *Id.* at 49 n.14.

[102] *See id.* at 10.

[103] *Id.* at 23.

[104] *See id.* at 9.

[105] *See id.* at 13–14; HASSEL, *supra* note 15, at 6.

[106] *See, e.g.*, MICHAEL A. REBELL & JESSICA R. WOLFF, MOVING EVERY CHILD AHEAD: FROM NCLB HYPE TO MEANINGFUL EDUCATIONAL OPPORTUNITY 58–60 (2008) (detailing the stringent state standards imposed under No Child Left Behind).

[107] *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925). It also merits noting that several states have begun amending voucher programs to require standardized testing. GILL ET AL., *supra* note 57, at 10.

[108] Zelman v. Simmons-Harris, 536 U.S. 639, 645 (2002) (quoting OHIO REV. CODE ANN. § 3313.976(A)(6) (West 2005)); *see also* GILL ET AL., *supra* note 57, at 23–24.

issue in *Zelman*, tuition aid checks were made payable to parents, who then signed them over to their chosen private school.[109] Under charter programs, the per-pupil funds allocated to charter schools are sent directly to the schools' leadership.[110] Thus, the disbursement of dollars from government to educational institution is, at least superficially, more direct with charters than vouchers.

At the opposite end of the spectrum, a significant parallel between charters and participating voucher schools is their shared status as schools of choice. As noted above, no parent is required to enroll her child in either program. In fact, the uncertainty that attaches to any start-up venture offers a disincentive for parents to send their children to new charters, just as the possibility of copayment presents a financial disincentive to send them to participating voucher schools.[111]

In sum, although charters differ from vouchers in requiring government authorization and receiving funds directly from local school districts, the programs share institutional independence within the confines of basic state standards, open enrollment, and parental choice. There are certainly additional points of overlap and departure between charters and vouchers. But the features discussed above form the essential framework of the constitutional analysis that follows.

B. Zelman *and Constitutional Challenges to Religious Charters*

Potential challenges to religious charters can be grouped into two traditional categories: facial attacks, urging that any legislation interpreted to authorize religious charters inherently violates the Establishment Clause, and as-applied challenges, asserting that the authorization or operation of a particular religious charter school constitutes a similar violation.[112] This distinction is, of course, not absolute. In practice, the difference between facial and as-applied challenges will often blur.[113] However, accounting for these basic classifications allows for consideration of the varied constitutional arguments that might be marshaled in support of religious charters.[114]

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[109] *Zelman*, 536 U.S. at 646.

[110] *See, e.g.*, SCHORR, *supra* note 13, at 224–25; *cf.* GILL ET AL., *supra* note 57, at 50 (observing that "charters are usually funded more generously" than voucher schools).

[111] The *Zelman* Court noted this financial hurdle. *Zelman*, 536 U.S. at 654.

[112] *Cf.* United States v. Playboy, 529 U.S. 803, 834 n.3 (2000) (Scalia, J., dissenting) (explaining the difference between an as-applied challenge, "in which the issue is whether a particular course of conduct" is unconstitutional, and a facial challenge, "in which the issue is whether the terms of [the] statute are unconstitutional").

[113] *See, e.g.*, Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1327–28 (2000) ("[W]hen holding that a statute cannot be enforced against a particular litigant, a court will typically apply a general norm or test and, in doing so, may engage in reasoning that marks the statute as unenforceable in its totality.").

[114] Although the following discussion integrates likely constitutional objections to such schools, consideration of these arguments will be, of necessity, limited in its scope. For a classic articula-

Under *Zelman*'s rubric, a program is resistant to challenge under the Establishment Clause if it is "neutral with respect to religion," assists "a broad class of citizens," and directs money to religious schools only as a product of those citizens' "genuine and independent private choice."[115] With the benefit of the preceding discussion, it is possible to measure charters against each of these factors in turn.

1. Neutrality Toward Religion. — In at least one important respect, charters are certainly religion-neutral. Given that no explicitly religious charters have yet been authorized, it is difficult to argue that any of the legislation authorizing charter schools was intended to advance any particular brand of religious education.[116] Of course, the historical roots of charter legislation aside, the introduction of religious charters might plausibly raise questions as to whether chartering bodies are favoring one religious group over others.

For instance, if the Minneapolis School District authorized dozens of charters for explicitly Jewish schools, while denying all applications for Catholic ones, it could reasonably be said to have expressed a preference for one religion over another. However, the state was required to pass similar — albeit less intrusive — judgment on the comparative merits of religious schools that opted to participate in *Zelman*'s voucher program, which was limited to those schools that met state educational standards.[117] The state presumably confined its inquiry in those cases to the quality of secular instruction provided by the schools, leaving the merits of their religious curricula to their respective boards. One could imagine a similar approach being applied to religious charters, with charter authorizers limiting their evaluation to the proposed schools' nonsectarian offerings, and thereby remaining neutral on thorny issues of religious faith.[118]

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tion of the strict-separationist perspective, see LEO PFEFFER, CHURCH, STATE, AND FREEDOM 727–28 (1967).

115 *Zelman*, 536 U.S. at 652.

116 *But see* Editorial, *Preacher Paige*, WASH. POST, Apr. 10, 2003, at A28 (asserting that remarks by Secretary of Education Rod Paige "seem[] to confirm the worst fears of voucher opponents — that 'school choice' is a cover for Christian school advocates who have given up on public education").

117 *See Zelman*, 536 U.S. at 645.

118 *Cf.* McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972) (finding ministerial exception to equal opportunity employment provisions); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1261 (2003) (asserting the need to hold publicly subsidized providers of social services accountable to public values, and citing the fact that under current law "a school voucher plan . . . must not involve any school that excludes students on the basis of race, religion, national origin, or ethnicity" as an example of this approach in action). *But see* David Saperstein, *Public Accountability and Faith-Based Organizations: A Problem Best Avoided*, 116 HARV. L. REV. 1353, 1385–89 (2003) (challenging the feasibility of holding religious entities accountable without jeopardizing their "special place in our legal schema [and] threatening many of the protections [religion] currently receives").

It is also worth noting that culture-specific charter schools already engage government in constitutional issues that traditionally require a commitment to neutrality. For example, states are expressly barred from privileging one race over another, particularly in educational settings.[119] And yet, Illinois granted a charter to the expressly "Afrocentric" Betty Shabazz International Charter School.[120] Indeed, authorizing a charter that celebrates a particular culture — even one comprised entirely of a constitutionally protected class — has yet to be considered discrimination on the basis of race.[121] Undeniably, opening a "public" school that endorses a particular faith runs the risk of placing the government's imprimatur on religious denomination. Yet, whether maintenance of such a system constitutes *greater* endorsement of religion than financing a student's parochial education via tuition vouchers seems open to interpretation. Viewed in light of culture-specific charters, it is possible to envision a system under which state authorities make reasoned judgments as to the viability of various religious charter schools without expressing a religious preference.

Although facially neutral, such a policy might still leave individual religious charters vulnerable to as-applied constitutional challenges. In the face of such a challenge, the notion that a particular publicly subsidized religious charter could somehow be "neutral" toward faith would seem to strain credulity — and with good reason. At first glance, it is difficult to imagine anything *less* neutral toward religion than the image of a government-sponsored instructor affirming the merits of a particular faith in a classroom paid for with taxpayer dollars. Yet, this perspective fails to account for another dimension of the Court's evolving Establishment Clause jurisprudence: its emergent emphasis on the Clause as a guarantor of political equality.

As Professor Noah Feldman has observed, recent Establishment Clause rulings — including many of those described above — reflect an egalitarian focus, "which measures constitutionality by asking whether government has made religion relevant to political stand-

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119 *Cf.* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2768 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

120 *See supra* pp. 1755–56.

121 A variety of factors may account for the apparent acceptance of such schools, including the role of community and parental choice in their development and enrollment. The "opt-in" nature of cultural charters provides an evident point of contrast with the sort of district-made racial classifications that have failed to pass constitutional muster. *Cf. Parents Involved*, 127 S. Ct. 2738; Gratz v. Bollinger, 539 U.S. 244 (2003). Should culture-oriented charters someday be targeted for constitutional challenge, this distinction may prove dispositive. For more on the apparent constitutional resilience of such racially themed charters, see Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 PENN ST. L. REV. 43 (2004), which concludes that "charter school programs should probably be able to survive most Equal Protection challenges," *id.* at 56.

ing."[122] Under this interpretation, government aid to religious institutions is not constitutionally barred, so long as it is provided to religious and nonreligious recipients on an equal basis.[123] According to Feldman, such thinking has resulted in a transformed constitutional landscape, featuring "doctrine that justifies the effective elimination of the separation of church and state, in favor of what amounts to an egalitarian establishment of religion."[124] As the *Mitchell* plurality explained: "If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be."[125] Accordingly, although government support of a teacher at an individual religious charter school may seem to express a preference for a particular religious denomination, it may not reflect an endorsement of that faith so long as charter funding is provided on an equal basis to religious, areligious, and irreligious institutions alike. The degree to which this as-applied inquiry is bound up in broader consideration of the funding scheme in which a particular charter school's subsidization is embedded may help explain the surprising dearth of as-applied challenges to other school choice programs.[126]

2. Availability to a Broad Class of Citizens. — In facing this aspect of the *Zelman* calculus, religious charters stand on far firmer constitutional ground. In contrast to school vouchers, the option of pursuing a charter is available to all citizens, not only those with demonstrated financial need. Moreover, at least for the moment, the benefits of char-

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[122] Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 730–31 (2002). Feldman sets out a detailed critique of this approach and its "perverse" implications. *See id.* at 678, 718–30. Although Feldman's assessment pre-dated *Zelman*, that ruling's emphasis on the equal availability of voucher funding to both religious and secular programming indicates that it, too, is wholly consonant with the line of cases he discussed. *See Zelman*, 536 U.S. at 653–54 (quoting Agostini v. Felton, 521 U.S. 203, 231 (1997)). For further discussion of egalitarian principles as the foundation of constitutional religious freedom, see MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (2008).

[123] Feldman, *supra* note 122, at 724. An extreme (and problematic) version of this perspective might lead to the conclusion that the *failure* to fund religious alternatives to secular public education represents an unconstitutional violation of neutrality. *Cf.* Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1012–14 (1991).

[124] Feldman, *supra* note 122, at 729.

[125] *Id.* at 724 (quoting Mitchell v. Helms, 530 U.S. 793, 827 (2000)). Significantly, the *Mitchell* ruling dealt with an as-applied challenge to a government funding program. *Mitchell*, 530 U.S. at 801.

[126] *See* Recent Case, 120 HARV. L. REV. 1097, 1101 (2007) ("A voucher program has yet to be confronted in an as-applied challenge . . . ."); *cf. id.* at 1101–04 (asserting the merits of as-applied challenges as a superior means of assessing vouchers' impact on the adequacy of state-provided education).

ters appear to be distributed fairly evenly across race and class lines.[127] Accordingly, access to religious charter schools would not be uniquely available to people of a particular faith.[128] On the contrary, people of all beliefs would presumably be free to seek charter authorization — and those who prefer nonsectarian charters would have a 4000-school head start.[129] Under this framework, the question of broad availability does not seem to pose a significant obstacle to religious charters.

3. The Role of Independent and Private Choice. — Charter schools are unquestionably schools of choice. Enrollment in charters is entirely optional, as is the decision to create such a school. In that sense, the *Zelman* Court's emphasis on "true private choice" seems entirely applicable to religious charters.

On a cosmetic level, the intervening function of parents is certainly more prominent in voucher programs than in charters. As noted above, charter school parents do not receive the share of district funding allocated for their children's education; that money goes directly to the charter school. The absence of the intervening act of signing over the tuition money to the religious school does suggest greater visibility of governmental support for religious charters. Yet, that functionally irrelevant detail — recipients of education vouchers are, after all, forbidden to spend them on anything *but* their children's education — does not touch the essential, underlying question of "whether beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid."[130] Although the Court did not address this issue in *Zelman*, a plurality in *Mitchell v. Helms* expressly disclaimed the significance of an intermediate step in the flow of funding from government to religious schools, finding that respondents' reliance on a "direct/indirect distinction to require that any aid be literally placed in the hands of schoolchildren rather than given directly to the school for

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127 *See* Forman, Jr., *supra* note 36, at 851–66.

128 *But see* SCHORR, *supra* note 13, at 162–63 (citing charter entrepreneur's sense that black ministers are uniquely positioned to advance the charter movement in their communities); *cf.* JOHN L. JACKSON, JR., RACIAL PARANOIA: THE UNINTENDED CONSEQUENCES OF POLITICAL CORRECTNESS 61 (2008) ("Black churches have become central to any discussion of political activism in the black community.").

129 The lax oversight of some charter agencies may render effective administration of nondiscrimination policies difficult. *Cf.* SCHORR, *supra* note 13, at 304–05. Yet, this serious concern presents itself as a largely practical question — rather than a constitutional obstacle — one appropriately resolved on a case-by-case basis. Such case-by-case evaluations are common in other educational contexts. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244 (2003) (finding University of Michigan's use of racial preference in undergraduate admissions constitutionally invalid); Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998) (striking down racially conscious admissions policy employed by Boston magnet school).

130 Zelman v. Simmons-Harris, 536 U.S. 639, 669 (2002) (O'Connor, J., concurring).

teaching those same children"[131] was an exercise in empty formalism, which "breaks down in the application to real-world programs."[132] Under charter programs, parents are free to choose where their child's per-pupil allocation is spent, and, in a system that includes religious charters, can direct that money toward traditional public schools, nonsectarian charters, or, if they prefer, religious charters. Depending on the state rules governing the creation of new charters, they can even choose to seek their *own* charter school, an option that was not available to *Zelman*'s voucher participants.

Accordingly, although the direct flow of money from the government to religious charters makes the exercise of individual choice less *apparent* than in voucher settings, the nature of charter schools ensures that those private choices are no less real. Indeed, on at least one level, the decision to attend a religious charter school is likely *more* real. For many voucher recipients, the decision to attend a parochial school — particularly a Catholic school — is driven by nothing more than financial necessity.[133] The cost differential between Catholic and other private schools ensures that many voucher recipients will be more able to opt for a parochial education than other private alternatives, a factor that does not surface in the religious charter school calculus. Thus, as with the question of neutrality, the question simply becomes (at most) one of degree — a concern that did not preclude the Court's ruling in *Zelman*.[134]

D. Other Factors

Beyond the purely constitutional issues discussed in the preceding sections, several additional factors suggest judicial amenability to religious charters. First, both legislators and the Court have evinced receptiveness to dividing classrooms along gender lines,[135] a basis for classification that itself merits constitutional scrutiny, albeit of a less intense variety than religious distinctions.[136] Second, while voucher

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[131] Mitchell v. Helms, 530 U.S. 793, 817 (2000) (plurality opinion).

[132] *Id.* at 818.

[133] *See, e.g.*, Martha Minow, Op-Ed, *Vouching for Equality*, WASH. POST, Feb. 24, 2002, at B5 (observing that for poor, minority families "the chief route out of local public schools in urban areas is through parochial — usually Catholic — schools that are relatively affordable").

[134] *Cf. Zelman*, 536 U.S. at 726 (Breyer, J., dissenting) ("School voucher programs differ, however, in both *kind* and *degree* from aid programs upheld in the past.").

[135] *See* United States v. Virginia, 518 U.S. 515, 534 n.7 (1996) (affirming states' "prerogative evenhandedly to support diverse educational opportunities," including single-sex education); Elizabeth Weil, *Teaching to the Testosterone*, N.Y. TIMES, Mar. 2, 2008, § 6 (Magazine), at 38 (tracing developments in single-sex public education).

[136] *See, e.g.*, J.E.B. v. Alabama, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring in the judgment) (noting the application of intermediate scrutiny to gender-based classifications). Of course, since its adoption of this standard, the Court has consistently "pressed it closer to strict scrutiny."

provisions were quickly stricken from No Child Left Behind amidst claims that they represented a stealthy bid to privatize public education,[137] the reform package drew religious institutions further into the educational arena by authorizing the disbursement of public dollars to faith-based groups that provide (secular) tutoring to students who qualify for such supplemental services.[138] Third, the addition of two new Justices to the Supreme Court appears, for better or worse, to have yielded a new majority that views the interaction between church and state with far less trepidation than the rough consensus it replaced.[139]

None of these developments carries meaningful constitutional weight with regard to the viability of religious charters. They are, however, reflective of a climate that may be more favorable to the introduction of religious charter education than any in recent memory. In the context of public education, what was once a "high and impregnable"[140] wall between church and state has rarely seemed more porous.[141]

IV. CONCLUSION

A cynic might argue that the lack of legal challenge to the sort of culture-specific charters discussed in Part I.B reflects a public desire to

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Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 75 (1996).

137 James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547, 588 (2007).

138 *See, e.g.*, Michelle R. Davis, *Religious Groups Jump at Chance To Offer NCLB Tutoring*, EDUC. WK., June 22, 2005, *available at* http://www.edweek.org/ew/articles/2005/06/22/41faith.h24.html.

139 *See, e.g.*, JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 336 (2007) (asserting that the confirmation of both Chief Justice Roberts and Justice Alito advanced the agenda of those who would "[w]elcome religion into the public sphere"); Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1, 38 (2007) ("[W]ith the elevation of Chief Justice Roberts and Justice Alito, [church-state] integrationists now have an effective majority on the Court and can convert the older integrationist dissents and pluralities into majority opinions."); Julie F. Mead et al., *Re-examining the Constitutionality of Prayer in School in Light of the Resignation of Justice O'Connor*, 36 J.L. & EDUC. 381, 398 (2007) (citing Justice Alito's lower court opinions in concluding that he "is likely to join the conservative faction of the Court and not assume Justice O'Connor's ideological centrist position" with regard to Establishment Clause jurisprudence). However, the precise dimensions of the Roberts Court's approach to the Establishment Clause remain uncertain, as the Justices have yet to take any cases that require substantive interpretation of the clause. *Cf.* Hein v. Freedom From Religion Found., 127 S. Ct. 2553 (2007) (concluding that taxpayers did not have standing to challenge the use of executive branch funds on faith-based initiatives).

140 Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

141 *See, e.g.*, Jay D. Wexler, *Preparing for the Clothed Public Square: Teaching About Religion, Civic Education, and the Constitution*, 43 WM. & MARY L. REV. 1159, 1191 (2002) (observing that "the movement to encourage public schools to teach about religion is at its strongest point in the last forty years").

let the inherently experimental charter model play itself out in classrooms across the nation. Yet, keeping these experiments in the shadows may subvert the public's ability to learn from the model they are exploring — a model that may soon be conscripted into service in the constitutionally fraught arena of religion. Mainstream acceptance of charter schools — along with vouchers, magnet programs, and an array of related innovations — illustrates the degree to which advocates of assorted ideologies have been willing to challenge institutional norms in the effort to improve this nation's educational opportunities. Only time will tell whether the once bedrock principle of wholly secular public education will go the way of entirely centralized school districts and the refusal to allocate state funds for private schools. Of course, the controversy-ridden history of publicly financed education in this country indicates that even the most sacrosanct traditions may be open to reconsideration.

In some respects, the analysis presented here concededly consists of a constitutional house of cards, with "potentials" piling atop "maybes" and "mights" to shape a line of argument that could collapse at the first whiff of constitutional challenge. But there can be little uncertainty regarding whether such a challenge will be forthcoming. The educational entrepreneurs who built culturally themed schools like Ben Gamla have thus far carefully avoided breaching traditional barriers between church and state. However, the proliferation of these schools in religious communities suggests that it is only a matter of time before this constitutional détente collapses, forcing courts and legislatures to revisit questions of whether and how the wall of church-state separation in the arena of publicly financed education should strictly be maintained.