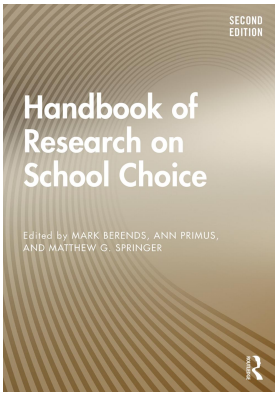

Handbook of Research on School Choice

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THE LAW OF PARENTAL CHOICE

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It is impossible to discuss school choice without discussing the law. Not only do constitutional rules establish the framework within which school choice policies operate, but these programs are both created and governed by the law. Every detail in every school choice program is a legal detail—and there are far too many to cover in one short chapter. Thus, this chapter focuses exclusively on *constitutional* questions, both state and federal,[1] raised by various types of public and private school choice programs. Forty-three states now authorize charter schools, over half of all states and the District of Columbia have at least one private school choice program, and very few have been invalidated on constitutional grounds. Still, the legal issues discussed in this chapter persist, with constitutional challenges raised nearly each time a state enacts legislation establishing a new public or private school choice program.

There are a number of constitutional law provisions that are relevant to school choice. The First Amendment to the United States Constitution provides, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." (These two clauses are known respectively as the "Establishment Clause" and the "Free Exercise Clause," and they figure largely in questions surrounding school choice.) The Fourteenth Amendment to the U.S. Constitution provides, "No state shall . . . deprive any person of life, liberty, or property without due process or law; nor deny to any person within its jurisdiction the equal protection of the laws." (The two clauses are known respectively as the "Due Process Clause" and the "Equal Protection Clause.") Each of the 50 state constitutions contain similar provisions, as well as education-specific provisions that are discussed in detail below.

The chapter begins by asking whether, and to what extent, either federal or state constitutional law enshrines rights to education and/or parental choice, and, if so, under what circumstances. The chapter then turns to constitutional questions raised by public school choice programs, such as the vexing issue of whether public education authorities consider a student's race in admissions decisions to integrate the schools participating in these programs. The chapter goes on to address three constitutional questions about charter schools: First, for purposes of both state and federal constitutional law, are charter schools legally public or private schools? Second, does the First Amendment prohibit religious charter schools, and if it does not, does it require states to permit them? And third, do racial disparities within the charter sector raise Equal Protection concerns? Finally, the chapter discusses four questions about private school choice programs: First, does the Establishment Clause prohibit faith-based schools from participating in private school choice programs? Second, what limitations does the federal constitution place on regulations governing private and faith-based

schools' participation in parental choice programs? Third, what additional limitations on private school choice are imposed by state constitutions? And fourth, can a state rely on its own constitution to exclude religious schools from participating in private school choice programs?

A Constitutional Right to Parental Choice?

The U.S. Constitution does not guarantee a right to an education, but rather leaves the provision of education to the states. The right to an education is, however, universally guaranteed by all 50 states' constitutions, either explicitly or by judicial interpretation. The contours of these guarantees vary significantly, with the texts ranging from open-ended and general to quite specific. Litigation about the meaning of these clauses—raised primarily in cases challenging the inter-local disparities in public school funding—has intensified over the past several decades. While opponents frequently argue that new choice programs violate state education guarantees, with two limited exceptions discussed below, these provisions have not played a significant role in the legal battles surrounding school choice.

The U.S. Constitution does protect the right of parental choice, however, at least to the extent of guaranteeing parents the right to send their children to non-public schools. In *Pierce v. Society of Sisters* (1925), the Supreme Court invalidated an Oregon law mandating that all parents send their children to public schools. The Court ruled that the U.S. Constitution "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." Together with *Meyer v. Nebraska* (1923), a decision that invalidated a state law mandating that the instruction of all school children be in English, *Pierce* is widely regarded as protecting the right of parents to direct the upbringing of their children.

Subsequent decisions, however, have made clear that this right is not necessarily a capacious one. In *Yoder v. Wisconsin* (1972) the Supreme Court ruled that the Old Order Amish can assert a religious liberty exemption to compulsory attendance law after eighth grade, but the precedential weight of *Yoder* has proven quite limited. Litigation asserting a constitutional right to homeschool, for example, met with mixed results, although parents now have a statutory right to homeschool their children in all 50 states. Federal courts have held that *Pierce* does not preclude reasonable regulation of homeschooling or private schools, nor does it entitle parents to object to public school curricular offerings (even those that are offensive to their religious beliefs).

Parents' federal constitutional right to educate their children in private schools does not include the right to access public education funds. During the 1980s, some unsuccessful lawsuits claimed that limiting publicly funded educational options to public schools imposed an "unconstitutional condition" on the rights of religious parents who objected to the content of public school curricula (Garnett, 2015). Efforts to argue that a state constitutional education guarantee requires that parents may access public funds to finance their school choices have also been unsuccessful, although some have maintained that parental choice ought to be employed as a remedy in school finance litigation (Heise & Nechyba, 1999).

Public School Choice

The road to school choice in the U.S. arguably began in an unexpected place and time—suburban Detroit, Michigan in the early 1970s. A federal district court ruled that the Detroit Public Schools had unconstitutionally discriminated against Black students and granted a sweeping multi-district busing remedy, which required the compulsory transfer of students between the Detroit public schools and 53 surrounding suburban districts. In *Milliken v. Bradley* (1974), however, the U.S. Supreme Court rejected the multi-district remedy because there was no evidence that the suburban school districts included had engaged in intentional race discrimination.

Milliken prompted urban districts to achieve integration by means other than busing, including magnet schools and other public school choice programs. In the 1977 *Milliken II* decision, the Supreme Court approved these "compensatory" strategies, and since then public school choice programs have proliferated (Clotfelter, 2004; Brown, 2005). While attendance at a traditional, geographically assigned public school remains the norm in many communities, the number of students attending chosen public schools continues to rise steadily. This is true especially in urban districts, many of which offer (in theory) universal public school choice. A number of states also permit interdistrict school choice, although the extent of choices offered is often dramatically constrained by available space in stronger school districts (Ryan & Heise, 2002).

One challenge posed by magnet schools and other public school choice programs is that the common methods of determining admission (residential preference, lottery, and testing) can lead to within-school racial imbalances (Ryan & Heise, 2002). In districts subject to remedial supervision by federal courts for past discrimination, federal judges routinely permit (indeed, require) the districts to take steps to ensure that a school's student body roughly approximates the demographics of the district. Outside of this remedial context, a number of districts historically employed voluntary integration measures that considered race in admissions decisions. In *Parents Involved in Community Schools v. Seattle School District* (2007), the U.S. Supreme Court invalidated two districts' policies that made race a determining factor in student admissions. The Court also ruled that K–12 school assignment policies that consider race are subject to "strict scrutiny," meaning that they must be "narrowly tailored to advance a compelling governmental interest." Although strict scrutiny has been said to be "strict in theory, fatal in fact," Chief Justice Robert's opinion, which would have held that race could never be considered in K–12 admissions decisions, did not command a majority of the Court. The question therefore remains whether admissions policies that consider race as one factor among many might be constitutional, as they are in the higher education context.

Charter Schools

If *Milliken II* opened the door for parental choice, the enactment of the nation's first charter school law by Minnesota in 1991 opened the floodgates. Although charter schools initially were conceived of as a modest reform that offered a more moderate, public alternative to vouchers, they have evolved to become legally complex creatures. This section discusses three legal issues raised by these complexities: First, are charter schools "public" or "private" schools for constitutional purposes? Second, does the federal Establishment Clause prohibit faith-based charter schools? And third, do racial imbalances in charter schools raise federal Equal Protection concerns?

The Publicness of Charter Schools

Charter schools are considered public schools for two overlapping reasons. The first is that federal law and the laws of each of the 43 states authorizing them designate them as public schools. Charter school proponents and operators generally benefit from that categorization and routinely refer to it. The second reason is that charter school laws do more than permit charter schools to operate: They set up the legal process that creates them. Charter schools are created by an agreement (the charter) between the school operator and a charter authorizer (which, depending upon the state, can include a range of governmental, educational, and nonprofit private entities). Before that agreement is struck, the charter school does not exist, and so—the logic goes—the schools so created must be public (Garnett, 2017).

However, neither the legal designation of a charter school as public nor the fact that it is created by a governmental act resolves the question of whether charter schools are public or private for constitutional law purposes. Importantly, most charter schools are, like private schools, owned and

operated by private entities. Moreover, although state regulation of charter schools differs across a number of variables, charter schools generally enjoy wide-ranging autonomy over staffing, curriculum, budget, internal organization, and many other matters. These private school characteristics of charter schools confound the question of whether the law should consider them public or private.

Challenges to the "publicness" of charter schools have arisen in both state and federal courts. In the federal context, charter schools have defended themselves by arguing that they are not "state actors" for federal constitutional purposes. (That is, they do not act on behalf of the government.) The legal implications of this are enormous: The U.S. Constitution only restrains the actions of governmental entities, not private ones; thus, if charter schools are not state actors, then millions of students are now attending—and thousands of teachers are employed by—institutions where the federal constitutional rules that govern the relationships between traditional public schools and their teachers and students are inapplicable.[2]

The U.S. Supreme Court has articulated a number of factors to determine whether a privately operated institution is a "state actor" for federal constitutional purposes. These factors include whether the private actor is performing a governmental function; whether the government compelled or significantly encouraged the challenged action; whether the government controls the private actor to such an extent that it is a governmental agent; and the degree of interdependence between the government and the private actor.

Neither government regulation nor government funding necessarily transforms a private entity into a public one. For example, in *Rendall-Baker v. Kohn* (1982), the Supreme Court held that a heavily regulated private school for special needs students that received more than 90 percent of its funds from a state was not a state actor:

> The school is not fundamentally different from many private corporations whose business depends on [government] contracts. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts. (p. 841)

And, importantly for the purposes of analyzing the status of charter schools, the Supreme Court has ruled both that entities created by government action are not necessarily state actors and that the legal characterization of an entity as private or public is not dispositive of the state action determination (Metzger, 2003). These factors suggest that applying the state-action doctrine to charter schools may vary from state to state, along with the extent of state control over charter school operations.

Federal courts have divided over the question of whether charter schools are state actors. In *Caviness v. Horizon Community Learning Center, Inc.* (2010), the U.S. Court of Appeals for the Ninth Circuit rejected the assertion that an Arizona law's designation of charter schools as public schools that provide public education service controlled the state action question. The court reasoned that, whatever the legal designation of the charter school (which was, under state law, also a private corporation), the challenged decision (to terminate a teacher) was the purely private action of a private corporation following privately created termination procedures specified in the school's charter. Relying on *Caviness*, a federal district court similarly dismissed a teacher's First Amendment claim against a charter school in *Sufi v. Leadership High School* (2013), reasoning the connection between the decision to authorize the school and the school's dismissal decision was too weak to be fairly classified as "state action."

In other decisions, federal courts have taken a more formalistic approach, holding that charter schools are state actors because they are designated as public schools by state law and/or because public education is a traditional function of state governments. For example, federal courts in Illinois, Ohio, and New York have relied upon the state law designations to conclude that charter schools are state actors. In *Riester v. Riverside Community School* (2002), the U.S. District Court for

the Southern District of Ohio held that Ohio law's designation of charter and community schools as public "ends the inquiry" into the state action question (p. 972). At least one district court held that charter schools are state actors because they perform a traditional state function (public education)—despite the obvious circularity in concluding that the education provided by charter schools is "public" education.

The question of whether a charter school is public for *state* law purposes arguably has even more profound implications, because some states' constitutions prohibit the public funding of private schools. In a number of cases, opponents have argued that charter school laws violate state constitutions because they authorize the creation and funding of private schools. This theory was endorsed by the Washington Supreme Court in *League of Women Voters v. State of Washington* (2015). In the case, the court considered a challenge to a 2012 law that empowered two governmental agencies—a new state charter school commission and the Washington State Board of Education—to authorize charter schools. The law designated charter schools as "common schools" and directed that they be funded in the same manner as traditional public schools. The court held that the charter school law violated Article IX, § 2 of the Washington Constitution, which limits certain public expenditures to common schools. The court reasoned that because they were independent from public school districts, charter schools were not common schools and could not be publicly funded. This decision sent shockwaves through the education reform world and left Washington legislators scrambling to find alternative ways to fund charter schools. Similar lawsuits in other states have been unsuccessful, however.

The second theory pursued in state constitutional challenges is that charter schools undermine the uniformity of public education systems. As mentioned previously, all state constitutions contain an education clause, although the particulars of the mandate vary significantly across jurisdictions. Generally, state constitutions require the establishment of a system of public schools, with provisions using a range of adjectives to describe that system (e.g., "uniform," "efficient," "suitable," "adequate," "thorough").

In *Bush v. Holmes* (2006), the Florida Supreme Court relied upon the state's education clause to invalidate a state-wide voucher program. Since then, opponents have begun to mimic the tactic in litigation, alleging that charter schools also run afoul of uniformity provisions. For example, in *State ex rel. Ohio Congress of Parents & Teachers v. State Board of Education* (2006), the Ohio Supreme Court rejected a challenge to the law establishing and authorizing "community schools" (as charter schools are called in Ohio). The plaintiffs alleged that charter schools inhibited the state's ability to provide for a thorough and efficient system of public schools because they diverted public funds away from traditional public schools into private schools that were not subject to many state education regulations. In rejecting these claims, the Ohio Supreme Court concluded that charter schools were a constitutionally appropriate means of reforming public education and increasing educational options.

In other cases, the plaintiffs have alleged that charter school laws run afoul of state uniformity clauses because they divest local school boards of control over public education. In these claims, plaintiffs do not allege that charter schools are private, but rather that they must be supervised by local school boards because they are public. The Georgia Supreme Court endorsed this claim in *Gwinnett County School District v. Cox* (2011), when it invalided the state statute establishing the Georgia Charter School Commission as inconsistent with a state constitutional provision vesting control of public schools in local boards of education. (The state subsequently amended its constitution to allow for the authorization of charter schools by bodies other than local school districts.) Other courts have rejected similar claims, reasoning that the legislature has significant latitude to experiment with new mechanisms for delivering K–12 education. For example, in 2002, the Utah Supreme Court rejected the claim that the state's charter school act was unconstitutional because it vested the authorization and supervision of charter schools with the Utah State Board of Education, rather than local school boards. The Court concluded that the Utah Constitution gave the

legislature plenary power to structure the state's educational system to advance the goals of an educated populace, including by establishing non-traditional public schools like charter schools.

A Constitutional Space for Faith-Based Charter Schools?

The charter school sector is characterized by a remarkable degree of institutional diversity, with one hard-and-fast limit: Charter schools must be secular. State laws express this prohibition in various ways. The majority approach is to simply require that charter schools be "nonsectarian." Seven states (and the federal government) additionally prohibit charter schools from being "affiliated" with religious institutions, and two others (Maine and New Hampshire) prohibit such affiliation to the extent that it is prohibited by the U.S. Constitution. Others (e.g., New York) prohibit charter schools from being "under the control" of a religious institution. Still others (e.g., Georgia) explicitly permit religious institutions to operate charter schools so long as they are secular schools. Some states' laws are silent on the question, although the accepted view is that the Establishment Clause prohibits religious charter schools (Brinig & Garnett, 2014). Thus, while charter schools may incorporate cultural or intellectual themes with religious connotations, they may never teach religion as the truth of the matter. As a result, when a faith-based school changes status and becomes a charter school—as a handful of evangelical, Catholic, and Jewish schools have done—the school must secularize. Twelve states expressly forbid the conversion of private schools to charter schools, although in practice, conversions can be structured to avoid offending such statutes (Brinig & Garnett, 2014).

There are two reasons that it is commonly assumed that the Establishment Clause requires charter schools to be secular. The first is that charter schools are universally considered public, and public schools must be secular. Of course, if charter schools are not state actors, then this reason evaporates, and the question turns on the second reason, which is related to the equally complex "direct-indirect" funding distinction in federal Establishment Clause jurisprudence. The Supreme Court has distinguished between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reaches religious schools indirectly through the independent choices of private individuals. In the indirect aid context, the Court has held that the Establishment Clause does not prohibit religious institutions from receiving public funds, since the relevant decision maker is the private recipient of the funds (e.g., in the case of school-aged children, the recipients' parents), not the government.

In contrast, the Court has held that the government may not directly fund religious activities or instruction. Unfortunately, the Court has been divided about what constitutes a program of private choice, so it is unclear whether the charter school funding would be considered indirect or direct. The prevailing wisdom is that the funding of charter schools is direct aid, made by virtue of the government's decision to authorize a charter school to operate, and unlike the funding of private school choice, which is indirect, made by virtue of a parent's enrollment decision. Of course, one could argue that the per-pupil funding allocation received by charter schools and a scholarship provided in a parental choice program are effectively equivalent since both result in money flowing to a privately operated school as a result of a parent's enrollment decision. But, the question remains open, and one that the Supreme Court is unlikely to take up in the near future.

All that said, it is important to keep in mind that the fact that religious charter schools may be constitutionally permissible does not mean that they are legally permitted. State law requirements that charter schools be secular are ubiquitous, and the political impediments to removing statutory prohibitions on religious charter schools are substantial. As a result, litigation asserting that prohibitions on religious charter schools themselves violate the Free Exercise Clause would be required to eliminate statutory mandates that charter schools be secular. Whether such challenges would be successful turns primarily on whether the U.S. Supreme Court's recent decision in *Trinity Lutheran Church v. Comer* (2017), which is discussed in more detail below, extends to public funding.

The Racial Imbalance Question

Questions about charter school demographics have received much attention in recent years. A majority of students enrolled in charter schools are racial minorities, leading some scholars to raise civil rights concerns. In an important study, for example, Gary Orfield and his colleagues at the UCLA Civil Rights Project found that charter schools were more racially isolated than traditional public schools (UCLA Civil Rights Project, 2009). Other scholars, however, have argued that charter schools are not necessarily more racially isolated than public schools in the same neighborhood (Ritter et al., 2010). Regardless of the empirics, it is important to note that, as a federal constitutional matter, the Equal Protection Clause only prohibits governmental actions taken with the intent to discriminate, not those that disproportionately affect a racial group. Therefore, assuming that charter schools are public schools (if they are not, then the Equal Protection Clause does not apply to them at all), the fact that some are majority–minority or single-race does not raise a federal constitutional question, nor do school policies that might disproportionately attract students from one ethnic group, such as dual-language immersion or Afrocentrism. On the other hand, federal regulations that apply to all recipients of federal funds extend in some cases to policies that have the *effect* of discrimination, as do a handful of state equal protection clauses (Garnett, 2014). A full discussion of these issues, however, is beyond the scope of this chapter.

Private School Choice

Given the fact that charter schools now dominate the parental choice landscape, it may come as a surprise that the first publicly funded private school choice program pre-dates the first charter school law (albeit by only a year). Although other forms of choice were in place before the first voucher program, the private school choice movement began in earnest in 1990, when Wisconsin state and education leaders marshalled a coalition to form the Milwaukee Parental Choice Program (MPCP), the first modern program to embrace the use of publicly funded vouchers to enable children to attend private schools. Originally, the MPCP prohibited the participation of faith-based schools, but it expanded to include that sector five years later. The expansion raised the vexing "church–state" constitutional questions that generated dozens of cases since the Supreme Court's landmark decision more than 30 years prior in *Everson v. Board of Education* (1947).

Federal Constitutional Considerations

The First Amendment's Establishment Clause

At the federal level, the focus on the constitutionality of private school choice centered on whether the Establishment Clause permitted publicly funded scholarship aid to flow into faith-based schools. In *Everson v. Board of Education* (1947), the Court upheld a New Jersey law funding transportation to and from private and religious—including Catholic—schools. The Court's opinion articulated the "neutrality" principle that continues to guide modern Establishment Clause doctrine: The government may neither favor nor disfavor religious organizations or entities, nor may it directly fund religious activity or instruction.

Everson did not resolve whether the First Amendment permits state aid to flow to parents choosing to enroll their children in faith-based schools. In the years that followed, the Court wrestled with this question numerous times in a series of cases that only tended to compound the confusion. In *Lemon v. Kurtzman* (1971), the Court invalidated a program providing salary supplements for teachers of secular subjects in religious schools. Importantly, *Lemon* established a framework (known as the "*Lemon* test") used to evaluate programs that allow public support to flow into

religious organizations, including schools. The *Lemon* test, which has been eroded but not replaced by subsequent cases, provides that a program extending a public benefit to a religious entity: 1) must have a secular legislative purpose, 2) must not have the primary effect of advancing or inhibiting religion, and 3) must not foster excessive government entanglement with religion. Two years later, in *Committee for Public Education v. Nyquist* (1973), the Court invalidated a handful of programs that extended tuition assistance to private school students; the Court concluded that the primary effect of the programs was to advance religion. In *Nyquist*, however, the Court signaled that publicly funded scholarships to faith-based schools offered on a neutral basis may survive Establishment Clause scrutiny.

Following *Nyquist*, the Court turned its attention to the conditions under which neutrally applied aid might be permissible—specifically the question of the direct–indirect aid distinction discussed above. In *Mueller v. Allen* (1983), the Court upheld a Minnesota tuition tax deduction program that had primarily inured to the benefit of faith-based school families. The Court's rationale for permitting such aid was twofold: First, the program was "neutral" toward religion; and second, the tax subsidy benefited religious schools only through an intervening private choice—that is, the decision made by the parents to enroll their children in a religious school. This direct–indirect aid distinction ultimately led the court to uphold publicly funded private school choice.

Twelve years after *Mueller*, two states—Wisconsin and Ohio—adopted programs that enabled children to use vouchers to attend religious schools. In 1997, Arizona enacted the nation's first scholarship tax credit program, which provided a state tax credit for donations to private scholarship funds. At the time these programs were adopted, the question of whether the Establishment Clause permitted these policies remained an open one. The answer came in two parts.

First, in *Zelman v. Simmons-Harris* (2002), the Court upheld Cleveland's Pilot Scholarship Program, despite the fact that 96 percent of the scholarship recipients were enrolled in religious schools at the time of the litigation. Relying upon the direct–indirect aid distinction, the Court concluded that the program was one of "true private choice," which was imbedded in a range of educational opportunities that included private, charter, and magnet schools. Since then, no voucher program has been invalidated under the *Zelman* criteria.

Second, in 2011, the Court considered the constitutionality of Arizona's scholarship tax credit program. In *Arizona Christian School Tuition Organization v. Winn* (2011), the Court declined to resolve the Establishment Clause question. Instead, it dismissed the case because the plaintiffs lacked "standing" to challenge the program because the aid itself—private donations eligible for a credit against state income tax—was not government money. Going forward, *Winn* disqualifies most Establishment Clause challenges against contemporary scholarship-tax-credit programs. Taken together, *Zelman* and *Winn* answer the question of whether the Establishment Clause permits most contemporary publicly funded private school choice in the affirmative. As the concept of choice continues to evolve and newer models such as education savings accounts, course choice, and others come into play, there is always the chance that we may see a new round of Establishment Clause litigation. For now, however, publicly funded private school choice is presumptively permissible under the Establishment Clause.

Free Exercise Issues

The other First Amendment question raised by private school choice concerns the Free Exercise rights of participating schools, parents, and students. While *Zelman* makes clear that the Establishment Clause in no way requires faith-based schools to secularize in order to participate in parental choice programs, it does not address the extent to which the government may impose regulatory burdens that undermine religious liberty. The four most common issues that such regulatory burdens might touch on would likely be participating schools' *hiring*, *curriculum*, *pedagogy*, and *admissions*

(similar to the "four essential freedoms" of a university outlined by Justice Frankfurter in *Sweezy v. New Hampshire* [1957]: who may teach, what may be taught, how it may be taught, and who may be admitted to study). Theoretically, some schools might also object to academic accountability requirements on religious grounds.

To date, states have largely avoided regulatory conditions that directly touch on religious mission. The only example of such regulatory strings is actually from the birthplace of private school choice—Wisconsin—where both the Milwaukee Parental Choice Program and the Racine Parental Choice Program include religious "opt out" provisions. These require participating schools to allow students to absent themselves from religious activities. In practice, no students availed themselves of this option in the first 13 years of the Milwaukee program, and anecdotal evidence suggests that very few have done so since then. Other than this exception, some programs do impose restrictions on issues such as teacher certification and/or student admissions, but none of these touches directly on participating schools' ability to transmit and teach faith as truth. Of course, current regulatory policy is no prediction of future regulations. It is possible, perhaps even likely, that states may begin to impose additional regulatory strings on schools participating in private school choice programs.

An important limitation on their ability to do so is the fact that faith-based schools are constitutionally entitled to exemptions from laws that go to core exercises of religious liberty. The most prominent example is the "ministerial exception," which protects faith-based organizations' ability to hire and fire "ministers" by exempting them from employment discrimination laws. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012), the U.S. Supreme Court ruled unanimously that the Free Exercise Clause entitles faith-based organizations to a ministerial exception to regulations controlling their selection of ministers—a group that includes faith-based school teachers whose professional responsibilities involve transmitting the faith (regardless of whether the school is participating in a choice program). That said, it remains an open question whether the government could condition participation in a private school choice program on a faith-based school's waiver of the ministerial exception. Likewise, there is an ongoing question about the extent to which the federal Religious Freedom Restoration Act and similar state laws might prohibit government regulations imposing a substantial burden on free exercise.[3]

Unconstitutional Conditions Questions

The final concern regarding religious liberty may prove more of a political issue than a legal one. The reality is that the government can, and in fact does, impose regulations (some of which arguably limit Free Exercise), regardless of whether a school is participating in a choice program. The best recent example of this is the context reviewed in *Burwell v. Hobby Lobby* (2014), which examined the Affordable Care Act mandate requiring all employers (including faith-based nonprofits with an expressed religious objection, whether or not they had received state funding) to provide insurance coverage for contraceptives and abortifacients. Likewise, and as referenced earlier, although no state has conditioned choice funding on a faith-based school's approach to discrimination laws in areas such as sexual orientation, transgender status, or marriage equality, it is certainly possible that we could see such regulations in the years ahead.

State Constitutional Considerations

Following *Zelman*, many commentators predicted that state constitutions would prove a more formidable, perhaps even insurmountable, barrier to private school choice than the federal Establishment Clause. And indeed, the litigation that inevitably attends the enactment of a new parental choice program has shifted from federal to state court, although—contra the early predictions—most state courts rejected constitutional challenges to choice programs. The provisions most commonly cited

generally fall into two categories: 1) those prohibiting state aid of religious organizations, churches, usually referred to as "Blaine amendments"; and 2) those referencing the form, function, and funding of the state educational system itself, commonly known as "education clauses" (Komer, 2009).

Blaine Amendments

The first category of these state constitutional provisions largely emanated from a nativist, anti-Catholic, know-nothing fervor that dominated the latter half of the 19th century. This manifested most prominently in 1875, when U.S. Senator James Blaine marshalled an effort to ratify an amendment to the U.S. Constitution that would prohibit the use of public funds in "sectarian" schools. After easily passing in the House, the amendment fell short of the required supermajority in the Senate. In response, Blaine and his confidants devised a new strategy, installing similar amendments in as many state constitutions as possible by requiring their adoption as a condition of admission to the Union. The strategy proved to be a success, as every state admitted to the Union after 1876 does indeed contain such an amendment (Vitteriti, 1998; Komer, 2009).

Thirty-seven states currently have constitutional language that may be appropriately classified as Blaine Amendments (Komer, 2009). While each one is worded differently, these provisions typically prohibit the use of public funding for the "aid" or "benefit" of faith-based schools—some forbidding support of all private schools and some forbidding such aid "directly" and/or "indirectly." Although no taxonomy is complete, perhaps the most helpful framework for categorizing these different provisions would be the one developed largely by Richard Komer and Olivia Grady (2016): the "proto-Blaines," the "Classic Blaines," and the "Super-Blaines." The first set, the proto-Blaines, would be those provisions that pre-date (and in fact served as a model for) Senator Blaine's failed attempt to include a no-aid provision in the U.S. Constitution. This group would include Massachusetts, Indiana, and Illinois. Massachusetts' Blaine Amendment, enacted in 1855, read in relevant part that funds raised for public or common schools "shall never be appropriated to any religious sect for the maintenance exclusively of its own schools." The second set, the Classic-Blaines, are those provisions subsequent to Blaine's 1875 proposed amendment that serve to prohibit state aid to faith-based schools. The Super-Blaines are those provisions whose scope reaches beyond education, prohibiting aid to sectarian organizations such as hospitals and orphanages.

In the wake of *Zelman*, private school choice opponents shifted their litigation focus from the Establishment Clause to these Blaine amendments, which some believed would be a more effective means of invalidating choice legislation than the First Amendment. The reality, however, is that only two Blaine Amendments (Massachusetts and Michigan) appear to be prohibitive of any form of private school choice. Although several lower courts have invalidated choice programs on Blaine amendment grounds, only two state supreme courts have done so. In 2009, the Arizona Supreme Court ruled in *Cain v. Horne* that the state's two voucher programs—one providing scholarships to children with documented special needs and the other providing scholarships to children in foster care—violated Art. IX § 10 of the Arizona Constitution. The article reads that "[n]o tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school." Six years later, the Colorado Supreme Court ruled that a voucher program in Douglas County violated Colorado's Blaine Amendment, which prohibits any public funding "in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination." With these two exceptions, no state supreme court has ruled that a choice program runs afoul of a Blaine Amendment.

There remains an open question whether states can rely upon Blaine amendments to exclude faith-based schools from otherwise constitutional private school choice programs without running afoul of the First Amendment's neutrality principle discussed above. In a recent decision,

the Supreme Court held that the Free Exercise Clause protects faith-based organizations against government regulation that denies otherwise neutral and secular funding solely on the basis of the religious identity of the recipient. In *Trinity Lutheran Church of Columbia v. Comer* (2017), the Court reviewed a decision of the Missouri Department of Natural Resources (DNR) that denied funding to a Lutheran preschool and daycare for the purpose of purchasing recycled tires to resurface a playground. The DNR denied the funding on the basis of Missouri's Blaine Amendment, which reads in relevant part: "[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, section, or denomination of religion." The Court determined that the DNR's denial of Trinity Lutheran's application represented unconstitutional religious discrimination in violation of the church's free exercise rights. In a footnote, however, the Court left open the question of whether the ruling extended to other forms of aid to religious schools, such as vouchers. The Court also distinguished its earlier opinion in *Locke v. Davey* (2004), which upheld Washington's refusal to allow a college student to use a state scholarship to study for the ministry.[4]

Some scholars have also suggested that Blaine amendments violate the Equal Protection Clause because they enshrine an intent to discriminate against Catholic schools. No court has endorsed this argument, but in *Mitchell v. Helms* (2000) a plurality of the Supreme Court endorsed the proposition that Blaine Amendments were in fact born of bigotry and should be "buried," noting "[h]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow" (p. 828). More recently, the dissenting opinion in the Colorado Supreme Court decision invalidating the Douglas County voucher program noted that the majority had failed to acknowledge the anti-Catholic bigotry that may have motivated the provision upon which the majority relied (Garnett, 2004).

Education Clauses

Other constitutional challenges to parental choice programs rely on state constitutional provisions directly addressing education. Most commonly, these challenges have focused on a particular type of provision found in several state constitutions that enumerates required qualities of the state's education system—such as "thorough and efficient," "high quality," or "uniform." In *Bush v. Holmes* (2006), for example, the Florida Supreme Court invoked the state's uniformity clause (which guarantees all Florida students a "uniform, efficient, safe, secure, and high quality system of free public schools") to invalidate a statewide voucher program available to children zoned to attend failing district schools. Using the maxim "the expression of one thing implies the exclusion of another," the Court reasoned that because the uniformity clause provides for the public funding of public schools, it must necessarily prohibit public funding for private alternatives to those schools. While the decision engendered grave concerns among some school choice advocates that similar logic would be applied by other state courts interpreting similar constitutional provisions, *Bush v. Holmes* has proven to be an outlier. Other courts have rejected claims similar to the one brought in *Bush*, reasoning that private school choice "supplements rather than supplants" traditional public schools. For example, in 2015 the North Carolina Supreme Court rejected a uniformity challenge to the state's voucher program and a Florida trial court rejected a uniformity challenge to the state's scholarship tax credit program on standing grounds.

Conclusion

This chapter has attempted to canvas many of the most important constitutional law issues raised at the state and federal level by public and private parental choice programs. The discussion was necessarily not a comprehensive one and leaves many important legal issues to the side. The bottom line legally, however, is that neither the states nor federal constitutions represent a significant

impediment to the growth of parental choice in the U.S. Most of the legal battles over school choice are political, not constitutional, and will be carried out in legislative chambers rather than judicial ones.

Notes

1 Constitutional debates all too frequently focus only on the federal constitution, disregarding the fact that there are 51 constitutions in the United States. Each state has its own, with provisions that differ from (or have been interpreted to have a distinct meaning other than) the federal constitution. In the context of parental choice, state constitutional provisions often are as important (or more important) than their federal counterparts; we take care to address them here.

2 These rights include the First Amendment's protection of freedom of expression, *Morse* v. *Frederick*, 551 US 393 (2007), the Fourth Amendment's prohibition on unreasonable searches and seizures, *Safford Unified Sch. Dist. # 1* v. *Redding*, 557 US 364 (2009), and the Fourteenth Amendment's due process guarantees, *Goss* v. *Lopez*, 419 US 565 (1975).

3 *Christian Legal Society* v. *Martinez* (2010) held that the University of California could refuse to approve a student group that limited membership to professed Christians. While not directly on point, *Martinez* may suggest that a state could condition the award of public funding on such a waiver.

4 Prior to the *Trinity Lutheran* decision, two federal appellate courts rejected claims that Maine and Vermont's longstanding "tuitioning" programs, which provide public funding for certain rural children to attend secular private schools, violated the First Amendment by excluding faith- based schools.

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