

Note to workshop participants:

In the interest of full disclosure, I am neither a philosopher nor a scholar of the natural law. Nor was my ambition when I set out to write this essay, which was solicited for a forthcoming symposium in the *Education Law and Policy Review*, to compose a piece on the natural law—but rather to draw attention to what I see as a troubling decline in educational pluralism in the American K12 education sector. Much of what I have come to believe about the natural law and education policy I learned from your colleagues, Jack Coons and Steve Sugarman. (Indeed, the most powerful and succinct natural law case for parental choice ever made is, in my view, Coons’ 1992 *First Things* essay, “School Choice as Simple Justice,” although he didn’t use the term.) In recognition of my own disciplinary limitations—which is to say that I know far more about education policy and constitutional law than I know about natural law—the claims made in this essay are modest ones. I look forward to discussing whether my view that educational pluralism is a necessary corollary of parents’ natural law right to direct the upbringing of their children is correct—as well as whether education policies that directly or indirectly suppress such pluralism have natural-law implications.

- Nicole Garnett

The (Natural Law) Case for Educational Pluralism

Nicole Stelle Garnett*

In January 2018, the Roman Catholic Bishop of Memphis, Tennessee, Martin Holley, announced his decision to close all of the diocese's Jubilee Schools—a network of Catholic schools serving almost exclusively disadvantaged urban children—at the end of the 2018-19 school year.¹ The decision, which affects nearly 1500 students, rocked the Catholic school world. For decades, the Jubilee network—often dubbed the “Miracle in Memphis”—had been a counterfactual bright spot set apart from the otherwise bleak reality of decline facing urban Catholic schools. While nearly 3000 Catholic schools, most of them located in urban centers, have closed since 1990, Bishop Holley's predecessor, Bishop Terry Steib, made the decision in 1999 to reopen nine previously closed Catholic schools in the city center in order to provide poor children in Memphis the option of a Catholic education. Steib subsequently added several additional schools to the Jubilee network, including the only Catholic high school in Memphis's urban core² Almost all of the children attending the Jubilee schools are poor, and the overwhelming majority of them are African American and Hispanic.³

Holley made clear that his decision was primarily a financial one, motivated by the depletion of the private philanthropic funds supporting the Jubilee schools. But he and other diocesan officials emphasized that the human costs of the school closures would be mitigated by their plans to enlist a charter management organization to operate the Jubilee schools going

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¹ Jennifer Pignolet, “Memphis Jubilee Catholic Schools to Close after 2018-19 School Year,” *Memphis Commercial Appeal*, January 23, 2018, <https://www.commercialappeal.com/story/news/education/2018/01/23/memphis-jubilee-catholic-schools-close-after-2018-19-school-year/1059023001/>

² Michael Humphrey, “Miracle in Memphis: Reopen Catholic Schools Bring Life Back to Inner-City Neighborhoods,” *Nat'l Catholic Reporter*, April 4, 2008, http://natcath.org/NCR_Online/archives2/2008b/040408/ss040408a.htm.

³ “Nothing to Celebrate with this Jubilee,” *Catholic School Matters*, May 13, 2018, <https://www.smores.com/5gj9t-catholic-school-matters>.

forward. Former diocesan superintendent Mary McDonald, the architect of the Jubilee network, likened their transition from Catholic schools to charter schools to a parent watching a child graduate from college. She argued that the growth of charter schools in Memphis had obviated the need for the educational opportunities provided by the Jubilee schools. "Now it's time for the child to move on and do what is the next best thing in that child's life....I think the bottom line is how can we assure that the children are receiving the education they need to give Memphis an educated workforce and lift people out of poverty."⁴ Within a month of the decision to close the Jubilee schools, New Day Schools—a new charter operator affiliated with the Christian Brothers University, a private Roman Catholic College in Memphis—filed a letter of intent to open a network of nine new charter schools in some of former Jubilee locations. These schools would be known as the Compass Community Schools.⁵

In June 2018, however, the Shelby County School Board voted to reject all pending charter school applications, including the proposal by New Days Schools for the Jubilee School sites.⁶ Two months later, the Board partially reverse course and approved, by a vote of five to three, six of the nine charter schools proposed for the Jubilee locations. Board members and district administrators, however, expressed trepidation that the Memphis might be overly saturated with schools. One board member demanded a “charter compact” agreement between the district and charter operations to address the “saturation of neighborhoods” with new schools. Another complained that the charter schools were drawing children out of their neighborhoods to

⁴ Pignolet, *supra* note 2.

⁵ Jennifer Pignolet, *Growth, Partnerships with CBU Part of the Plan to Replace Jubilee Schools*, MEMPHIS COMMERCIAL APPEAL, Feb. 4, 2018; Michelle Corbet, *Plans to Turn Jubilee Schools into Charters Moves Forward*, MEMPHIS BUSINESS JOURNAL, April 2, 2018.

⁶ Jennifer Pignolet, *SCS Board Rejects All Charter School Applications*, MEMPHIS COMMERCIAL APPEAL, June 26, 2018.

the detriment of community life. And, Superintendent Dorsey Hopkins worried, “we have way too many schools...Right now, we are just spreading ourselves even more thin.”⁷

These recent events in Memphis are emblematic of deep fissures in American education policy. Father Andrew Greeley, a noted sociologist, famously quipped that the first school voucher would arrive the day that the last Catholic school closed.⁸ Greeley’s prediction echoed true in the decision to close Memphis’s Jubilee schools. Since Minnesota enacted the first charter school law in 1991, charter schools have dramatically eclipsed the private-school choice movement. While private-school choice has a much older intellectual pedigree, charter schools quickly moved into the education policy mainstream, in large part because they were perceived—at least until recently—to be a less extreme, public education-reform device.⁹ A variety private-school programs, including vouchers, tax-credit scholarship programs and education savings accounts now available to parents in more than half of the states and the District of Columbia. But, many of these programs are extremely limited in scope and provide only a fraction of the resources available on a per pupil basis to charter schools, and charter schools enroll nearly ten times the number of children participating in a private-school-choice program (~3.2 million *versus* ~450,000)¹⁰ This reality has had profound implications for the faith-based schools like the Jubilee schools, which, unlike charter schools, have no access to public funds unless they opt to secularize and “convert” to charter schools. Tennessee is case in point. The

⁷ Bill Dries, *SCS Board Approves 9 New Charter Schools with Concerns about Saturation*, MEMPHIS DAILY NEWS, Aug. 22, 2018.

⁸ MARGARET F. BRINIG & NICOLE S. GARNETT, *LOST CLASSROOM, LOST COMMUNITY: CATHOLIC SCHOOLS’ IMPORTANCE IN URBAN AMERICA*, 156 (2014).

⁹ Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 VAND. L. REV. 1, 13-16 (2017) [hereinafter Garnett, *Sector Agnosticism*].

¹⁰ National Alliance for Public Charter Schools, *National Charter School Facts*, <https://data.publiccharters.org/>; AMERICAN FEDERATION FOR CHILDREN, 2016-17 SCHOOL CHOICE YEARBOOK 14-15 (2017) (listing total enrollment, by program, in private-school choice), <https://afcgrowthfund.org/wp-content/uploads/2018/06/AFC-2016-17-Yearbook-FINAL.pdf>.

state has one modest parental-choice program for special needs students.¹¹ Efforts to enact a broader program that would have benefitted the disadvantaged children like those attending the Jubilee schools have fallen short in recent years.¹²

The stark reality is that the future of faith-based schools serving disadvantaged children likely depends, as Greeley predicted, on the continued expansion of private-school choice. Some—perhaps many—might argue that the case for private-school choice has been rendered obsolete by the expansion of choices with the public sector. But, like traditional public schools, faith-based schools have both educational and communal attributes that are distinctive from charter schools. The “charters are enough choice” compromise is, in my view, a mistaken one, and the continued constriction of the faith-based school sector ought to reignite debates about the appropriate scope of parental-choice policies. Does the shifting landscape of American K12 education have anything to do with the natural law? This essay makes but one modest claim in that regard, which flows from the fact that the natural law assigns to parents the right and duty to direct the upbringing of their children. Since a core component of that right and duty is their formation through education, both formal and informal, education policy has significant natural-

¹¹ School Choice: Tennessee—Individual Education Account Program, <https://www.edchoice.org/school-choice/programs/tennessee-individualized-education-account-program/>.

¹² William Hughes, “The Next 200 Years: A Post Mortem of the Once Promising Jubilee Catholic Schools,” *EdChoice Blog*, April 20, 2018, <https://www.edchoice.org/blog/the-next-200-years-a-post-mortem-of-the-once-promising-jubilee-catholic-schools/>; Laura Faith Kebede, “With the Defeat of Vouchers, Memphis Catholic Leaders Seek Charter Conversion,” *Chalkbeat*, Jan. 24, 2018, <https://ny.chalkbeat.org/posts/tn/2018/01/24/with-the-defeat-of-vouchers-memphis-catholic-leaders-seek-charter-conversion/>. The Shelby County School Board’s resistance to the plan to “convert” the Jubilee Schools into charter schools also reflects current trends in education policy. Charter schools have historically enjoyed broad bipartisan support—and have been promoted as a “safer,” “public” and more “democratic” alternative to private-school choice programs. This “charter compromise” on parental choice policy has unraveled in recent years, and charter schools have come under increasing fire, as increasing number of students exit traditional public schools for charter schools. Forty-three states now have laws authorizing charter schools, and approximately six percent of public school students in the United States attend one. However, the charter-school market share is much higher in some urban districts. In the 2016-17 school year, a majority of students were enrolled in charter schools in three school districts, and thirty percent or more were in nineteen districts. In Memphis, seventeen percent of students enrolled in charter schools during that school year. NAT’L ALLIANCE FOR PUBLIC CHARTER SCHOOLS, *A GROWING MOVEMENT: AMERICA’S LARGEST CHARTER PUBLIC SCHOOL COMMUNITIES AND THEIR IMPACT ON STUDENTS* (11TH ED. 2016), <https://www.publiccharters.org/sites/default/files/migrated/wp-content/uploads/2016/11/enrollment-share-web1128.pdf> [hereinafter *A GROWING MOVEMENT*].

law implications.¹³ Education policies that respect and foster pluralism in the K12 education sector respects parental rights and enables them to carry out their natural law obligations to them, and policies that suppress educational pluralism undermines their ability to do so. Thus, while the natural law may not mandate any particular educational funding system, a respect for parents’ natural rights over the upbringing and education is the right place to start when considering questions of parental choice.¹⁴

Unfortunately, our collective decision to fund privately operated secular schools (charters) but – by and large – not religious ones, is resulting in a troubling decline in educational pluralism. There is little question that charter school growth is one factor precipitating the closure trends in the faith-based school sector.¹⁵ As Peter Schuck has observed, a government decision to fund the private provision of one kind of service may have the effect (intended or unintended) of “crowding out” other private providers of the related services.¹⁶ This is precisely what is happening in K12 education: The decision to fund charter schools rather than – or in addition to – vouchers and other private-school-choice devices, is “crowding out” faith-based schools. Many parents (especially those of modest means) who might previously opted to pay tuition at a faith-based school, such as an urban Catholic school, are now opting to send their kids to charter schools because they are free.¹⁷ And some faith-based schools, like the Memphis

¹³ For an explication of the connection between parents natural rights and education policy, *see generally* MELISSA MOSCHELLA, *TO WHOM DO CHILDREN BELONG?* (2016); Melissa Moshella, *Natural Law, Parental Rights, and Education Policy*, 59 AM. J. JURIS. 197 (2014).

¹⁴ See, e.g., Stephen D. Sugarman, *Family Choice in Education*, 6 OXFORD REV. OF EDUCATION 31 (1980). As Coons and Sugarman have elsewhere demonstrated, the natural law principle of subsidiarity, which holds that decisions should be assigned to the smallest competent unit of social organization, also supports a presumption in favor of parental choice. JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* 49-61 (1978)

¹⁵ See BRINIG & GARNETT, *supra* note 9, ch. 2. Charter schools are a factor precipitating public school closures as well. Nicole Stelle Garnett, *Disparate Impact, School Closures, and Parental Choice*, 2014 U. CHICAGO LEGAL FORUM 289, 299-307 [hereinafter Garnett, *Disparate Impact*].

¹⁶ PETER H. SCHUCK, *WHY GOVERNMENT FAILS SO OFTEN, AND HOW IT CAN DO BETTER* 201-203 (2014).

¹⁷ *Id.* at 201 (“Creating a government program or expanding an existing one is likely to have a ‘crowding out’ effect in which people who previously purchased products in the market at some cost ... will now opt to obtain them from the government program where they are cheaper or even free.”)

Jubilee Schools, are opting to secularize and “convert” to charter schools in order to receive public funds. Thus, even if the natural law does not require the government to fund parental choice in education, our skewed funding decisions have natural-law implications because they have the consequence of reduce the options available to parents.

Nearly thirty years after the enactment of the first voucher and charter school laws, many of the reasons for favoring the latter over the former have dissipated. The Supreme Court made clear in *Zelman* (2002) that the First Amendment’s Establishment Clause does not prohibit parents from expending public resources to send their kids to faith-based schools, and – despite commentators’ breathless predictions to the contrary at the time – most state courts to consider the issue have concluded the same thing about their state antiestablishment provisions. Indeed, in the recent *Trinity Lutheran* decision, the US Supreme Court called into question the constitutionality of relying on these state Blaine Amendments to deny faith-based providers public benefits at more.¹⁸ Moreover, while long touted as a “public” and “democratic” alternative to vouchers, charter schools are privately operated and sufficiently independent from public education authorities federal courts have begun to hold that they are not “state actors” for purposed of federal constitutional law.¹⁹

This essay makes a case for expanding parental choice policies to preserve and enhance authentic pluralism in the K12 educational sector. I am relatively agnostic about the best policy mechanism for achieving that goal. The path of least resistance to preserving educational pluralism likely would be to expand the scale and scope of existing private-school-choice policies.²⁰ Another option would be faith-based charter schools. I have elsewhere made the

¹⁸ *Trinity Lutheran Church of Columbia v. Comer*, 137 U.S. 2012 (2017). Joshua Dunn, *Narrow Opening for School Choice: But Blaine Amendments Stand, for Now*, EDUCATIONNEXT, WINTER 2018, no. 1.

¹⁹ See Garnett, *Sector Agnosticism*, *supra* note 9,

²⁰ See *infra* notes 87-88 and text accompanying notes.

argument that there are no federal constitutional impediments to lifting legal restrictions requiring charter schools to be secular,²¹ and Steve Sugarman has gone farther and argued that such restrictions are in fact unconstitutional.²² But either change will carry consequences for faith-based schools. In particular, faith-based schools' continued and deepening participation in parental choice programs requires both wise policy design and adaptation by the schools themselves: Schools and school systems must prepare to respond to demands for greater transparency and accountability for results; regulators should also consider designing more-flexible academic accountability regulations that permit a range of assessment options and that incorporate non-cognitive outcomes, such as attainment, that have long been a particular strength of faith-based schools serving disadvantaged children.²³ And, regulators must exercise restraint, lest they impose conditions on the receipt of public funds that themselves suppress pluralism, either directly or indirectly, with other natural law consequences.

I. The Rise, Consequences (and Demise) of the Charter-School Compromise

Today, while attendance at the traditional public schools assigned to them by geographical boundaries remains the norm for most children, many American parents also can choose from an array of educational options, ranging from choice among traditional public schools and public magnet schools, to charter schools, and, in limited circumstances, the use of public funds at private and faith-based schools. Yet, it is important to recall how recent the parental choice

²¹ All states with charter schools require them to be “secular,” and most prohibit them from being operated by or affiliated with any religious organization. Garnett, *Sector Agnosticism*, *supra* note 9, at 46-50. The elimination of these restrictions would require either legislative change or an aggressive litigation campaign challenging their constitutionality, the prudential wisdom of which I have previously called into question. Nicole Stelle Garnett, *The Legal Landscape of Parental Choice Policy*, Nov. 15, 2015 (available at <http://www.aei.org/publication/the-legal-landscape-of-parental-choice-policy/>).

²² Stephen D. Sugarman, *Is It Unconstitutional to Prohibit Faith-Based Schools from Becoming Charter Schools?* 32 J. L. & RELIGION 227 (2017). I have my doubts the wisdom of pro-active litigation challenging these restrictions, even if Sugarman is correct (and I tend to believe that he is). See Nicole Stelle Garnett, *The Legal Landscape of Parental Choice Policy* (AEI, Dec. 4, 2015) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2699296).

²³ See *infra* Section IV.

revolution generating these choices actually is. The idea of publicly funded school choice is a deeply contested one in American history, dating at least to the mid-nineteenth century battles over the public funding of Catholic schools.²⁴ But, although parents with the financial means to do so have long chosen their children’s schools, either by moving to districts with high-performing schools or by financing private education, education policies that funded parents’ decisions to select *any* school other than the public school assigned to them by either geography or—in the post-desegregation world—federal court order were rare until recent decades.²⁵ The nation’s first modern private-school-choice program—a modest voucher program enabling a few hundred Milwaukee children to use public funds to attend a secular private school—was enacted less than thirty-years ago, in 1990.²⁶ The following year, in 1991, Minnesota enacted the first charter school law.²⁷

The fact that charter schools, rather than school vouchers, would fuel the parental-choice revolution was far from immediate apparent. Indeed, the charter school ascendancy arguable is one of the most unexpected domestic policy developments in recent history. Until 1991, not a single charter school existed in the United States; they were basically an amorphous idea that

²⁴ See, e.g., BRINIG & GARNETT, *supra* note 9, at 16–18 (discussing “the funding question” in Catholic schools); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 221–29 (2002) (documenting the conflict between those desiring an alliance between church and state and those desiring separation); JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM 111–21 (2003) (discussing the controversy surrounding the state’s power over education).

²⁵ See Nicole Stelle Garnett, *Affordable Private Education and the Middle Class City*, 77 U. CHI. L. REV. 201, 212–14 (2010) (reviewing data on private school enrollment and moving to opt into public school systems). In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Supreme Court held that parents had a constitutional right to send their children to private school, invalidating an Oregon law that mandated public school attendance.

²⁶ See *Jackson v. Benson*, 578 N.W.2d 602, 607–10 (Wis. 1998) (summarizing history of Milwaukee Parental Choice Program). Since the mid-nineteenth century, Maine and Vermont both have maintained “town tuitioning” programs, which permit students in towns without public high schools to use public dollars to attend other public or private, secular schools. Illinois and Minnesota have very modest non-refundable parental tax credit programs. See ABCS OF SCHOOL CHOICE: *The Comprehensive Guide to Every Private School Choice Program in America*, FRIEDMAN FOUND. FOR EDUC. CHOICE 33–34, 55–60, 95–97 (2015), <https://www.edchoice.org/wp-content/uploads/2015/09/The-ABCs-of-School-Choice-2015.pdf> [hereinafter “ABCs OF SCHOOL CHOICE”].

²⁷ See Richard D. Kahlenberg, *The Charter School Idea Turns 20*, EDUC. WK. (Mar. 25, 2008), http://www.edweek.org/ew/articles/2008/03/26/29kahlenberg_ep.h27.html (discussing the origin of the idea for charter schools and the first charter school legislation).

required the establishment of new schools. Private school choice, on the other hand, had long and more-refined intellectual pedigree,²⁸ and promised to enlist existing schools with a proven track record of educating disadvantaged kids, especially urban Catholic schools.²⁹ At their inception, charter schools were hardly intended to fuel a revolution. The term “charter school” is attributed to the late Albert Shanker, the long-time president of the American Federation of Teachers, the nation’s second largest teachers’ union. In a 1988 speech, Shanker urged America to develop a “fundamentally different model of schooling” that would “enable any school or any group of teachers . . . within a school to develop a proposal for how they could better educate youngsters and then give them a ‘charter’ to implement that proposal[.]”³⁰ In 1991 Minnesota charter school law, however, fundamentally altered Shanker’s proposal. The Minnesota legislation envisioned charter schools authorized by agencies independent from local education authorities, operated by private entrepreneurs, and staffed with non-unionized teachers. These changes led Shanker to reject the charter schools as a “gimmick” and later to condemn the charter movement for “corporatizing” public education and embracing “quick fixes that won’t fix anything.”³¹ But the Minnesota model, characterized by private operators and independence from

²⁸ The argument that parents should be given the option of spending public education funds to enroll their children in private schools usually is attributed to Nobel Laureate economist Milton Friedman. In a 1955 article, Friedman argued that the injection of competition into the market for K12 education enabled by what he called “vouchers” would improve overall academic performance across educational sectors. See Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 123, 127, 132 (Robert A. Solo ed., 1955); EdChoice, *What is School Choice?*, <https://www.edchoice.org/school-choice/what-is-school-choice/> (“In 1955, Dr. Milton Friedman proposed the idea of school vouchers, which would separate the financing and administration of schools, effectively jumpstarting the modern school choice movement.”). The case for private-school choice, however, predates Friedman. During the nineteenth century, Catholic bishops vigorously but unsuccessfully demanded public funds for students enrolled in Catholic schools on equality grounds, arguing that the public schools of the time were effectively Protestant schools that were either unwelcoming of Catholic students, determined to evangelize them, or both. BRINIG & GARNETT at 15–17.

²⁹ See *infra* notes 74-76.

³⁰ Albert Shanker, *Restructuring Our Schools*, 65 *PEABODY J. EDUC.* 88, 97–98 (1988). Ray Budde, an Education Professor at the University of Massachusetts, apparently suggested the concept—and used the term—over a decade earlier. Susan Saulny, *Ray Budde, 82, First to Propose Charter Schools, Dies*, *N.Y. TIMES* (June 21, 2005), <http://www.nytimes.com/2005/06/21/us/ray-budde-82-first-to-propose-charter-schools-dies.html>?

³¹ DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* 122–24 (2010); Paul E. Peterson, *No, Al Shanker Did Not Invent the Charter School*, *EDUCATIONNEXT* (July 21, 2010), <http://educationnext.org/no-al-shanker-did-not-invent-the>

local school authorities, rather than the Shanker model, which envisioned experimentation within the traditional public school sector, led the expansion of charter schools to other states over time.

Charter schools expanded rapidly.³² By 1995, less than five years after Minnesota’s groundbreaking legislation, nineteen states had enacted charter school statute.³³ Today, charter schools are authorized in forty-four states and the District of Columbia. In the first decade of their existence, nearly 1,300 charter schools opened. In the 2016-17 school year, there were 7000 charter schools serving approximately 3 million students.³⁴ Charter school enrollment continues to grow exponentially: in the past decade, the number of students enrolled in charter schools has increased by 255 percent. Between 2010 and 2018, over 1700 charter schools opened, and an additional 1.2 million students enrolled in charter schools—a nearly 250 percent increase. A majority of charter schools are located in urban areas, and a majority of charter school students are poor students and racial minorities.³⁵ As discussed previously, the overall statistics on the nationwide charter share (six percent of public school students) masks the reality that substantially higher percentages of students in many urban school districts are enrolled in charter schools. During the 2015-16 school year, charter schools enrolled more than fifty percent of public schools students in three districts, more than forty percent in six districts, and more than thirty percent in 17 districts.³⁶

charter-school/.

³² <https://edexcellence.net/articles/charter-school-timeline-twenty-five-years-later>

³³ See *Charter School FAQ*, PBS: CLOSING THE ACHIEVEMENT GAP (2004), <http://www.pbs.org/closingtheachievementgap/faq.html> (stating when and where the first charter school opened).

³⁴ National Alliance for Public Charter Schools, *The Public Charter Schools Dashboard*, <http://dashboard.publiccharters.org> [hereinafter “Dashboard”]. Two states, Washington and Alabama, have enacted charter school legislation since 2014. See *Alabama Enacts a Public Charter School Law; Joins 42 States and D.C.*, *supra* note 26; Donna Gordon Blankinship, *Washington High Court to Hear Charter-Schools Case*, SEATTLE TIMES (Oct. 26, 2014), <http://www.seattletimes.com/seattle-news/washington-high-court-to-hear-charter-schools-case/> (stating that Washington’s first charter school opened in fall 2014).

³⁵ See *Dashboard*, *supra* note 29.

³⁶ See A GROWING MOVEMENT, *supra* note 14.

The private-school-choice movement did not enjoy anywhere near this momentum. In the later decades of the last century, Republicans, including, importantly Ronald Reagan, began to make vouchers a centerpiece of education reform proposals.³⁷ The idea languished, however, until two events in 1990 ignited the modern parental choice movement. The first was the publication of John Chubb and Terry Moe’s enormously influential book, *Politics, Markets and American Schools*. Chubb and Moe, like Friedman, saw parental choice in education as a means of igniting competition with public schools. “Choice,” they asserted, “has the capacity *all by itself* to bring about the kind of transformation that, for years, reformers have been seeking to engineer in myriad other ways.”³⁸ The second was the emergence of a successful if unusual political coalition in Wisconsin. African American activists in Milwaukee—led by former Milwaukee school superintendent Howard Fuller and a state legislator named Polly Williams—combined forces with Republican Governor Tommy Thompson to secure the passage of the nation’s first modern school voucher program.³⁹ Initially, the Milwaukee Parental Choice Program entitled poor public school children in the city of Milwaukee to spend a portion of their public education funds at secular private schools; the program was expanded to include religious schools in 1995.⁴⁰ Ohio followed suit in 1995, enacting a private-school-choice program for disadvantaged children in Cleveland, most of whom opted to attend religious schools. The U.S. Supreme Court rejected an Establishment Clause challenge to the Cleveland program in the 2002

³⁷ Robert Pear, *Reagan Proposes Vouchers to Give Poor a Choice of Schools*, N.Y. TIMES (Nov. 14, 1985), <http://www.nytimes.com/1985/11/14/us/reagan-proposes-vouchers-to-give-poor-a-choice-of-schools.html>.

³⁸ JOHN E. CHUBB & TERRY MOE, *POLITICS, MARKETS, AND AMERICAN SCHOOLS* 217 (1990).

³⁹ Since the mid-nineteenth century, Maine and Vermont both have maintained “town tuitioning” programs, which permit students in towns without public high schools to use public dollars to attend other public or private, secular schools. Illinois and Minnesota have very modest non-refundable parental tax credit programs. See *ABCs OF SCHOOL CHOICE*, *supra* note 21, 33–34, 55–60, 95–97.

⁴⁰ See *Jackson v. Benson*, 578 N.W.2d 602, 607–10 (Wis. 1998) (summarizing history of Milwaukee Parental Choice Program).

Zelman v. Simmons-Harris decision, thus clearing the federal constitutional path for the expansion of private-school choice.⁴¹

Private-school-choice proponents faced major legal and political obstacles. Legally, even after the U.S. Supreme Court settled the federal constitutional question in *Zelman*,⁴² significant state constitutional hurdles to parental choice remained. Thirty-seven state constitutions contain provisions, commonly known as “Blaine Amendments,” that prohibit the public funding of private and/or “sectarian” schools.⁴³ Following *Zelman*, many commentators predicted that these provisions represented major impediments to the expansion of private-school choice.⁴⁴ The political hurdles to private-school choice have proven even more substantial than the legal ones. For a variety of reasons, including but not limited to political power and opposition of teacher unions, private-school choice has proven the proverbial “third rail” of education policy.⁴⁵ Indeed, opposition to voucher proposals arguably fueled the movement to enact charter laws, which in turn took the wind out of the sails of the private-school-choice movement. Charter schools were promoted as a “safer” and more “constrained” version of parental choice—one that is both “public” and “secular.” Within debates about educational finance, many moderate reformers traditionally advocated for charter schools as an alternative to

⁴¹ 536 U.S. 639, 643–62 (2002).

⁴² *Zelman v. Simons-Harris*, 536 U.S. 639 (2002).

⁴³ These provisions, called “Blaine Amendments” for Sentaor James Blaine of Maine, who attempted as Speaker of the House in 1875 to amend the federal constitution to prohibit the public funding of sectarian schools, reflect a lingering legacy of America’s historical anti-Catholic bias. See AMERICAN LEGISLATIVE EXCHANGE COUNCIL, SCHOOL CHOICE AND STATE CONSTITUTIONS: A GUIDE TO DESIGNING SCHOOL CHOICE PROGRAMS 4 (2007), <http://www.alec.org/docs/IJ-ALEC-school-choice.pdf>; Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 FIRST AMEND. L. REV. 45 (2003).

⁴⁴ See, e.g., Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917 (2003); Thomas C. Berg, *Vouchers and Religious Schools*, *The New Constitutional Questions*, 72 U. CINN. L. REV. 151 (2003).

⁴⁵ See, e.g., TERRY M. MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICAN’S PUBLIC SCHOOLS 327-29 (2011) (discussing teacher-union opposition to private-school choice); Michael Heise, *Law and Policy Entrepreneurs: Empirical Evidence on the Expansion of School Choice Policy*, 87 NOTRE DAME L. REV. 1917, 1932 (2012) (“Understandably, and with considerable justification, school choice supporters reflexively blamed teachers unions for school voucher initiative losses.”)

private-school-choice programs such as tax credits or vouchers.⁴⁶ For example, the 2004 Democratic Party platform provided, “Instead of pushing private school vouchers that funnel scarce dollars away from the public schools, we will support public school choice, including charter schools.”⁴⁷ Michael Heise has demonstrated that the likelihood that a state enacted or expanded a charter program increased along with the “threat” of publicly funded private-school choice.⁴⁸

In recent years, proponents of private-school choice have begun to overcome these political barriers. Since the enactment of the first private-school-choice legislation in Wisconsin in 1990, more than half of states have created at least one program that provides some public subsidies for children attending private school. Today, half of the states and the District of Columbia have at least one publicly funded private-school-choice programs, and participation in private-school-choice programs has more than tripled in the last decade.⁴⁹ All told, in 2017, there were 52 private-school-choice programs in the United States, with the largest programs located in Florida, Indiana, Louisiana and Ohio.⁵⁰

A confluence of factors have fueled the increased momentum behind parental choice. First, and somewhat, ironically, charter schools, which initially were promoted as an alternative to vouchers, may have undermined the argument that private-school-choice is “radical” by normalizing the idea of parental choice exponential growth of charter schools has resulted in millions of children moving from publicly to privately operated schools.⁵¹ Second, and relatedly, opponents of private-school choice today have had bigger battles to fight, including battles with

⁴⁶ JACK BUCKLEY & MARK SCHNEIDER, CHARTER SCHOOLS: HOPE OR HYPE 3 115–70 (2007).

⁴⁷ Brinig and Garnett at 37.

⁴⁸ Michael Heise, *Law and Policy Entrepreneurs: Empirical Evidence on the Expansion of School Choice Policy*, 87 NOTRE DAME L. REV. 1917, 1929–30 (2012).

⁴⁹ See ABCS OF SCHOOL CHOICE, *supra* note 21,, at 33, 55, 57-59, 95.

⁵⁰ *Id.* at 14-15.

⁵¹ JACK BUCKLEY & MARK SCHNEIDER, CHARTER SCHOOLS: HOPE OR HYPE 3 (2007).

charter schools, which historically enjoyed broad bi-partisan support but which today pose a serious competitive threat to urban school districts.⁵² Second, over the past two decades, the menu of private-choice options has expanded to encompass policy devices that are more politically other than vouchers.⁵³ Beginning with Arizona in 1997, more than a dozen states have adopted a new private-school-choice device, the “scholarship tax credit,” which does not directly fund private-school scholarships, but rather incentivizes donations to private scholarship organizations.⁵⁴ Additionally, six states—Arizona, Florida, Mississippi, North Carolina, Nevada, and Tennessee—have adopted “education savings account” programs that empower parents to spend state education funds on a range of educational expenses, including private-school tuition.⁵⁵ And, most recently, several states have adopted “course choice” programs, which allow students customize their education by purchasing individual courses across multiple sectors (public, private and charter).⁵⁶

Moreover, state constitutional establishment clauses (often referred to a “Blaine Amendments”) have not proven to be insurmountable hurdles to the expansion of parental

⁵² In recent years, the truce between charter schools and public schools has unraveled as charter market share has grown, and public schools have faced enrollment declines as a result. *See, e.g.*, Richard D. Kahlenberg & Halley Potter, *Restoring Shanker’s Vision for Charter Schools*, AMERICAN EDUCATOR, Winter 2014-15, at 4, 5 (“Proposed to empower teachers, desegregate students, and allow innovation from which the traditional public schools could learn, many charter schools instead prized management control, reduced teacher voice, further segregated students, and became competitors, rather than allies, of regular public schools.”); Richard Whitmire, *Charter School War could go National: Governor Andrew Cuomo is Winning the Battle in New York, but what about your state?* USA TODAY (Apr. 1, 2014), <http://www.usatoday.com/story/opinion/2014/04/01/bill-de-blasio-cuomo-charter-schools-new-york-column/7158071/>.

⁵³ A 2014 Poll conducted by *EducationNext* found that support for supporting school choice through tax credits was actually higher than support for charter schools, with sixty percent of respondents supporting tax credit policies but only 54 percent supporting charter schools. Michael B. Henderson, Paul E. Peterson & Martin R. West, *No Common Opinion on the Common Core*, EDUCATION NEXT (2014), <http://educationnext.org/2014-ednext-poll-no-common-opinion-on-the-common-core/>.

⁵⁴ The nation’s three largest private-school-choice programs (in terms of enrollment)—in Arizona, Florida, and Pennsylvania—are all scholarship tax credit programs. SCHOOL CHOICE YEARBOOK, *supra* note 11.

⁵⁵ *See* EDCHOICE, *What is an Education Savings Account?*, <https://www.edchoice.org/school-choice/types-of-school-choice/education-savings-account/>.

⁵⁶ *See* SCHOOL CHOICE YEARBOOK *supra* note 11, at 8.

choice, as predicted by commentators in the wake of *Zelman*.⁵⁷ Although a state constitutional challenge inevitably follows the enactment of a new private-school-choice program, only two state's supreme courts (Arizona and Colorado) have invalidated voucher programs on anti-establishment grounds and a third (Florida) on other state constitutional grounds.⁵⁸ Blaine Amendment challenges to private-school-choice programs have been rejected by the highest court in Indiana, Wisconsin, Ohio, Alabama and, most recently, North Carolina.⁵⁹ In states with strong Blaine Amendments, moreover, scholarship tax credits offer a way around the state constitutional restrictions on the public funding of private schools since state supreme courts appear inclined to follow the U.S. Supreme Court's holding in *Arizona Christian School Tuition Organization v. Winn* that taxpayers lack standing to challenge these programs because scholarship funds raised through tax credit programs are not public dollars.⁶⁰ Finally, and importantly, in 2017, in *Trinity Lutheran Church v. Comer*, the U.S. Supreme Court ruled that Missouri's effort to rely on its state establishment clause to exclude a faith-based preschool from a program providing recycled tires for playground resurfacing violated the First Amendment's Free Exercise Clause. While the Court left to one side whether this ruling applied to monetary benefits, a subsequent ruling might further limit states' ability to rely on Blaine Amendments to restrict parental choice.⁶¹

⁵⁷ See Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers and the Next Round of Constitutional Battles*, 78 N.D. L. REV. 917 (2003); Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 FIRST. AMD. L. REV. 45 (2003).

⁵⁸ *Cain v. Horne*, 202 P.3d 1178, 1184 (Ariz. 2009); *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461, 471 (Colo. 2015); *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006).

⁵⁹ *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998); *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999); *Magee v. Boyd*, 175 So.3d 79 (Ala. 2015); *Hart v. State of North Carolina*, 368 N.C. 122 (N.C. 2015).

⁶⁰ 563 U.S. 125 (2011). See also, e.g., Travis Pillow, *Judge Dismisses Lawsuit Challenging Florida Tax Credit Scholarships*, REDEFINED, May 18, 2015, <https://www.redefinedonline.org/2015/05/judge-plaintiffs-lack-standing-to-challenge-florida-tax-credit-scholarships/>.

⁶¹ Joshua Dunn, *Narrow Opening for School Choice: But Blaine Amendments Stand, for Now*, EDUCATIONNEXT, WINTER 2018, no. 1.

Finally, and perhaps most importantly, the political coalition supporting private-school choice has expanded and diversified and the arguments offered in favor of it have shifted from free-market to the social-justice/natural law rhetoric that scholars like Jack Coons and Steve Sugarman have promoted for decades.⁶² As a result, the political coalition supporting private-school choice has expanded and diversified. Although public opinion polls suggest that support for parental choice is today highest among disadvantaged and minority parents, the primary political proponents have traditionally been white and conservative.⁶³ In recent years, fueled in part by a shift in messaging, away from a discussion of “markets” and toward the imperative of giving poor parents options for their children, support among elected leaders for private-school choice has begun to cross party and demographic lines.⁶⁴ As Terry Moe has observed, “The modern arguments for vouchers have less to do with free markets than with social equity. They also have less to do with theory than with the commonsense notion that disadvantaged kids should never be forced to attend failing schools and that they should be given as many attractive options as possible.”⁶⁵

At the same time that vouchers, scholarship tax credits, and other private-school-choice devices have been gaining steam, the “charter school compromise” on parental choice has begun to unravel. During their first two decades, charter schools enjoyed broad, bipartisan support. During the 2008 presidential election cycle, both John McCain and Barack Obama expressed strong support for charter schools. President Obama made charter schools a centerpiece of his education policy, as had both President George W. Bush and President Bill Clinton before him.

⁶² See, e.g., COONS & SUGARMAN, *supra* note 14.

⁶³ See, e.g., Katie Ash, *Black Parents in South Favor Increased School Choice, Says New Survey*, EDUC. WK. (July 24, 2013, 5:40 PM), http://blogs.edweek.org/edweek/charterschoice/2013/07/black_parents_want_more_school_choices_says_new_survey.html [<https://perma.cc/RL7T-KCS4>]; Diana Jean Schemo, *Program on Vouchers Draws Minority Support*, N.Y. TIMES (Apr. 6, 2006),

⁶⁴ See MOE, *supra*, note 57, at 329.

⁶⁵ *Id.*

Even the two major teachers unions cautiously endorsed charter schools until recently.⁶⁶ But, as the footprint of charter schools has expanded, the truce between charter school proponents and supporter of traditional public schools has evaporated. In July 2017, for example, the NEA amended its policy on charter schools. The new policy characterizes charter schools as largely a “failed experiment” and demands that they be placed under the control of local school districts, which should authorize new charter schools only when they do not have an adverse impact on local public schools.⁶⁷ That same month, the NAACP issued a report calling for a national moratorium on all charter schools and emphasizing their negative effects on traditional public schools, especially those in urban areas.⁶⁸ The debate over charter schools has become so intense that commentators frequently refer to the “charter school wars,”⁶⁹ and, as in the Memphis story described previously, charter operators to describe it, and – as in Memphis – operators seeking to open new schools face increasing regulatory scrutiny from authorizers.

It is important to acknowledge that the factors leading to the disintegration of the charter-school compromise are directly linked to those factors that led public-school proponents initially to support charter schools and shun vouchers. By making charter schools a politically palatable “safe” alternative to vouchers, public-school proponents opened the door to make charter schools a politically palatable, “safe” alternative to traditional public schools. As a result, the charter school ascendancy has affected negatively both private schools (especially the urban faith-based schools that represented, in the not-so-distant past, the only affordable and viable alternative to students of modest means) and traditional public schools. In other words, growing footprint of

⁶⁶ Brinig and Garnett at 37.

⁶⁷ NEA Policy Statement on Charter Schools, July 4, 2017, <https://ra.nea.org/nea-policy-statement-charter-schools/>.

⁶⁸ NAACP TASK FORCE ON QUALITY EDUCATION, QUALITY EDUCATION FOR ALL...ONE SCHOOL AT A TIME, July 2017, https://www.naacp.org/wp-content/uploads/2017/07/Task_ForceReport_final2.pdf.

⁶⁹ See, e.g., Gail Robinson, *From Charters to Common Core, There is a Ceasefire in NY’s School Wars*, September 19, 2018, Don Shavley, *Declaring a Truce in the Charter Versus District School Wars*, EDSOURCE, Nov. 26, 2017; CITYLIMITS.ORG; Editorial, *Chicago’s Charter School Wars*, CHICAGO TRIBUNE, June 1, 2015; Richard Kahlenberg & Halley Potter, *End the Charter School Wars*, September 28, 2014

charter schools, combined with a decline in school-age population in most urban centers, has led to—and will continue to fuel—school closures in both the private and public sectors.⁷⁰ Not only do charter schools compete for students with other schools in both sectors, but, in the both sectors, system leaders have come to view the “conversion” of their schools into charter schools as a school-reform device. In the public sector, enlisting a charter management organization to operate failing schools is attractive to public officials as a means of addressing a dysfunctional institutional culture. When a school is closed and converted to a charter school, the leadership and teaching staff are generally dismissed and offered the opportunity to reapply—but to the charter operator, rather than the school district. Charter school teachers are rarely unionized, and even where they are, charter schools are generally not bound by the requirements of collective bargaining agreements between the local teachers’ union and the public school district.⁷¹ In the faith-based sector, “conversion” decisions usually result from fiscal realities, with faith-based schools closed and reopened as charter schools in order to secure public funding.⁷² In some districts, charter school conversions have become the ultimate accountability device: rather than attempting to fix public schools, public education officials are opting to close and convert them to charter schools.⁷³

⁷⁰ BRINIG & GARNETT, *supra* note 9, chs. 1 & 2; Garnett, *Disparate Impact*, *supra* note 15, at 298-307.

⁷¹ *Sector Agnosticism*, *supra* note 10, at 39-40.

⁷² BRINIG & GARNETT, *supra* note 9, at 45-47.

⁷³ *State Legislation: Accountability—Sanctions/Interventions*, EDUC. COMMISSION STATES (May 23, 2016), <http://www.ecs.org/ecs/ecscat.nsf/WebTopicView?OpenView&count=-1&RestrictToCategory=Accountability--Sanctions/Interventions> [<https://perma.cc/L4NX-K87D>] (compiling state laws that give states the ability to close failing schools and turn them over to charter organizations); *see also, e.g.*, FLA. STAT. § 1008.33(4)(b)(1)–(5) (2012), (allowing a school district to either take over the school, “[r]eassign students to another school,” close and reopen the school as a charter school, contract with a private management company, or any other model “that [has] a demonstrated record of effectiveness”); ILL. ADMIN. CODE tit. 23, § 1.85(e)(1)–(4) (2012) (“Each school restructuring plan shall indicate that the district is undertaking one or more of the following actions in the affected school . . . reopening the school as a public charter school . . .”); MASS. GEN. LAWS ch. 69, § 1J(o) (2012) (listing sixteen possible actions that a superintendent may take with respect to a persistently low performing school); MICH. COMP. LAWS § 380.1280c(2) (2011) (“[T]he redesign plan shall require implementation of [one] of the [four] school intervention models that are provided for the lowest achieving schools under the federal incentive grant program . . . known as the ‘race to the top’ grant program.”); N.C. GEN. STAT. § 115C-105.37B(a) (2012) (stating that “the State Board of Education may authorize [a] local board of education to adopt” the transformation, restart,

I. A Case for Expanding Choice to Preserve Pluralism

These observations are not intended to disparage charter schools. Charter schools, to be sure, have disrupted the educational *status quo*, and no disruption is costless. But the educational *status quo* was not and is not working well for many American children—especially those of modest means. As a proponent of giving parents options for their children, my view is that the rise of charter schools has been—by and large—a positive development, especially for disadvantaged urban students. The most recent reports on the performance of urban charter schools, which suggest that charter schools are—on the whole—helping disadvantaged urban kids close the achievement gap, are heartening (although the results are by no means uniformly positive).⁷⁴ Even if I thought otherwise, the reality is that charter schools likely have become a permanent fixture in the American educational landscape. Despite opponents’ best efforts, charter schools’ footprint and market-share probably will continue to expand—perhaps exponentially in some places—in coming years.⁷⁵ The same cannot be said of faith-based schools, which are rapidly disappearing from America’s urban neighborhoods for a variety of reasons, including but not limited to charter schools.⁷⁶ Not only have charter schools fueled enrollment declines in faith-based urban schools, but, as noted previously, some faith-based schools operators, like the Diocese of Memphis, opting to “convert” their schools to charter

turnaround, or closure model).

⁷⁴ See *National Charter School Study 2013*, CTR. FOR RES. ON EDUC. OUTCOMES (2013), <http://credo.stanford.edu/documents/NCSS%202013%20Final%20Draft.pdf> (studying twenty-six states and the District of Columbia and finding that, on the whole, urban charter students were now outperforming public school students reading (gaining an additional eight days of learning each year), were on par with public school students in terms of math gains, and that students in poverty, minority students, and English language learners gain significantly more days of learning each year in both reading and math compared to their traditional public school peers).

⁷⁵ For example, a 2012 report commissioned from the Boston Consulting Group by the Philadelphia School Reform Commission (the entity that has operated the Philadelphia public school system since the Commonwealth of Pennsylvania assumed control of the district over a decade ago) predicted that, in the next five years, total charter school enrollment in Philadelphia would grow from roughly a quarter to forty percent of all public school students. See *Transforming Philadelphia’s Public Schools*, BOSTON CONSULTING GROUP 6–9 (2012),

⁷⁶ BRINIG & GARNETT, *supra* note 9, ch. 1.

schools—a move which requires the operators to close their schools, relinquish operational control and secularize the curriculum.⁷⁷

A. Four Reasons Why Faith-Based Schools Matter

Assuming that faith-based schools indeed add unique and valuable pluralism to the educational landscape, with particular benefits for disadvantaged children, the question remains how to ensure that they remain a viable option in the future. Those satisfied that the choices within the public sector—including magnet schools, public-school choice, and charter schools—are sufficient perhaps will not be troubled to consider the answer to this question. But there are a number of reasons why the question is an important one, and why I believe that faith-based schools contribute valuable pluralism to the K12 educational landscape in the United States. These include:

First, and perhaps most importantly, faith-based schools are an important component of parents' natural law rights and duties to direct their children's upbringing. Perhaps the core component is parents' natural law rights and obligations to their children concern their moral and religious formation.⁷⁸ over the moral and religious formation of their children are central Faith-based schools assist parents in the formation of their children by providing a learning environment that not only educates children within a particular faith tradition but that also models the compatibility of faith and reason. To be sure, parents choose faith-based schools for many reasons other than faith-formation (such as character formation and discipline), as evidenced by the fact that non-coreligionists opt to send their children to religious schools.⁷⁹

And, parents can and do form their children morally and religiously in many ways other than

⁷⁷ *Id.* at 42-47. ANDY SMARICK, SETON EDUC. PARTNERS, CATHOLIC SCHOOLS BECOME CHARTER SCHOOLS 11, available at https://www.setonpartners.org/assets/PDFs/Seton_DC_Case_Study_FINAL_r.pdf.

⁷⁸ See, e.g., MOSCHELLA, *supra* note 13, at 64-66.

⁷⁹ For example, nearly 20 percent of students enrolled in Catholic schools are not Catholic. <http://www.usccb.org/beliefs-and-teachings/how-we-teach/catholic-education/upload/Catholic-Schools-FACT-Sheet-2016.pdf>.

sending them to faith-based schools (for example, homeschooling – which likely is the fastest growing education sector in the U.S., and after-school religious education).⁸⁰ But religious schools support parents’ natural law obligations and rights in a particular and comprehensive way, and they are particularly important to parents of modest means (who may lack the resources and education to avail themselves effectively to other means of formation).⁸¹ When they disappear (or secularize as in Memphis), parents are left without this assistance and may have to avail themselves of other (more-costly and less-effective) means of achieving this formation.

Second, faith-based schools, and especially urban Catholic schools, have a long and demonstrated record of lifting students out of poverty. Decades of social science research has demonstrated a “Catholic school effect” on student performance. Beginning with the groundbreaking research of James Coleman and Andrew Greeley, numerous scholars have found that Catholic school students—especially poor, minority, students—tend to outperform their public school counterparts. Greeley found, for example, that the achievement of minority students in Catholic schools not only surpassed that of those in public schools but, moreover, that the differences were the greatest for the poorest, most disadvantaged, students.⁸² More recently, Derek Neal confirmed Greeley’s “Catholic school effect” in research demonstrating that Catholic school attendance increased the likelihood that a minority student would graduate from high school from 62 percent to 88 percent and more than doubled the likelihood that a similar student would graduate from college.⁸³ Catholic schools, in other words, close the achievement gap. As Nicholas Lehmann observed in a 1986 *Atlantic Monthly* article, “In the ... ghetto today, the only

⁸⁰ Data on homeschooling is notoriously unreliable, but estimates of the annual growth rate range from seven to fifteen percent. <https://www.nheri.org/research-facts-on-homeschooling/>

⁸¹ See, e.g., COONS & SUGARMAN, *supra* note 14.

⁸² ANDREW GREELEY, CATHOLIC HIGH SCHOOLS AND MINORITY STUDENTS 108 (1982); JAMES COLEMAN, ET AL., HIGH SCHOOL ACHIEVEMENT (1982).

⁸³ Derek Neal, *The Effect of Catholic Secondary Schooling on Educational Attainment*, 15 J. LABOR ECON. 98 (1997).

institutions with a record of consistently getting people out of the underclass are the parochial schools.”⁸⁴ Catholic school students, controlling for a range of predictive demographic factors, also are more likely to graduate from high school, to attend and complete college, to maintain steady employment and earn higher wages than similar students attending other types of schools.⁸⁵

Third, faith-based schools appear to be particular good at the critical task of forming citizens. A common argument against private-school choice—identified most prominently with Amy Gutman—is that public education is necessary to inculcate democratic values and tolerance of diversity. School choice is dangerous, Gutmann asserts, because most parents are “unwilling to resist a strong human impulse: the desire to pass some of their particular prejudices onto their children.”⁸⁶ The available empirical evidence, however, tends to rebut this concern. A number of social scientists have sought to measure the how well private schools in general, and private schools participating in school choice programs in particular, perform as civic educators. Most of these studies find that private schools—and especially Catholic schools— appear to do an excellent job at preparing students to be engaged members of a diverse, democratic society.⁸⁷ For example, using data from the 1996 National Household Education Survey (NHES), David Campbell compared student enrolled in public and private schools along four variables—

⁸⁴ Nicholas Lehman, *The Origins of the Underclass*, ATLANTIC MONTHLY (July 1986).

⁸⁵ Cites

⁸⁶ AMY GUTMANN, DEMOCRATIC EDUCATION 34 (1987).

⁸⁷ See, e.g., TERRY M. MOE, SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC (2001) (arguing that private schools are, because of their independence from bureaucracy, better suited to serve as models for democratic education than public schools); Patrick J. Wolf et al., *Private Schooling and Political Tolerance*, in CHARTERS, VOUCHERS, AND PUBLIC EDUCATION (Paul E. Peterson & David E. Campbell eds., 2001) (finding that college students who attended private schools score more highly on measures of political tolerance); Jay P. Greene, *Civic Values in Public and Private Schools*, in LEARNING FROM SCHOOL CHOICE (Paul E. Peterson, ed., 1998) (finding that students in private schools are more likely to participate in public service than public school students); Richard G. Niemi, *Community Service by High School Students: A Cure for Civic Ills?* 22 POLITICAL BEHAVIOR 45 (2000) (same for religiously affiliated schools); Kenneth R. Godwin, *Teaching Tolerance in Public and Private Schools*, 82 PHI DELTA KAPPAN 524 (2001) (finding that private schools do a slightly better job than public schools of encouraging interethnic friendships and developing support for democratic norms).

community service, “civic skills” or the ability of students to engage in political activities, political knowledge, and political tolerance. Campbell found that private school students were significantly more likely to engage in community service than public school students, were more likely to learn civic skills in school, were better informed about the political process, and were, on average, more politically tolerant than students in public schools. Interestingly, however, Campbell also found that the distinction between public and private schools disappeared when Catholic schools were excluded from the analysis, leading him to conclude that “students in Catholic schools drive the private school effect.”⁸⁸ These results mirror other studies comparing public and private school students. In 2007, Patrick Wolf examined 21 quantitative studies of the effects of school choice on civic values, and found that the effect of private schooling and school choice was almost always neutral or positive. While not all of these studies control for selection bias, many do, leading Wolf to conclude, “The statistical record shows that private schooling and school choice often enhances the realization of the civic values that are central to a well-functioning democracy. This seems to be the case particularly...when Catholic schools are the schools of choice.”⁸⁹

Fourth, faith-based schools—again especially urban Catholic schools—are stabilizing community institutions. In my work with Margaret Brinig, we measured the effects of Catholic school closures on perceived disorder, perceived social cohesion, and crime in Chicago, Philadelphia, and Los Angeles neighborhoods. Our findings, which are reported in detail in our 2014 book, *Lost Classroom, Lost Community: Catholic Schools Importance in Urban Neighborhoods*, can be briefly summarized as follows: A Catholic school closure triggered a

⁸⁸ See David E. Campbell, *The Civic Side of School Choice: An Empirical Analysis of Civic Education in Public and Private Schools*, 2008 B.Y.U. LAW REV. 487, 501-10 (2008). See also David E. Campbell, *Bowling Together: Private Schools, Public Ends*, EDUCATION NEXT, Fall 2001.

⁸⁹ Patrick J. Wolf, *Civics Exam*, EDUCATION NEXT, Summer 2007.

decrease in social capital and an increase in serious crime urban neighborhoods in Chicago and Philadelphia.⁹⁰ And, in Chicago, that an open Catholic school appeared to suppress crime in a police beat. In fact, our regression analysis suggested that crime in police beats with open Catholic schools was, on average, at least 33 percent lower than police beats without them. In contrast, open charter schools appeared to have no statistically significant effect on overall crime rates in a police beat.⁹¹ In the analysis of school closures, we incorporated a variable to disaggregate school-closure decisions from neighborhood demographics, enabling us to demonstrate causation.⁹² In our analysis of the effects of open charter and Catholic schools, however, we were unfortunately unable to demonstrate causation since we could not identify a variable predicting the locations of charter schools, as we could for Catholic schools. We therefore were unable to disentangle the locations of charter schools from neighborhood demographic factors that might predict more crime, although we did control for these factors in our analysis.⁹³ (Curiously, we found that Catholic schools appeared to have no effects on either social capital or crime in Los Angeles, leaving us with a puzzle that we have yet to solve!)⁹⁴

B. School Choice and the Future of Educational Pluralism

A world without private-school choice, or with the extremely constrained menu of choices available today, likely will increasingly become a world fewer and fewer faith-based schools (especially low-cost ones). Some faith-based schools will, as in Memphis, become charter schools. They will, in so doing, cease to be faith-based schools. (The questions of whether a secularized version of a formerly faith-based school can continue to capture the positive academic and community effects reviewed above is beyond the scope of this essay, but it is

⁹⁰ BRINIG & GARNETT, *supra* note 9, at 64-70, 100-105.

⁹¹ *Id.* at 94-97.

⁹² *Id.* at 59-64.

⁹³ *Id.* at 97-98.

⁹⁴ *Id.* at 106-11.

certainly clear that they cannot continue to form students in particular faith traditions—at least without violating legal prohibitions on religious charter schools.) Some elite faith-based schools serving wealthier children will continue to thrive, and some serving lower-income students will survive on philanthropic support. But most of the latter will gradually continue to disappear from the American educational landscape.

Private-school choice matters to faith-based schools for a number of related reasons. The first, and perhaps most obvious reason is the rise of charter schools. Faith-based and other private schools, which must charge tuition, compete with charter schools, which are free to students. The competition is particularly intense in many urban centers, where the charter school enrollment share increases each year. Nationwide, private schools continue to enroll approximately twice as many students (5.7 million in 2015) than charter schools (3.1 million in 2015), but charter school enrollment is growing exponentially while private school enrollment is stagnant.⁹⁵ Moreover, as discussed previously, the growth of charter schools is even more staggering in urban centers, where private and faith-based school closures (as well as public school closures) are being experienced most intensely.⁹⁶ And, it is worth noting that—while the private schools’ enrollment share has held steady at about ten percent, the percentage of students enrolled in faith-based schools (which tend to be more affordable) has decreased and the enrollment share of non-sectarian private schools (almost all of which are beyond the financial reach of families of modest means) increased over the past few decades.⁹⁷

The second reason why expansion of parental choice is important to the long-term viability of faith-based schools is that rising operational costs have driven tuition increases, reducing

⁹⁵ Council for American Private Education, *Facts and Studies*, <http://www.capenet.org/facts.html>.

⁹⁶ Garnett, *Disparate Impact*, *supra* note 9, at 290-93.

⁹⁷ In 2011-12, the average non-sectarian private school charged \$21,510 in tuition compared to \$6,890 for Catholic schools and \$8,690 for other religious schools. Council for American Private Education, *Facts and Studies*, <http://www.capenet.org/facts.html>.

affordability. This is especially true in the Catholic sector, where a dramatic decline in the number of women religious (*i.e.*, nuns) has left schools without a stable supply of low-cost teachers and leaders.⁹⁸ Cross-subsidies between churches, synagogues and mosques and schools, which historically kept tuition relatively low, also has declined substantially (again, especially in—but not limited to—the Catholic sector), particularly in urban areas where demographic shifts have left pews and collection plates empty. (One reason why there are so few low-cost secular private school options is that religious congregations have historically subsidized faith-based schools. A second reason is that low-cost secular schools have migrated to the charter sector in order to access public funds.)⁹⁹

Of course, the fact that private-school choice has enjoyed an unexpected ascendancy in recent years is good news for faith-based schools. It is hardly surprising that faith-based schools compete more effectively with charter schools—and are less likely to close—when private-school choice becomes available.¹⁰⁰ That said, many private-school choice programs are poorly designed, and all of the programs more limited in scope than charter-school programs. Almost all of them are limited in eligibility, compared to the universal access guaranteed by charter-school laws.¹⁰¹ The largest programs are either means-tested or means-tested and limited to students exiting failing schools or students residing in a particular city or school district. Other programs are limited to students with specific characteristics, such as foster children or children with

⁹⁸ In 1950, 90 percent of teachers in Catholic schools were nuns. In 2016, 2.8 percent were. See MARGARET F. BRINIG & NICOLE STELLE GARNETT, *LOST CLASSROOM, LOST COMMUNITY: CATHOLIC SCHOOLS' IMPORTANCE IN URBAN AMERICA* 26 (2014); U.S. Conference of Catholic Bishops, “2016 Catholic School Fact Sheet,” <http://www.usccb.org/beliefs-and-teachings/how-we-teach/catholic-education/upload/Catholic-Schools-FACT-Sheet-2016.pdf>.

⁹⁹ BRINIG & GARNETT, *supra* note 9, at 25-28.

¹⁰⁰ See Adam B. Schaeffer, *The Charter School Paradox: How Public-Sector-Only Choice Can Increase Costs, Reduce Educational Diversity and Undermine Competition, and How Those Unintended Consequences can be Avoided*, Cato Institute, August 28, 2012, <https://object.cato.org/sites/cato.org/files/pubs/pdf/charter-school-paradox.pdf>.

¹⁰¹ See SCHOOL CHOICE YEARBOOK, *supra* note 11, at 14-15.

specific disabilities (e.g., autism, dyslexia). Approximate half of all programs are scholarship tax credit programs, which incentivize donations to scholarship funds but do not directly provide public funding for students to attend private schools. Many scholarship tax credit programs generate very little choice: For example, in 2016, 178 and 188 students participated in New Hampshire’s and Kansas’s scholarship tax programs, respectfully. The per-pupil scholarships amount provided in scholarship tax credit programs tend to be, on average, less than half of those provided in voucher programs (in 2016, \$2,937 and \$6,319, respectively).¹⁰² Even when voucher programs are included in the calculus, however, scholarships provided by private-school choice tend to be significantly lower than the per-pupil allocation provided to charter schools (which in turn tend to receive less money than traditional public schools). A recent study by Patrick Wolf and his colleagues at the School Choice Demonstration Project found that charter schools receive, on average, \$5,721 (or 28 percent) less than traditional public schools. Still, the 2014 weighted average for charter-school per student revenue was \$14,200, nearly \$10,000 less than the average scholarship amount in a private-school-choice program in 2016. It is not surprising, therefore, that nearly ten times as many students currently attend charter schools (3.2 million) than participate in a private-school-choice program (442,000).¹⁰³ Not surprisingly, the number of students enrolled in private schools through one of these programs (approximately 300,000) remains only about a tenth of total charter-school enrollment.¹⁰⁴

II. The Path Forward

¹⁰² *Id.*

¹⁰³ PATRICK WOLF, ET AL., CHARTER SCHOOL FUNDING: INEQUITY IN THE CITY 4, 11 (May 2017), <http://www.uaedreform.org/downloads/2017/05/inequity-in-the-city.pdf>; SCHOOL CHOICE YEARBOOK, *supra* note 11, at 9, 17; Nat’l Alliance for Public Charter Schools, *National Charter School Facts*, <https://data.publiccharters.org/>.

¹⁰⁴ *See* SCHOOL CHOICE YEARBOOK, *supra* note 11, at 14-15.

As noted in the introduction, some scholars—including myself, Aaron Saiger, and Steve Sugarman—have argued that faith-based charter schools are not constitutionally impermissible,¹⁰⁵ and Sugarman has gone farther and argued that legal rules requiring prohibiting them are themselves unconstitutional.¹⁰⁶ Although I think that Sugarman’s argument that the logic of the U.S. Supreme Court’s Free Exercise decisions, especially the recent *Trinity Lutheran* decision, calls into question the constitutionality of rules prohibiting authentically religious charter schools, these rules are ubiquitous and eliminating them likely would entail an aggressive proactive litigation strategy which would almost certainly be unsuccessful in its early stages. I have elsewhere argued that the prudential path would be to secure the expansion of the scope and geographic footprint of private-school choice programs.¹⁰⁷

That said, significant hurdles—mostly political, not legal—to the expansion of private-school choice remain. The rest of this essay addresses responses to those hurdles on both the part of the faith-based schools and regulators. While fierce political opposition to private-school choice persists, many impediments to expanding parental choice to include faith based schools (and increasing the scope of, and funding levels in, existing programs) arguably are self-imposed from within the faith-based school sector. In order to overcome these hurdles, faith-based schools need to do the following:

A. Attend to results

Most studies of private-school-choice programs find modest positive effects on academic performance over time (following, in some cases, early losses) as well as more-significant longer-term effects on noncognitive variables, including high school graduation rates, college

¹⁰⁵ See Garnett, *Sector Agnosticism*, *supra* note 9; Sugarman, *Is It Unconstitutional to Prohibit Faith-Based Schools from Becoming Charter Schools?*, *supra* note 22; Aaron Saiger, *Charter Schools, the Establishment Clause, and the Neoliberal Turn in Public Education*, 34 *CARDOZO L. REV.* 1163, 1179-80 (2013).

¹⁰⁶ Sugarman, *supra* note 22.

¹⁰⁷ Garnett, *The Legal Landscape of Parental Choice Policy*, *supra* note 21.

matriculation and persistence and reduced likelihood of involvement in the criminal justice system.¹⁰⁸ Eighteen random-assignment studies have evaluated the academic effects of participating in publicly and privately funded school voucher programs. Of these, fourteen have found some positive effects on student achievement, most of them modest. Six of the studies found positive effects on all participating students and eight found benefits for some group of students (*e.g.*, racial minorities, extremely disadvantaged students, and students exiting poorly performing public schools) and no visible effects on others. For example, the final review of the D.C. Opportunity Scholarship project found no overall effects on student achievement, but positive effects on certain subgroups in reading.¹⁰⁹ More recent studies have found that negative effects on student achievement in first few years that students participate in choice program. For example, a study of the early results of Indiana's statewide voucher program found no effect in reading and negative effects in math, but recent a follow-up study by the same researchers found that students caught up and began to improve if they remained in their chosen school for four years.¹¹⁰ Recent studies of student performance in Louisiana's voucher program similarly found that students lost ground in the early years of participation, but caught up and in some cases surpassed their public school peers after three years in the program.¹¹¹

Research on non-cognitive outcomes tend to find much larger and more positive effects. For example, a 2010 evaluation of the Milwaukee Parental Choice Program found that participating students scored higher than similar public school students in reading but not in math.¹¹²

However, program participation increased the likelihood that a student would graduate from high

¹⁰⁸ See, *e.g.*, Celia Elena Rouse & Lisa Barrow, *School Vouchers and Student Achievement: Recent Evidence, Remaining Questions*. 1 ANN. REV. ECON. 17 (2008)

¹⁰⁹ PATRICK WOLF, ET AL., EVALUATION OF THE D.C. OPPORTUNITY SCHOLARSHIP PROGRAM, FINAL REPORT, (June 2010).

¹¹⁰ Mark Berends, *et al.*, *Lessons Learned from Indiana*, EDUCATIONNEXT, Spring 2018.

¹¹¹ Cory Turner & Anya Kamenetz, *School Vouchers Get Two New Report Cards*, NPRED, June 26, 2017, <https://www.npr.org/sections/ed/2017/06/26/533192616/school-vouchers-get-a-new-report-card>.

¹¹² JOHN WITTE, ET AL., MPCP LONGITUDINAL EDUCATIONAL GROWTH STUDY FIFTH YEAR REPORT (2012).

schools and enroll in college by approximately 20 percent.¹¹³ The latter finding was in keeping with the random-assignment study of the D.C. Opportunity Scholarship Program, which found that participation increased students' probability of completing high school from 70 to 82 percent.¹¹⁴ Scholars conducting random-assignment studies of voucher programs also have documented positive effects on students' "civic values," including political knowledge, tolerance, volunteerism, and respect for diversity, especially among students moving from traditional public to Catholic schools.¹¹⁵

These "non-cognitive" outcomes are important, perhaps more important to long-term flourishing and success than a few points on a standardized academic achievement exam. Indeed, in education-reform debates, all agree that far more is at stake that can be measured by standardized tests. It is also possible that, over time, private schools participating in choice programs will produce stronger results—in the same way that urban charter schools have begun to outperform traditional public schools after a relatively unimpressive start.¹¹⁶ But the reality remains that when it comes to debates about parental choice, bad news is bad news: Opponents are prepared to use any study reporting that private-school choice does not "work" as ammunition to defeat new programs and block the expansion of existing ones.¹¹⁷ And, proponents need to come to terms with the fact that these programs have not—at least as

¹¹³ PATRICK J. WOLF, THE COMPREHENSIVE LONGITUDINAL EVALUATION OF THE MILWAUKEE PARENTAL CHOICE PROGRAM (Feb. 2012). More recently, researchers from the School Choice Demonstration Project found that participating in the MPCP was associated with a significant decrease in later criminal behavior, with even stronger effects for students the longer that they persisted in the program. Corey A. DeAngelis & Patrick Wolf, *The School Choice Voucher: A "Get Out of Jail" Card?* (2016), <http://www.uaedreform.org/the-school-choice-voucher-a-get-out-of-jail-card-2/>.

¹¹⁴ Patrick J. Wolf, *et al.*, *School Vouchers and Student Outcomes*, 32 J. POL'Y ANALYSIS & MGMT 247, 252 (2013).
¹¹⁵ See, e.g., Margaret F. Brinig & Nicole Stelle Garnett, *Catholic Schools, Urban Neighborhoods, and Education Reform*, 85 N.D. L. REV. 887, 942-43 (2010) (summarizing research).

¹¹⁶ CENTER FOR RESEARCH OF EDUCATIONAL OUTCOMES, URBAN CHARTER SCHOOL STUDY REPORT ON 41 REGIONS (2015), <https://urbancharters.stanford.edu>

¹¹⁷ See, e.g., Jonah Edelman & Randi Weingarten, *School Vouchers Don't Just Undermine Public Schools, They Undermine Our Democracy*, L.A. TIMES, May 31, 2017.

measured by test scores—delivered the results long promised. Choice is not, as Terry Moe and John Chubb memorably predicted in 1990, “a panacea.”¹¹⁸ Choice is hard work. And, if faith-based schools want to see it expanded, then they must attend to results and prove that they can take advantage of public resources to turn around the academic prospects of disadvantaged children.

A related goal on the part of regulators should be to focus on developing ways to measure school quality other than student test scores—and incentivizing chosen schools to report their performance based on these factors. The federal education legislation in 2015, the Every Student Succeeds Act (ESSA), requires states to employ at least one non-test-score-based method of school quality, which hopefully will incentivize experimentation along these lines. States have opted for a range of measures including, *inter alia*, chronic absenteeism, access to a diverse curriculum; rigor of high school curriculum; post-secondary enrollment and persistence; and, in a handful of states, measures of school climate and parental satisfaction.¹¹⁹ The development of alternative measures of school quality is particularly important in the parental-choice context for three related reasons. First, while parents clearly value school quality, it is not always the most important factor influencing school choice decisions. Parents value a range of factors, and they make tradeoffs between their preferences when selecting schools; most studies find that only a minority of parents rank test scores as the most important predictor of school quality.¹²⁰ Second, and importantly, the research discussed previously suggests that standardized test scores alone may underestimate the benefits of parental choice, since the biggest payoffs of giving parents options for their children tended to be reflected in longer-term effects on things like high school

¹¹⁸ JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS AND AMERICA’S SCHOOLS* 217 (1990).

¹¹⁹ See Nicole Stelle Garnett, *Post-Accountability Accountability*, forthcoming MICH. J. L. REFORM.

¹²⁰ See Heidi Holmes Erickson, *How Do Parents Choose Schools, and What Schools Do they Choose? A Literature Review of Private School Choice Programs in the United States*, 11 J. OF SCHOOL CHOICE 491, 501-503.

graduation and college enrollment and persistence. Incorporating non-test-score measures of school quality may also reduce the resistance of private-school operators to transparency, as discussed below.

B. Embrace and encourage transparency

For a variety of reasons, including legitimate concerns about regulatory overreach and—in the case of faith-based school—worries about threats to autonomy and religious liberty—private schools have not typically participated in state accountability programs. This remains the case in most states with private-school choice, with the exception of the voucher programs in four states: In Indiana, all participating schools must comply with the state’s report-card requirements, and in Louisiana, Ohio, and Wisconsin, participating schools must administer the state assessment and report results publicly. In two of these states—Indiana and Louisiana—schools that fail to reach a certain achievement threshold on the assessment are excluded from future participation in the program. In the rest of the states with parental choice, schools are not required to provide information about student performance publicly (although some must report this information to parents). And, unfortunately, most private and private and faith-based schools are not transparent about student achievement, at least at the school level, although most Catholic dioceses do provide achievement data at the system level.

This resistance to transparency likely is unsustainable and is a major impediment to the expansion of private-school choice. To begin, opacity runs contrary to both of the animating goals of parental choice policy: to increase the number of high-quality schools available to disadvantaged children and to empower parents to make informed decisions about their children’s education. Moreover, ESSA requires charter schools to participate fully in state academic accountability regimes and mandates that states issue the same report card for both

traditional public and charter schools. This relatively new requirement places private-schools' resistance to transparency even more out of step with both trends in education policy and parents' expectations.

To encourage transparency, regulators would be well-advised to permit private schools to choose among a range of assessment options. While ESSA gives states the autonomy to select the criteria that they will use to assess school quality, it also requires that states use the same assessment criteria for both public and charter schools and mandates transparent reporting of the results of school assessments. Neither requirement, however, applies to private schools, including schools participating in parental-choice programs. As a result, states are free to give private schools flexibility in selecting their own assessment measures, and most do so. With the four exceptions discussed above, all states allow private schools participating in choice programs to choose between administering state assessments or a nationally normed test. Several parental-choice states do not require participating private schools to administer standardized tests.¹²¹

The goal of promoting transparency among private schools is linked to the willingness to permit a range of assessments. Many private schools object to state testing mandates. They assert that state testing mandates will force them to align with state exams, which may unduly constrain their ability to innovate and differentiate themselves from other schools. Moreover, since private schools do not always adhere to state curricular requirements, student performance on state exams is not necessarily an accurate reflection of student achievement and progress.¹²² While state testing mandates enable apples-to-apples comparisons of school quality, there are significant tradeoffs, including the risk that requiring the administration of state-mandated exams

¹²¹ See David Stuit & Sy Doan, *School Choice Regulations: Red Tape or Red Herring?* (Jan. 2013), <https://edexcellence.net/publications/red-tape-or-red-herring.html>.

¹²² NATIONAL CONFERENCE OF STATE LEGISLATURES, ACCOUNTABILITY IN PRIVATE SCHOOL CHOICE PROGRAMS (Dec. 2014), <http://www.ncsl.org/documents/educ/AccountabilityInPrivateSchoolChoice.pdf>.

may deter participation in parental-choice programs.¹²³ A compromise position would be to permit private schools to choose the researched-based testing regime of their choice but require the public reporting of results, ideally for all children enrolled in a school (not just those participating in the program). While multiple testing regimes complicates comparisons across sectors (and even between private schools administering different tests), a transparency requirement will empower parents with far more information than is currently available publicly while preserving schools' curricular autonomy. Moreover, over time, the “apples to oranges” challenges may diminish as more states opt for national rather than state tests, as many states have following the enactment of ESSA.¹²⁴

C. Prepare to Address Other Accountability Concerns

The concerns discussed above focus primarily on academic outcomes of chosen schools. These concerns ought to take center stage in debates about accountability in parental choice programs. But, there are numerous other accountability concerns that have been raised in parental-choice debates. This essay leaves to another day and other scholars the treatment of other contested “accountability” questions—including governance, financial transparency, teacher qualifications, terms of service and retention, admission criteria, retention and expulsion rates, racial demographics, special education and inclusion, and nondiscrimination requirements that may conflict with the core beliefs of certain faith-based institutions.¹²⁵ I leave these issues

¹²³ See Thomas B. Fordham Institute, *Public Accountability and Private School Choice* 9 (Jan. 2014), <https://edexcellence.net/publications/public-accountability-private-school-choice>.

¹²⁴ Twenty-one states have opted to use one of two tests based upon the Common Core Standards (the Partnership for Assessment of Readiness for College and Careers (PARCC) test or the Smarter Balanced Assessment Consortium (SBAC); fourteen states plan to use the National Assessment of Educational Progress (NAEP) at least for some grades; and twenty-two states will administer the ACT or SAT to assess high schools' performance. See U.S. Dep't of Ed., *ESSA State Plan Submission*, <https://www2.ed.gov/admins/lead/account/stateplan17/statesubmission.html>.

¹²⁵ For some useful sources covering these issues, see ANNEBERG INSTITUTE FOR SCHOOL REFORM, *PUBLIC ACCOUNTABILITY FOR CHARTER SCHOOLS: STANDARDS AND POLICY RECOMMENDATIONS FOR EFFECTIVE OVERSIGHT* (Brown Univ. 2014), <http://www.annenberginstitute.org/sites/default/files/CharterAccountabilityStds.pdf>; Marcus A. Winters, *What Underlies the So-Called Charter School 'Special Education Gap'*, REALCLEAR EDUCATION (June 20, 2014), <http://>

to the side not they are unimportant, but rather that they are important enough to deserve their own treatment. Regulations addressing these issues likely will raise other natural law issues concerning the balance between the autonomy of religious institutions and the state’s duty to ensure the formation of citizens.¹²⁶ They may also shape the pluralistic landscape of private-school choice as much or more than the funds made available to students attending private schools since regulatory anxieties and concerns about religious liberty and institutional autonomy may deter the participation of some schools in parental choice programs.¹²⁷

Conclusion

Nearly thirty years have passed since the Minnesota legislature struck the “charter compromise” on parental choice. In the intervening years, the once-modest reform proposal has expanded beyond anyone’s wildest expectations, and the American education landscape has become populated by schools in three sectors rather than the two that existed in 1990. The charter school compromise has had repercussions for both public and private (especially faith-based schools). This essay has explored the repercussions in the faith-based sector, arguing that it is time to reconsider the exclusion of these schools from the menu of publicly funded options in order to preserve educational pluralism, especially in America’s urban centers.

www.realcleareducation.com/articles/2014/06/20/charter_school_special_education_gap_1025.html; ERICA FRANKENBERG ET AL., CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS (Jan. 2012), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report>; GROVER J. WHITEHURST ET AL., CENTER ON CHILDREN AND FAMILIES, SEGREGATION, RACE AND CHARTER SCHOOLS: WHAT DO WE KNOW? (Oct. 2016), https://www.brookings.edu/wp-content/uploads/2016/10/ccf_20161021segregation_version-10_211.pdf; LINDA DARLING-HAMMOND ET AL., LEARNING POLICY INSTITUTE, PATHWAYS TO NEW ACCOUNTABILITY THROUGH THE EVERY STUDENT SUCCEEDS ACT (Apr. 2016), <https://learningpolicyinstitute.org/product/pathways-new-accountability-through-every-student-succeeds-act>.

¹²⁶ The available evidence, reviewed above, strongly suggests that arguments that faith-based schools and private-school choice pose threats to democratic ideals are vastly overstated, *see supra* notes 86-89 and text accompanying notes. That said, tensions between traditional religious beliefs and the modern progressive view of the scope of the nondiscrimination principle have renewed efforts to regulate faith-based schools, especially those participating receiving public funds. *See, e.g.*, Arika Herron, *Roncalli-inspired school funding proposal that bans LGBT discrimination rejected by lawmakers*, INDIANAPOLIS STAR, Feb. 15, 2019 (discussing Indiana proposal to prohibit schools that discriminate on the basis of LGBT status from participating in the state’s school voucher program).

¹²⁷ Garnett, *Post-Accountability*, *supra* note 107.

