**ALL OR NOTHING AT ALL: CAN FRIEDMAN’S PRIVATE CHOICE BE EFFECTIVE IN THE UNITED STATES?**

“Choice” is a popular buzzword in dealing with current charter school and voucher programs. Proponents of such programs highlight the ability of families to choose their child’s educational path,\(^1\) detractors attack the programs for forcing certain choices upon other families,\(^2\) and scholars endlessly search for true choice.\(^3\) Milton Friedman is well-known for his seminal 1955 argument for school choice, *The Role of Government in Education*.\(^4\) Friedman’s “forceful articulation” of the benefits of a robust market-based school system has been developed and adjusted in many ways over the years, and has formed the basis for numerous theories dealing with public administration of schools.\(^5\) The highly theoretical work presents a reasoned analysis of the economic arguments for and against removing education from the current nationalized system.\(^6\) Although school choice has become a popular policy recently,\(^7\) the current system for charter and voucher adoption has led to what would be at best considered a partial school choice system.\(^8\)

This comment will argue that while Friedman has identified the proper aspects of education affected by school choice, his overstatement of the positive effects mask the fact that robust choice is impracticable to institute. Part I evaluates Friedman’s arguments in the context of our current partial school choice system. Part II discusses whether a more robust school choice system might alleviate some of the issues plaguing Friedman’s reasoning, observing a Swedish system that has implemented unrestrained school choice. Part III concludes by trying to reconcile this school-choice model with the anchoring philosophies of Friedman and the American system.

I. THE PERILS OF PARTIAL SCHOOL CHOICE

Although Friedman’s baseline is a limited-government philosophy, he recognizes that there is a benefit conferred by education that is impossible to compensate through the free
market. In keeping with this philosophy, he rejects the nationalization of education and advances a voucher system similar to the GI Bill. The article recognizes that exceptions must be made in certain circumstances, however, the proposed structure would almost entirely displace current schools, public and private, through the operation of the free market.

The first target is parochial schools, which are inconsistent with Friedman’s characterization of the benefits of education. He believes that robust choice will create competitive options that will be more responsive to parental input than parochial schools, which inhibit the teaching of a common core of values. Unfortunately, the availability of donation subsidy for parochial schools, something Friedman himself points out, appears to make parochial schools one of the most attractive options when they are available as a school choice.

Friedman also expects that increased choice would lead schoolteacher salaries to become more responsive to market forces, regardless of his conception of the market rate, the inference today is that depressed teacher salaries should rise. In the current system, the opposite often occurs; since charter schools are often exempt from state education laws, they can hire non-certified teachers to fill teaching positions. Additionally, the school can hire certified teachers who cannot find work elsewhere. Although this is partially explainable by statutory exemptions for charter schools, the ultimate problem is funding. Since funding per student is not tied to performance, the schools are unwilling to pay more when demand far outpaces supply, and thus resort to artificially increasing the supply by looking outside of the pool of well-qualified teachers. Although raising government expenditures per student would help, even constitutionally backed decisions to raise funding indefinitely are considered unreasonable, and it is unclear how much higher salaries must rise for supply to keep up with demand.
The proposed system claims to be easier to administer, with beneficial small-scale innovation likely during the transition. However, small-scale experimentation in current charter schools deals primarily with cost-cutting, which often benefits the private enterprise to the detriment of students. In this case, robust choice may very well provide the check on schools that could be needed to ensure that they are not experimenting in ways detrimental to the students. Friedman does not mention, however, any standards for schools other than the statutory minimum in his proposal; current standards are enforced at only a 6.2% closure rate even with 37% of charters underperforming their public peers. Taken in conjunction with the fact that parent satisfaction with charter schools is universally higher, it is unclear whether this check is proper. Proponents of choice would note that arts schools are examples of true charter school innovation; however, arts schools have existed since before charter schools, and thus are not wholly attributable to the choice movement.

Friedman’s concerns about his own system are quite prescient, though. Aside from questions of natural monopoly in rural areas, which are not applicable to the partial school choice regime in place, his primary concern of exacerbating class distinctions closely anticipates current issues of racial isolation and resegregation. School choice supporters may argue that this may disappear with robust choice; those that value diversity can choose a school that creates such diversity. Some even argue that racial isolation might be positive. This, however, is inconsistent with Friedman’s purpose of instilling children with a common set of core values. Regardless, racial isolation as a byproduct of choice seems to be unavoidable while racial prejudice is still common, as choosing a diverse school is a solution that only corrects the problem for those who actively seek it out.
While Friedman appears to fall victim to the gap between theory and policy, it is possible that the partial school choice system is simply insufficient to reap the benefits of robust choice. To address this contention, we turn to Sweden, which utilizes a system of absolute school choice.\[34\]

**II. THE CURIOUS EXAMPLE OF SWEDEN**

Sweden’s system of school choice has allowed many types of schools to emerge, including schools that compress the curriculum into mornings and schools where students set their own schedule of classes.\[35\] This appears to be the robust system of choice Friedman coveted for its innovation.\[36\] Unfortunately, because of the differences between Swedish society and American society, it is difficult to evaluate the pillars of Friedman’s argument in the Swedish system. It appears that there are very few private schools remaining in Sweden today, but that unlike the United States, few existed to begin with, leaving the private school inquiry open,\[37\] and little is known about schoolteacher salaries in Sweden. Judging by the innovative educational structures in only a small sampling of schools, however, Friedman’s intent of minimizing administrative costs while maximizing innovation seems to be somewhat fulfilled.\[38\] However, while may signify that school choice is truly effective, a country like Sweden, where racial isolation is a less pressing concern, seems to be able to maintain a common core of values to teach regardless of any divisive effects,\[39\] something that has not proven true even in the American partial choice system.\[40\]

An important measurement is also missing: Sweden’s performance relative to the United States is unknown, although Sweden’s performance is markedly behind Finland’s.\[41\] Since Finland is considered the gold standard, this is not terribly informative.\[42\] However, if Sweden’s academic performance is not significantly better than that of the United States, it is unlikely that
the improvement in innovation and variety would sufficiently offset the detrimental effects of racial isolation to justify such a change.\textsuperscript{43} Additionally, with or without any compelling justification, suburban parents would likely be a powerful force working against school choice, looking to ensure that their school quality is not compromised in any way.\textsuperscript{44}

**III. DIVERGING PHILOSOPHIES**

Perhaps the most important difference in implementing the Swedish system, however, is their view on the goals of education. In explaining the difference between their system and Finland, a school official explains that Sweden aims to produce “socially conscious generalists,\textsuperscript{45}” perhaps a surprising check on an otherwise deregulatory mindset. On testing, Sweden may fall short, but this is much more in line with Friedman’s “common set of values;\textsuperscript{46}” many of the arguments against Friedman’s reasoning drop away in theory if the United States can implement this philosophy. Much like high-performing neighbor Finland, America is much more focused on tests and metrics to judge student success.\textsuperscript{47} There is some support for moving toward a system where choice is valued over test performance.\textsuperscript{48} Ultimately, though, this begins to encroach on questions of defining the objectives of our school system, a fiercely debated topic in its own right.\textsuperscript{49}

Regardless of the philosophy ultimately adopted, the partial school choice system in place seems to be a compromise between two competing philosophies that do not work well in tandem and are often at odds with each other. Should reform be chosen, it should be done so wholeheartedly.\textsuperscript{50} Although neither may be the right or wrong choice, it is likely that the policy chosen will ultimately shape education for decades to come,\textsuperscript{51} and legislatures must consider the consequences of school choice, increased racial isolation and corner-cutting, against their long-
term priorities, either through the standard test-based performance model or a more “socially conscious” model backed by Friedman and used by Sweden.


3 See Note, Church, Choice, and Charters: A New Wrinkle for Public Education?, 122 HARV. L. REV. 1750, 1769 (2009) [hereinafter Church, Choice, and Charters] (comparing private choice in voucher programs and charter schools); see also Aaron Jay Saiger, School Choice and States’ Duty to Support “Public” Schools, 48 B.C. L. REV. 909, 929 (attempting to reconcile school choice with the Florida constitution).


5 Morley, supra note 4; Saiger, supra note 3, at 941-42.

6 See Friedman, supra note 4, supra at 127 (framing counterarguments as “argument[s] . . . for nationalizing education”).

7 See sources cited supra note 1.

8 For examples of how current examples of school choice can be considered less than true, see James E. Ryan & Michael Heise, The Political Economy of School Choice, 111 YALE L.J. 2043, 2045 (2002) (noting that suburban schools and parents can and do limit the scope of urban school choice when they worry about protecting their students and the exclusivity of their tax expenditures); Church, Choice, and Charters, supra note 3, at 1768 (weighing the relative actuality of various forms of school choices); Gillian E. Metzger, Privatization as Delegation, 103 COLUM. L. REV. 1367, 1498 (2003) (citing Zelman v. Simmons-Harris, 536 U.S. 639 (2002)) (noting that the Supreme Court has ruled that non-actual formal choice is permissible).

9 Friedman, supra note 4, at 125.

10 Id. at 127.

11 See id. at 130 (noting that there is a “natural monopoly” where the population is not dense enough to sustain competition, one of the other cases under which Friedman believes government intervention is proper).

12 Id. at 127.
13 See id. at 129 (noting the majority of parents lack the ability to send children to private school, “in the process producing further stratification”).

14 Id. at 128.

15 Id.; see also Morley, supra note 4, at 1815 (arguing that the nonprofit donation advantage is more useful than monetary advantages available to private for-profit schools).

16 See Church, Choice, and Charters, supra note 3, at 1761 (citing Zelman, 536 U.S. 639) (noting that 96% of students in the Cleveland voucher program ultimately chose a religious school). Because of the difficulty of forming religious charters and the lack of other voucher programs that deal with religious schools, Zelman’s example carries even greater weight considering that there are few similar situations, none with known contrary outcomes. See Hillman, supra note 1, at 588 (discussing obstacles to forming religious charter schools); see also Ryan & Heise, supra note 8, at 2047 (noting that voucher programs only exist elsewhere in Milwaukee and Florida, and Florida’s program had been extremely limited in scope).

17 Friedman, supra note 4, at 131.


19 Id.

20 See Saiger, supra note 3, at 966 (stating that not limiting amount of state spending to meet constitutional standards would be “to indulge in a jurisprudence of fantasy”).

21 Friedman, supra note 4, at 131-32.

22 See Conn, supra note 18, at 144 (discussing the types of ways school management corporations can become profitable by cutting costs); Morley, supra note 4, at 1812 (discussing the ability of for-profit charters to exploit economies of scale to compete with public schools).


24 Cf. Friedman, supra note 4, at 128 (mentioning a statutory minimum standard for allowing private schools to enter the market).


28 See Gratto, *supra* note 27, at 18 (noting that an arts school support organization was founded in 1983 while the first charter school law was passed in 1991).

29 Friedman, *supra* note 4, at 130.


31 *See* Alyssa M. Simon, *Student Diversity and Charter Schools: A State Action Problem?,* 10 CONN. PUB. INT. L.J. 399, 422-23 (2011) (arguing that lack of state action can be used to ensure racial balance).

32 See Hillman, *supra* note 1, at 587 (noting that charter school parents often appreciate schools where like-minded people are found).

33 Friedman, *supra* note 4, at 125.

34 *Education in Sweden and Finland: Our Friends in the North: Finding the Secret to Educational Success*, Economist (June 6, 2008), http://www.economist.com/node/11477890 [hereinafter *Sweden and Finland*].

35 *Id.*

36 Friedman, *supra* note 4, at 132.

37 *See Sweden and Finland, supra* note 34 (noting that the founder of Kinskapsskolan, an independent school company, took his children to “one of Sweden’s few private schools” before he became involved in the reform movement, and alluding to the continued existence of such schools in questioning whether such treatment would occur today).

38 See Friedman, *supra* note 4, at 132 (arguing that the cost of administering a nationalized system are by definition higher than costs in a robust school choice system); *see also supra* note 35 (citing examples of Swedish school innovation).

39 *Sweden and Finland, supra* note 34.

40 *See* sources cited *supra* notes 29-32.

41 *See Sweden and Finland, supra* note 34 (discussing Sweden’s efforts to narrow the difference in educational performance between itself and Finland).
42 See id. (discussing Finland’s routine top performance in PISA studies).

43 See sources cited supra notes 29-32; see also Gleason et al., supra note 26, at 3 (demonstrating that charters have a net normalizing effect but do not significantly improve or worsen performance, which may be the strongest evidence available in the absence of more specific Swedish data).

44 See Ryan & Heise, supra note 8, at 2047 (discussing the “incentives and political power” of suburbanites when dealing with school choice); see also Lyndsey Layton, Parent Trigger: School Tests California Law that Allows Takeover via Petition, WASH. POST, Mar. 5, 2012, at A01 (examining the lengths to which involved parents will go in pursuing improved educational opportunities).

45 Sweden and Finland, supra note 34.

46 Friedman, supra note 4, at 125.

47 See Sweden and Finland, supra note 34 (discussing test taking in Finland); see also Walker Richmond, Note, Charter School Accountability: Rhetoric, Results, and Ramifications, 12 VA. J. SOC. POL’Y & L. 330, 339 (2004) (noting that a common critique of the public school system is an increased focus on rules, potentially to the detriment of the quality of education).

48 See Walk, supra note 23, at 248–49 (noting favorably that management companies have an incentive to cater to the desires of parents, regardless of whether these desires match up with test performance).

49 Compare State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ., 857 N.E.2d 1148, 1158-59 (assuming that legislative intent for education laws is not only for improvement, but customization), with id. at 1168 (Resnick, J., dissenting) (quoting Molly O’Brien & Amanda Woodrum, The Constitutional Common School, 51 CLEV. ST. L. REV. 581, 638-41) (reading the education clause in the Ohio constitution as intending to bring diverse students together to be educated), and Saiger, supra note 3, at 929 (citing Bush v. Holmes, 919 So. 2d 392, 400 (2006)) (explaining that the Florida Supreme Court has read the possibility of school choice entirely out of their constitution).


51 See Sweden and Finland, supra note 34 (noting that Sweden has not been able to repeal ineffective reforms associated with the 1970s until 2008).
The state action doctrine is a critical means by which courts determine the constitutional significance of an otherwise-private action. Should private activity be designated state action, it becomes subject to the same constitutional constraints as any purely governmental action. Should it remain wholly private, the constitutional protections guaranteed by the Bill of Rights do not apply.

While the line between private and state action is often clear, courts have struggled to define whether charter schools, which have characteristics of both public and private institutions, are private or state actors. In New York, for instance, charter schools are expressly defined as public schools. They are created by the state, funded by the state, and free to attend. Yet typically they are run by private companies. And as long as they meet state-mandated accountability standards, they are absolved from compliance with the rules and regulations that apply to traditional public schools. Nonetheless, each state defines and implements charter schools in its own unique way, so state action determinations must be made individually for each state.

This comment will argue that under the more flexible approach to state action analysis defined by the “entwinement test,” a substantial portion of New York’s charter school activity should qualify as state action. However, the entwinement test requires a more fact-based and nuanced view of the state action doctrine than many courts have tended to exercise. Part I reviews the way state action should be evaluated under the entwinement test, while Part II uses this approach to analyze New York charter schools under the New York Charter School Act.
I. THE STATE ACTION TESTS: FROM RIGID TO FLEXIBLE

For many years, courts answered state action questions regarding otherwise-private activity with rigid and difficult-to-meet standards.\(^\text{15}\) For example, the public function test asked whether a private entity is performing a function that is “traditionally and exclusively the prerogative of the state.”\(^\text{16}\) In *Rendell-Baker v. Kohn*,\(^\text{17}\) the Supreme Court announced that education was not an exclusive prerogative of the state, finding no state action in the employment decisions of a private company contracted by Massachusetts to provide educational services to students.\(^\text{18}\) If a public service as long-standing and all-encompassing as state education does not qualify as state action, there is likely little else that would.\(^\text{19}\)

Recently, however, the Court has favored a more flexible approach. In *Brentwood v. Tennessee Scholastic Athletic Association*,\(^\text{20}\) the Court articulated an “entwinement test” that requires balancing an entity’s public and private composition to determine whether its “nominally private character . . . is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings.”\(^\text{21}\) Despite the fact that the athletic association in *Brentwood* consisted of private schools alongside public ones,\(^\text{22}\) the association was still held by the Court to be a state actor.\(^\text{23}\)

Importantly, the Court did not find older, more rigid approaches to state action inquiries dispositive.\(^\text{24}\) While such tests remain sufficient to deem private activity state action, after *Brentwood* they no longer are necessary. Yet, the courts have been slow to catch on.

In *Caviness v. Horizon Community Learning Center*,\(^\text{25}\) the Ninth Circuit ignored *Brentwood* and the entwinement test entirely. Relying almost completely on the public function test, the court held that an Arizona charter school was not a state actor.\(^\text{26}\) Nonetheless, in so holding, the court acknowledged that a private entity could be designated a state actor for some
of its aspects and a private one for others. Yet the court failed to scrutinize any such distinctions individually. Such analysis was unlikely to lead to a different outcome in Caviness, which may explain the court’s decision to forego the entwinement test. But that more individualized and segmented approach can prove critical to other, less straightforward state action inquiries. New York charter schools provide a salient illustration of such an inquiry making an important difference.

II. NEW YORK CHARTER SCHOOLS UNDER THE ENTWINEMENT TEST

In 1998, New York enacted the New York Charter Schools Act (NYCSA), which articulated the methods by which charter schools could be authorized. Analyzing the provisions of the NYCSA under the entwinement test, the public/private composition of certain aspects of New York’s charter schools stand out as being sufficiently public to constitute state action. Others seem so autonomous as to be wholly within the private domain.

Under the NYCSA, New York directly funds charter schools in the same manner as public schools—based on the number of students enrolled. Yet state funding alone is not enough to qualify private entities as state actors. Likewise, though New York expressly defines charter schools as public schools that perform “essential public . . . and governmental purposes,” a designation as public is also insufficient to qualify it as a state actor. When courts insist on more rigid state action formulas, rather than engaging with an entity’s varied functions and responsibilities, courts tend to end their analysis at this early point. State funding or public classifications being insufficient to find state action, courts deem the actor completely private, abruptly ending the inquiry. The entwinement test, instead, requires courts to probe more deeply, demanding an individual analysis of the public/private composition of each facet of an entity, rather than simply assessing the entity as a whole.
In *Brentwood*, the Court found state action because the public membership of the athletic association vastly outweighed the private.\textsuperscript{38} Thus, for New York charter schools to qualify as state actors in certain respects, state control over those aspects must be near complete. The NYCSA makes clear that these charter schools meet such a standard.

The crucial provisions in New York’s charter statute are those that define the charter itself. The charter is the written agreement between the organizers of the proposed school and the state, detailing the state-mandated provisions under which the school must operate.\textsuperscript{39} Charters can only be approved by designated state agencies.\textsuperscript{40} The charter must include, among other things, a description of student achievement goals that must meet or exceed standards set by the Board of Regents—a state-run agency.\textsuperscript{41} As part of their oversight responsibilities, these agencies are given the authority to oversee each school they approve\textsuperscript{42} to ensure the school is in compliance with all applicable laws, as well as with the provisions in its specific charter.\textsuperscript{43}

This oversight is exactly the “pervasive entwinement” the Court envisioned in *Brentwood*. Though the private charter company makes the day-to-day decisions necessary to run a school,\textsuperscript{44} all such decisions must be based around meeting the goals dictated by the state.\textsuperscript{45} By exerting near-complete control over the standards towards which each school must work, the day-to-day decisions of the charter company—their “compositions and workings”—are “overborne” by New York’s performance mandates.\textsuperscript{46}

Notably, this holds true despite the fact that New York charter schools are exempt from all state laws, regulations or policies governing traditional public schools.\textsuperscript{47} Simply because charter schools are not regulated in the *same* manner as are traditional public schools does not mean they are not regulated by the state *at all*. The charter provisions legislated by state agencies
constitute regulation just as significant and encompassing as do those placed upon traditional public schools.\(^48\)

Likewise, state-mandated open-access provisions regulate the admissions process, requiring admission to all eligible students who submit timely applications.\(^49\) This effectively removes any admissions discretion from the charter schools themselves.\(^50\) Again, state control here is pervasive and outweighs private decisionmaking enough to characterize any admissions decision as state action.\(^51\)

Of course, a large portion of the charter school domain remains firmly situated in the private sphere. In *New York Charter School Ass'n v. Smith*,\(^52\) New York’s high court held specific labor laws to be inapplicable to charter schools because the schools were not sufficiently “public.”\(^53\) The court’s holding keeps with the general tendency of courts to hold employment to be under such private control that state action is vitiates.\(^54\) Likewise, in *New York Charter Schools Ass'n v. DiNapoli*,\(^55\) the same court held charter schools could not be audited by the state comptroller because they did not constitute political subdivisions.\(^56\) Given the independence New York provides charter companies over the management of their finances, budgetary concerns such as these are also likely to constitute solely-private action.\(^57\) Thus, these holdings do not implicate the state action analysis of the more state-regulated charter school functions addressed above.\(^58\)

### III. Conclusion

Questions of state action, though sometimes difficult to ascertain, are important to properly characterize the constitutional implications of a given activity. When courts neglect to weigh public aspects against private in answering such questions, they diminish the ability of courts and individuals to hold publicly-funded and publicly-regulated educational institutions
properly accountable. The use of a more flexible state action inquiry achieves the individualistic and fact-based analysis the Supreme Court, in articulating the entwinement test, intended for such determinations. The intricacies of New York’s statutory scheme demonstrate how this approach should be applied and the fundamental differences it makes to state action outcomes.

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2 See, e.g., Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (examining Ohio’s school voucher program and implicitly finding state action, since the program was required to comply with the Establishment Clause of the First Amendment), quoted in Aaron Jay Saiger, School Choice and States’ Duty to Support “Public” Schools, 48 B.C. L. REV. 909, 945–46 (2007).


5 Compare Greater Heights Acad. v. Zelman 522 F.3d 678, 680 (6th Cir. 2008) (declaring Ohio charter schools to be political subdivisions of Ohio and thus state actors), quoted in Caviness, 590 F.3d at 814, and Gillian E. Metzger, Privatization as Delegation, 103 COLUM. L. REV. 1367, 1495 (2003) (asserting that charter schools are likely to be deemed state actors by courts because they are created by the state and operate subject to state regulations), with Caviness, 590 F.3d at 816 (finding Arizona charter schools to be private actors, despite being created and regulated by the state, based on the state’s lack of exclusivity over the education field).


8 See id. § 2851(1) (“[A] charter school application may be filed in conjunction with a college, university, museum, educational institution, . . . a not-for-profit corporation . . . or [a] for-profit business or corporate entity . . . .”); cf. MINN. STAT. ANN. § 124D.10.1(b)(2)–(3) (West 2010) (listing the private entities qualified to open charter schools, including non-profit corporations and private colleges).

9 N.Y. EDUC. LAW § 2851(2) (McKinney 2008), quoted in DiNapoli 13 N.Y.3d at 124; cf. MINN. STAT. ANN. § 124D.10.3(i) (detailing the process of review the state conducts over charter schools).

Cf. Caviness v. Horizon Cmty. Learning Ctr., 590 F.3d 806, 814 (9th Cir. 2010) (maintaining that simply because the Sixth Circuit found Ohio charter schools to qualify as state actors does not mean Arizona charter schools should be characterized similarly); Huffman supra note 1 at 1294–96 (detailing the varied ways different states authorize and renew their charter schools).


See, e.g., Caviness, 590 F.3d at 816 (declaring charter school employment decisions to be private action because education is not within the exclusive province of the state’s traditional functions); Smith, 15 N.Y.3d at 409–10 (holding charter schools as too private to be affected by a local wage law without weighing the individual public and private characteristics involved in the question).


See, e.g., Blum v. Yaretsky, 457 U.S. 991 (1982) (utilizing the “government coercion” test to dismiss a class action suit filed by Medicaid patients because the government had not overtly or covertly encouraged the patient care decisions of the nursing home in question), discussed in Simon, supra note 1 at 423–24; Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (employing the public function test to dismiss a § 1983 suit because the actor was deemed private based on the lack of exclusivity in the state’s dominion over education), cited in Simon, supra note 1 at 424; Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) (applying the “close nexus” test to dismiss a due process challenge against a utility company based on the connection between the company and the state being too attenuated), discussed in Simon, supra note 1 at 423; see also Simon, supra note 1 at 424 (elaborating on some of the state actions tests the courts have used to define state action narrowly).

Jackson, 419 U.S. at 353, quoted in Caviness, 590 F.3d at 815.


Id. at 832.
19 Compare Aaron Jay Saiger, School Choice and States’ Duty to Support “Public” Schools, 48 B.C. L. Rev. 909, 924–25 (2007) (noting that every state constitution contains an education clause providing education at a prescribed level of quality and accessibility, often through general terms such as, “thorough,” “public,” “common,” “free,” “uniform,” and “excellent”), with Rendell-Baker, 457 U.S. at 832 (declaring state action to be inapplicable to educational companies, since education is not an exclusive prerogative of the state), cited in Caviness, 590 F.3d at 815, and Logiodice v. Trs. of Me. Cent. Inst., 296 F.3d 22 (1st Cir. 2001) (holding a private school contracted to be the sole provider of public high school education for a district was not a state actor because education was declared to never have been a function reserved to the state), discussed in Simon, supra note 1 at 424–25.


22 This public/private mixing would likely have vitiated state action under the public function test, since the involvement of private schools in athletics would deprive the state of the exclusivity the public function test demands. See Rendell-Baker, 457 U.S. at 832.

23 Brentwood, 531 U.S. at 298. Public schools constituted almost eighty-five percent of the athletic association’s membership. Simon, supra note 1 at 425.

24 See Simon, supra note 1 at 425 (noting the Court’s rejection of the idea that a failure to satisfy the previous, more rigid state action tests was dispositive).

25 590 F.3d 806 (9th Cir. 2010).

26 Id. at 816.

27 See id. at 814 (“[A] private entity may be designated a state actor for some purposes but still function as a private actor in other respects.”).

28 See id. at 815 (declaring charter schools to be private actors simply based on the state’s lack of total control over the domain of education, without analyzing the public/private composition of the employment decisions at issue).

29 Even under the entwinement test, employment decisions are unlikely to constitute state action. See discussion infra Part II and note 56.


31 Id. § 2850(2)(e).
32 See Rendell-Baker, 457 U.S. 830, 832 (1982) (finding no state action despite the fact that the state provided 90 to 99 percent of an educational organization’s operating budget), cited in Caviness, F.3d at 815; Johnson v. Pinkerton Acad., 861 F.2d 335, 338 (1st Cir. 1988) (“Granted that the state requires that its children . . . be educated, even to the extent of assuming full tuition cost . . . , it does not follow that the mechanics of furnishing the education is exclusively a state function.”), quoted in Caviness, 590 F.3d at 815.


34 See Caviness, 590 F.3d at 815 (specifying that a state’s characterization of educational services as public is not necessarily controlling, and therefore those services can still constitute solely-private action).

35 See sources cited supra note 13.

36 Cf., e.g., Caviness, 590 F.3d at 814 (failing to look into any distinctions once the court makes a determination that the action at issue fails the public function test, despite acknowledging that a private entity may be “designated a state actor for some purposes, but still function as a private actor in other respects.”).

37 See id. (asserting that a private entity can be “designated a state actor for some purposes, but still function as a private actor in other respects.”); Simon, supra note 1 at 425 (describing the balancing between public and private composition or control that the entwinement test requires).

38 See discussion supra note 23.


40 See id. § 2851(2) (defining a “charter entity” as (1) the State Board of Regents; (2) the Board of Trustees of the State University of New York; (3) the board of education of the school district in which the charter school resides; or (4) the Chancellor of the City School District if the charter school is to be located in New York City). A charter entity receives applications from potential charter schools and is the designated entity that can approve the application. Id. But see Paul Josephson, Op-Ed., No Public Vote is Needed to Start Charter Schools, RECORD (N.J.) (Mar. 8, 2012), http://www.northjersey.com/news/opinions/141869463_Charter_schools_don_t_need_public_assent.html (describing a proposed New Jersey State Legislature bill that would require a referendum as the primary means of approving a charter school application); Lyndsey Layton, Parent Trigger: Schools Test California Law That Allows Takeover via Petition, WASH. POST, Mar. 5, 2012, at A01 (depicting a California law that allows a majority of families at a struggling traditional public school to close it down and reopen it as a charter, noting similar laws exist in Mississippi, Texas, and Connecticut).
In addition to the charter renewal process that must take place every five years, this oversight includes site visits and financial audits and requires schools to submit yearly progress reports. *Id.* §§ 2851(2), 2851(4)(c), 2853(1)(f).

*Id.*

*See id.* § 2853(1)(f) ("[Charter schools have] final authority for policy and operational decisions of the school . . . .").

*Id.* § 2851(2). Failure to meet these achievement goals can lead to revocation of the school’s charter. *Id.* § 2853(2)(a). *But see* Editorial, *Shuttering Bad Charter Schools*, N.Y. TIMES, Feb. 20, 2012, at A24 (observing that smaller and smaller percentages of charter schools are being denied renewal nationally, despite facing significantly worse in student test measures than traditional public schools). Yet this could be explained by an increase in selectivity among states authorizing charter school applications. *See* Wayne Washington, *In Your Schools: Charters Lag Behind Traditional Schools*, ATLANTA J.-CONST., Feb. 16, 2012, at 1A (Main Edition) (mentioning that in 2004, all 15 charter schools that submitted applications in Georgia were approved, whereas by 2010, only 40 out of 80 had the same success).


*See* id. § 2853(1)(g) (declaring that no civil liability may attach to the state or any state agency for any act or omission of any New York charter school). Nonetheless, though New York is absolved of civil liability, the charter schools themselves remain civilly liable.

*Cf.* Walk *Supra* note 10 at 242 (claiming management companies are responsive to student needs because they are heavily regulated by the state, who will shut them down if they diverge from those regulations). *But see* Kathleen Conn, *For-Profit School Management Corporations: Serving the Wrong Master*, 31 J. L. & EDUC. 129, 130 (2002) (arguing that the for-profit corporations running some charter schools are more concerned with meeting the needs of their shareholders than providing a quality education to their students).

evoke-separate-but-equal-era-in-u-s-education.html. In such a situation, a stronger argument could be made against state action.

50 *But cf.* Huffman *supra* note 1 at 1291 (portraying states as generally providing discretion to charter schools in their student recruitment efforts); Lucinda Rosenfeld, Op-Ed., *How Charter Schools Can Hurt*, N.Y. TIMES (Mar. 17, 2012), http://www.nytimes.com/2012/03/17/opinion/how-charter-schools-can-hurt.html (describing one charter school’s efforts to recruit more well-off students from a local public school).

51 State control over the admissions process is particularly noteworthy given the problems some charter schools have had with a lack of diversity. This may stem, in part, from admissions policies. *See* Hechinger *Supra* note 49 (arguing that admissions policies of some Minnesota charter schools are fostering school segregation that harkens back to the Jim Crow era). *See generally* Huffman, *supra* note 1 at 1299 (listing various states that have been more or less successful at reaching at-risk, minority students via their charter schools). A determination for or against state action can have dramatic effects on the ability to remedy these diversity problems. *Compare*, Simon *supra* note 1 at 422–23 (arguing that designating charter schools as private actors allows for more effective racial balancing based on affirmative action principles, since the Equal Protection Clause would not apply), *with* Huffman *supra* at 1311–12 (arguing that the Equal Protection Clause only sets a floor that individual litigants can surpass by relying on protections expressed in the equal protection clauses that exist in all state constitutions).

52 15 N.Y.3d 403 (2010).

53 *Id.* at 409–10.

54 *See, e.g.*, Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (finding an educational institution’s employment decision did not qualify as state action), *discussed in* Caviness v. Horizon Cmty. Learning Ctr., 590 F.3d 806, 815 (9th Cir. 2010); *Caviness*, 590 F.3d at 816 (holding that the employment decisions of Arizona charter schools were not state action); *cf.* Huffman *supra* note 1 at 1291, 1294 (describing the way charter schools trade a certain amount of required accountability for, among other things, independence in staffing decisions). *But see Smith*, 15 N.Y.3d at 410 (holding that wage laws do not apply to charter schools because they are less public than the entities to which the prevailing labor law was intended to apply, without deeming charter schools wholly private in such areas); Huffman *supra* at 1296 (“Other states have placed limitations on charter schools, requiring observation of local collective bargaining agreements with extensive local and state oversight.”).


56 *Id.* at 133.

57 *See id.* (“The money paid by a school district to a charter school is no longer under the State’s control once the funds have been transferred.”); *Cf.* PA. STAT. ANN. § 17-1716-A (West 2002) (“The board of trustees of a charter school shall have the authority to decide matters related to
the operation of the school, including, but not limited to, budgeting . . . ’’), quoted in Anne E. Trotter et al., Commentary, Education Management Organizations and Charter Schools: Serving All Students, 23 WEST’S EDUC. L. REP. 935 (2006), available at 2006 WL 3833427; Huffman Supra note 1 at 1294–96 (depicting the financial independence states typically provide to charter schools).

As in Caviness, 590 F.3d 806, the courts in these two cases applied an older, more rigid state action formula. Therefore, such analyses would not necessarily vitiate state action under the entwinement test. See discussion supra part I. Nonetheless, given the lack of state involvement in these two areas, courts would have difficulty finding state action here. See sources cited supra notes 54, 57.

See Huffman supra note 1 at 1312–13 (describing the requirements, including state action, for succeeding in a state-constitution-based equal protection challenge, noting it works the same way as does an Equal Protection Clause challenge). But see Metzger supra note 5 at 1376 (arguing that extending constitutional norms to private entities is problematic because it transfers regulatory authority onto courts when the point of such privatization is to provide entities the freedom needed to address specific policy concerns).
INTRODUCTION

The school choice movement is growing, with burgeoning popularity\(^1\) for charter schools, institutions that are publicly funded but privately managed. Charter schools utilize public funds but excise the government involvement that is characteristic of public schools, leading to descriptions such as “quasi-public” or “hybrid public.”\(^2\) Recent litigational issues have forced courts to consider to what degree charter schools should be treated as public bodies capable of state action.\(^3\) Courts have differed on the central issue of whether charter schools are state actors,\(^4\) but the majority opinion seems to hold that they are.\(^5\) However, many courts fail to apply the Supreme Court’s state action tests.\(^6\) This comment will argue that charter schools should be treated consistently as private entities rather than public establishments. Part I argues that the charter school movement represents an ideological shift away from the need for wholly uniform standards of learning. Part II discusses the case precedent that is consistent with that ideological framework. Part III examines and dismisses state constitutional objections that have been—or could be—raised.

I. A TRANSITION FROM PUBLIC UNIFORMITY TO PRIVATE NEEDS

When considering the methods for characterizing charter schools, one must first consider the purposes of a public education system. Economist Milton Friedman proposed two such goals: “(1) general education for citizenship, and (2) specialized vocational education.”\(^7\) He defined the former as a “common set of values and… a minimum degree of literacy and knowledge” which is essential for a democratic society,\(^8\) and he defined the latter as education that “increases the economic productivity of the student.”\(^9\) He created this dichotomy to illuminate the difference between education that serves the government and education that serves the student: that is, public purposes versus private purposes.
Chartering represents a reaction against education for general public knowledge purposes and in favor of education for private purposes. The private needs extend beyond vocational training; students may select from schools that promote traditional Latino values,\textsuperscript{10} immerse students in German culture,\textsuperscript{11} focus on arts education,\textsuperscript{12} or foster alternative learning styles.\textsuperscript{13} State governments have permitted each school to teach unique subjects and instill distinct sets of values, advancing personal educational experience at the possible expense of Friedman’s first objective.

Some have criticized culture-centered charter schools as re-segregating American education,\textsuperscript{14} but those schools exist for the same reason as the arts schools: to provide parents and students with the option to choose a specialized type of education. Indeed, despite mixed evidence regarding charters’ effect on achievement, an empirical study has found that “[b]eing admitted to a study charter school did significantly and consistently improve both students’ and parents’ satisfaction with school.”\textsuperscript{15} Thus, in an environment with broad opportunities for school choice, students and parents are pleased to use public education to focus not on students’ citizenship-based knowledge, but students’ own sense of personhood.

\textbf{II. PROPER JUDICIAL ANALYSIS OF STATE ACTION}

The courts should treat charter schools as private institutions, both due to the aforementioned ideological foundation in individualistic educational pursuits and due to state action precedent. The Supreme Court has devised four state action tests,\textsuperscript{16} all of which should lead to a finding of charter schools as private actors in general. The “close nexus” test and the “government coercion” test both inspect the degree and proximity of potential government control over the private function in question.\textsuperscript{17} In the case of charter schools, the local charter authorizer\textsuperscript{18} has ultimate authority and provides a system of accountability through the threat of
closure, leaving governments with little control over charter school management. The “entwinement” test examines the level of actual public involvement in the institution, but state governments generally adopt fairly non-interventionist positions towards charter schools, typically taking little action to close weak charter schools without the authorizers’ consent.

The final and most interesting analysis is the “public function” test, which determines whether the service in question is the exclusive province of the state. The Supreme Court has never ruled directly on the nature of charter schools, but they did hold in Rendell-Baker v. Kohn that a school which was 90% publicly funded was not a state actor because education is not exclusively state territory. Federal circuits have rightfully applied Rendell-Baker to charter schools. One circuit has claimed charter schools to be “administrative island[s],” detached from public school districts.

Some state courts have reached similar results, such as the New York courts which held that although charters are publicly funded, they did not qualify as “political subdivisions” of New York and were not wholly public entities. Most revealing is the Ohio Supreme Court’s assertion that the state’s chartering legislation “was drafted with the intent that parental choice and sponsor control would hold community schools accountable.” The Ohio case also compares charter schools to permits “for vocational education and special education.” These courts have correctly treated charter schools not as state actors or public establishments, but as publicly funded institutions that further the private needs of individual students.

III. REBUTTALS OF STATE CONSTITUTIONAL OBJECTIONS

State constitutions contain various education clauses, some of which appear more consistent with charter schooling than others. Some state constitutions provide for education that is “public” or “uniform,” and the inclusion of those words may appear facially
inconsistent with the conceptualization of charter schooling as furthering specialized private purposes. Indeed, in a case with reasoning that could easily apply to charter schools, the Florida Supreme Court determined in *Bush v. Holmes*[^36] that privately run schools funded through government vouchers were insufficiently public, and the lack of applicable public regulations rendered the schools insufficiently uniform[^37].

Nonetheless, the reasoning in *Holmes* is severely flawed, justified only by a baffling reading of the Florida constitution. The court concluded the provision for a “uniform, high quality system of free public education” precluded the offering of alternative educational choices.[^38] However, offering publicly funded options in addition to government-managed educational should only be unconstitutional if a constitution provides *solely* for publicly operated schools. No such limitation appears to exist in Florida.[^39] Furthermore, surely the constitution does not prohibit parents from choosing private schools, and providing options only to families that can afford private schooling reeks of socioeconomic discrimination.

Alternatively, Aaron Jay Saiger has suggested that uniformity is best served by “creat[ing] diverse schools to serve a diverse population of learners… [which] promotes equality of educational opportunity in a world where all children are different.”[^40] Indeed, individualized learning programs can encourage success by tailoring the experience to the child’s needs. An empirical study found that “ability grouping” in charter schools correlated with a positive effect on achievement.[^41] In addition, Finland features the best public schools in the world according to the Programme for International Student Assessment (PISA),[^42] and Finland’s school system incorporates many different class levels for students to learn at different paces, yet still shows very little variation in PISA results between its best students and worst students.[^43] With such an endorsement for separating students based on ability, one could also infer that separating...
students based on learning styles should also be useful. Perhaps some children learn best via cyber education; an education framed through the lens of the child’s cultural heritage; or through a particular authorizer’s teaching philosophy. Accommodating a diversity of abilities may best promote uniformity.

Many state constitutions also contain provisions for high-quality education, which should be seen as the real objective of publicly funded schooling. Some commentators denounce charter schools as ineffective, but an empirical study has found that charter schools in urban areas which serve larger proportions of economically disadvantaged students tend to stimulate great benefits compared to public school analogues. This result is unsurprising, since publicly managed schools in affluent suburban areas generally tend to be better-funded, and common sense would suggest schools with more resources generally surpass schools with fewer; consequently, the students in affluent areas already enjoy a high-quality option. Chartering therefore creates higher-quality choices for students in disadvantaged urban areas, ensuring that students of all socioeconomic backgrounds have more valuable options. Additionally, since chartering provides more leeway to experiment than publicly regulated schools, charter schools could be seen as laboratories of education, analogous to the model of the states as laboratories of democracy. Policy that proves effective at one charter school could be adopted throughout the state, ensuring higher-quality education for all.

Hence, constitutional educational requirements should only proscribe chartering if the constitution affirmatively excludes non-public options, and ironically, specialized charter schools may actually promote uniformity of education. Moreover, school choice fosters high-quality education. Ergo, state constitutional objections are misplaced.

CONCLUSION
Although charter schools are generally considered components of the public education system and often found to be state actors, this comment has supported the courts which have held charter schools to be private institutions. The finding of private action for charter schools concurs with the theoretical basis for the school choice movement as well as Supreme Court precedent on state action, and the aforementioned objections based on state constitutions are erroneous. By acknowledging the private nature of charter schools, America will provide them with the freedom they need in order to flourish.

Word Count: 1,499

1 See, e.g., PHILIP GLEASON ET AL., THE EVALUATION OF CHARTER SCHOOL IMPACTS 1 (2010), available at http://ies.ed.gov/ncee/pubs/20104029/pdf/20104030.pdf (“Charter schools... are an important and growing component of the public school system in the United States.”); Sharon Davis Gratto, Arts Education in Alternative School Formats, ARTS EDUC. POL’Y REV., June 2002, at 17, 18 (“Charter schools are among the most rapidly growing categories of educational institutions today.”).

2 Julie Mead, Devilish Details: Exploring Details of Charter Schools that Blur the Public/Private Divide, 40 HARV. J. ON LEGIS. 349, 351-52.


4 Alyssa M. Simon, Student Diversity and Charter Schools: A State Action Problem?, 10 CONN. PUB. INT. L.J. 399, 426 (“[C]ases involving alleged infringement of constitutional rights by charter schools have been inconsistent, both in their outcomes and in their application of the state action doctrine.”).

5 Id. (“Most frequently, courts assume the conclusion of state action while failing to conduct the requisite analysis under any of the tests recognized by the Supreme Court.”).
6 Id.


8 Id.

9 Id. at 126.


11 Id.


13 Arts education may simply serve vocational training purposes, but “there is [also] growing evidence that the high-level thinking skills and creativity engendered by serious education through the arts can contribute to a better-prepared force of industrial leaders.” Id. at 43. In some states, home schooling and cyber schools can qualify as charter schools. See Mead, supra note 2, at 357-58.


15 GLEASON ET AL., supra note 1, at 1.


17 Id. at 423.

18 Note that a school board can authorize charters, but often the authorizer is a private charity, non-profit organization, or college. See MINN. STAT. ANN. § 124D.10(3)(b)(1)-(5) (West 2010).

20 See 24 PA. STAT. ANN. § 17-1716-A (West 2002), quoted in Anne E. Trotter et al., Education Management Organizations and Charter Schools: Serving All Students, 23 WEST’S EDUC. L. REP. 935, 946 (2006) (“The board of trustees of a charter school shall have the authority to decide matters related to the operation of the school, including, but not limited to, budgeting, curriculum, and operating procedures, subject to the charter school's charter. The board shall have the authority to employ, discharge, and contract with necessary professional and nonprofessional employees subject to the school's charter and the provisions of this article.”); N.Y. Charter Sch. Ass’n v. DiNapoli, 13 N.Y.3d 120, 133 (N.Y. 2009) (“The money paid by a school district to a charter school is no longer under the State's control once the funds have been transferred.”).

21 See Simon, supra note 4, at 425.

22 For model legislation adopted by the American Legislative Exchange Council which includes the provision “a charter school is exempt from all statutes and rules applicable to a school, a board, or a district,” see CTR. FOR EDUC. REFORM, CHARTER SCHOOL LAWS ACROSS THE STATES: RANKINGS AND SCORECARD 83 (Jeanne Allen et al., eds., 11th ed. 2010).


24 See Simon, supra note 4, at 424.


26 See Simon, supra note 4, at 424.

27 See, e.g., Caviness v. Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 815 (9th Cir. 2010).

28 See Racine Charter One, Inc. v. Racine Unified Sch. Dist., 424 F.3d 677, 682 (7th Cir. 2005).


32 Id.

34 See ARIZ. CONST. art. XI, § 1(A).

35 See id.; see also WIS. CONST. art. X, § 3.

36 919 So. 2d 392, 400 (2006), cited in Saiger, supra note 33, at 928.

37 Bush, 919 So. 2d at 400 (2006), cited in Saiger, supra note 33, at 928.

38 Id., cited in Saiger, supra note 33, at 928-29.

39 It seems that Florida construed the constitutional language describing a duty to provide “uniform, high quality system of free public education” as prohibiting other state-funded options. Id., cited in Saiger, supra note 33, at 929.

40 Saiger, supra note 33, at 961.

41 GLEASON ET AL., supra note 1, at 1.


43 Id.

44 See Shuttering Bad Charter Schools, supra note 23.

45 See GLEASON ET AL., supra note 1, at 1-2.

46 See Saiger, supra note 33, at 963.

47 “[C]harter schools were d]esigned at least in some measure to experiment with this conventional way of establishing and operating schools….,” Mead, supra note 2, at 351.
RULES OF ATTRACTION: RETHINKING PARENT-DRIVEN DEMAND
AND THE CHARTER SCHOOL MARKET

INTRODUCTION

In recent decades, state and local governments have embraced the charter school movement as a potential solution to the perceived failings of the public school system in the United States. Proponents argue that, unencumbered by government regulation and subject to free market competition, charter schools will outperform traditional public schools academically while reversing the trend of economic stratification and racial segregation. Unfortunately, these benefits have yet to materialize: studies reveal that, on average, charter schools have a negligible effect on student performance and are also more racially segregated than traditional public schools.

This comment will argue that the free market approach to school choice rests on flawed assumptions about the relationship between parent-driven demand and the traditional objectives of public education. These flawed assumptions may be a significant factor in the disappointing performance of charter schools to date. Because the desires of many parents are, at best, tangential to the macro objectives of publicly-funded schooling, policymakers should ensure that charter schools remain committed to pursuing traditional objectives, rather than allow charter schools to redefine those objectives in their own self-interest.

I. TRADITIONAL OBJECTIVES OF PUBLIC EDUCATION AND THE PROMISE OF SCHOOL CHOICE

Public education in the United States supports the fundamental goal of a “stable and democratic society” in a variety of ways. Academic development in areas such as reading, math
and science is the most visible for several reasons. A more educated student body leads to a more competent workforce and a more competitive, productive economy.\textsuperscript{8} Widespread academic enrichment also supports better social and political leadership.\textsuperscript{9} Furthermore, the academic aspect of public education may attract the lion’s share of attention because it can be easily measured and evaluated empirically.\textsuperscript{10}

Public schooling also aims to contribute to a stable and democratic society in some less tangible ways. By uniting students from various segments of the community, public schools promote harmony, affinity and respect for diversity.\textsuperscript{11} By indoctrinating students with state-approved curricula, public schools foster democratic values, the principles of ethics and a sense of national history and identity.\textsuperscript{12}

Members of the charter school movement, however, feel that traditional public schools have failed to realize their potential; they cite substandard tests scores, growing stratification and pervasive racial and economic segregation as reasons for advocating for a fundamental shift in the administrative structure of the public school system.\textsuperscript{13} Proponents of charter schools believe that free market competition will lead to input-based efficiency and output-based accountability among charter schools.\textsuperscript{14} Unencumbered by the bureaucratic red tape that has stunted the development of public schools, charters have the flexibility to tailor their offering to the needs of students.\textsuperscript{15} Those that meet parent-driven demand will thrive, while those that do not will lose enrollment and ultimately vanish.

However, since charter schools necessarily divert enrollment and funding from traditional public schools,\textsuperscript{16} it is critical to establish whether their benefits actually outweigh their costs.
II. FUNDAMENTAL INCONSISTENCY OF THE MARKET-BASED APPROACH

As framed by charter school proponents, the superiority of the free market approach in delivering efficiency and accountability is difficult to deny. But efficiency is relative: a system that uses $X$ resources to produce $Y$ product is only efficient to the extent that $Y$ is of value to the end user. Similarly, the fact that charter schools may meet the demands of parents more efficiently does not necessarily mean that they meet the demands of the public more efficiently as a whole. Furthermore, when proponents of the charter system espouse an increase in accountability, the appropriate response should be, “accountability to whom?”

John Morely’s note on the “agency costs approach” to education represents a stark example of pro-charter logic. Morley asserts that the “idiosyncratic” offerings of some charter schools, “improve efficiency by allowing parents and students… to derive more satisfaction from the same level of government spending.” Morley implicitly assumes that the primary objective of public education is parent and student satisfaction, regardless of academic enrichment or civic development. His rejection of a society-focused evaluation of efficiency in favor of a parent-focused evaluation is not, however, intuitive.

Public school systems are supported by all taxpayers, regardless of whether those taxpayers have children or choose to send their children to public schools. And while every state has adopted a constitutionally grounded commitment to educate its citizens, the provision of state-subsidized education for all, regardless of financial need, is not a foregone conclusion. The community decision to support the cost public schools incidentally confers a benefit on the individual in order to promote a broader, positive externality: a more “stable, democratic society” for all. A publicly funded school’s efficiency, therefore, should be measured by its
ability to bestow broad benefits on the public, rather than narrow benefits on the student or parent.

III. CONSEQUENCES OF PARENT-DRIVEN DEMAND

While it is possible that the parents who desire the traditional objectives of public schooling so substantially outnumber parents with tangential desires that the market will only support charter schools dedicated to achieving traditional ends, John Hechinger’s article on the Minneapolis public school system\(^\text{25}\) indicates otherwise. Minneapolis’s school system has spawned an assortment of charter schools dedicated to serving the needs of particular ethnic groups.\(^\text{26}\) These schools focus their curricula on culture-specific topics; some even teach the bulk of their classes in the native language.\(^\text{27}\) So while these charter schools are technically open to all, they naturally attract a racially and culturally homogenous student body.\(^\text{28}\) Even if these institutions were to outperform similarly situated public schools academically (they allegedly do not\(^\text{29}\)), it is difficult to see how they promote social harmony, respect for diversity, or a common sense of national identity.

Ethnocentric schooling is not the only possible side effect of a free market approach: a variety of imaginable offerings unrelated to the traditional goals of public education have the potential to meet parent-driven demand.\(^\text{30}\) For example, a charter school might attract working parents by simply offering a substantially longer school day, dedicating resources to daycare rather than teaching. Other parents may be attracted to a school that minimizes classroom time in favor of intensive training for team sports seen as lucrative at the professional level, even when the odds of actually “going pro” are astronomically slim. This dynamic may be exacerbated by the presence of for-profit educational management organizations.\(^\text{31}\)
The controversial issues raised in *Zelman v. Simmons-Harris*\(^3^2\) add a new dimension to the dangers of unregulated charter markets, even when parents are not pursuing idiosyncratic objectives. Charter schools operated by organizations representing particular interest groups may supplement charter revenues with their own outside revenue streams,\(^3^3\) thereby gaining a competitive advantage over schools. Having acquired a captive student-audience with the help of public funds, these organizations would be free to promote their own biased philosophical agendas.\(^3^4\) This represents a very different, but equally concerning, vulnerability inherent to the charter school market.

### III. Recalibrating Market Forces for Optimal Efficiency

Despite the inherent risks, policymakers need not forsake the charter school movement altogether. Contrary to the all-or-nothing conception advanced by some charter school proponents,\(^3^5\) the optimal solution to the public school problem may lie somewhere between oppressive bureaucracy and total *laissez-faire*. The key is to identify which aspects of public education society is willing to forgo for the possibility of a more effectual school system.

Policymakers should acknowledge that parent-driven demand is an imperfect proxy for the needs of the general public. If charter school offerings can be appropriately constrained to serve the traditional, civic-minded objectives of publicly funded schooling, the power of parent choice can be safely unharnessed to promote efficiency and accountability. When academic goals and cultural doctrine are held constant, and idiosyncratic agendas excluded, charter schools will remain free to compete for enrollment by applying a variety of teaching methods, organizational structures and fiscal strategies\(^3^6\) to the pursuit of common academic objectives.
The “choice” in school choice should be about how schools achieve common objectives, not what objectives they aim to achieve.

CONCLUSION

Policymakers weighing the net benefits of charter schools should clearly articulate the objectives of their educational policies. If parent satisfaction is the sole objective, then so be it. But if charter schools are part of a strategy to promote the traditional goals of public education by progressive means, then charter school legislation should be structured to foster innovation without sacrificing social utility. Similarly, courts interpreting charter laws should construe them narrowly, absent an unambiguous authorization of sectarian, ethnocentric or otherwise idiosyncratic charter institutions. Finally, charter review commissions should consist of strong, independent review panels that enforce clear revocation criteria.37

At the very least, enforcing common educational objectives will facilitate comparison and lend insight into the disappointing performance of traditional public schools and charter schools alike. Ideally, though, a recalibration of market forces will help charter schools in the United States transcend a legacy of subpar academic performance and deepening segregation.

Word Count: XXXXX

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2 John Morely, Note, For-Profit and Nonprofit Charter Schools: An Agency Costs Approach, 115 YALE L.J. 1782, 1817 (2006) (“[C]harter schools may produce value by creating gains on widely agreed upon standard measures of success because charters have both the regulatory freedom and the incentive to innovate.”).


6 See generally id. (reporting on a variety of ethnocentric charter schools chosen by parents in Minneapolis).


8 See id. at 126.

9 See id.

10 See, e.g., Gleason et al., supra note 4 (comparing test scores of charter school lottery winners with lottery losers).


12 See O’Brien & Woodrum, supra note 11.

13 See Ryan & Heise, supra note 3, at 2045.

14 Morley, supra note 2, at 1817.


18 Morley, supra note 2.

19 Id. at 1816.

20 Id. (“Even if distinctive curricula do not improve students’ performance on standardized tests, they make parents and students happier and more satisfied with schools.”).

21 See Richmond, supra note 1, at 338.


23 See Friedman, supra note 7, at 125 (“If the financial burden [of childhood education] could readily be met by the great bulk of the families in a community, it might be both feasible and desirable to require the parents to meet the cost directly.”).

24 Id. at 124–27 (describing the role of government with regard to “neighborhood effects”).

25 Hechinger, supra note 5.

26 Id.

27 Id.

28 Id.

29 Id.

30 See Gillian E. Metzger, Privatization as Delegation, 103 Colum. L. Rev. 1367, 1391 (2003) (arguing that parent and student empowerment could lead to public funding for agendas the public has refused to support).

31 See id. at 1389 (emphasizing that charter schools operated by for-profit companies are largely free of the rules governing traditional public schools).

32 Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (holding that students may redeem publicly funded vouchers at religious schools, so long as the choice is “genuine and independent”), discussed in Saiger, supra note 16.

33 See Morely, supra note 2, at 1815 (observing that schools may attract donations outside of public funding).
34 Saiger argues that the Zelman Court, “would presumably have rejected a voucher program that allowed parents to choose between free attendance at a public school ‘among the worst performing ... in the Nation’ and free attendance, by means of a state-funded voucher, in a single, academically top-notch but pervasively sectarian private academy.” Saiger, supra note 16, at 946 (alteration in original) (quoting Zelman, 536 U.S. 639). This does not, however, foreclose the possibility of a secular, though equally partisan, school succeeding in the context of a charter system under similar circumstances. It also does not foreclose religious or secular schools from taking advantage of a similar dynamics when the situation is less extreme.

35 See Id. at 962 (arguing that market institutions are preferable to “district-based, stratified, and low-quality educational monopolies”).

36 See Huffman, supra note 22, at 1296 (describing the ways in which charter schools typically differ from traditional public schools).

37 See Editorial, supra note 15 (describing charter review panels in many states as weak and inefficient).
**AN ACTION-PACKED CONTROVERSY: STATE ACTION AND EQUAL PROTECTION IN THE CHARTER SCHOOL CONTEXT**

**INTRODUCTION**

Schools today are more segregated than schools a generation ago,¹ and they’re becoming more so.² In no small part, this trend derives from the rise of highly segregated public charter schools.³

Given the reality of resegregation across all types of public schools, some scholars and activists have embraced charter schools despite their often monolithic racial composition, in the hope that these new schools will improve educational outcomes for students of all backgrounds.⁴ But in the debate over charter schools, more is at stake than students’ test scores. As important as those are, more important is the Court’s sixty-year commitment to the proposition that racially segregated schools can never be equal.⁵ It can be argued that recent Supreme Court decisions have not kept faith with that proposition,⁶ but if charter schools are not found to be state actors, they may not be bound by the Court’s Fourteenth Amendment precedent at all.⁷

Charter schools are a legal hybrid: publicly authorized and funded but often privately run.⁸ Courts have yet to figure out exactly what to make of them.⁹ How they are eventually defined – as state actors or private entities – will have enormous implications for students’ equal protection rights.

If those rights are to be defended, and charter school segregation to be challenged, some culpable state actor must be identified. The first part of this comment explores whether charter schools are likely to be considered state actors for the purposes of equal protection. The second part argues that chartering entities are state actors, and that discriminatory chartering decisions may be challenged as state action. The third part evaluates the applicability of equal protection doctrine to chartering decisions.
I. Charter Schools’ Status Is Unsettled

The question of whether charter schools may be considered state actors for the purposes of the Fourteenth Amendment is unsettled.\(^\text{10}\) Although courts have often found charter schools to be state actors for various purposes, there is no consensus on the matter.\(^\text{11}\)

Two Supreme Court cases suggest that it is unlikely that courts will wholly embrace charter schools as state actors for constitutional purposes. In *Rendell-Baker v. Kohn*, the Court held that a private school operating almost entirely on public funds would not be considered a state actor.\(^\text{12}\) Because the provision of education was not “traditionally the exclusive prerogative of the state,” the court determined that the provision of education, even with public funds, did not of itself constitute state action.\(^\text{13}\)

Although that decision predated the charter school movement,\(^\text{14}\) a recent attempt to distinguish *Rendell-Baker*’s holding was rejected by the Ninth Circuit, which found that the provision of “public education services” by a charter school was indistinguishable from the provision of “education services” by the *Rendell-Baker* private school, and would not of itself render a charter school a state actor for all purposes.\(^\text{15}\) The First Circuit has similarly reiterated the Court’s holding in *Rendell-Baker*, finding that a private school which contracted with the state to serve as the sole provider of public education for high school students was not a state actor and was, consequently, not subject to the Fourteenth Amendment.\(^\text{16}\)

Counterintuitively, some scholars have suggested that a judicial finding that charter schools are not state actors for the purposes of equal protection analysis might in fact serve the cause of diversity.\(^\text{17}\) Given recent Supreme Court decisions forbidding schools from taking race into account for the purpose of increasing diversity, the argument goes, characterizing charter
schools as non-state actors for the purposes of the Fourteenth Amendment might actually free schools to take steps to boost diversity that traditional schools could not.\textsuperscript{18}

There are two problems with this argument. First, there is no evidence that charter schools \textit{are} taking additional steps to increase diversity. To the contrary, charter schools are \textit{less} diverse than traditional public schools.\textsuperscript{19} Second, characterizing charter schools as non-state actors would deprive students of remedies against discriminatory school policies and actions.\textsuperscript{20}

\section*{II.

\textsc{Chartering Entities Are State Actors}}

Regardless of whether charter schools are found to be state actors, chartering entities – persons and organizations with the power to approve applications for new charter schools, oversee existing charter schools, and close failing charter schools – should be considered state actors.

Often, chartering entities are explicitly and exclusively governmental bodies.\textsuperscript{21} Indeed, a majority of states grant chartering power only to government authorities.\textsuperscript{22} Model legislation also suggests that elected or appointed state or local officials should have the exclusive power to approve and oversee charter schools.\textsuperscript{23} However, some states have granted chartering authority to a wider variety of entities.\textsuperscript{24} For example, Minnesota grants chartering authority to certain charitable organizations.\textsuperscript{25} Although not themselves government authorities, these and all other chartering entities should be considered state actors.

There are four primary tests for determining whether an entity is functioning as a state actor: the “close nexus” test,\textsuperscript{26} the government coercion test,\textsuperscript{27} the public function test,\textsuperscript{28} and the “entwinement” test.\textsuperscript{29} By any of these tests, chartering entities undertake state action when making chartering decisions. Chartering decisions are made only following state authorization
and in compliance with state regulation.\textsuperscript{30} Decisions with regard to the management of public schools, including the opening and closing of public schools, have historically been made exclusively by state or local government entities.\textsuperscript{31} And public officials are often intimately involved in chartering decisions, either as members of charter granting entities or as charter petitioners.\textsuperscript{32}

The designation of chartering entities as state actors is critical. As state actors, they may be held accountable under the Fourteenth Amendment’s Equal Protection Clause and similar state constitutional clauses for any chartering decision that is found to violate the guarantees of those clauses. That accountability is even more important if charter schools are not also found to be state actors, ensuring that the rights of charter school students are no less protected than the rights of traditional public school students.

III. APPLYING EQUAL PROTECTION TO CHARTERING DECISIONS

Some scholars have raised the possibility that individual choice may be an adequate protection against equal protection violations in the charter school context – if a school operates in a discriminatory manner, it is suggested, students may simply choose to attend classes elsewhere.\textsuperscript{33} However, significant barriers exist to real freedom of choice in the school context.\textsuperscript{34}

Further, the most significant equal protection violations may result from students’ inability to opt into charter schools in the first place. Statistics indicate that minority or low-income students may not have access to charter schools in some states.\textsuperscript{35} Elsewhere, charter schools overall may be accessible to students of diverse ethnic backgrounds, but individual schools may be highly segregated.\textsuperscript{36}
Limitations on student choice and racial or ethnic school segregation may result from the types of schools chartered, schools’ enrollment policies, and the nuts-and-bolts requirements of attendance. Equal protection challenges to chartering entities’ decisions in such matters will be evaluated in accordance with rational basis review or strict scrutiny.

A suit based on the Fourteenth Amendment is unlikely to succeed unless plaintiffs are able to convince the court to apply strict scrutiny to the alleged discriminatory action. And, unfortunately, federal courts have been generally unwilling to apply strict scrutiny to school cases in recent years. But characterizing chartering entities as state actors preserves the ability of students and parents to challenge discriminatory decisions and segregated schools if federal courts become more amenable to such challenges in the future.

Further, the characterization of chartering entities as state actors lays the groundwork not only for suits based on the Fourteenth Amendment, but also for suits based on students’ state constitutional rights to equal protection and education. If plaintiffs can show that a right to “equal access to public education” can be found in the state constitution and that low-income or minority students are unable to access charter schools because of the types of schools and school policies approved by the chartering entity, then the chartering entity’s decisions may be found to violate the state constitution.

CONCLUSION

Today, more than two-thirds of states have passed legislation enabling the creation and funding of public charter schools. More than 1.5 million children attend more than 5000 charter schools across the country. Those schools are hailed for their flexibility and ability to innovate, but charter schools’ freedom from regulation could also result in public funds being used to support “educational agendas” that lack public support.
unequal opportunities for students, and when they are embodied in schools’ charter petitions, students and parents may hold chartering entities accountable as state actors, ensuring that their most basic state and federal constitutional rights are protected.

WORD COUNT: 1428

1 Matthew D. Lynch, Why Charter Schools in Mississippi are a Good Idea, HUFFINGTON POST (Feb. 27, 2012, 2:44 PM), http://www.huffingtonpost.com/matthew-lynch-edd/mississippi-charter-schools_b_1300751.html (“Black and Hispanic Students tend to be concentrated in schools where they make up almost the entire body. . . . [T]he percentage of black students in majority white schools has decreased to a level lower than in any year since 1968.”).


3 Id. (“[S]egregation is growing because of charter schools . . . . Charter schools are more segregated than traditional public schools, according to a 2010 report by the Civil Rights Project . . . .”); see also Lucinda Rosenfeld, Op-Ed., How Charter Schools Can Hurt, NEW YORK TIMES, Mar. 17, 2012, http://www.nytimes.com/2012/03/17/opinion/how-charter-schools-can-hurt.html (explaining how charter schools soliciting students from urban schools can also drain traditional school of diversity by creating a “snowball effect” whereby the departure of one middle-class student from a traditional public school for a charter school can beget another).

4 See, e.g., Hechinger, supra note 2 (noting support for charter schools serving particular ethnic communities among certain educational leaders); Benjamin Siracusa Hillman, Note, Is There a Place for Religious Charter School?, 118 YALE L.J. 554, 589 (2008) (suggesting that charter schools catering to minority communities “improve[] democracy by incorporating previously marginalized groups into the political system”); Lynch, supra note 1 (opining that the “ship has sailed” with regard to resegregation and supporting the expansion of charter schools).

5 See Hechinger, supra note 2 (noting that it has been sixty years since the Supreme Court held “separate but equal,” race-segregated schools to be unconstitutional).


7 See Alyssa M. Simon, Student Diversity and Charter Schools: A State Action Problem?, 10 CONN. PUB. INT. L.J. 399, 422 (pointing out that the Fourteenth Amendment is thought apply solely to state actors).

8 N.Y. Charter Sch. Ass’n v. Smith, 15 N.Y.3d 403, 409-10 (2010) (“[C]harter schools possess some characteristics similar to a public entity. . . . At the same time, however, charter schools are not governed by appointees of the government, but by a self-selecting board of trustees . . . .”).

9 Id. at 410 (“[T]he status of charter schools has often been difficult to define because they may not be easily identified as either a purely private or public entity.”).
At least one scholar believes that “a very strong case” can be made that charter schools are state actors. Gillian E. Metzger, Privatization as Delegation, 103 COLUM. L. REV. 1367, 1495 (2003). But the point has also been made that charter schools “push the boundaries” of the concept of a public institution. Julie Mead, Devilish Details: Exploring Details of Charter Schools that Blur the Public/Private Divide, 40 HARV. J. ON LEGIS. 349, 351.

Simon, supra note 7, at 426.

Id. at 424 (construing Rendell-Baker v. Kohn, 457 U.S. 830 (1982)).

Id. This decision is an example of the Court’s application of the public function test for state action. See infra note 27 (describing the public function test).

The first charter school law was not enacted until 1991, nine years after the Rendell-Baker decision. Sharon Davis Gratto, Arts Education in Alternative School Formats, ARTS EDUC. POL’Y REV., June 2002, at 17, 18.

Caviness v. Horizon Cmty. Learning Ctr., 590 F.3d 806, 814-15 (9th Cir 2010). However, the Court’s holding in Caviness was restricted to the question of whether a charter school would be considered a state actor for the purposes of an employment discrimination suit; it left open the question whether the charter school might be considered a state actor with regard to its decisions regarding enrollment, admissions, and other policies directly affecting student. Id. at 814.

Simon, supra note 7, at 424 (construing Logiodice v. Trustees of Me. Cent. Inst., 296 F.3d 22 (1st Cir. 2001)).

Id. at 422-23.

Id.

See Hechinger, supra note 2.

For example, “[42 U.S.C. § 1983] provides remedies for deprivations of rights under the Constitution and laws of the United States when the deprivation takes place under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.” Caviness, 590 F.3d at 813. However, the law “excludes from its reach merely private conduct, no matter how discriminatory or wrongful.” Id. (internal quotation marks omitted).

See, e.g., IOWA CODE ANN. § 256F.3 (West 2011) (requiring that applications for the conversion of a traditional school into a charter school be submitted to local school boards).

Mead, supra note 10, at 353 (“The majority of states only grant chartering authority to the state educational agency and either local school districts independently or local districts in combination with other districts.”).


Mead, supra note 10, at 353 (noting that certain states have authorized colleges and universities and charitable organizations to grant charters, in addition to more traditional public entities and officials).

MINN. STAT. ANN. § 124D.10(3)(b) (West 2010).

Simon, supra note 7, at 423 (describing the “close nexus” test as requiring “a ‘close nexus’ between state regulation and the challenged action”).

Id. at 423-24 (describing the government coercion test as requiring that the state have “exercised some coercive power over the entity’s decision-making process such that the action can be deemed to be that of the state”).
Charter schools are created through state legislation, and chartering authority is legislatively bounded – the number of charters and the application process are often prescribed by statute. Kevin S. Huffman, *Charter Schools, Equal Protection Litigation, and the New School Reform Movement*, 73 N.Y.U. L. Rev. 1290, 1294 (1998). See also, *e.g.*, NEXT GENERATION CHARTER SCHOOLS ACT § 4 (Am. Legislative Exch. Council), in CTR. FOR EDUC. REFORM, CHARTER SCHOOL LAWS ACROSS THE STATES: RANKINGS AND SCORECARD 80-81 (Jeanne Allen et al. eds., 11th ed. 2010) (“Each charter authorizer must establish a charter petition process and timeline that conform to the requirements of the Charter School Act while optimizing effective review of its proposed charter schools and oversight of its approved charter schools.”). Further, charter authorizers themselves must, in some states, apply for state recognition and receive approval as a chartering entity before chartering schools. MINN. STAT. ANN. § 124D.10(3)(c) (West 2010).

Government officials are likely to be involved in making chartering decisions. Mead, *supra* note 10, at 353-54. Alternatively, government officials may be involved in determining which entities will be granted chartering authority. *E.g.*, MINN. STAT. ANN. § 124D.10(3)(c) (West 2010). In addition, certain government officials, including public school principals and teachers may be explicitly authorized to petition a chartering entity to open a charter school. *E.g.*, IOWA CODE ANN. § 256F.3 (West 2011).

See Metzger, *supra* note 10, at 1497.

The only alternative may be traditional failing schools. *Id.* at 1497-98. In addition, students may be unable to transfer schools during the school year. *Id.* at 1391.

Charter schools in Georgia and Colorado, for example, serve a lower percentage of African American and low-income students than traditional public schools. Huffman, *supra* note 30, at 1299.

An overview of Minnesota charters includes Dugsi Academy (catering to East Africans), Hmong College Prep Academy (99 percent Asian-American), and Academia Cesar Chavez School (93 percent Hispanic). Hechinger, *supra* note 2.

For example, Twin Cities German Immersion School in St. Paul, Minnesota, suggests that students should be fluent in German before enrolling, unless they enter in their earliest years of schools. In part as a result, far fewer low-income students enroll there than in the city’s traditional public schools. *See id.*

For example, some charter schools require would-be students and parents to sign “contracts” whereby they agree to donate time or perform tasks in order to secure admission. Obviously, such contracts reward parents and families with spare time to give. See Huffman, *supra* note 30, at 1300.

For example, some charter schools do not provide busses for students, requiring families to provide their own transportation to and from school. Hechinger, *supra* note 2 (noting one state legislator’s view that lack of transportation prevents low-income students from attending charters that do not provide bus transportation).
41 Id. at 1315.

42 See id.

43 For example, the Supreme Court might one day recognize a fundamental right to education, triggering strict scrutiny review. See id. at 1312. Although the Court in San Antonio Independent School District v. Rodriguez found no constitutional right to education, id. at 1311-12 (construing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)), that decision predates not only the charter school movement but also forty years of Court precedent, during which time the Court has identified a number of fundamental rights not previously protected by the federal courts. Given that all fifty state constitutions contain education clauses and that a number of states have recognized a fundamental right to education, id. at 1315, the Supreme Court might someday revisit its Rodriguez precedent.

44 See id. at 1312.

45 See id. at 1320-21.

46 Gratto, supra note 14.


48 Metzger, supra note 10, at 1391.