NOTES

THE FIRST RELIGIOUS CHARTER SCHOOL: A VIABLE OPTION FOR SCHOOL CHOICE OR PROHIBITED UNDER THE STATE ACTION DOCTRINE AND RELIGION CLAUSES?

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After the First Amendment's Religion Clauses were ratified, church and state became increasingly divorced from one another, as practicing religion became a private activity on which the government could not encroach. This separation, however, was slow, and much credit is owed to the U.S. Supreme Court for its efforts to disentangle the two. One particular area in which the Supreme Court exercised its influence was the U.S. education system; the Court invoked the Religion Clauses and neutrality principles to rid public schools of religious influences and ensure that private religious schools could partake in government programs that were available to all. The Court's efforts, in part, eventually yielded a rise in alternative education opportunities, including charter schools and, more recently, religious charter schools.

This Note examines whether religious charter schools are private or state actors under the state action doctrine and, consequently, whether they are prohibited under the Religion Clauses. This Note argues that charter schools, generally, cannot be categorized as either private or public actors; rather, particular practices and characteristics of a charter school can be deemed state action such that the school must comply with the Religion Clauses' demands. This Note analyzes these instances, focusing on the Court's jurisprudence regarding religious curricula, teacher-led prayer, government funding, and religious symbols. Ultimately, this Note concludes that the most identifying feature of a religious charter school—its religious curriculum—cannot be considered state action and, thus, religious charter schools are permissible and beneficial additions to school choice.

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INTRODUCTION

> Deciding where religion ends and government begins has never been easy or straightforward. Yet Americans are committed to the protection of religious freedom. After all, the First Amendment to the United States Constitution opens with the importance of religion: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1]

On June 5, 2023, the Oklahoma Statewide Virtual Charter School Board made history by approving the first religious charter school in the United States[2]: St. Isidore of Seville Catholic Virtual School.[3] Oklahoma's State Superintendent of Public Instruction, Ryan Walters, took to X (formerly known as Twitter) the following day to report the approval and express his satisfaction with the decision.[4] Superintendent Walters cited religious freedom as an important reason for, and used American history to support, the approval.[5] He stated, "It is incredibly important that our religious institutions—our churches—aren't oppressed by government and are given the freedom to grow and exercise their faith and their religious beliefs. . . . As a matter of fact, it was churches that started the first schools in the country."[6] Superintendent Walters further declared that "freedom of school choice" is critical to ensure "the best options are available for every child" and to improve education offered in the state.[7]

Despite Superintendent Walters's joy, many others expressed their disagreement with the board's decision,[8] which was the result of a narrow three-to-two vote.[9] Chairman of the board Robert Franklin, for example,

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1. SARAH BARRINGER GORDON, THE SPIRIT OF THE LAW 1 (2010) (citing U.S. CONST. amend. I).

2. Religious charter schools are "charter schools that are religious in the same way that private faith-based schools are religious: they teach religion as the *truth*." NICOLE STELLE GARNETT, RELIGIOUS CHARTER SCHOOLS: LEGALLY PERMISSIBLE?: CONSTITUTIONALLY REQUIRED? 6 (2020), https://media4.manhattan-institute.org/sites/default/files/religious-charter-schools-legally-permissible-NSG.pdf [https://perma.cc/XZJ3-4V8C].

3. Rick Hess, Opinion, *Oklahoma Has Approved the Nation's First Religious Charter School. What's That Mean?*, EDUCATIONWEEK (June 7, 2023), https://www.edweek.org/policy-politics/opinion-oklahoma-has-approved-the-nations-first-religious-charter-school-whats-that-mean/2023/06 [https://perma.cc/U9U7-NGBS].

4. @RyanWaltersSupt, X (June 6, 2023, 11:43 AM), https://twitter.com/RyanWaltersSupt/status/1666108515377721344 [https://perma.cc/EX3M-NBFZ].

5. *See id.*

6. *Id.*

7. *Id.*

8. Tyler Kingkade, *How Oklahoma's Schools Superintendent Became the State's Top Culture Warrior*, NBC NEWS (Aug. 23, 2023, 9:01 AM), https://www.nbcnews.com/news/us-news/ryan-walters-oklahoma-schools-superintendent-tulsa-rcna101235 [https://perma.cc/D98G-PVKY].

9. Katie Arata, *Oklahoma Virtual Charter School Board Approves Nation's First Religious Charter School*, KOKH FOX 25 (June 5, 2023, 5:55 PM), https://okcfox.com/news/local/oklahoma-virtual-charter-school-board-approves-nations-first-religious-charter-school-the-catholic-archdiocese-public-school-constitutional-debate-governor-kevin-stitt-

believed that the decision violated the state constitution.[10] Americans United for Separation of Church and State, together with a group of Oklahoma "parents, clergy[,] and education activists," filed a lawsuit requesting that the Oklahoma state court bar the board's action.[11] Those against sanctioning the school believe, unlike Superintendent Walters, that the school inhibits and threatens religious freedom.[12] In response to this lawsuit, Superintendent Walters posted a statement: "Oklahomans hold their faith and liberty sacred, and atheism should not be the state-sponsored religion. . . . We will never back down."[13]

Although the Oklahoma religious charter school is the first of its kind in the nation, the conflict over state-sponsored religion and the true meaning of religious freedom is a deeply rooted issue, originating in the colonial era.[14] During that period,[15] many of the first settlers in the now–United States sought refuge from religious persecution in Europe under laws and government that were deeply intertwined with churches and religious support.[16] Though they sought religious freedom, it was not religious freedom that they enforced on arrival; in the colonies, those who did not comply with the local beliefs of a town's religion were physically persecuted and often exiled.[17] These practices eventually "shock[ed] the freedom-loving colonials into a feeling of abhorrence," sparking efforts to secure true religious liberty for all individuals.[18]

In the following founding era,[19] Thomas Jefferson and James Madison joined forces to disentangle religion and government and to guarantee

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state-superintendent-ryan-walters-attorney-general-gentner-drummond-church-and-state [https://perma.cc/63TF-WKW9].

10. Andrea Eger, *Board Chair Refuses to Sign Controversial Catholic Charter School Contract*, TULSA WORLD (Oct. 16, 2023), https://tulsaworld.com/news/state-regional/education/board-chair-refuses-to-sign-controversial-catholic-charter-school-contract/article_af7ba4a4-69f5-11ee-8d38-b37a77666204.html [https://perma.cc/7V83-LNGK].

11. Moriah Balingit, *Lawsuit Aims to Halt the Opening of Nation's First Religious Charter School*, WASH. POST (July 31, 2023, 4:34 PM), https://www.washingtonpost.com/education/2023/07/31/lawsuit-oklahoma-st-isidore-charter-school/ [https://perma.cc/7AQK-98VD].

12. *See id.*

13. @RyanWaltersSupt, X (Oct. 20, 2023, 7:05 PM), https://twitter.com/RyanWaltersSupt/status/1715504464033902713/photo/1 [https://perma.cc/4H7N-9PS7].

14. *See* Everson v. Bd. of Educ., 330 U.S. 1, 8–9 (1947).

15. For the purposes of this Note, the colonial era refers to the period when Europeans began sailing over to and establishing the New England colonies, up until the founding era when the Revolutionary War took place.

16. Brad J. Davidson, Comment, *Balancing Parental Choice, State Interest, and the Establishment Clause: Constitutional Guidelines for States' School-Choice Legislation*, 33 TEX. TECH L. REV. 435, 452 (2002).

17. *See id.*; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1422–24 (1990).

18. *Everson*, 330 U.S. at 11.

19. For the purposes of this Note, the founding era refers to the period beginning with the Revolutionary War—when the colonists declared their independence from England—up to and including the ratification of the First Amendment by the states in 1791.

religious freedom to *all* citizens, regardless of religion.[20] Their efforts yielded the First Amendment, in which the first two clauses—commonly referred to as the Religion Clauses[21]—provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[22] One of Jefferson's primary concerns in his efforts to separate church and state was the sectarian schools[23] of the colonies.[24] He advocated for nonsectarian public schools that would neither teach religious doctrine nor engage in religious exercise.[25]

Although Jefferson's efforts failed,[26] his ideas resurfaced in the 1830s when Horace Mann advocated for nonsectarian public schools in Massachusetts.[27] Faced with opposition from Christian sectarian groups, such schools resorted to teaching mainstream Protestantism,[28] as opposed to sectarianism.[29] This caused a conflict between Protestants and Catholics, leaving Catholics to resort to private parochial schools[30] or to seek opportunities for publicly funded religious schools.[31] Consequently, throughout the nineteenth century, several states passed legislation prohibiting religious instruction in public schools, restricting state aid for religious schools, and enforcing compulsory attendance at public schools.[32] Although the U.S. Supreme Court originally assumed that it had no

20. *See* Reynolds v. United States, 98 U.S. 145, 163–64 (1878).

21. *See, e.g.*, Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 668 (1970). The Religion Clauses are the Establishment Clause and Free Exercise Clause of the First Amendment. *See id.*

22. U.S. CONST. amend. I. The first clause is the Establishment Clause, and the latter is the Free Exercise Clause.

23. Sectarian schools are schools that enforce the principles of a particular religion or belief system and teach academics through the lens of that faith. *Types of Sectarian Schools*, EDUCATIONBUG, https://www.educationbug.org/a/secular-vs--sectarian-schools.html [https://perma.cc/Y229-HJT6] (last visited Mar. 3, 2024).

24. James E. Wood, Jr., *Religion and the Public Schools*, 1986 BYU L. REV. 349, 351.

25. *See id.*

26. *See infra* note 86 and accompanying text.

27. *See infra* notes 100–01 and accompanying text.

28. *See infra* notes 102–04 and accompanying text.

29. The term sectarianism refers to a particular set of denominational views within a faith or religion. *What Is Sectarianism?*, NIL BY MOUTH, https://www.nilbymouth.org/what-is-sectarianism [https://perma.cc/56BN-FSX6] (last visited Mar. 3, 2024). For example, Lutheranism and Presbyterianism are both sects of Protestantism. *Appendix B: Classification of Protestant Denominations*, PEW RSCH. CTR. (May 12, 2015), https://www.pewresearch.org/religion/2015/05/12/appendix-b-classification-of-protestant-denominations/ [https://perma.cc/EBY4-AJWX]. Similarly, Catholicism and Protestantism are both sects of Christianity. Derek Demars, *A Handy-Dandy Breakdown of Different Christian Denominations*, THEOLOGY PATHFINDER (Sept. 6, 2018), https://derekdemars.com/2018/09/06/a-handy-dandy-breakdown-of-different-christian-denominations/ [https://perma.cc/NDY5-EG5L].

30. A parochial school is a private religious school that is directly associated with, and receives funding primarily from, a religious organization. Robert Kennedy, *Religious Private Schools*, THOUGHTCO. (July 3, 2019), https://www.thoughtco.com/nonsectarian-and-religious-private-schools-2774351 [https://perma.cc/L7JP-56S8].

31. *See infra* notes 107, 109 and accompanying text.

32. *See infra* notes 112–14, 118–20 and accompanying text.

jurisdiction over the states' governance of public education,[33] it eventually stepped in to set boundaries between religion, the state, and education.[34] In these cases, the Religion Clauses were employed by opposing parties to both support and attack the entwinement of religion and education in the United States,[35] just as they are being employed in Oklahoma state court today in the conflict over St. Isidore of Seville Catholic Virtual School.[36]

Beginning around the 1940s, the Supreme Court invoked the Religion Clauses to remove teacher-led prayer and religious curricula from public schools,[37] ensure that religious symbols are not erected on public school property,[38] and give all private schools—including religious ones—equal opportunity to participate in government-funded programs.[39] These cases not only precipitated a long line of Religion Clauses jurisprudence, but also helped induce both religious and nonreligious parents to seek public funding for other educational options for their children.[40] This set the stage, at least in part, for the modern school choice movement, which has manifested in unique education opportunities such as private voucher programs and charter schools.[41]

Charter schools, which are this Note's primary focus, are unique institutions that are publicly funded but, more often than not, run by private organizations.[42] Various scholars have debated whether charter schools are public or private actors under the state action doctrine,[43] which requires that any person or organization acting through, with, or by the state uphold and protect U.S. citizens' constitutional rights and privileges.[44] Thus, if charter schools are state actors, they must comply with the Religion Clauses; however, if they are private, they need not meet those constitutional demands.

State action analysis is very fact-specific,[45] however, and charter schools vary widely from state to state depending on the charters and state laws under which they are established.[46] The Supreme Court has yet to address this issue, and federal and state courts have reached disparate conclusions

33. *See infra* note 130 and accompanying text.
34. *See infra* note 129 and accompanying text; *infra* Parts I.C.2–4.
35. *See infra* Parts I.C.2–4.
36. *See supra* notes 2–13 and accompanying text.
37. *See infra* Part I.C.3.
38. *See infra* Part I.C.4.
39. *See infra* Part I.D.3.
40. *See* Hillel Y. Levin, *Tax Credit Scholarship Programs and the Changing Ecology of Public Education*, 45 ARIZ. ST. L.J. 1033, 1039–40 (2013); *infra* notes 198–207 and accompanying text.
41. *See* Levin, *supra* note 40, at 1041–42.
42. Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1095–96 (2014).
43. Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 VAND. L. REV. 1, 52–53 (2017); *see infra* note 265 and accompanying text.
44. 42 U.S.C. § 1983.
45. *See infra* notes 332, 393 and accompanying text.
46. Garnett, *supra* note 43, at 54–55; *infra* Part II.E.

regarding the label of such schools under the state action doctrine.[47] This Note examines these differing court analyses,[48] the supporting arguments for each side of the debate, and the implications for charter schools that flow from each conclusion, with a narrowed focus on the Religion Clauses.[49]

This Note proceeds in three parts. Part I discusses religion's involvement in and influence over early American life, including—most importantly—the education system; how church-state entanglement in colonial America affected the drafting of the First Amendment; the Religion Clauses' role in untangling the knot between education and religion; and the impact of that process on education in the United States. Part II examines how courts have analyzed and decided whether charter schools are state or private actors under the state action doctrine and the implications of both possible determinations under the Religion Clauses. Part II also addresses the scholarly view that a universal determination of whether charter schools are state actors or not is impracticable and illogical. Part III argues that charter schools cannot be categorically deemed private or state actors, but rather that specific practices and characteristics of charter schools can be classified as or attributed to private or state action. Part III also explains how religious charter schools' distinctive features may violate or comply with the Religion Clauses, focusing on teacher-led prayer, religious curricula, government funding, and religious symbols.

I. THE INTERPLAY BETWEEN RELIGION, THE FIRST AMENDMENT, AND EDUCATION IN THE UNITED STATES

The relationship between church and state that originally existed in the colonies significantly influenced both the Religion Clauses and the U.S. education system. Part I.A discusses the codependency of church and state in American history, which necessitated the Religion Clauses' inclusion in the Bill of Rights to disentangle that relationship. Part I.B describes the ways in which certain groups tried to maintain religion in the American lifestyle by fighting for its inclusion in the developing public education system. Part I.C addresses how several lines of Religion Clauses jurisprudence developed from the intersection of public education, the state, religion, and private schools. Finally, Part I.D considers the school choice movement as a response to growing disapproval of U.S. public schools. Part I.D also discusses the ways in which the Supreme Court has addressed alternative, publicly funded education opportunities in light of the Religion Clauses.

A. The Development of and Need for the Religion Clauses

The Religion Clauses in the Constitution arose during a time of necessity, when the founders believed that religion had become far too influential in

47. *See infra* Part II.A.
48. *See infra* Part II.A.
49. *See infra* Parts II.C–D.

Americans' lives.[50] This influence began when the original settlers arrived in the now–United States to either spread religion or flee religious governance.[51] Part I.A.1 explains how religion came to be a central feature of early American colonial life, focusing on the crossover between religion and education. Part I.A.2 discusses how the founders sought to obtain religious freedom for all citizens, including by purging religion from education, with their efforts yielding the Religion Clauses.

1. Religious Domination over the State in Colonial America

The entanglement of church and state in the United States dates back to the colonial era, when religion was a prominent feature of the social order that "permeate[d]" the emerging colonies.[52] This "symbiotic relationship" between religion and government came from England to the colonies with the earliest settlers.[53] England's established church was the Anglican Church,[54] and the King of England sent voyagers to advance Christianity across waters in the early seventeenth century.[55] These Englishmen were not seeking refuge from corruption or persecution.[56] Soon thereafter, however, Puritans fled England for America, motivated by their disagreement with the religiosity of the Anglican Church and their views on its corruption.[57] The Puritans sailed to the colonies in the hope of establishing a more ideal state that better integrated their Christian views, run by a "[g]overnment both civil and ecclesiastical."[58]

Protestant Christianity became the early colonies' dominant religion, and "colonial churches served as the institutional vehicles of its dissemination,"[59] consistent with the Puritans' desires. Nonetheless, religious pluralism still

50. *See infra* notes 88–95 and accompanying text.

51. *See infra* notes 54–58 and accompanying text.

52. MARK DOUGLAS MCGARVIE, ONE NATION UNDER LAW: AMERICA'S EARLY NATIONAL STRUGGLES TO SEPARATE CHURCH AND STATE 22 (2004).

53. *Id.*

54. RONALD B. FLOWERS, THAT GODLESS COURT?: SUPREME COURT DECISIONS ON CHURCH-STATE RELATIONSHIPS 10 (2005).

55. Robert J. Miller, *The International Law of Colonialism: A Comparative Analysis*, 15 LEWIS & CLARK L. REV. 847, 906–07 (2011); *see also* Robert J. Miller, *Christianity, American Indians, and the Doctrine of Discovery*, *in* REMEMBERING JAMESTOWN: HARD QUESTIONS ABOUT CHRISTIAN MISSION 51, 61 (Amos Yong & Barbara Brown Zikmund eds., 2010). Other factors also motivated England's colonization of America, such as mercantilism and economic profit. Fernando Rey Martinez, *The Religious Character of the American Constitution: Puritanism and Constitutionalism in the United States*, 12 KAN. J.L. & PUB. POL'Y 459, 470 (2003).

56. FLOWERS, *supra* note 54, at 10.

57. *Id.* at 10–11; *see also* Martinez, *supra* note 55, at 467.

58. FLOWERS, *supra* note 54, at 11 (quoting John Winthrop, *A Model of Christian Charity*, *in* 1 H. SHELTON SMITH, ROBERT T. HANDY & LEFFERTS A. LOETSCHER, AMERICAN CHRISTIANITY: AN HISTORICAL INTERPRETATION WITH REPRESENTATIVE DOCUMENTS 100 (1960)).

59. MCGARVIE, *supra* note 52, at 22. According to the Puritans, church and state were "inextricably linked in nature and in function." John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 379 (1996).

existed in the colonies, manifested in the presence of members of various religious sects, including Anglicans, Baptists, Catholics, Jews, Lutherans, and Quakers.[60] This pluralism, though, did not yield a "high degree of toleration among the colonists themselves."[61] Early colonial governments persecuted those who failed to follow the favored local religion.[62] Even colonies that were considered "religious refuges"—Maryland, Pennsylvania, and Rhode Island—used religion to limit individual liberty.[63] Thus, though it may have been the prospect of religious freedom that drove many early settlers from Europe to America, they did not necessarily enforce or encounter religious freedom once there.[64]

Because religion was a major impetus for the American colonies' development,[65] it became intertwined with all aspects of American life.[66] This included education, as "[t]he first educational institutions in this country were all church-related."[67] Education was a means to uphold and affirm the authority of both the governing civic entity and a colony's dominant religion by teaching dedication to civic law and religious principles.[68] In the colonial era, public laws regarding education were meant to "promote knowledge of scriptures, public morals, and good order."[69]

The first law regarding education in America,[70] the Massachusetts Law of 1642,[71] required parents to ensure that their children could read and write to properly understand religious principles and a township's laws.[72] Five years later, the Massachusetts colonial government passed another education law, which ordered every town to appoint someone to teach children how to read and write so that "[l]earning may not be buried in the graves of our

60. *Religion in Colonial America: Trends, Regulations, and Beliefs*, FACING HIST. & OURSELVES (Apr. 28, 2022), https://www.facinghistory.org/resource-library/religion-colonial-america-trends-regulations-beliefs [https://perma.cc/W4LC-YQHZ].

61. MCGARVIE, *supra* note 52, at 25; *see also id.* at 30 ("Religious diversity, however, did not mean acceptance so much as separation . . . .").

62. *See* Everson v. Bd. of Educ., 330 U.S. 1, 8–9 (1947); *see also* Reynolds v. United States, 98 U.S. 145, 162–63 (1878); McConnell, *supra* note 17, at 1422–24 (stating that "dissenters" who did not comply with a colony's religious views were persecuted in various ways, including being jailed, whipped, hanged, and exiled).

63. MCGARVIE, *supra* note 52, at 27–28.

64. Davidson, *supra* note 16, at 452.

65. *See supra* notes 54–58 and accompanying text.

66. *See supra* note 52 and accompanying text.

67. FLOWERS, *supra* note 54, at 69.

68. JOEL SPRING, THE AMERICAN SCHOOL: FROM THE PURITANS TO THE TRUMP ERA 15 (10th ed. 2018); *see also* ROBERT M. HARDAWAY, AMERICA GOES TO SCHOOL: LAW, REFORM, AND CRISIS IN PUBLIC EDUCATION 69 (1995).

69. STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 46 (2000).

70. Wood, *supra* note 24, at 350.

71. *See* 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 1632–1649, at 497 (photo reprt. 2001) (Nathaniel B. Shurtleff ed., Boston, William White Press 1853).

72. *Id.*; Amy L. Matzat, *Massachusetts Education Laws of 1642 and 1647*, UNIV. NOTRE DAME, https://www3.nd.edu/~rbarger/www7/masslaws.html [https://perma.cc/W3Q7-YUPW] (last visited Mar. 3, 2024).

fore-fathers in Church and Commonwealth."[73] Other colonies followed suit by establishing similar legislation requiring towns to set up schools.[74] Thus, education in the colonial era became a tool for the state to use to establish religion and regulate people's practices and beliefs.

2. Freedom and the First Amendment

As the colonial era gave way to the Revolutionary War, religious disputes "took a backseat" to political conflicts.[75] After the Revolution, however, the colonies' official independence from England renewed concerns about the establishment of religion.[76] Unmoored from the monarchy from which they emanated,[77] Americans were in disarray and struggling to create new institutions and societies founded on the freedom in which they were rejoicing.[78] During this transitional period, public opinion regarding the purpose of education shifted; it was no longer meant primarily to "prepare an individual to live a godly life" and ensure that the public could read the Bible and laws.[79] Instead, people began to recognize "the value of learning as a tool for gaining independence, not just for instilling subservience."[80]

In 1779, Thomas Jefferson proposed "A Bill for the More General Diffusion of Knowledge" to the Virginia legislature, which advocated for schools to provide tuition-free education for children for three years.[81] This bill became the first proposal in American history for a comprehensive plan of state-provided public education.[82] Jefferson's proposed schools would teach history, "reading, writing, and common arithmetick [sic]" to every county's youth.[83] He believed that teaching children about religion and the Bible at such a young age was not as important as teaching them about

73. *See* 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 1632–1649, *supra* note 71, at 682; *Old Deluder Satan Law of 1647*, MASS.GOV, https://www.mass.gov/doc/old-deluder-satan-law/download [https://perma.cc/L7TA-QLXC] (last visited Mar. 3, 2024). This was the first compulsory education law. *See* Jeffrey Shulman, *The Parent as (Mere) Educational Trustee: Whose Education Is It, Anyway?*, 89 NEB. L. REV. 290, 318 (2010).

74. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 51 (Francis Bowen ed., Henry Reeve trans., Cambridge, Cambridge Univ. Press 1862) (1850); Shulman, *supra* note 73, at 318.

75. MCGARVIE, *supra* note 52, at 38.

76. *See id.* at 40.

77. HARDAWAY, *supra* note 68, at 69.

78. *Id.* at 70.

79. SPRING, *supra* note 68, at 50.

80. *Id.*

81. *A Bill for the More General Diffusion of Knowledge*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0079 [https://perma.cc/9J59-MXH6] (last visited Mar. 3, 2024); *see also* Ian Bartrum, *The Political Origins of Secular Public Education: The New York School Controversy, 1840–1842*, 3 N.Y.U. J.L. & LIBERTY 267, 273 (2008).

82. *See* Bartrum, *supra* note 81, at 273; Wood, *supra* note 24, at 351.

83. *A Bill for the More General Diffusion of Knowledge*, *supra* note 81; Bartrum, *supra* note 81, at 273–74.

history, geography, grammar, and languages.[84] In this respect, he was very different from his contemporaries.[85] Although Jefferson's bill did not pass,[86] it marked the founding era as a "transition period in educational affairs."[87]

Jefferson's efforts to remove religion from this newly formed society were not contained to education, as he saw the need for a complete separation between church and state in all facets of American public life to restore individual liberty.[88] At Jefferson's urging, James Madison,[89] a fellow framer with similar views on religion,[90] drafted and disseminated a Bill of Rights to the Constitution to protect certain freedoms.[91] Chief among them was the freedom of religion, which barred intrusion by the newly formed government.[92] In 1789, Madison proposed to the First Congress the foundations of what would later be adopted as the Religion Clauses of the First Amendment: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established . . . ."[93] The First Amendment in its final form was approved by both the House of Representatives and Senate that same year and ratified by the states in December of 1791.[94] It begins with the Religion Clauses: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[95] These two clauses would set the Supreme Court on a long path of confusing jurisprudence as it sought to interpret the meaning of "establishment" and to define the scope of "free exercise."[96]

B. Religious Denominational Conflicts in Public Education

In response to these secularization efforts, the nation experienced a revival of "religious enthusiasm" and support at the end of the eighteenth century,

84. *See A Bill for the More General Diffusion of Knowledge*, *supra* note 81; SPRING, *supra* note 68, at 64.

85. *See* Bartrum, *supra* note 81, at 274–76 (noting that Noah Webster, who believed that the Bible should be taught in the classroom, better represented the opinion of those at that time).

86. Lew Taylor, *Thomas Jefferson and the Diffusion of Knowledge*, 8 SABER & SCROLL J. 85, 88 (2019).

87. SAMUEL WINDSOR BROWN, THE SECULARIZATION OF AMERICAN EDUCATION: AS SHOWN BY STATE LEGISLATION, STATE CONSTITUTIONAL PROVISIONS AND STATE SUPREME COURT DECISIONS 56 (1912). The purpose of education was no longer religious, but instead "civic, industrial, and professional." *Id.* at 57.

88. John A. Ragosta, *A Wall Between a Secular Government and a Religious People*, 26 ROGER WILLIAMS U. L. REV. 545, 558–60 (2021).

89. President James Madison is often credited as the primary author of the Bill of Rights. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 590 (1992).

90. Tyler Broker, *Church and State Originalism*, 50 U. MEM. L. REV. 1, 9–12 (2019); *see also* PETER IRONS, GOD ON TRIAL 14–15 (2007).

91. Broker, *supra* note 90, at 12; IRONS, *supra* note 90, at 14.

92. *See* IRONS, *supra* note 90, at 14–15.

93. Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73, 133–34 (2005) (footnote omitted) (noting Madison's proposal).

94. IRONS, *supra* note 90, at 15.

95. U.S. CONST. amend. I.

96. *See* RICHARD H. JONES, ONE NATION UNDER GOD? 29 (2012).

often referred to as the Second Great Awakening.[97] This religious movement resulted in more Christian sectarian diversity, which made it harder to educate students under one common religious principle.[98] Massachusetts became one of the first states to attempt to resolve this "denominational conflict."[99] In 1837, Horace Mann[100] became the Secretary of the first Massachusetts Board of Education.[101] In his first annual report, he advocated for neutral education that excluded religious teachings from the classroom.[102] Faced with sectarian opposition and accusations of being anti-Christian, Mann defended himself by explaining that he had no "plan for excluding either the Bible or religious instruction from the schools."[103] Instead, he advocated for a public school system that taught common Christian principles and "mainstream Protestantism."[104] This became known as "nonsectarianism."[105]

Many Catholics viewed nonsectarianism as anti-Catholic and as Protestant sectarianism in disguise.[106] In response, Catholics attempted to diversify the Protestant-dominated public education system by, among other methods, petitioning for Catholic schools to share in public funds.[107] These attempts failed due to resistance by anti-Catholic groups and Protestantism's monopoly on public education.[108] Some Catholic groups then, as part of an

97. Geoffrey R. Stone, *The Second Great Awakening: A Christian Nation?*, 26 GA. ST. U. L. REV. 1305, 1307–08 (2010).

98. Bartrum, *supra* note 81, at 282–83.

99. *See* Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 214–15 (1948).

100. Horace Mann is well-known as the leading advocate for the public school system in America. Kenneth L. Townsend, *Education and the Constitution: Three Threats to Public Schools and the Theories that Inspire Them*, 85 MISS. L.J. 327, 332 (2016).

101. Bartrum, *supra* note 81, at 281–82.

102. Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 666 (1998).

103. MASS. DEP'T OF EDUC., TWELFTH ANNUAL REPORT OF THE BOARD OF EDUCATION 104 (1849), https://archives.lib.state.ma.us/items/8c0e2817-cbb6-497e-856d-3e01770b2cea [https://perma.cc/RH9H-J6C4] (click the link under "Files" to access the PDF).

104. Viteritti, *supra* note 102, at 666; *see also* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 559 (2003).

105. Bartrum, *supra* note 81, at 283. Nonsectarian means "not affiliated with or restricted to a particular religious group" or sect. *Nonsectarian*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/nonsectarian [https://perma.cc/S2JW-P9B3] (last visited Mar. 3, 2024).

106. Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169, 176 (1996) (footnotes omitted) ("[Catholic leaders] maintained that the reading of the Protestant version of the Bible in the schools coupled with objectionable remarks directed towards Catholics in school textbooks created a situation in which Catholics' rights . . . were being 'wantonly violated.'").

107. *See generally, e.g.*, Bartrum, *supra* note 81, at 286–320 (describing the various attempts Catholics made to quash the monopoly nonsectarian public schools had over education in New York City); *see also* Salomone, *supra* note 106, at 176.

108. Salomone, *supra* note 106, at 176–77; *see also* Bartrum, *supra* note 81, at 319 (noting that although Catholics in New York City pushed for the destruction of nonsectarianism through legislation allowing state funds to be allocated to all religious denominations, including Catholicism, their fight to preserve the placement of Catholicism in public education ironically led to the secularization of American public education).

"anti-public school crusade," resorted to opening their own parochial schools combining Catholic religious and secular education.[109] Still, many Catholics were wary of pulling their children from the public school system,[110] and momentum for a fully secularized public education increased.[111] Consequently, several states enacted legislation throughout the nineteenth century that sought to disentangle religion from public schools.[112] As part of this attempt at secularization, though much broader than originally intended, Speaker of the House James G. Blaine proposed a constitutional amendment ("the Blaine Amendment") to Congress in 1875 that would have forbidden states from providing aid to "'sectarian' schools."[113] Although the amendment was not adopted, it was highly influential, as many states soon thereafter enacted legislation that was modeled after the Blaine Amendment and restricted monetary aid for religious schools.[114]

C. The U.S. Education System and the Religion Clauses

After some states adopted their own versions of the Blaine Amendment,[115] others made similar efforts to decrease religion's authority in the U.S. education system.[116] Resultingly, as the nineteenth century advanced, the practices and nature of public schools, as they related to religion, began "directly implicat[ing] constitutional questions."[117] This section discusses how the Supreme Court used the Religion Clauses throughout the twentieth century to distinguish and set boundaries between religion and public education while ensuring that the U.S. education system accommodated and protected the rights of private religious institutions and individuals. Part I.C.1 discusses state control over education and the limitations of such control, as delineated by the Supreme Court. Part I.C.2 discusses the initial application of the Religion Clauses to the states. Part I.C.3 outlines how the Supreme Court used the Religion Clauses and their demand for neutrality to address public school curricula and teacher- or official-led prayer. Part I.C.4 analyzes the Supreme Court's application of the Religion Clauses to religious

109. *Sectarian Education. Anti-public School Crusade. Aggressive Attitude of the Roman Catholic Clergy—the Terrors of the Church Threatened.*, N.Y. TIMES (Aug. 24, 1873), https://www.nytimes.com/1873/08/24/archives/sectarian-education-antipublic-school-crusade-aggressive-attitude.html [https://perma.cc/EH2X-2ZN3].

110. *Id.*

111. *See* BROWN, *supra* note 87, at 57.

112. *Id.* at 57–67 (collecting nineteenth century state legislation that prohibited religious instruction in public schools).

113. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2268 (2020) (Alito, J., concurring); Townsend, *supra* note 100, at 335–37. The Blaine Amendment was often seen as anti-Catholic and pro-Protestant, as many Protestants who supported it did not view their own religion as sectarian. DeForrest, *supra* note 104, at 565–66; Townsend, *supra* note 100, at 335–37.

114. DeForrest, *supra* note 104, at 573.

115. *See supra* notes 113–14 and accompanying text.

116. *See, e.g.*, Townsend, *supra* note 100, at 337–38 (discussing an Oregon statute that effectively banned private schools by requiring all students between certain ages to attend public schools).

117. *Id.* at 335.

symbols and government funding of religious education, using a more evenhanded concept of neutrality.

1. Challenging State Power over Education

Toward the end of the nineteenth century, after several states included amendments resembling the Blaine Amendment in their constitutions[118] and almost all states enacted compulsory education laws,[119] the U.S. education system was largely controlled at the state level.[120] States' power to enact such compulsory education laws was challenged, but the Court viewed the states' authority as permissible.[121] Through these laws, the states controlled "aspects of the curriculum, the school year length, aspects of teacher qualifications, standardized test-taking requirements, and the like."[122] This control over education was not surprising, as states sought to use education throughout the entire nineteenth century to "shap[e] the American citizenry."[123]

In 1925, however, the *extent* of such control was challenged in *Pierce v. Society of Sisters*.[124] *Pierce* involved an Oregon compulsory education statute that required parents to send children of ages eight through sixteen years old to public school.[125] The Court, as it had previously, upheld the validity of compulsory education laws and the states' authority to regulate both private and public schools in certain ways;[126] it nonetheless held that the state cannot force children to attend public school exclusively.[127] Because the First Amendment had not yet been applied to the states, the

118. *Blaine Amendments in State Constitutions*, BALLOTPEDIA, https://ballotpedia.org/Blaine_amendments_in_state_constitutions [https://perma.cc/6LN8-SL3L] (last visited Mar. 3, 2024); *see also* DeForrest, *supra* note 104, at 573.

119. Vivian E. Hamilton, *Home, Schooling, and State: Education in, and for, a Diverse Democracy*, 98 N.C. L. REV. 1347, 1356 (2020); *see also* Robert B. Everhart, *From Universalism to Usurpation: An Essay on the Antecedents to Compulsory School Attendance Legislations*, 47 REV. OF EDUC. RSCH. 499, 510 (1977) ("The majority of legislation on compulsion was passed during the last quarter of the nineteenth century, and by 1918 all states had adopted compulsory attendance laws."); Jack Alan Kramer, Note, *Vouching for Federal Educational Choice: If You Pay Them, They Will Come*, 29 VAL. U. L. REV. 1005, 1007 (1995).

120. Hamilton, *supra* note 119, at 1356.

121. Meyer v. Nebraska, 262 U.S. 390, 400 (1923) ("[I]t is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States . . . enforce this obligation by compulsory laws.").

122. Stephen D. Sugarman, *Is It Unconstitutional to Prohibit Faith-Based Schools from Becoming Charter Schools?*, 32 J.L. & RELIGION 227, 248 (2017).

123. *See* DeForrest, *supra* note 104, at 559; *see also* Levin, *supra* note 40, at 1039 n.20 (stating that public education was a tool used to impart democratic and religious ideals in the early-to-mid nineteenth century).

124. 268 U.S. 510 (1925).

125. *Id.* at 530.

126. *Id.* at 534 ("No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.").

127. *See id.* at 535.

Court relied on principles of liberty to reach its conclusion.[128] The Court proceeded to hear several cases throughout the twentieth century that concerned the "reach and nature of public education,"[129] including those detailed herein.

2. Applying the Religion Clauses to the States

The Supreme Court originally assumed that it could not use the Religion Clauses to protect the religious freedom of state citizens because state laws were intended to protect religious liberties.[130] It was not until the 1940s that the Court declared that the Religion Clauses applied to the states.[131] The Court incorporated the Free Exercise Clause as a protection against state action in *Cantwell v. Connecticut*,[132] and it incorporated the Establishment Clause in *Everson v. Board of Education*.[133] Once the clauses were applied as such, under the state action doctrine, all *government* actors—including those at the state level—were required to uphold and protect these individual constitutional rights.[134] Thus, the Supreme Court was able to enforce the Religion Clauses against public schools, which are state actors,[135] and require that they be secular.[136]

In *Cantwell v. Connecticut*, two Jehovah's Witnesses were charged with violating a state law that prohibited solicitation for religious causes.[137] The Court held the law to be an unconstitutional "censorship of religion" under the Free Exercise Clause.[138] In subsequent cases, the Court's analysis of the Free Exercise Clause became intertwined with its analysis and review of the

128. *See id.* at 534–35; Townsend, *supra* note 100, at 339.

129. Townsend, *supra* note 100, at 339.

130. Permoli v. Mun. No. 1, 44 U.S. 589, 609 (1845).

131. Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 OR. L. REV. 563, 570 (2006); *see also* Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment.").

132. 310 U.S. 296 (1940).

133. 330 U.S. 1 (1947).

134. Kathleen C. Ryan, Note, *The Emerging Possibility of Religious Charter Schools: A Case Study of Arizona and Massachusetts*, 98 NOTRE DAME L. REV. 2257, 2265 (2023); *see* 42 U.S.C. § 1983 (stating that anyone acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia" cannot deprive U.S. citizens of their rights or privileges under the Constitution).

135. Under the state action doctrine, it is not always clear whether an entity is acting through or by the authority of the state and is thus a state actor. Jackson v. Metro. Edison Co., 419 U.S. 345, 349–50 (1974) ("[T]he question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer."). Here, however, public schools are easily identifiable as state actors "because they are operated and controlled by local government entities." GARNETT, *supra* note 2, at 8.

136. Garnett, *supra* note 43, at 46 & n.176.

137. 310 U.S. at 300–02.

138. *Id.* at 305. The Court also held that religious solicitations that are not "noisy, truculent, overbearing or offensive" are protected as free speech under the First Amendment. *Id.* at 308–11.

Establishment Clause.[139] For example, in *Everson v. Board of Education*, a local taxpayer challenged a New Jersey law that reimbursed parents who sent their children to Catholic schools via public-operated buses for bus fares.[140] Relying on the Religion Clauses, the Court approved the New Jersey law, which granted government aid to parents choosing either private sectarian or public secular schools.[141] It emphasized that the state must be neutral toward all religions and cannot use its power to "handicap" nor favor them.[142] At the close of his opinion, Justice Hugo L. Black stated that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."[143] This case paved the way for a plethora of litigation challenging any law bearing the scent of a commingling of church and state.[144] The secularization of public schools seemed to take "permanent residence behind the Establishment Clause's protective shield."[145]

3. Neutrality Toward Religion as Secularism

Since *Everson*, two lines of case law developed in the Court's Religion Clauses jurisprudence as it relates to schooling[146]: the first concerns religious expression in public schools[147] and the second deals with public funding provided to religious schools.[148] In both sets of cases, the Supreme Court emphasized neutrality when determining whether laws that seemed to either establish or impinge on religion were constitutional, reasoning that the Religion Clauses demand neutrality toward religion.[149] The cases within the

139. *See* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 668–70 (1970) (recognizing a "play in the joints" between the Religion Clauses that ensures a proper balance between "government control of churches or governmental restraint on religious practice").

140. 330 U.S. 1, 3 (1947).

141. *Id.* at 17–18; *see also* Davidson, *supra* note 16, at 455–56.

142. *Everson*, 330 U.S. at 18.

143. *Id.*

144. Witte, *supra* note 59, at 422.

145. Bartrum, *supra* note 81, at 321.

146. This Note does not purport to encapsulate the entirety of the Supreme Court's jurisprudence regarding the Establishment Clause or Free Exercise Clause. It only seeks to provide a summary of cases that are relevant and important to the intersection of public and private education and the Religion Clauses.

147. *See infra* notes 154–79, 183–89 and accompanying text.

148. Davidson, *supra* note 16, at 454; *see infra* notes 190–97 and accompanying text; *infra* Part I.D.3.

149. Bradley Girard & Gabriela Hybel, *The Free Exercise Clause vs. the Establishment Clause: Religious Favoritism at the Supreme Court*, AM. BAR ASS'N (July 5, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/the-free-exercise-clause-vs-the-establishment-clause/ [https://perma.cc/2KQA-PP84]. "Neutrality" became a central element to consider in a three-part test the Court applied in its earlier Establishment Clause jurisprudence. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971), *abrogated by* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022); Jason S. Marks, *Only a "Speed Bump" Separating Church and State?*, 57 J. MO. BAR 36, 39–40 (2001). However, the Court departed from this three-part test in its later jurisprudence. Kramer, *supra* note 119, at 1029–30, 1030 n.148; *see* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) ("[T]his Court long ago abandoned *Lemon* . . . ."). Nonetheless, it still maintains "neutrality" as a "pivotal factor" in its Establishment Clause jurisprudence. Kramer, *supra* note 119, at 1036 n.204.

first line of case law that addressed curricula and teacher- or official-led prayer in public schools, however, are sometimes seen as more hostile toward religion than neutral,[150] as the Court seemingly viewed neutrality in terms of secularism.[151] The Court in these cases focused on "carv[ing] out public space that was decidedly secular,"[152] "protecting a secular state[,] and confining religion to the private realm."[153]

Epperson v. Arkansas[154] involved an Arkansas law that prohibited public schools from teaching the theory of evolution because it contradicted the book of Genesis's theory of the origin of man.[155] A tenth-grade teacher challenged the law,[156] and the Court recognized the state's "right to prescribe the curriculum for its public schools."[157] However, it held that this right does not include the ability to tailor its curriculum "to the principles or prohibitions of any religious sect or dogma."[158] The latter practice is not religiously neutral and, thus, is a constitutional violation.[159]

In *Edwards v. Aguillard*,[160] teachers, religious leaders, and parents of children who attended public schools challenged a Louisiana law forbidding public schools from teaching the theory of evolution unless they also taught the theory of creation.[161] The Court relied on *Epperson* to strike down the state law,[162] reasoning that the Louisiana law's purpose was to promote a religious theory or to prohibit the teaching of a scientific theory that certain religious sects did not prefer.[163] Either way, the Establishment Clause prohibits, in public schools, the preference or promotion of certain religious teachings, as well as the exclusion of theories that conflict with preferred religious dogma.[164]

Engel v. Vitale[165] addressed a New York State Board of Regents recommendation that New York public schools begin the school day with recitation of a prayer.[166] Expounding on the dangers of a close unity between church and state in American history and the founders' attempt to avert such dangers,[167] the Court held that the state's prayer program violated the

150. Davidson, *supra* note 16, at 454.
151. *See* Townsend, *supra* note 100, at 370–71.
152. *Id.*
153. Patrick M. Garry, *Establishment Clause Jurisprudence Still Groping for Clarity: Articulating a New Constitutional Model*, 12 NE. U. L. REV. 660, 676 (2020).
154. 393 U.S. 97 (1968).
155. *Id.* at 98–99, 107.
156. *Id.* at 100.
157. *Id.* at 107.
158. *Id.* at 106.
159. *Id.* at 109.
160. 482 U.S. 578 (1987).
161. *Id.* at 581.
162. *Id.* at 590–91, 593, 597.
163. *Id.* at 593.
164. *Id.*
165. 370 U.S. 421 (1962).
166. *Id.* at 422–23.
167. *Id.* at 429–35.

Establishment Clause.[168] Then, in *School District of Abington Township v. Schempp*,[169] the Court assessed whether Bible reading and recitation of religious prayer in public schools were constitutional under the Religion Clauses, provided that students were also given the option to not participate upon their parent's request.[170] The Court again drew on history[171] and neutrality principles[172] to hold that, under the Establishment Clause, a state cannot pass laws requiring students—those who do not opt out—to participate in activities of such religious character.[173] In both cases, the Court was concerned about the psychologically coercive nature of such prayer, regardless of the opportunity to opt out.[174]

In *Lee v. Weisman*,[175] the Court again addressed the constitutionality of prayer in public schools, this time in the context of a graduation ceremony.[176] The parent of a public school student objected to a rabbi leading the audience in prayer at graduation.[177] The Court, consistent with its jurisprudence, held that the Establishment Clause prohibits a state's psychological compulsion of student participation in a religious exercise.[178] Similar to *Schempp*, the Court emphasized that one's ability to voluntarily opt out of attendance is purely formalistic and does not negate the compulsion that a student feels to attend or engage in religious exercises.[179]

4. Neutrality Toward Religion as Evenhandedness

In its more recent jurisprudence, beginning in the 1980s,[180] the Court exhibited a shift in its position on neutrality under the Religion Clauses.[181] In some areas of the law, the Court has moved away from viewing neutrality as secularism and has instead focused on "evenhandedness" as the type of neutrality that the Religion Clauses demand.[182] This shift is evident in the

168. *Id.* at 430.
169. 374 U.S. 203 (1963).
170. *Id.* at 205.
171. *Id.* at 212–14.
172. *Id*. at 215, 218, 225–26.
173. *Id.* at 223–25. The Court also held that the "required exercises [are not] mitigated by the fact that individual students may absent themselves upon parental request." *Id.* at 224–25.
174. *See* Maya Syngal McGrath, Note, *Teacher Prayer in Public Schools*, 90 FORDHAM L. REV. 2427, 2433 & n.50 (2022).
175. 505 U.S. 577 (1992).
176. *Id.* at 580–82.
177. *Id.* at 581.
178. *Id.* at 599.
179. *Id.* at 594–96. The Court's more recent ruling in *Kennedy v. Bremerton School District*—which held that a public school coach engaging in personal prayer in public without his players was private religious practice that does not violate the First Amendment—does not disturb the holdings of *Engel*, *Schempp*, and *Lee* because these three cases focus on the coercive activities of public officials who prayed in front of students or during times of instruction in a classroom. *See* 142 S. Ct. 2407 (2022); *see also* McGrath, *supra* note 174, at 2433.
180. *See* Mitchell v. Helms, 530 U.S. 793, 881 (2000) (Souter, J., dissenting).
181. *See* Townsend, *supra* note 100, at 371.
182. *Id.*; *see Mitchell*, 530 U.S. at 881 (Souter, J., dissenting); *see also* Marks, *supra* note 149, at 39; *see, e.g.*, Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 839 (1995) ("We

Court's cases dealing with religious symbols and government funding of religious schools.

In *American Legion v. American Humanist Ass'n*,[183] a case involving religious symbols, the Court confronted whether monuments with religious significance should be removed from public land.[184] In doing so, the Court relied on the Establishment Clause,[185] holding that symbols or monuments with a religious origin are permitted on public land when these objects acquire a secondary meaning over time.[186] These dual-purpose symbols are constitutional, despite their religious connections, if they honestly attempt to achieve inclusivity, do not discriminate, and demonstrate respect for other views.[187] Further, the Court noted, attempts to destroy such objects based on their religious affiliations reflect religious hostility, not neutrality.[188] Thus, the Court held that a cross erected in 1925 did not constitute an establishment of religion because, although it originated as a religious symbol and stood on public land, it had acquired various secular and historical meanings over time and was still considered an important part of the community.[189]

In *Mueller v. Allen*,[190] the Court addressed a Minnesota law offering parents a tax deduction for expenses incurred in sending their children to any elementary or secondary school.[191] Minnesota taxpayers filed suit, claiming that the law was unconstitutional because parents who sent their children to parochial schools utilized the deduction.[192] Although recognizing that the line of cases dealing with government funding of sectarian schools is a particularly "sensitive area of constitutional law,"[193] the Court nevertheless rejected the idea that any government funding to a religious institution violates the Establishment Clause.[194] Justice William H. Rehnquist, writing for the Court, reasoned that because the tax benefit was available for all parents[195] and the assistance provided to parochial schools was indirect—tax deductions for individual parents, not "the direct transmission of assistance

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have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.").

183. 139 S. Ct. 2067 (2019).

184. *Id.* at 2079–82, 2087–88.

185. *Id. But see* Stone v. Graham, 449 U.S. 39 (1980) (holding that religious symbols in public school classrooms that have no secular or legislative purpose, but whose preeminent purpose is religion, violate the Establishment Clause).

186. *American Legion*, 139 S. Ct. at 2085–87.

187. *Id.* at 2086–89.

188. *Id.* at 2086–87.

189. *Id.* at 2089–90.

190. 463 U.S. 388 (1983). Although *Mueller* is an instructive and pivotal case in the Supreme Court's jurisprudence relating to government funding allocated to religious schools, *Zelman v. Simmons-Harris* and *Espinoza v. Montana Department of Revenue* are the more modern, key cases in this line of jurisprudence. *See infra* Part I.D.3.

191. *Mueller*, 463 U.S. at 391.

192. *Id.* at 392.

193. *Id.* at 393 (quoting Lemon v. Kurtzman, 403 U.S. 602, 612 (1971), *abrogated by* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022)).

194. *Id.*

195. *Id.* at 397.

from the State to the schools themselves"[196]—the law did not violate the Establishment Clause.[197]

D. Diversifying the Education System in the United States

Over time, U.S. public schools grew less popular, causing parents to seek alternatives for their children's education. Although the Supreme Court sought to shape the public education system in accordance with neutrality principles,[198] public schools faced critiques from secularists and religious observers alike; some claimed that public school curricula should offer more secularized perspectives, whereas others claimed that the secular nature of public schooling demonstrated hostility toward religious beliefs.[199] Additionally, after the Court's mandate in *Brown v. Board of Education*[200] to racially desegregate public schools, many white families either moved their children to private schools or left more integrated cities for the suburbs.[201] Although some parents simply moved their children to private schools, private education was expensive.[202] Thus, many sought reform within public schools themselves to bring control over a child's education back to the parent,[203] to spur an improvement in the quality of education they provide,[204] or, alternatively, to expand educational options beyond those available.[205] Moreover, there was a revival in the call for public funding for religious schooling.[206]

Together, all of these factors triggered the modern school choice movement.[207] School choice refers to "policies granting parents and guardians the opportunity to select from among more than one option for complying with state compulsory school laws."[208] "There are many

196. *Id.* at 399.
197. *Id.* at 402–03.
198. *See supra* note 149 and accompanying text.
199. *See* Salomone, *supra* note 106, at 181; *see also* Hamilton, *supra* note 119, at 1357–58.
200. 347 U.S. 483 (1954).
201. *See* Hamilton, *supra* note 119, at 1358; *see also* Myron Orfield, Milliken*,* Meredith*, and Metropolitan Segregation*, 62 UCLA L. REV. 364, 452 (2015); *see also* Nick J. Sciullo, *Regionalism, the Supreme Court, and Effective Governance: Healing Problems that Know No Bounds*, HOW. SCROLL, Spring 2006, at 21, 23 & n.10 (2006).
202. *See* Hamilton, *supra* note 119, at 1358.
203. *See* Kramer, *supra* note 119, at 1008–09.
204. *See id.*; *see also* Garnett, *supra* note 43, at 21; *see also* James, *supra* note 42, at 1088–90.
205. *See* Amanda S. Sen, *Limited Choices: How the School-Choice Paradigm Subverts Equal Education for Students with Disabilities*, 78 MD. L. REV. 470, 473–74 (2019).
206. *See* Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 829–30 (2011).
207. *See* Levin, *supra* note 40, at 1039 n.20 (distinguishing between earlier iterations of the school choice movement and the modern school choice movement).
208. Minow, *supra* note 206, at 816; *see also* Will Robertson & Virginia Riel, Note, *Right to Be Educated or Right to Choose?: School Choice and Its Impact on Education in North Carolina*, 105 VA. L. REV. 1079, 1081 (2019); *see also* John Schoenig, *Parental Choice, Catholic Schools, and Educational Pluralism at the Dawn of a New Era in K-12 Education Reform*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 513, 515 n.9 (2013).

permutations on the 'choice' theme,"[209] but, "[i]n its current incarnation, school choice is manifested most typically as voucher programs and charter schools."[210] Part I.D.1 introduces government-subsidized voucher programs as a pivotal part of the school choice movement. Part I.D.2 discusses charter schools as another option for school choice, outlining the similarities to and differences from voucher programs. Part I.D.3 details relevant Supreme Court precedent regarding religious schools' inclusion in or exclusion from school choice programs.

1. Voucher Programs

The concept of voucher programs arose as early as the 1950s, when Nobel Prize economist Milton Friedman proposed an alternative arrangement to the centralized U.S. public education system.[211] This alternative system would allow parents to choose where to spend government funds for their child's education.[212] Several years later, Friedman elaborated on his proposal, outlining a system of government-subsidized private schools to preserve and extend "freedom of thought and belief."[213] His program would allow parents to use redeemable vouchers toward approved private education institutions.[214] Early on, Friedman expressed concerns about indoctrination if schools run by religious organizations were eligible for subsidies.[215] Nevertheless, he did not believe that this concern should inhibit parents' freedom to make schooling decisions for their own children.[216]

In the following years, Friedman's idea for expanding school choice was tarnished by those who sought to use it improperly.[217] Southern states, for example, emphasized freedom of choice to maintain segregated schools and fight integration.[218] Additionally, several states sought to financially aid religious schools by filtering government funds directly to them.[219] Despite

209. Salomone, *supra* note 106, at 230.

210. James, *supra* note 42, at 1095; *see also* James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2047 (2002).

211. Milton Friedman, *The Role of Government in Education*, *in* ECONOMICS AND THE PUBLIC INTEREST 123 (Robert A. Solo ed., 1955).

212. *See id.*

213. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 89–90 (Rose D. Friedman ed., 40th anniversary ed. 2002); *see also* Sugarman, *supra* note 122, at 230.

214. FRIEDMAN, *supra* note 213, at 89; *see also* MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 161 (1980).

215. FRIEDMAN, *supra* note 213, at 90.

216. *Id.* ("Drawing a line between providing for the common social values required for a stable society, on the one hand, and indoctrination inhibiting freedom of thought and belief, on the other is another of those vague boundaries that is easier to mention than to define.").

217. *See* Sugarman, *supra* note 122, at 231.

218. *See id.*; *see also* Minow, *supra* note 206, at 822 ("White Southerners did, in fact, use school choice practices as a form of resistance to court-ordered desegregation."). However, the Supreme Court ruled that school choice programs enacted for segregational purposes were unconstitutional. *See* Griffin v. Cnty. Sch. Bd., 377 U.S. 218 (1964); *see also* Green v. Cnty. Sch. Bd., 391 U.S. 430 (1968).

219. Sugarman, *supra* note 122, at 231; *see also* Lemon v. Kurtzman, 403 U.S. 602, 615, 621 (1971), *abrogated by* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (striking down Rhode Island's state program, which solely benefitted Catholic schools, and

these drawbacks, in 1990 the Milwaukee Parental Choice Program became "the country's first school choice voucher program."[220] As of September 2023, sixteen states, Washington, D.C., and Puerto Rico have voucher programs;[221] further, a total of thirty-two states and Washington, D.C. offer some version of a school choice program, including voucher programs and tax-credit scholarships.[222]

Voucher programs are mostly targeted toward students from low-income families, disabled students, or students who attend poorly performing or failing schools.[223] The programs permit government funds to be allocated toward private schools to cover all or part of a student's tuition.[224] Parents whose children are eligible to partake in the program receive a government voucher and sign over the financial aid to a participating school of their choice.[225] Participating schools must, in turn, accept all eligible applicants with no enrollment cap[226] or, if there are more applicants than seats available, conduct a random drawing.[227]

Pennsylvania's state program, which provided financial aid directly to church-related schools).

220. *Milwaukee Parental Choice Program*, SCH. CHOICE WIS., https://schoolchoicewi.org/programs/milwaukee-parental-choice-program/ [https://perma.cc/FS7Z-VAG8] (last visited Mar. 3, 2024); *see also* Schoenig, *supra* note 208, at 526–27 (explaining how Wisconsin officials proposed the program to fix racial misbalancing in schools and narrow the achievement gap between students).

221. *See School Choice Facts & Statistics*, EDCHOICE, https://www.edchoice.org/school-choice/fast-facts/ [https://perma.cc/E7K4-HTR4] (Apr. 17, 2023).

222. Anayat Durrani, *What School Choice Is and How It Works*, U.S. NEWS (Apr. 14, 2023, 1:50 PM), https://www.usnews.com/education/k12/articles/what-school-choice-is-and-how-it-works [https://perma.cc/2L48-5N2C].

223. *See* Arianna Prothero, *What's the Difference Between Vouchers and Education Savings Accounts?*, EDUCATIONWEEK (June 9, 2015), https://www.edweek.org/policy-politics/whats-the-difference-between-vouchers-and-education-savings-accounts/2015/06 [https://perma.cc/KT65-DL5J]; *see also* Kaz Weida, *15 States with Voucher Programs to Help Parents Pay for Private School*, PENNY HOARDER (Mar. 30, 2023), https://www.thepennyhoarder.com/save-money/school-vouchers/ [https://perma.cc/Q983-BPYJ].

224. *See* Julie F. Mead, *The Right to an Education or the Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees*, 42 FORDHAM URB. L.J. 703, 706 (2015).

225. *See id.*; *see also* Sugarman, *supra* note 122, at 250–51.

226. *See, e.g.*, *Milwaukee Parental Choice Program*, *supra* note 220; *Maine Town Tuitioning Program*, EDCHOICE, https://www.edchoice.org/school-choice/programs/maine-town-tuitioning-program/#rules_and_regulations [https://perma.cc/S6XX-MSP3] (Dec. 6, 2023). Most state voucher laws include clauses that prevent discrimination on the basis of race or national origin, without banning discrimination on the basis of sex or religion, because private schools can be single-sex schools and/or religious. *See* Michael Kavey, Note, *Private Voucher Schools and the First Amendment Right to Discriminate*, 113 YALE L.J. 743, 747 (2003); *see, e.g.*, David Ramsey, *How Does the Arkansas LEARNS Voucher Program Work?: We Have Answers.*, ARK. TIMES (Aug. 19, 2023, 9:14 AM), https://arktimes.com/arkansas-blog/2023/08/19/how-does-the-arkansas-learns-voucher-program-work-we-have-answers [https://perma.cc/BJL6-SN48].

227. *See, e.g.*, *Milwaukee Parental Choice Program*, *supra* note 220.

2. Charter Schools

In a similar attempt to reform public education, public schools experimented with charters[228] to test unique educational strategies,[229] originally implementing charter *programs*[230] as opposed to charter *schools*. Charter programs, as first proposed by Ray Budde, would contract with teams of public school teachers who would be given more authority over the school and classroom than they had under the traditional public school model.[231] The teachers would submit teaching plans detailing curricula and strategies that would ensure that their "pupils acquire[d] lifelong learning skills."[232] This was a way to integrate "challenging learning materials" into the curricula, replace "bland, pablum textbooks" provided by schools, and connect career development with in-school curricula.[233]

Budde eventually acknowledged that charter *schools*,[234] though, are more strategic and powerful than charter programs.[235] Nearly two decades after charter programs were originally presented, the first charter school—which contemplated nonunionized teachers and schools operated by private institutions free from district oversight and control—was established in Minnesota in 1991.[236]

Charter schools are similar to voucher programs that help fund private schools in that both are funded with government money,[237] have teachers that

228. The term "charter" means "a grant or guarantee of rights, franchises, or privileges from the sovereign power of a state or country." *Charter*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/charter [https://perma.cc/RN4C-EGUF] (last visited Mar. 3, 2024).

229. *See* Ryan, *supra* note 134, at 2259.

230. *See* RAY BUDDE, EDUCATION BY CHARTER: RESTRUCTURING SCHOOL DISTRICTS 126 (1988), https://files.eric.ed.gov/fulltext/ED295298.pdf [https://perma.cc/AB8S-F3GZ].

231. *See id.* at 30, 39.

232. *Id.* at 39.

233. *Id.* at 38–39.

234. A charter school is "a tax-supported school established by a charter between a granting body . . . and an outside group . . . which operates the school without most local and state educational regulations so as to achieve set goals." *Charter School*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/charter%20school [https://perma.cc/HV3L-QLDR] (last visited Mar. 3, 2024). Charters can be granted by the state to a wide array of recipients, including nonprofit organizations, colleges, private individuals, and government entities. *See* Jason Lance Wren, Note, *Charter Schools: Public or Private? An Application of the Fourteenth Amendment's State Action Doctrine to These Innovative Schools*, 19 REV. LITIG. 135, 141 (2000).

235. *See* Ray Budde, *The Evolution of the Charter Concept*, 78 PHI DELTA KAPPAN 72, 72 (1996).

236. *See* Nicole Stelle Garnett, *Decoupling Property and Education*, 123 COLUM. L. REV. 1367, 1378 (2023).

237. *See* Joseph O. Oluwole & Preston C. Green III, *School Vouchers and Tax Benefits in Federal and State Judicial Constitutional Analysis*, 65 AM. U. L. REV. 1335, 1340 (2016); *see also* Stephen D. Sugarman & Emlei M. Kuboyama, *Approving Charter Schools: The Gate-Keeper Function*, 53 ADMIN. L. REV. 869, 873 (2001).

are privately hired,[238] can subject teachers to accreditation requirements,[239] and aim for inclusivity through school admission processes.[240] Further, in exchange for participating in such programs, schools must comply with certain accountability rules,[241] including reporting requirements[242] and curricula standards.[243] Charter schools differ from voucher programs, however, in the amount of government funding provided by the program[244]

238. Sugarman, *supra* note 122, at 238. However, though not as common, some states allow teachers in charter schools to join public school teacher unions and retirement plans. *See id.*; *see also* Aaron Saiger, *Charter Schools, the Establishment Clause, and the Neoliberal Turn in Public Education*, 34 CARDOZO L. REV. 1163, 1173 (2013) (recognizing that in some states, charter schools are not exempt from collective bargaining agreements between teachers and local school districts).

239. *See* Preston C. Green III, Bruce D. Baker & Joseph O. Oluwole, *Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 EMORY L.J. 303, 312 (2013); *see also* Saiger, *supra* note 238, at 1194.

240. Charter schools must be open to all students within the district or state and, if there are not enough seats, students are admitted based on a lottery. *See* Maren Hulden, Note, *Charting a Course to State Action: Charter Schools and § 1983*, 111 COLUM. L. REV. 1244, 1246–47, 1256 (2011); James E. Ryan, *Charter Schools and Public Education*, 4 STAN. J. C.R. & C.L. 393, 407 (2008). Although voucher programs are often only offered to certain groups of students, participating schools must admit all eligible applicants and resort to an equitable random selection process if there are more applicants than seats available. *See supra* notes 223–27 and accompanying text.

241. Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes that Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349, 350 (2003); *see, e.g.*, *supra* note 226; Mass. Gen. Laws ch. 71, § 89(v) (2023); *D.C. Opportunity Scholarship Program*, EDCHOICE, https://www.edchoice.org/school-choice/programs/district-of-columbia-opportunity-scholarship-program/ [https://perma.cc/HA32-CCMR] (Dec. 18, 2023); *see also* Nicole Stelle Garnett, *The Comparative Legal Landscape of Educational Pluralism*, 73 ARK. L. REV. 455, 484–85 (2020); Green et al., *supra* note 239, at 313; Saiger, *supra* note 238, at 1173 ("Charter[] [schools] are also prohibited from discriminating among students in admission.").

242. Garnett, *supra* note 241, at 480, 484 (noting that all states require private schools to comply with reporting requirements and all private school choice programs require participating schools to adhere to state requirements for private schools generally); Oluwole & Green, *supra* note 237, at 1433–34; Sugarman & Kuboyama, *supra* note 237, at 921–22.

243. Garnett, *supra* note 241, at 484 ("A handful of [private choice] programs establish basic curricular minimums beyond those required of nonparticipating private schools, such as the teaching of civic and character education."); Green et al., *supra* note 239, at 313 (noting that charter schools in Ohio must administer tests to students to ensure certain academic standards are being achieved); Saiger, *supra* note 238, at 1193 (noting that states sometimes require charter schools to cover certain curricula); *id.* at 1194 (recognizing that voucher programs may require participating schools to follow certain curricula regulations); *see, e.g.*, Wis. Stat. § 119.23(2)(a)(9) (2023). However, charter schools—though sometimes required to cover and exclude certain curricula—may supplement their curricula in many ways without state restriction. *See* Wren, *supra* note 234, at 164; *see also* Robertson & Riel, *supra* note 208, at 1087. For example, "some charter schools focus on a particular curricular theme [, i.e.,] STEM, Afrocentrism, international studies, fine arts, or classical education." Garnett, *supra* note 43, at 43; *see, e.g.*, Mass. Gen. Laws ch. 71, § 89(m).

244. Sugarman & Kuboyama, *supra* note 237, at 873 (stating that charter schools do not charge tuition beyond the public funding they receive); *see also, e.g.*, Mass. Gen. Laws ch. 71, § 89(m); *Parental Private School Choice Program (Racine)*, EDCHOICE, https://www.edchoice.org/school-choice/programs/wisconsin-parental-private-school-choice-program-racine/ [https://perma.cc/AQ9G-6WWT] (Dec. 14, 2023) (stating that the Wisconsin voucher program imposes a maximum voucher amount). *But see* Garnett, *supra* note 241, at 484 (noting that some voucher programs preclude participating schools from charging any tuition beyond the amount of the voucher).

and, some argue, in the way that funding reaches the school.[245] They also differ, some argue, as to whether participating schools must comply with constitutional mandates under the state action doctrine.

3. The Supreme Court and School Choice Programs

About a decade after voucher programs and charter schools were first established, the Supreme Court decided *Zelman v. Simmons-Harris*.[246] In *Zelman*, Ohio taxpayers challenged an Ohio state voucher program that provided tuition assistance to parents in financial need who then chose where to send their child and, effectively, where to spend the aid.[247] Public schools, private nonreligious schools, and private religious schools within the district were all allowed to participate in the program.[248] The Court focused on the fact that government funding aided religious schools only through individual parental choice to send their children to such schools with state voucher money.[249] The Court concluded that the Ohio program was constitutional under the Establishment Clause because it was "entirely neutral with respect to religion" and "a program of true private choice."[250]

More recently, in 2020, the Court decided *Espinoza v. Montana Department of Revenue*.[251] Montana's constitution had a "no-aid provision" that prohibited the direct or indirect payment of government money for sectarian purposes or to schools controlled by churches or sects.[252] Montana also had a state program that granted scholarships to students for use toward

245. In voucher programs, "[t]uition aid is distributed to parents . . . [and] [w]here tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child." Zelman v. Simmons-Harris, 536 U.S. 639, 646 (2002); *see also* Saiger, *supra* note 238, at 1172. In contrast, charter schools "are directly subsidized by a combination of primarily state and local taxes based on their enrollments." Green et al., *supra* note 239, at 303. Professor Aaron Saiger and Nicole Stelle Garnett argue, however, that the direct/indirect aid distinction is formalistic to a fault and that the way funding is provided by voucher programs and charter schools is entirely similar. *See* Garnett, *supra* note 43, at 14; Saiger, *supra* note 238, at 1198 ("A parent who enrolls a student in a charter school, and by doing so directs one unit of state per capita aid to that school, is isomorphic to a parent who endorses a voucher chit over to a private school, which school on that basis then receives a state check."); *see also* Sugarman, *supra* note 122, at 250.

246. 536 U.S. 639 (2002). Prior to *Zelman*, using public voucher programs toward private education was a "hotly debated" issue. DeForrest, *supra* note 104, at 552.

247. *See Zelman*, 536 U.S. at 644–46.

248. *See id.* at 645.

249. *Id.* at 649–53. Although the Court emphasized the role of indirectness in how voucher money gets from the state to a religious school, the Court has also held—in another Religion Clauses case that did not deal with the education system—that direct payments from the government to a religious institution are allowed. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 458–59, 466–67 (2017) (holding that the Establishment Clause permits, and the Free Exercise Clause requires, a government program to provide a public benefit to religious institutions if it is providing the same benefit to other organizations, even if that benefit is provided directly by the government).

250. *Zelman*, 536 U.S. at 662–63. The Court also emphasized that "the amount of government aid channeled to religious institutions by individual aid recipients was not relevant to the constitutional inquiry." *Id.* at 651.

251. 140 S. Ct. 2246 (2020).

252. *See id.* at 2252.

tuition at private schools.[253] The state promulgated an administrative rule that applied the no-aid provision to the scholarship program to effectively prohibit private religious schools from receiving such funding.[254] Parents of students attending private religious schools in Montana sued,[255] and the Court decided that the application of the no-aid provision to the scholarship program violated the Free Exercise Clause.[256] The Court held that the state's exclusion of religious schools—and of the families of students attending them—from a government program for which they are otherwise eligible is unconstitutional religious discrimination.[257] Importantly, it also clarified that "[a] [s]tate need not subsidize private education. But once a state decides to do so, it cannot disqualify some private schools solely because they are religious."[258]

The Court echoed and applied *Espinoza* in a similar and more recent case.[259] In *Carson ex rel. O.C. v. Makin*,[260] the Court overturned a Maine law that prohibited using state tuition program funds for private, religious high schools,[261] holding that the state law violated the Free Exercise Clause.[262] *Zelman*, *Espinoza*, and *Carson* all exemplify the Court's attitude toward the expanding landscape of school choice programs.

II. CHARTER SCHOOLS, THE STATE ACTION DOCTRINE, AND THE RELIGION CLAUSES

Although the Supreme Court previously decided the constitutionality of funding private religious institutions through school choice programs, it has never dealt with the constitutionality of religious charter schools. Perhaps this is because the first religious charter school was approved only last year, in 2023.[263] The constitutionality of such government funding under the Religion Clauses hinges on whether charter schools are state actors, like public schools.[264] Although religious charter schools are only a recent innovation, whether charter schools are state actors under the state action doctrine is a contested issue that has been discussed and argued about by both courts and scholars.[265]

253. *See id.* at 2251. Tax-credit scholarships are another form of school choice. *See supra* note 222 and accompanying text.
254. *Espinoza*, 140 S. Ct. at 2251–52.
255. *Id.* at 2252.
256. *Id.* at 2262–63.
257. *See id.* at 2255, 2262–63.
258. *Id.* at 2261.
259. *See* Carson *ex rel.* O.C. v. Makin, 596 U.S. 767, 780 (2022) ("The . . . principles applied in . . . *Espinoza* suffice to resolve this case.").
260. 596 U.S. 767 (2022).
261. *Id.* at 771–73, 789.
262. *Id.* at 789.
263. *See supra* notes 3–13 and accompanying text.
264. *See* GARNETT, *supra* note 2.
265. Garnett, *supra* note 43, at 53 n.212; Hulden, *supra* note 240, at 1251; *see, e.g.*, Derek W. Black, *Religion, Discrimination, and the Future of Public Education*, 13 U.C. IRVINE L. REV. 805, 842 (2023).

Part II.A introduces the ways in which circuit courts have labeled charter schools under the state action doctrine. Part II.B analyzes Supreme Court precedent that is relevant to whether a charter school is a state actor. Part II.C discusses charter schools as private actors and the constitutional implications that flow from such a label, primarily under the Religion Clauses. Part II.D examines charter schools as state actors, as well as the accompanying implications of the Religion Clauses. Part II.E introduces the scholarly opinion that charter schools, as hybrid institutions, cannot collectively and universally be labeled state or private actors due to the fact-intensive nature of state action doctrine analysis and the variability among charter schools.

A. Charter Schools in the Legal Arena

Determining whether charter schools are state actors requires thorough analysis under the state action doctrine,[266] under which there are several tests available for determining if an entity is a private or state actor.[267] These tests include the "public function test,"[268] the "close nexus test,"[269] the "symbiotic relationship test,"[270] the "joint participation test,"[271] the "government compulsion test,"[272] and the "pervasive entwinement test."[273] The public function test looks "behind the State's decision to provide public services through private parties"[274] and analyzes whether those services are "exclusively reserved to the State."[275] The close nexus test asks "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[276] The symbiotic relationship test looks at whether the state is profiting from a private party's conduct.[277] The joint participation test is concerned with a relationship of interdependence between the state and another entity such that they are joint participants in a common venture.[278] The government compulsion test looks at whether the state has compelled a

266. *See supra* note 134 and accompanying text.

267. *See* Catherine LoTempio, Comment, *It's Time to Try Something New: Why Old Precedent Does Not Suit Charter Schools in the Search for State Actor Status*, 47 WAKE FOREST L. REV. 435, 442–46 (2012); *see also* Wren, *supra* note 234, at 152–54.

268. *See* Marsh v. Alabama, 326 U.S. 501, 506 (1946).

269. *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

270. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 842–43 (1982).

271. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

272. *See* Adickes v. S. H. Kress & Co., 398 U.S. 144, 170 (1970) ("[A] State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act.").

273. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 291 (2001) ("[T]he association's regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association, there being no offsetting reason to see the association's acts in any other way.").

274. *Jackson*, 419 U.S. at 371 (Marshall, J., dissenting).

275. *Id.* at 352 (majority opinion).

276. *Id.* at 351.

277. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 842–43 (1982).

278. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

separate entity to act.[279] Lastly, the pervasive entwinement test identifies private institutions that have become so entwined with government action that their actions become those of the state.[280]

Although there are instances in which the application of these tests seems relatively straightforward, there are many complex situations in which the relationship between a private party and the state is not clear.[281] As demonstrated by the conflicting decisions reached by the state and federal courts that have addressed the matter,[282] deciding whether charter schools are public or private is one of those complex situations. Courts have used various approaches and tests to analyze the issue.[283]

In *Caviness v. Horizon Community Learning Center*, *Inc.*,[284] the U.S. Court of Appeals for the Ninth Circuit decided that a charter school is not a state actor in the context of teacher employment and termination.[285] Applying the public function test, the court found that, although a private entity (a nonprofit corporation) was providing education through a contract with the state, providing education is not exclusively a state function.[286] The court also held that neither providing state subsidies to a private entity nor requiring the state to regulate and approve a charter school's charter are the type of state action that implicates the state in an employment decision.[287] The court recognized, however, that if the particular regulations enforced against the teacher had involved state-established substantive guidelines or standards, then state action might have been present.[288] Nonetheless, that was not the case in *Caviness*,[289] and the court decided that the entity that ran the school had acted independently through its own judgments.[290]

Similarly, the U.S. Court of Appeals for the First Circuit found in *Logiodice v. Trustees of Maine Central Institute*[291] that a private school that operated under contract with the state's local school district was not a state actor.[292] This case is instructive—even though it dealt with a state's contract

279. *See* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) ("[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.").

280. *See* Evans v. Newton, 382 U.S. 296, 299 (1966).

281. *See supra* note 135; *see also* GARNETT, *supra* note 2 (describing the state action doctrine as "complicated and confusing").

282. *See* Garnett, *supra* note 43, at 55–57; *see also* Green et al., *supra* note 239, at 326–33; Hulden, *supra* note 240, at 1266–73; LoTempio, *supra* note 267, at 452–53.

283. LoTempio, *supra* note 267, at 454.

284. 590 F.3d 806 (9th Cir. 2010).

285. *Id.* at 818.

286. *See id.* at 815–16.

287. *See id.* at 816–18.

288. *See id.* at 817–18.

289. The court emphasized that there was no "reference to charter schools in the statutory sections governing certified teachers' employment rights" and charter schools are "exempt from all statutes and rules relating to schools, governing boards and school districts." *Id.* at 817.

290. *See id.*

291. 296 F.3d 22 (1st Cir. 2002).

292. *Id.* at 31–32.

with a private school, not a charter school—because the nature of the contract[293] resembles that between a state and a charter school. Like the *Caviness* court, the *Logiodice* court recognized that providing education is not an exclusive state function.[294] In holding that there was no state action, the court emphasized that the private school was run by private trustees,[295] that the decision-making at issue—suspending a student and requiring that he obtain counseling before returning to school[296]—was executed by the private entity under disciplinary procedures imposed by the school, and that state officials merely served as advisors.[297]

In contrast, the U.S. Court of Appeals for the Fourth Circuit decided in *Peltier v. Charter Day School, Inc.*[298] that the charter school under review was a state actor in the specific context of the challenged school policy—the charter school's dress code—and, thus, it was bound by the Constitution's mandates.[299] In finding state action, the court focused on the school's designation as "public" under state law,[300] the substantial funding that the charter school received from the state,[301] and the fact that charter schools are able to provide education only by the authority states grant to them.[302] The court decided that the charter school's dress code was part of the school's educational mission to provide a "traditional school," which directly impacted the state's grant of authority and responsibility to the school.[303] The Fourth Circuit's holding falls in line with most state courts that have addressed the issue.[304]

These cases exemplify the fact-specific nature of state action doctrine analysis,[305] as all three analyzed charter schools or private schools contracting with the state and reached disparate conclusions. The Fourth Circuit in *Peltier* determined that the decisions of *Logiodice* and *Caviness* did not establish "bright-line rules applicable to every case, but instead . . . evaluat[ed] the specific conduct challenged by the plaintiffs in the context of the governing state law."[306] The courts in *Logiodice* and *Caviness* analyzed student discipline and personnel decisions, respectively, whereas the court in

293. *But see* Riester v. Riverside Cmty. Sch., 257 F. Supp. 2d 968, 972–73 (S.D. Ohio 2002) (distinguishing *Logiodice* on the grounds that a charter school is recognized by state legislation as public).
294. *Logiodice*, 296 F.3d at 26–27.
295. *See id.* at 28.
296. *See id.* at 25.
297. *See id.* at 28.
298. 37 F.4th 104 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2657 (2023).
299. *See id.* at 130–31.
300. *See id.* at 117.
301. *See id.* at 118.
302. *See id.*
303. *See id.* at 120.
304. *See* LoTempio, *supra* note 267, at 454 & nn.185–86 (collecting cases); *see also* Green et al., *supra* note 239, at 326–31.
305. *See infra* note 332 and accompanying text.
306. Peltier v. Charter Day Sch., Inc., 37 F.4th 104, 121 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2657 (2023).

Peltier addressed the charter school's decision to enact a dress code.[307] The Fourth Circuit in *Peltier* believed that the charter school's dress code directly implicated the school's educational philosophy and function, thus implicating its state-granted authority.[308] The Ninth Circuit emphasized in *Caviness*, however, that if there are no explicit substantive state standards, guidelines, or regulations that "compelled or influenced" the charter school's actions, then the decisions made are neither the state's nor state action.[309] Interestingly, the charter school in *Peltier* was not operating under any specific state guidelines; the dress code was a product of the educational philosophy implemented by a private board of trustees.[310] Thus, it may be that even under the same facts, these cases would come out differently in different circuit courts.

Additionally, although they discussed different sets of state action tests, when addressing the same test in their analyses, the courts arrived at different conclusions. All three cases applied the public function test,[311] and, in doing so, *Caviness* and *Peltier* both discussed the language of state statutes designating charter schools as public.[312] Each court relied, however, on different presumptions to begin their analyses, leading to differing outcomes. The Ninth Circuit in *Caviness* began its analysis from the assumption that "a state's statutory characterization of a private entity as a public actor for some purposes is not necessarily dispositive with respect to all of that entity's conduct."[313] It thus held that the charter school was not a state actor, reasoning that education is not an exclusively state function.[314] In contrast, the court in *Peltier* decided that the charter school in question—because it provided "public education"—performed a function traditionally reserved exclusively for the government.[315] This decision rested, however, on the fact that the *Peltier* court had already decided that the charter school was public based on the state statute's definition.[316] If *Peltier* had operated from the same assumption as *Caviness*, perhaps the case might have yielded a different result.

B. The Supreme Court's Instructive Precedent for Charter Schools

The Supreme Court has decided two cases that are relevant to the state action issue regarding charter schools: *Rendell-Baker v. Kohn*[317] and *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*.[318]

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307. *See id.* at 121.
308. *See id.* at 120–22.
309. *See* Caviness v. Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 818 (9th Cir. 2010).
310. *See Peltier*, 37 F.4th at 113.
311. *See id.* at 119; *Caviness*, 590 F.3d at 814–16; Logiodice v. Tr. of Me. Cent. Inst., 296 F.3d 22, 26 (1st Cir. 2002).
312. *See Peltier*, 37 F.4th at 117; *Caviness*, 590 F.3d at 814.
313. *Caviness*, 590 F.3d at 814.
314. *See id.* at 814–16.
315. *See Peltier*, 37 F.4th at 119.
316. *See id.* at 117.
317. 457 U.S. 830 (1982).
318. 531 U.S. 288 (2001).

In *Rendell-Baker*, a counselor from a privately operated school alleged that the school violated her constitutional free speech and due process rights by discharging her after a dispute.[319] The Court first had to determine whether the school was a state actor before it could assess whether the petitioner's constitutional rights were violated.[320] The Court applied the government compulsion test,[321] the public function test,[322] and the symbiotic relationship test[323] to reach its conclusion that the school was not a state actor.[324] In its analysis, the Court recognized that the school received between 90 percent and 99 percent of its budget from state funds,[325] but it decided that such financial dependency did not make the school's decisions those of the state.[326] Significantly, the Court noted that "[a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts."[327] Additionally, the Court decided that although the state exercised "extensive regulation" over the school, the regulation was not related to the challenged decision of the school and, thus, did not make such a decision state action.[328] The Court also held that there was no symbiotic relationship between the school and the state because the relationship was similar to other government-contractor relationships, in which contractors perform state services for the public from which the state does not profit financially.[329] Lastly, the Court held that even though the school's education services serve the public, that service is not an exclusive public function under the state action doctrine.[330]

In *Brentwood Academy*, a private school that was a member of the Tennessee Secondary School Athletic Association, a membership corporation, sued the association under the First and Fourteenth Amendments for bringing a regulatory enforcement action against the school.[331] The Court recognized that determining state action is a fact-specific inquiry that cannot apply with uniformity[332] and that considers various factors.[333] Relying heavily on the pervasive entwinement test, the Court emphasized that 84 percent of the association's membership was comprised of public schools, public school officials controlled and performed the association's "ministerial acts by which the Association exists," the association's staff was able to partake in a state retirement program, the state approved and reviewed

319. *See Rendell-Baker*, 457 U.S. at 831–35.
320. *See id.* at 838.
321. *See id.* at 841.
322. *See id.* at 842.
323. *See id.* at 842–43.
324. *See id.* at 843.
325. *Id.* at 832.
326. *See id.* at 840.
327. *Id.* at 841.
328. *Id.* at 841–42.
329. *See id.* at 842–43.
330. *See id.* at 842.
331. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 291, 293 (2001).
332. *See id.* at 295–96, 298.
333. *See id.* at 296.

the association's rules, and the state allowed students to satisfy their physical education requirement by partaking in athletics sponsored by the association.[334] Thus, the state was sufficiently entwined with the membership organization to yield state action.[335]

The courts in *Peltier*, *Logiodice*, and *Caviness* each relied on this Supreme Court precedent to reach their respective holdings, with some courts emphasizing one case over the other to distinguish or support its own conclusion. *Caviness* compared the charter school it analyzed to the private school in *Rendell-Baker*, highlighting that private entities contracted with the state to provide education in both cases.[336] Relying on *Rendell-Baker* to support and reach its conclusion, the court in *Caviness* rejected an argument that *Rendell-Baker* was not binding on the court because the relevant state statute in *Caviness* designated charter schools as public.[337] The *Caviness* court held that such statutory designation does not control.[338] However, the Fourth Circuit in *Peltier*—operating from the presumption that such statutory characterizations do control[339]—distinguished *Rendell-Baker* because it only applies to "special education," it involved a personnel decision rather than a dress code requirement, and the school in *Rendell-Baker* was private rather than public.[340]

As these cases demonstrate, relevant Supreme Court precedent can be interpreted in different ways, leading to variable outcomes, because it is based on fact-specific state action doctrine analysis. The court in *Peltier* briefly addressed the pervasive entwinement test from *Brentwood*, recognizing that, because the state was not involved in the charter school's decision to implement a dress code, there was no entwinement with the state.[341] *Caviness* also addressed the pervasive entwinement test from *Brentwood*, recognizing that the charter school would fail this test because state actors were not involved in the school's board and the state did not play any part in the board's decisions.[342] The court in *Caviness*, however, emphasized that state approval of rules does not amount to state action[343] and participation in a state retirement program does not yield state action because states are normally allowed to subsidize costs of private entities.[344] Interestingly, the Supreme Court considered both of these factors in *Brentwood* as contributing to the state's pervasive entwinement with the

334. *Id.* at 299–301.
335. *Id.*
336. *See* Caviness v. Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 815 (9th Cir. 2010).
337. *See id.* at 815–16.
338. *See supra* note 313 and accompanying text.
339. *See supra* note 316 and accompanying text.
340. *See* Peltier v. Charter Day Sch., Inc., 37 F.4th 104, 119–21 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2657 (2023).
341. *See id.* at 116.
342. *See Caviness*, 590 F.3d at 816 n.6.
343. *See id.* at 817–18.
344. *See id.* at 817.

Tennessee Secondary School Athletic Association.[345] Thus, relevant Supreme Court precedent may not be entirely helpful or outcome-determinative for other courts, as it requires a highly fact-specific analysis that is based on the totality of the circumstances.

C. Charter Schools as Private Actors—the Implications

Many scholars who have addressed the state action issue have recognized the various reasons why charter schools may be considered private actors. Institutions created by the government are not necessarily state actors,[346] designation as a public entity by law does not define that entity for purposes of legal analysis,[347] and an entity does not become a state actor because it receives a majority of its funding from the government through a contractual relationship.[348] As to charter schools, specifically, they are often organized and run by private organizations,[349] "they typically have more flexibility to determine curricula and school policies, much like traditional private schools,"[350] they are not zoned,[351] and their teachers are usually not unionized.[352]

If charter schools are deemed private actors, they do not have to comply with the Constitution[353] and, thus, are less likely to face Religion Clauses challenges. However, private institutions—especially religious entities—can challenge other state actors for violating their constitutional rights.[354] After *Espinoza* and *Carson*, for example, private religious schools may bring Free Exercise Clause challenges against the state if the state fails to include them in a private education subsidy program.[355] Additionally, because private schools usually set their own curricula but are required to follow state compulsory education laws,[356] a private religious school may bring a Free Exercise challenge if it believes that state law is improperly burdening its

345. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 291, 300–01 (2001).

346. *See* Garnett, *supra* note 43, at 54.

347. *See* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 395 (1995); *see also* Hulden, *supra* note 240, at 1280–81; Sugarman, *supra* note 122, at 252 ("To argue that there is a difference because charter schools are 'labeled' for some purposes as public schools seems the wrong way to look at things.").

348. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 840–41 (1982).

349. *See* Sugarman, *supra* note 122, at 237.

350. MADELINE W. DONLEY, CONG. RSCH. SERV., LSB10958, FOURTH CIRCUIT SAYS PUBLIC CHARTER SCHOOLS ARE STATE ACTORS, SUPREME COURT DECLINES TO WEIGH IN (2023); *see also* Wren, *supra* note 234, at 144 (recognizing that charter schools are subject to few state regulations).

351. Sarah Mervosh, *A Religious Charter School Faces Pushback from the Charter School Movement Itself*, N.Y. TIMES (June 8, 2023), https://www.nytimes.com/2023/06/08/us/oklahoma-religious-charter-school.html [https://perma.cc/AY4G-FS7E].

352. *See id.*

353. *See supra* note 134 and accompanying text.

354. *See supra* note 134 and accompanying text.

355. *See supra* Part I.D.3.

356. *See supra* note 126 and accompanying text.

ability to teach its chosen curriculum. This exact scenario is currently being litigated in a New York State court.[357]

New York requires that nonpublic schools use instruction that is "substantially equivalent" to that of public schools.[358] In 2015, the advocacy group Young Advocates for Fair Education filed a complaint alleging that students in New York yeshivas were not receiving adequate secular education, particularly in subjects such as math and English.[359] This complaint sparked a New York State Education Department investigation,[360] which uncovered that "[o]nly [2] of 28 yeshivas that city officials visited [we]re offering secular education that is considered 'substantially equivalent' to classes found in the city's public schools."[361] In September 2022, the New York State Board of Regents approved an updated regulation with criteria that local school districts should use to assess whether nonpublic school education is "substantially equivalent" to that of local public schools.[362] The board emphasized that this regulation does "NOT regulate religious

357. *See* Verified Petition, Parents for Educ. & Religious Liberty in Schs. v. Young, 190 N.Y.S.3d 816 (Sup. Ct. 2023) (No. 907655-22), ECF No. 1.

358. Memorandum from James N. Baldwin, Senior Deputy Comm'r for Educ. Pol'y, New York State Dep't of Educ., to P-12 Educ. Comm. 2 (Mar. 3, 2022), https://www.regents.nysed.gov/sites/regents/files/322p12d1.pdf [https://perma.cc/6NCU-M3CS]; *see also* Ray Domanico, *New York State vs. Hasidic Schools: Placing the "Substantially Equivalent" Curriculum Debate in Context*, MANHATTAN INST. (Mar. 23, 2023), https://manhattan.institute/article/new-york-state-vs-hasidic-schools-placing-the-substantially-equivalent-curriculum-debate-in-context#notes [https://perma.cc/GD5A-LUJC]; N.Y. STATE EDUC. DEP'T, SUBSTANTIAL EQUIVALENCY IMPLEMENTATION GUIDANCE 3 (2023), https://www.nysed.gov/sites/default/files/programs/nonpublic-schools/final-se-guidance_08-23-2023.pdf [https://perma.cc/ZCZ7-MLU5]. *But see id.* at 6 ("Substantially equivalent does not mean that a religious or independent school must have the same schedule or teach exactly the same content as the public school.").

359. *See* Cayla Bamberger, *NYC Schools Investigation Finds Several Yeshivas Fail to Offer Quality Secular Education*, DAILY NEWS (June 30, 2023, 3:52 PM), https://www.nydailynews.com/2023/06/30/nyc-schools-investigation-finds-several-yeshivas-fail-to-offer-quality-secular-education/ [https://perma.cc/M7NW-HUR5]; Yoav Gonen, *City Education Officials Let Failing Yeshivas Languish for Years, Newly Released Records Show*, CITY (Aug. 7, 2023 5:00 AM), https://www.thecity.nyc/2023/8/7/23822399/yeshiva-education-failing-city-review [https://perma.cc/4ZFZ-YC7N]; Eliza Shapiro & Brian M. Rosenthal, *In Hasidic Enclaves, Failing Private Schools Flush with Public Money*, N.Y. TIMES (Sept. 11, 2022), https://www.nytimes.com/2022/09/11/nyregion/hasidic-yeshivas-schools-new-york.html?smid=tw-share [https://perma.cc/QL5T-H5MT].

360. *See* Eliza Shapiro & Brian M. Rosenthal, *New State Rules Offer Road Map for Regulating Private Hasidic Schools*, N.Y. TIMES (Sept. 13, 2022), https://www.nytimes.com/2022/09/13/nyregion/new-york-rules-yeshivas.html [https://perma.cc/W9FS-2AHY].

361. Eliza Shapiro & Jeffery C. Mays, *Why New York's Inquiry into Yeshivas Mysteriously Stalled*, N.Y. TIMES (Dec. 18, 2019), https://www.nytimes.com/2019/12/18/nyregion/yeshivas-education-report-new-york.html [https://perma.cc/YD5F-CJYU].

362. N.Y. COMP. CODES R. & REGS. tit. 8, § 130.9 (2024); N.Y. STATE EDUC. DEP'T, FINAL SUBSTANTIAL EQUIVALENCE REGULATION 9 (2022), https://www.regents.nysed.gov/sites/regents/files/FB%20Monday%20-%20Final%20Substantial%20Equivalence%20Regulations.pdf [https://perma.cc/SM73-6JF9].

instruction" nor does it "[s]ingle out any one group or groups."[363] Many yeshiva schools, however, disagreed.[364]

A yeshiva advocacy group, Parents for Educational and Religious Liberty in Schools, opposed the regulation and filed suit with other Jewish advocates against the Chancellor of the Board of Regents of New York and the Commissioner of Education.[365] Among other things, plaintiffs alleged that the new regulations violated their constitutional rights, including their right to free religious exercise.[366] Though the court denied the petitioners' claims alleging constitutional violations, the court invalidated two subsections of the New York Codes, Rules and Regulations that required parents to withdraw their children from substantially inequivalent schools and enroll them instead in satisfactory educational institutions.[367] The court found that the state lacked the authority to direct the closure of such schools.[368] The respondents in this action, the Chancellor of the Board of Regents of New York and the Commissioner of Education, have since appealed.[369]

Yeshiva schools are private actors and thus can bring constitutional claims against the state overseeing them if it tries to restrict their curricula and religious teachings.[370] If charter schools are private actors, then religious charter schools could bring similar claims against the state overseeing them—especially considering that many religious charter schools would likely prefer curricula treating religious doctrine as the truth.[371]

D. Charter Schools as State Actors—the Implications

Alternatively, some scholars have argued that charter schools may be categorized as public entities because they are state-created,[372] they are often

363. N.Y. STATE EDUC. DEP'T, *supra* note 362, at 10.

364. *See* Shapiro & Rosenthal, *supra* note 360.

365. *See* Verified Petition, *supra* note 357.

366. *See id.* at 29–35.

367. *See* Decision and Judgment at 19–20, Parents for Educ. & Religious Liberty in Schs. v. Young, 190 N.Y.S.3d 816 (Sup. Ct. 2023) (No. 907655-22), ECF No. 168. The two subsections held invalid stated that, after a final determination by the state that a nonpublic school is not in compliance with the substantial equivalence requirement, the school "shall no longer be deemed a school which provides compulsory education." N.Y. COMP. CODES R. & REGS. tit. 8, § 130.6(c)(2)(i). The court reasoned that these subsections were beyond the legislature's authority because they "require parents to automatically unenroll their children from nonpublic schools that have been found to not provide substantially equivalent instruction, without allowing them the opportunity to prove that satisfactory supplemental instruction is being provided." Decision and Judgment, *supra*, at 19.

368. *See* Decision and Judgment, *supra* note 367, at 20.

369. *See* Notice of Appeal, *Parents for Educ. & Religious Liberty in Schs.*, 190 N.Y.S.3d 816 (No. 907655-22), ECF No. 172; *see also* Brief for Appellants, *In re* Parents for Educ. & Religious Liberty in Schs., No. CV-23-0756 (N.Y. App. Div. Oct. 24, 2023), ECF No. 11.

370. *See generally* Lee v. Weisman, 505 U.S. 577, 589–90 (1992) (maintaining that transmission of religious doctrine is "committed to the private sphere" and free from government interference).

371. *See supra* note 2.

372. *See* Hulden, *supra* note 240, at 1289; *see also* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1495 (2003); *see also* Lebron v. Nat'l R.R. Passenger

referred to as public schools in state laws,[373] they originated as a reform within the existing public school system,[374] they receive public funding from the government,[375] there is usually no tuition,[376] they often administer standardized tests that district public schools are likewise required to give,[377] they are "subject to the performance standards outlined in their charters,"[378] and they are publicly accountable because they are chartered by public bodies.[379]

If charter schools are deemed state actors, they must comply with every mandate of the Constitution, including the Religion Clauses.[380] Therefore, like in public schools, they could not have school officials lead classroom prayer with students,[381] erect religious symbols on school property if such property is state-owned,[382] or incorporate preferences for religious teachings into their curricula.[383]

E. The Challenge of Applying the State Action Doctrine to Hybrid Institutions

Charter schools vary in many respects from state to state.[384] As a result, the United States is home to a wide variety of charter schools, some that look more like private institutions whereas others resemble public schools.[385] Additionally, "[w]hile charter schools have emphasized their public characteristics to be eligible for funding under state constitutional law, they have also emphasized their private characteristics to be exempted from state and federal protections that are provided by traditional public schools for employees and students."[386] Thus, it is no surprise that courts have reached varying state action conclusions regarding the charter schools in cases that have come before them.[387]

Corp., 513 U.S. 374, 396 (1995) ("Government-created and -controlled corporations [a]re part of the Government.").

373. *See, e.g.*, N.Y. EDUC. LAW § 2853(1)(c) (McKinney 2024) ("A charter school shall be deemed an independent and autonomous public school . . . .").

374. *See supra* notes 229–36 and accompanying text.

375. *See* Saiger, *supra* note 238, at 1174. *But see* GARNETT, *supra* note 2, at 7 (noting that charter schools also receive funding from "philanthropists and other private donors").

376. *See* Mervosh, *supra* note 351; *see also* Mead, *supra* note 241, at 367.

377. *See* GARNETT, *supra* note 2, at 7; Hulden, *supra* note 240, at 1289 & n.269.

378. Donley, *supra*, note 350; *see also* Ryan, *supra* note 240, at 398 (noting that "standards and testing apply to charter schools just as they do to traditional public schools").

379. *See* Sugarman, *supra* note 122, at 237.

380. *See supra* note 134 and accompanying text.

381. *See supra* notes 165–79 and accompanying text.

382. *See supra* notes 183–89 and accompanying text.

383. Ryan, *supra* note 134, at 2267 ("[T]he most important issue is that charter schools are a private actor for curriculum purposes, so that the school could teach religion classes and incorporate religious concepts in other subjects without running afoul of the Establishment Clause. Without the ability to include religion in the curriculum, the school remains secular."); *see supra* notes 154–64 and accompanying text.

384. *See* Mead, *supra* note 241, at 350–51.

385. *See id.* at 351.

386. Green et al., *supra* note 239, at 313.

387. *See supra* Part II.A.

To account for this variety and their hybrid nature, charter schools, as a broad category, are often labeled and recognized as "'quasi-public,' 'other non-public,' and 'hybrid public schools.'"[388] Some scholars have argued that the state action doctrine is not equipped to deal with such hard-to-label institutions.[389] A complete and comprehensive analysis of the conflicting private and public aspects of charter schools can justifiably lead a court to reach either conclusion—that a charter school is private or public.[390] Further, state action precedent is often inconsistent or not directly applicable[391] due to the wide variety of charter schools[392] and the fact that state action analysis is highly fact-specific.[393] Thus, "even if the Supreme Court resolves th[e] [current circuit] split, . . . a Supreme Court decision may not answer the question for charter schools in all states or in all aspects of charter schools."[394] Accordingly, some have urged the Court to adopt a new method of state action analysis or a test specific to charter schools to properly account for their unique nature.[395]

III. RELIGIOUS CHARTER SCHOOLS ARE BROADLY PERMISSIBLE BUT MAY NARROWLY CONFLICT WITH THE RELIGION CLAUSES

Given the wide variety of charter schools,[396] it would not be practicable for the Supreme Court to establish one sweeping opinion that categorically labeled all charter schools either private or public. Ending the inquiry at this juncture fails to recognize the truly hybrid nature of such schools and ignores the fact that different states enact different charters with different terms. Nonetheless, many who oppose religious charter schools as an establishment of religion and violation of religious freedom[397] may rely on the extensive literature and federal and state court precedent labeling charter schools as public actors[398] to ensure that religious charter schools are deemed state actors and unconstitutional.

Part III.A rejects the argument that, under current state action doctrine jurisprudence, charter schools can all justifiably be deemed state actors and concludes that states should be allowed to approve religious charter schools. Part III.B recognizes that specific practices and characteristics of religious charter schools can still be analyzed under the state action doctrine and examines certain circumstances in which they may violate the Religion Clauses. Part III.C argues that religious charter schools may provide a better

388. Mead, *supra* note 241, at 352 (footnotes omitted); Ryan, *supra* note 134, at 2267, 2277–78 ("It is entirely possible that a charter school could be a state actor for one purpose but not another, depending on the extent of the state's role in each aspect.").
389. *See, e.g.*, Garnett, *supra* note 43, at 53.
390. *See* Wren, *supra* note 234, at 166.
391. *See, e.g.*, Hulden, *supra* note 240, at 1295; LoTempio, *supra* note 267, at 461–62.
392. *See supra* notes 384–85 and accompanying text.
393. *See supra* note 332 and accompanying text.
394. Ryan, *supra* note 134, at 2267.
395. *See, e.g.*, LoTempio, *supra* note 267, at 462.
396. *See supra* notes 384–85 and accompanying text.
397. *See supra* notes 9–12 and accompanying text.
398. *See* Saiger, *supra* note 238, at 1179–81.

option for many parents under the theory of school choice because (1) charter schools outperform public schools and (2) they can be held more accountable to state curricula requirements than private religious schools.

A. Religious Charter Schools Should Be Permitted

Opponents of religious charter schools may use various state action doctrine tests to argue that charter schools are state actors and thus cannot be religious. First, opponents may claim that a symbiotic relationship exists between the charter school and the state.[399] In *Burton v. Wilmington Parking Authority*,[400] the Court found that when a private entity operates out of a public building or on publicly owned land, the state pays for upkeep or land maintenance, and the private entity and state both financially benefit from connected usage of the land, this symbiotic relationship between parties constituted state action.[401] Although some charter schools may find their own space in which to operate,[402] including leasing space from or owning private buildings,[403] other charter schools operate out of public buildings.[404] Still, a charter school's operations would have to directly benefit the state financially for there to be a sufficiently symbiotic relationship.[405] The Court has asserted that a state interest in education is bolstered by the "overriding importance of preparing students for work and citizenship"[406] from which the state may eventually financially benefit. Although the state has an interest in "regulating education and the individual right to raise one's children,"[407] providing education is not exclusively a state function,[408] and the state is not the sole beneficiary of such education. Thus, charter schools, as a category, do not meet the symbiotic relationship test—nor the public function test, for that matter—so as to implicate the state action doctrine. Therefore, charter schools can be simultaneously religious and constitutional.

Another argument suggests that there is a sufficiently close nexus between the state and a charter school to deem a charter school a state actor[409] because charter schools and the state are so pervasively intertwined[410] and interdependent that the schools' actions cannot be solely private and the entities are joint participants in a common venture.[411] A charter school and the state, however, are not so interdependent nor so intertwined that the charter school's actions can no longer be seen as purely private, even if they are joint participants in a common venture of providing education. Charter

399. *See supra* notes 270, 277 and accompanying text.
400. 365 U.S. 715 (1961).
401. *See id.*; *see also* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972).
402. *See* Wren, *supra* note 234, at 165.
403. *See, e.g.*, N.Y. EDUC. LAW § 2853(3)(a),(c) (McKinney 2024).
404. *See id.* § 2853(3)(a).
405. *See supra* note 329 and accompanying text.
406. Grutter v. Bollinger, 539 U.S. 306, 331 (2003).
407. *See supra* notes 124–26 and accompanying text.
408. *See supra* notes 286, 330 and accompanying text.
409. *See supra* note 269 and accompanying text.
410. *See supra* notes 273, 280, 334–35 and accompanying text.
411. *See supra* notes 271, 278 and accompanying text.

schools are often run and organized by private institutions that impose policies and rules in which the government does not partake, such as their curricular theme.[412] If, as the *Caviness* court stated, a particular action involves substantive regulations or standards that the state imposes on the charter school, then the situation is different.[413] This nuance, however, lends support to this Note's argument that charter schools may only be deemed state actors in particular contexts, not categorically.[414] Thus, charter schools do not meet any of the state action tests so as to universally categorize them as state actors.

Opponents of religious charter schools may also attack how such schools are funded. When parents decide to send their children to charter schools instead of local district public schools or private schools, they effectively direct state funds to the charter school.[415] Such allocation of state funds has, in similar circumstances, been held constitutional.[416] Although the cases analyzing the direction of government funds to religious institutions dealt with state programs that did not provide for the full funding of those religious entities,[417] the Court has also previously held that complete or substantial financial dependency on state funds does not necessarily make the private institution entirely bound up with the state under the state action doctrine.[418] Thus, a charter school that is fully funded by the state does not necessarily become a state actor.[419] In conclusion, it should be constitutional for a state to do what Oklahoma did and approve a religious charter school as a valid part of the school choice landscape.[420]

B. When Religious Charter Schools Must Abide by the Religion Clauses

Although religious charter schools should be permitted, instances remain when such schools should be required to tailor their practices to comply with the Religion Clauses. Considering the aforementioned lines of Supreme Court cases involving teacher-led prayer, religious symbols, and curricula,[421] religious charter schools may, in specific circumstances, be too intertwined with the state to avoid compliance with the Court's Religion Clauses jurisprudence in these three categories.[422]

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412. *See supra* note 243 and accompanying text.
413. *See supra* note 288 and accompanying text.
414. *See infra* Part III.B.
415. *See supra* note 245.
416. *See supra* Part I.D.3.
417. *See supra* Part I.D.3.
418. *See supra* notes 319–26 and accompanying text.
419. Additionally, not all charter schools are fully funded by the government. *See supra* note 375.
420. *See supra* note 3 and accompanying text.
421. *See supra* notes 154–64, 165–79, 183–89 and accompanying text.
422. *See* Alexander Volokh, *Prison Vouchers*, 160 U. PA. L. REV. 779, 814 (2012) ("[W]hen state action is found in a particular context, it doesn't mean that the actor is a state actor in all contexts.").

First, religious charter schools may conduct teacher-led prayer if they privately hire their teachers and the teachers are only mandated to comply with certain accreditation requirements.[423] However, if the charter school is not exempt from its teachers partaking in collective bargaining agreements and allows its teachers to partake in teachers' unions,[424] then a court may find that the teacher's actions are state action under the pervasive entwinement test,[425] the joint participation test,[426] or the close nexus test.[427] Teachers participating in a union may be so entwined with the government they negotiate with and rely on for employment that there is a sufficiently close nexus to conclude that the teachers and state are interdependent entities and joint participants in the common venture of providing education.[428] Thus, if teachers are allowed to unionize, teacher-led prayer will likely be considered state action under any of these three tests and prohibited from religious charter schools under the Religion Clauses.

Notably, though, a main concern of the teacher-led prayer jurisprudence prohibiting such activity in public school classrooms was the psychological pressure that students may feel to participate, even with a formal opportunity to opt out.[429] Even if teachers in religious charter schools do not participate in collective bargaining agreements or teachers' unions, the concern surrounding teacher-led prayer may still manifest in these schools. This may lead a court to focus on the facts before it that allow it to decide there is state action so it can implicate the Religion Clauses to prevent such coercion. Because charter schools are a part of the school choice movement, however, parents have the full and free range choice to send or not send their children to such schools.[430] If parents choose to send their children to religious schools, it can be presumed that they intend for their child to learn the religious practices and beliefs that they teach. Thus, the concern about psychological coercion may be moot in religious charter schools and not dispositive in a court's state action analysis.

Second, religious charter schools may have religious symbols on their property if the school is on private property. Charter schools that are leased from, or that operate out of, private space[431] should be permitted to erect religious symbols because the land itself is privately owned. If the land is publicly owned, however, religious charter schools cannot have religious symbols on their property. This is not because of the symbiotic relationship test, as the state does not receive a direct financial benefit from the school.[432] If anything, the state suffers financially when it provides property to charter

423. *See supra* notes 238–39 and accompanying text.
424. *See supra* note 238.
425. *See supra* notes 273, 280, 334–35 and accompanying text.
426. *See supra* notes 271, 278 and accompanying text.
427. *See supra* notes 269, 276 and accompanying text.
428. *See, e.g.*, Ryan, *supra* note 134, at 2283–84.
429. *See supra* notes 169–74, 178–79 and accompanying text.
430. *See supra* note 208 and accompanying text.
431. *See supra* notes 402–03 and accompanying text.
432. *See supra* notes 400–08 and accompanying text.

schools, as such schools often do not have to pay taxes, fees, or assessments on the property.[433]

The joint participation test,[434] however, may be satisfied when a charter school is located on public property because the state and the private organization running a charter school are interdependent on one another for the property. The charter school relies on the state to provide it with a space to exist, and the state relies on the school to maintain the space and comply with its rules and regulations. Thus, a religious charter school on public property must comply with the Religion Clauses and refrain from displaying religious symbols. If, however, the public property on which the religious charter school operates has preexisting religious monuments with a secondary, nonreligious meaning—such as social or historical meanings[435]—then the monuments will likely remain as constitutional.

Lastly, religious charter schools may present religious curricula. A religious curriculum is the most important characteristic of a religious charter school, as the ability to "teach religion classes and incorporate religious concepts in other subjects" seems essential for a school to be considered religious.[436] Some argue that "the ideas [a charter school] selects are stamped with state approval, becoming those of the state itself."[437] But state approval of a charter does not necessarily indicate that the state endorses a charter or the instruction it offers.[438] Others may argue that a charter school's decision on its curriculum is state action under the government compulsion test,[439] pervasive entwinement test,[440] or the close nexus test;[441] however, although part of the curriculum that a religious charter school provides is compelled or encouraged by the state, it is compelled in the same way a religious private school is compelled to teach certain curriculum.[442]

State governments supervise and regulate private schools in many ways, including by requiring them to meet certain educational standards[443] and by imposing restrictions on them with respect to curricula.[444] But the government's regulations can only go so far with respect to private schools, considering that they are allowed to be religious and teach religious curricula. So too does the government's oversight of charter schools only extend to a certain point.[445] The government cannot and does not, for example, limit the ways in which charter schools can select a certain theme on which to center

433. *See, e.g.*, N.Y. EDUC. LAW § 2853(1)(d) (McKinney 2024).
434. *See supra* notes 271, 278 and accompanying text.
435. *See supra* note 189 and accompanying text.
436. Ryan, *supra* note 134, at 2267.
437. Black, *supra* note 265, at 848.
438. *See supra* note 343 and accompanying text.
439. *See supra* notes 272, 279 and accompanying text.
440. *See supra* notes 273, 280 and accompanying text.
441. *See supra* notes 269, 276 and accompanying text.
442. *See, e.g.*, *supra* note 358 and accompanying text.
443. *See* 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 179 (2008) (ebook).
444. *See* Saiger, *supra* note 238, at 1194.
445. *See id.*

their school values and teachings.[446] Similar to religious private schools, therefore, religious charter schools do not meet state action tests and are private actors in the context of their religious curricula, and the state should not be allowed to regulate the inclusion of religion in curricula.[447] If it does, the school can bring free exercise claims against the state, similar to the yeshiva schools' claims currently in New York state court.[448]

C. Religious Charter Schools Can Provide Parents with a Better Choice

As a final point, it is important to reconcile issues surrounding private religious institutions[449] with an increase in religious education. Charter schools have done much work to manage learning disparities, bridge achievement gaps, and better address learning losses for minority and low-income students.[450] Additionally, charter schools are outperforming public schools across the nation,[451] which is appealing to parents who prioritize academic achievement. Parents seeking religious education for their children should be afforded learning opportunities that ensure good results and high achievement with a low price tag.

Although the yeshiva schools in New York are currently under fire for their failure to comply with the "substantial equivalence" requirement,[452] religious charter schools are not likely to reach the extreme outcomes of these schools. Charter schools, like private schools, are required to meet certain standards[453] such as the "substantial equivalence" requirement in New York.[454] Failure to meet the substantial equivalence requirement in charter schools carries with it greater risks—the state may shut down charter schools if certain targets are not met[455]—that private schools are not subject to, which

446. *See supra* note 243.

447. This does not mean, however, that the state cannot continue to regulate a religious charter school's general curriculum, apart from its religious curriculum, to ensure that it meets certain thresholds and requirements imposed by the state. *See, e.g.*, *supra* note 358 and accompanying text. Nor does the state's regulatory authority convert the charter school's implementation of religious curriculum to state action.

448. *See supra* notes 358–69 and accompanying text.

449. *See supra* notes 358–69 and accompanying text.

450. Ryan, *supra* note 134, at 2261.

451. *See* Carl Campanile, *Charter Schools Outperform Public Schools in US, with NY Results 'Among the Best in the Country': Study*, N.Y. POST (June 11, 2023, 6:44 PM), https://nypost.com/2023/06/11/charter-schools-outperform-public-schools-in-us-with-ny-results-among-the-best-in-the-country-study/ [https://perma.cc/V3LS-2RNZ]; *see also* Carl Campanile, Jesse O'Neill, Georgett Roberts & Khristina Narizhnaya, *NYC Charters Outperform Public Schools—and Do It at Less than Half the Cost per Student*, N.Y. POST (Feb. 24, 2023, 12:41 PM), https://nypost.com/2023/02/22/nyc-charter-schools-do-more-with-much-less-funding-than-public-schools/ [https://perma.cc/V6EP-2VJQ].

452. *See supra* notes 358–69 and accompanying text.

453. *See supra* notes 241–43 and accompanying text.

454. *See supra* note 358 and accompanying text.

455. *See* Robertson & Riel, *supra* note 208, at 1087–88.

incentivizes higher performance.[456] Private schools, in contrast, just risk losing their status as a substantially equivalent institution, without further repercussions.[457] This added risk leaves charter schools with greater incentives to continue to not only meet state educational standards, but to surpass them.[458] Thus, religious charter schools can actually provide a better alternative to both public schooling and private religious schooling, making them an important addition to the school choice movement.

CONCLUSION

Although opponents of religious charter schools argue that they violate the Establishment Clause, many proponents argue that barring religious charter schools violates the Free Exercise Clause. Thus, both Religion Clauses are implicated in the debate surrounding these schools. Religious charter schools, however, can only be condemned by the Court as unconstitutional if charter schools are deemed state actors under the state action doctrine. Although there is guiding precedent on the matter, the Supreme Court has yet to rule on this issue, and circuit courts and scholars have reached varying conclusions. Nevertheless, the Court should not categorically label charter schools as either state or private actors because such schools are hybrid institutions, they vary nationwide, and the state action doctrine requires a fact-intensive inquiry for each case. Thus, religious charter schools should generally be permitted as a new addition to the modern school choice movement. There may still be circumstances and contexts, though, in which such schools' practices or characteristics may sufficiently constitute state action to come within the ambit of the Religion Clauses—particularly the Establishment Clause—and thus be unconstitutional. Importantly, however, religious charter schools' most identifying characteristic—their religious curricula—cannot be considered state action, and religious charter schools are thus acceptable at large.

456. Charles Upton Sahm, *Closing Failing Charter Schools Reinforces Accountability*, MANHATTAN INST. (Feb. 21, 2016), https://manhattan.institute/article/closing-failing-charter-schools-reinforces-accountability [https://perma.cc/BM6C-GF8S].

457. This lack of consequences is a result of the recent New York Supreme Court ruling declaring that New York education regulations—demanding that schools failing to meet the threshold be deemed substantially inequivalent and requiring parents to unenroll their children from such schools—are invalid. *See supra* notes 367–68 and accompanying text.

458. *See supra* note 451 and accompanying text.