

INDIANA’S CHARTER SCHOOLS: TAKING A HOLISTIC APPROACH TO DETERMINE THEIR CONSTITUTIONAL LEGALITY

KAYLEIGH LONG*

INTRODUCTION

Today’s modern public school system stems from the push for common schools in the mid-nineteenth century led by Horace Mann and Henry Barnard, both education reformers.¹ The purposes behind the common school concept included ensuring there was “centralized supervision, tax support, teacher training, better schoolhouses, and increased attendance [along with] uniformity of textbooks, curricula, methods, and discipline.”² In tandem with the common school movement arose the notion of school choice, supported by John Stuart Mill, who argued that parents should decide what type of education their children received.³ At the time, the decision of school choice centered primarily on whether to send a child to a public or private school.⁴

School choice has regained momentum in the last few decades because groups of policymakers and parents believe school choice is the solution to the traditional public schools’ problematic academic performance.⁵ In 2015, “[f]ourth-graders and eighth-graders across the United States lost ground on national mathematics tests . . . , the first declines in scores since the federal government began administering the exams in 1990.”⁶ In the same year, reading scores for eighth graders declined.⁷ School choice is viewed as a potential avenue to correct this problem, especially for minorities, with 2015 showing a persistent

* J.D. Candidate, 2018, Indiana University Robert H. McKinney School of Law – Indianapolis, Indiana; M.A. in Teaching, 2014, Oakland University – Rochester, Michigan; B.A. 2012, Indiana University – Bloomington, Indiana. I would like to thank Professor Carlton Waterhouse for his invaluable feedback throughout the research and writing process. I would like to specially thank my two kindergarten classes in Detroit and one kindergarten class in southeast Washington, D.C. for providing the inspiration for this Note.

1. L.K. Beale, Note and Comment, *Charter Schools, Common Schools, and the Washington State Constitution*, 72 WASH. L. REV. 535, 538 (1997).

2. *Id.* at 539.

3. Krista Kafer, *School Choice in 2003: An Old Concept Gains New Life*, 59 N.Y.U. ANN. SURV. AM. L. 439 (2003) (quoting JOHN STUART MILL, ON LIBERTY 119 (1869)).

4. Aaron Saiger, *Charter Schools, the Establishment Clause, and the Neoliberal Turn in Public Education*, 34 CARDOZO L. REV. 1163, 1168 (2013).

5. Jennifer Lynn Smith, *Educational Vouchers in Indiana? – Considering the Federal and State Constitutional Issues*, 34 VAL. U.L. REV. 275, 281 (1999).

6. Emma Brown, *U.S. student performance slips on national test*, WASH. POST: EDUC. (Oct. 28, 2015), https://www.washingtonpost.com/local/education/us-student-performance-slips-on-national-test/2015/10/27/03c80170-7cb9-11e5-b575-d8dcfedb4ea1_story.html [https://perma.cc/W6H3-JLBP].

7. *Id.*

<http://doi.org/10.18060/4806.1203>

achievement gap defined by the race and socioeconomic status of a student even after the federal government's concerted efforts to close that gap.⁸

While states look to school choice as a means to bolster public education, there has been pushback against this tactic.⁹ Education reformers opposed to charter schools fear that these schools' abilities to access the same public funding and students as the traditional public schools could be so detrimental that eventually the traditional public schools will no longer have enough money or students to stay open.¹⁰ Minnesota was the first state to open its doors to charter schools in 1992,¹¹ and as of the 2010 school year, 1.6 million children were enrolled in 5000 charter schools, making charters five percent of all public schools Fifteen school districts enroll at least a quarter of all public-school students in charters, including big-city districts in New Orleans, Detroit, the District of Columbia, Kansas City (MO), St. Louis, Cleveland, San Antonio, and Indianapolis.¹²

The fear that charter schools could wipe out traditional public schools prompted challenges in various state courts on the constitutionality of charter schools.¹³ The controversy also includes problems associated with management of the schools, so much so that it has reached mainstream circles, as most noted by an entire segment dedicated to the topic on *Last Week Tonight with John Oliver*.¹⁴

While the fight over the legality and ideology of charter schools continues, the current presidential administration looks poised to usher in a new wave of support for the school choice movement.¹⁵ President Donald Trump appointed

8. *Id.*

9. See Anya Kamenetz, *Questions Of Race And Charter Schools Divide Education Reformers*, NPRED (Sept. 30, 2016, 6:00 AM), <http://www.npr.org/sections/ed/2016/09/30/494606061/questions-of-race-and-charter-schools-divide-education-reformers> [<https://perma.cc/8DFT-J76W>].

10. Smith, *supra* note 5, at 281-82.

11. Kafer, *supra* note 3, at 442.

12. Saiger, *supra* note 4, at 1174.

13. See Council of Orgs. & Others for Educ. About Parochiaid v. Governor, 566 N.W.2d 208 (Mich. 1997); *In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 753 A.2d 687 (N.J. 2000); State *ex rel.* Ohio Cong. of Parents & Teachers et al. v. State Bd. of Educ. et al., 857 N.E.2d 1148 (Ohio 2006); League of Women Voters of Wash. v. State, 355 P.3d 1131 (Wash. 2015).

14. John Oliver, *Charter Schools*, LAST WEEK TONIGHT WITH JOHN OLIVER (Aug. 21, 2016), https://www.youtube.com/watch?v=_htSPGAY7I [<https://perma.cc/9B97-ZVUT>]. *Last Week Tonight with John Oliver* airs weekly on HBO and discusses a variety of current national and foreign issues. *Last Week Tonight with John Oliver: About*, HBO, <http://www.hbo.com/last-week-tonight-with-john-oliver/about/index.html> [<https://perma.cc/69FM-RB3S>] (last visited Mar. 12, 2017).

15. See Valerie Strauss, *What's the worst that could happen with Betsy DeVos as education secretary? Two scenarios.*, WASH. POST: ANSWER SHEET (Nov. 27, 2016), <https://www.washingtonpost.com/news/answer-sheet/wp/2016/11/27/whats-the-worst-that-could-happen-with->

Betsy DeVos (a Michigan billionaire and education reformer who supported an increase in vouchers to allow Michigan children to attend private and sectarian schools along with explosive charter school growth) to serve as his Secretary of Education.¹⁶ Included in DeVos's resume on school choice is her help in killing a bill that would have provided more oversight over Michigan charter schools, arguing oversight created too much regulation and the parents should be the ones to decide what schools should stay open or closed by where they enroll their children.¹⁷ She also proposed that all Detroit Public Schools be completely converted to charter schools.¹⁸

This Note argues that state courts thus far have inadequately examined the constitutionality of charter schools by failing to utilize a holistic approach that includes not just a constitutional analysis but also an examination of whether the state's charter schools present a real choice to parents by providing a quality education and promoting improvement within the traditional public schools. Indiana courts, when presented with a challenge to its charter schools, should apply this full-fledged analysis and find that the state's charter schools are unconstitutional because: (1) the local voters are not in control of the charter school boards; (2) there is an absence of real choice for parents because the charter schools do not perform any better than the traditional public schools and have not spurred improvement in the traditional public schools; and (3) the exemptions granted to the charter schools fail the uniformity prong of Indiana's education clause.

Part I of this Note explores the arguments for and against charter schools. Part II examines the federal government's role in the school choice movement, including an analysis of the U.S. Supreme Court's decision in *Zelman v. Simmons-Harris*. Part III moves to the state level and looks at how courts have handled challenges to their own charter schools, analyzing the varying state court approaches and noting the absence of a holistic analysis. Part IV moves to Indiana and examines its education clause and charter school legislation. Finally, part V analyzes Indiana's charter school laws against the holistic approach outlined, arguing that lack of voter control over the school boards, absence of increased academic performance in both the traditional public and charter schools in Indianapolis specifically, and failure to meet the uniformity prong of Indiana's education clause means that Indiana's charter schools are unconstitutional.

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[<https://perma.cc/Q5GN-V2HS>].

16. *Id.*

17. Kate Zemike, *How Trump's Education Nominee Bent Detroit to Her Will on Charter Schools*, N.Y. TIMES: POLITICS (Dec. 12, 2016), <http://www.nytimes.com/2016/12/12/us/politics/betsy-devos-how-trumps-education-nominee-bent-detroit-to-her-will-on-charter-schools.html> [https://perma.cc/KNR8-BWUK].

18. *Id.*

I. THE GROWING BACKLASH AGAINST CHARTER SCHOOLS

A. *The Arguments for Charter Schools*

Charter school proponents argue that school choice is a constitutional right, and school improvement can only be achieved through a market outside of traditional public and private schools.¹⁹ While traditional public schools continue to struggle to produce adequate academic performance, charter schools are designed to break out of the traditional public school standardized curriculum and experiment with different teaching methods and academic content.²⁰ Advocates stress that traditional public schools hold a monopoly on education and force local citizens to buy the “product,” which means the rich attend high-quality schools while the poor are forced into poorly-funded and low-performing schools.²¹ By allowing charter schools to enter the scene, the hope is that the increase in educational services competition will result in better academic performance within the traditional public schools themselves.²²

B. *The Inadequacies of Charter Schools Nationwide*

Looking at the national charter school landscape, there are constitutional and performance realities that should raise eyebrows.

1. *Public Control.*—The first notable difference between traditional public and charter schools is who controls the governing boards of the charter schools and to whom those schools ultimately answer.²³ Traditional public school boards are elected and funded by local citizens in a voting district, whereas charter school boards are selected by their “operators, [which can] include for-profit corporations, nonprofit organizations, coalitions of parents, and teachers and community groups.”²⁴ Charter schools can also receive private funding in addition to public monies,²⁵ which naturally leads to the question: “[C]an charter schools maintain their educational, legal, and fiscal autonomy and yet remain accountable to the public [against pressures from the private sector] that [both] finance[] their operation?”²⁶

Public funds given to charter schools can then flow to the private sector,

19. See Aaron Jay Saiger, *School Choice and States' Duty to Support "Public" Schools*, 48 B.C. L. REV. 909 (2007).

20. *Id.* at 916.

21. *Id.* at 919-20.

22. Justin M. Goldstein, Note, *Exploring "Unchartered" Territory: An Analysis of Charter Schools and the Applicability of the U.S. Constitution*, 7 S. CAL. INTERDISC. L.J. 133, 140 (1998).

23. Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 PENN ST. L. REV. 43, 47 (2004).

24. Leland Ware & Cara Robinson, *Charters, Choice, and Resegregation*, 11 DEL. L. REV. 1, 3 (2009).

25. Saiger, *supra* note 19, at 935.

26. Karla A. Turekian, Note and Comment, *Traversing the Minefields of Education Reform: The Legality of Charter Schools*, 29 CONN. L. REV. 1365, 1380 (1997).

acting as charter school authorizers and education service providers.²⁷ The goal of “equalizing educational opportunity for all” is then lost as funds are diverted from traditional public schools and supporting students’ academic needs to increasing the private sector’s bottom line.²⁸ Education then becomes a commodity, and decisions on how to spend funds are based on market considerations instead of student needs.²⁹ The problem with lack of public control and reliance on the market is that “[p]rivatization faithfully *expects* market forces to provide an equal educational opportunity, whereas the [state] [c]onstitution[s] *require*[] the state to deliver on that promise.”³⁰ State legislatures’ motivation for promoting charter schools is also suspect because charter schools initially receive, on average, less money from state and local funds,³¹ with private donations filling in the deficit.³² This begs the question then whether states seek charter school programs to better academic performance or just to save money on educational expenditures.³³

2. *School Quality*.—School choice is driven by the idea of providing a quality education that allows parents to decide where to send their children and encouraging improvements in the traditional public schools as they compete for students.³⁴ Although recent academic data shows that nationally, on average, charter school students perform better on reading tests, “[a]verages mask wide variation in charter school performance” and “[c]harter school performance varies . . . across cities and states.”³⁵ Even in areas where charter schools are producing

27. See *Measuring Up: Multiple Authorizers Available*, NAT’L ALL. FOR PUB. CHARTER SCH., <http://www.publiccharters.org/law-database/multiple-authorizers/> [https://perma.cc/FK3R-XVPQ] (last visited Mar. 12, 2017); *Measuring Up: Transparency Regarding Educational Service Providers (ESPs) Allowed*, NAT’L ALL. FOR PUB. CHARTER SCH., <http://www.publiccharters.org/law-database/educational-service-providers-esps-allowed/> [https://perma.cc/TBE7-EPBW] (last visited Mar. 12, 2017).

28. Nathaniel J. McDonald, Note, *Ohio Charter Schools and Educational Privatization: Undermining the Legacy of the State Constitution’s Common School Approach*, 53 CLEV. ST. L. REV. 467, 481-82 (2005-2006).

29. *Id.* at 485.

30. *Id.* at 492.

31. Joy Resmovits, *Charter Schools Get Less Money Than Public Schools. Is That A Problem?*, HUFFINGTON POST: POLITICS (Apr. 30, 2014, 5:03 PM), http://www.huffingtonpost.com/2014/04/30/charter-school-funding-_n_5242159.html [https://perma.cc/P8MR-XCCP].

32. *Charter schools in Indiana: Background*, BALLOTPEDIA, https://ballotpedia.org/Charter_schools_in_Indiana#tab=Background [https://perma.cc/T8X5-9AZA] (last visited Jan. 19, 2017).

33. See, e.g., Diana Sroka Rickert, *A money lesson for CPS*, CHI. TRIB. (Sept. 8, 2014, 7:47 PM), <http://www.chicagotribune.com/news/opinion/commentary/ct-chicago-public-schools-charter-catholic-archdio-20140908-story.html> [https://perma.cc/T8QG-VUD7] (noting that Illinois’s charter schools saved the state fifteen cents on the dollar versus its public schools).

34. Saiger, *supra* note 19, at 944-45.

35. Sara Mead, *Charter Schools Are Here to Stay*, U.S. NEWS & WORLD REPORT: OP. (Sept. 17, 2015, 3:35 PM), <http://www.usnews.com/opinion/knowledge-bank/2015/09/17/7-key-facts-about-charter-school-quality> [https://perma.cc/VUS3-6GFB].

better educational outcomes, the competing schools have not spurred any evidentiary improvements in their traditional public school counterparts, defeating the twin objectives of the market theory.³⁶

Quality of schools also depends on the stability of their presence in a community.³⁷ Charter schools are marked by high closure rates, with fifteen percent of charter schools closing nationally between 1992 and 2011.³⁸ Reasons for the closures range from lack of funding, mismanagement by the administrators or sponsors, and poor academic performance.³⁹ These closures are damaging because they significantly affect student performance with “higher dropout rates, lower achievement, loss of friendships, and weaker emotional ties between students and teachers.”⁴⁰ Even if a student’s charter school remains open, her teacher may not be there the next year because charter school teachers tend to remain in the classroom for only a handful of years, while traditional public school teachers average fourteen years of experience.⁴¹

Charter schools can be particularly damaging to minority students because the schools are more segregated than their traditional public school counterparts, with black students more likely to attend charter schools⁴² because the schools are mainly located in inner cities.⁴³ The U.S. Supreme Court remarked in *Brown v. Board of Education* that segregation “generates a feeling of inferiority as to . . . status in the community that may affect . . . hearts and minds in a way unlikely

36. Saiger, *supra* note 19, at 964.

37. See UNICEF, CHILD FRIENDLY SCHOOLS: CHAPTER FOUR: SCHOOL AND COMMUNITY 1-2 (2009), available at https://www.unicef.org/publications/files/Child_Friendly_Schools_Manual_EN_040809.pdf [<https://perma.cc/KX4S-5SZX>].

38. ALISON CONSOLETTI, THE STATE OF CHARTER SCHOOLS: WHAT WE KNOW—AND WHAT WE DO NOT—ABOUT PERFORMANCE AND ACCOUNTABILITY 7 (2011), available at https://www.edreform.com/wp-content/uploads/2011/12/StateOfCharterSchools_CER_Dec2011-Web-1.pdf [<https://perma.cc/5HKT-Y487>] (stating that “[o]f the approximately 6,700 charter schools that have ever opened across the United States, 1,036 have closed since 1992”).

39. *Id.* at 6-13.

40. James M. Noonan, *Schools Open, Schools Close: Charter Schools and the Ties that Bind*, HARVARD UNIV. BLOG (Aug. 30, 2016), <http://scholar.harvard.edu/jmnoonan/blog/schools-open-schools-close-charter-schools-and-ties-bind> [<https://perma.cc/7RXA-6QXF>]; see also Allie Gross, *Students scramble to find new high school after last minute closure announcement*, DETROIT METROTIMES: NEWS HITS (Aug. 23, 2016, 2:23 PM), <http://www.metrotimes.com/news-hits/archives/2016/08/23/students-scramble-to-find-new-high-school-after-last-minute-closure-announcement> [<https://perma.cc/9QT9-TK5X>].

41. Motoko Rich, *At Charter Schools, Short Careers by Choice*, N.Y. TIMES: EDUC. (Aug. 26, 2013), <http://www.nytimes.com/2013/08/27/education/at-charter-schools-short-careers-by-choice.html> [<https://perma.cc/WAG7-URRJ>].

42. Ware & Robinson, *supra* note 24, at 5.

43. *Choice Without Equity: Charter School Segregation and the Need for Civil Rights Standards*, UCLA: CIVIL RIGHTS PROJECT, <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report> [<https://perma.cc/F4CK-NTUJ>] (last visited Mar. 12, 2017).

ever to be undone.”⁴⁴ Segregation results in lesser “educational and mental development” of minority children along with the lack “of some of the benefits they would receive in a racial(ly) integrated school system.”⁴⁵ A recent study from the University of North Carolina found segregation specifically harms black students, who make fewer gains in reading growth in a segregated school than an integrated school.⁴⁶ These concerns have become so severe that the National Association for the Advancement of Colored People (NAACP) released a statement describing the formation of a task force on charter schools, calling for “[c]harter schools [to] cease to perpetuate de facto segregation of the highest performing children from those whose aspirations may be high but whose talents are not yet as obvious.”⁴⁷

3. *Uniformity.*—Charter schools’ statutory exemptions from mandates such as standardized curriculum and teacher licensing defeat the pinnacle goal of a “true” uniform public school education:

Charter schools are based on the notion of education as an entitlement; they are intended to increase parental choice and offer specialized programs of study not necessarily calculated to serve the state’s interests [whereas] public education is funded by the entire community[;] all taxpayers, not just parents, have a common right to determine what type of public education children receive.⁴⁸

Contrasted with traditional public schools,

charter schools contract with a private third party organization for management and/or operations services [T]hese entities take on many of the functions and duties of a charter school [but] [t]hey do so as private entities⁴⁹

This results in a dichotomy where charter schools may not have the same academic goals as traditional public schools, but they still require public funding to keep their doors open.⁵⁰

Under the holistic approach proposed in this Note, charter schools on a national scale may not be able to survive a constitutional or academic quality

44. 347 U.S. 483, 494 (1954).

45. *Id.* (quoting three-judge panel attachment to *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951)).

46. Rebecca Klein, *Another Reason Why Segregated Education Is Bad For Young Students*, HUFFINGTON POST: BLACK VOICES (July 30, 2014, 6:58 PM), http://www.huffingtonpost.com/2014/07/30/unc-school-segregation-study_n_5632118.html [<https://perma.cc/W9KE-JNHU>].

47. *Statement Regarding the NAACP’s Resolution on a Moratorium on Charter Schools*, NAT’L ASS’N FOR ADVANCEMENT COLORED PEOPLE (Oct. 15, 2016), <http://www.naACP.org/latest/statement-regarding-naacps-resolution-moratorium-charter-schools/> [<https://perma.cc/JGD3-CEJZ>].

48. Beale, *supra* note 1, at 560.

49. PARKER BAXTER ET AL., PUBLIC ACCOUNTABILITY & TRANSPARENCY OF CHARTER SCHOOLS & MANAGEMENT ORGANIZATIONS (2015).

50. Goldstein, *supra* note 22, at 164.

analysis. However, as conceded by charter school proponents, there is great variance between the schools state by state.⁵¹ Therefore, when assessing whether Indiana's charter schools live up to operating as actual public schools, providing a quality education, and meeting uniformity standards, the analysis must derive from data pertinent to the state's own schools and not the possible successes or failures of others.⁵²

II. THE FEDERAL GOVERNMENT AND SCHOOL CHOICE

A. Congress

The Elementary and Secondary Education Act⁵³ was the federal government's first major push to ensure all students, especially minorities and low-income children, received a quality education by substantially increasing federal funding for schools.⁵⁴ Schools with a significant low-income population were specifically targeted to receive these funds.⁵⁵ This Act and its principles evolved over the next few decades until the passage of the No Child Left Behind Act in 2001.⁵⁶

No Child Left Behind⁵⁷ ramped up requirements attached to the federal funding schools received, resulting in numerous consequences in the field of education.⁵⁸ One of the most notable of these was that the growing characterization of "failing" American schools "motivated those with the means to exit traditional public schools in general and poor and minority schools in particular."⁵⁹ To help with this exodus, parents began calling for the federal government to provide more money for voucher programs and charter schools.⁶⁰

The federal government has slowly but surely bowed to these demands with the Race to the Top program⁶¹ created in 2009, providing funding in part to expand the number of charter schools, and the Every Student Succeeds Act,⁶² which provides federal funding to schools with lower accountability measures attached.⁶³ As a result, states "cut traditional public school budgets at the same

51. Mead, *supra* note 35.

52. *Id.*

53. Elementary and Secondary Education Act of 1965, Pub. L. 89-10, 79 Stat. 27 (1965) (codified in scattered sections of 20 U.S.C.).

54. Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CAL. L. REV. 1309, 1317 (2017).

55. *Id.*

56. *Id.* at 1321-24.

57. No Child Left Behind Act of 2001, Pub. L. 107-100, Section 1111(b)(1), 115 Stat. 1425 (2002) (codified at 20 U.S.C. § 6311 (2015)).

58. Black, *supra* note 54, at 1324-25.

59. *Id.* at 1327.

60. *Id.*

61. Race to the Top, 74 Fed. Reg. 59,836 Nov. 18, 2009).

62. Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015).

63. Black, *supra* note 54, at 1329, 1341.

time that they were doubling funding for charters and sometimes tripling and quadrupling funding for vouchers.”⁶⁴

B. The Supreme Court

Although the U.S. Supreme Court has not ruled specifically on the constitutionality of charter schools, the Court found another aspect of school choice to be constitutional: voucher programs.⁶⁵

Zelman v. Simmons-Harris involved Ohio’s Pilot Project Scholarship Program, which helped support parents with children in struggling academic schools by providing voucher payments for young elementary students to attend other public or private schools.⁶⁶ At the time, nearly 4,000 students received vouchers, but a problem arose because ninety-six percent of recipients were attending sectarian schools.⁶⁷ Because these public funds were being diverted to private sectarian schools, the program was challenged under the Establishment Clause.⁶⁸

Writing for the majority, Chief Justice William Rehnquist upheld the voucher program because it had “the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system,”⁶⁹ intertwined with the fact that the parents had the ultimate choice of where to send their children.⁷⁰

In her concurring opinion, Justice Sandra Day O’Connor pointed out that “at most \$8.2 million of public funds flowed to religious schools under the voucher program . . . [which] is minor compared to the \$114.8 million the State spent on students in the Cleveland magnet schools.”⁷¹ On the notion of choice, Justice O’Connor emphasized that schools involved in the program did not have to “be superior” but instead “only . . . adequate substitutes” in order to be considered genuine options for parents.⁷²

Justice Clarence Thomas also concurred with the majority’s opinion but took a different approach.⁷³ His perspective on the voucher program focused on the following:

Faced with a severe educational crisis, the State of Ohio enacted wide-ranging educational reform Cleveland parents now have a variety of educational choices [T]he inclusion of religious schools makes sense given Ohio’s purpose of increasing educational performance and

64. *Id.* at 1345.

65. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

66. *Id.* at 644-45.

67. *Id.* at 647.

68. *Id.* at 648.

69. *Id.* at 649.

70. *Id.* at 651.

71. *Id.* at 664 (O’Connor, J., concurring).

72. *Id.* at 670 (O’Connor, J., concurring).

73. *Id.* at 681 (Thomas, J., concurring).

opportunities. Religious schools, like other private schools, achieve far better educational results than their public counterparts [T]he State has a constitutional right to experiment with a variety of different programs to promote educational opportunity. That Ohio's program includes successful schools simply indicates that such reform can in fact provide improved education to underprivileged urban children.⁷⁴

His emphasis on the fact that the voucher program included successful schools to provide an adequate education is a consideration that state courts should look to when evaluating their own choice programs.

Justice John Paul Stevens' dissent noted that when evaluating school programs, "[t]he criterion is one of genuinely free choice on the part of the private individuals who choose, and a Hobson's choice is not a choice, whatever the reason for being Hobsonian."⁷⁵ The availability of high-performing schools in Ohio's school choice program was a point of emphasis for Justice Thomas and a necessary factor for consideration of whether parents actually had a choice for Justice Stevens.⁷⁶

III. STATE COURTS ON THE CONSTITUTIONALITY OF THEIR CHARTER SCHOOLS

Although the U.S. Supreme Court provided a framework for analyzing issues of school choice, specific guidance on the legality of charter schools relies on the state courts because it is their legislatures that create charter schools.⁷⁷ State courts, though, have failed to look beyond the state's constitutional requirements and consider whether the schools actually provide real choice and spur improvement in the traditional public schools.⁷⁸

A. Council of Organizations and Others for Education About Parochiaid v. Governor

The Michigan Supreme Court addressed the legality of its charter schools in 1997.⁷⁹ It first looked at the state's education clause, which states "[t]he

74. *Id.* at 680-81 (Thomas, J., concurring).

75. *Id.* at 707 (Stevens, J., dissenting).

76. Joseph P. Viteritti, *The Inadequacy of Adequacy Guarantees: A Historical Commentary on State Constitutional Provisions that Are the Basis for School Finance Litigation*, 7 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 58, 60 (2007); *Zelman*, 536 U.S. at 681, 707.

77. *Charter Schools In The States: A Series Of Briefs*, NAT'L CONF. ST. LEGIS., <http://www.ncsl.org/research/education/charter-schools-in-the-states.aspx> [<https://perma.cc/H2B4-XMFB>] (last visited Jan. 17, 2017).

78. *See* Council of Orgs. & Others for Educ. About Parochiaid v. Governor, 566 N.W.2d 208 (Mich. 1997); *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745 (Cal. Ct. App. 1999); *In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 753 A.2d 687 (N.J. 2000); *State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ. et al.*, 857 N.E.2d 1148 (Ohio 2006); *League of Women Voters of Wash. v. State*, 355 P.3d 1131 (Wash. 2015).

79. *Council of Orgs.*, 566 N.W.2d at 208.

legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.”⁸⁰ Michigan specifically defined its charter schools as public schools, allowing them to receive public funding.⁸¹ The constitutionality of the charter schools centered on the issue of local control, and the majority determined that the state constitution “d[id] not mandate exclusive control, [by the local populace] . . . [and the schools we]re under the ultimate and immediate control of the state.”⁸² With the state standing in for the local populace, public institutions acting as authorizers exercised control over the schools, and this relationship sufficed for local control.⁸³

The court also deferred to the actions of the Michigan legislature, writing that the state constitution gave that branch “the authority to prescribe what officers should be chosen to conduct the affairs of the school districts, to define their powers and duties, their term of office, *and how and by whom they should be chosen.*”⁸⁴ Therefore, the formation of charter school boards did not have to be based on local elections because the legislature had the power to determine the election system, and “the board of the authorizing bodies [overseeing the charter schools wa]s publicly elected or appointed by public bodies[,]” allowing local voters to assert some power over the process.⁸⁵ In the end, the court held there was no constitutional requirement that voters directly control or elect members of a school board,⁸⁶ and the charter schools were public because the legislature declared them to be so.⁸⁷ Michigan’s education clause does not include a uniformity requirement,⁸⁸ and the majority did not examine the academic performance of the charter schools.⁸⁹

Justice Patricia Boyle wrote a strong dissent, arguing that the legislature “cannot make what is private, public, simply by declaring it so.”⁹⁰ Her concern centered on the private selection of charter school board members because, unlike public school boards controlled by the local electorate who can remove members they are dissatisfied with, “the State Board of Education has no authority whatsoever under the statute to supervise the selection, retention, or removal of academy board members.”⁹¹ Additionally, she questioned the charter schools’ publicness because they were exempted from many state regulations concerning

80. *Id.* at 212 n.5.

81. *Id.* at 214.

82. *Id.* at 216.

83. *Id.* at 216-17.

84. *Id.* at 217 (quoting *Belles v. Burr*, 43 N.W. 24 (Mich. 1889)) (emphasis added).

85. *Id.*

86. *Id.* at 218.

87. *Id.* at 221.

88. *Id.* at 212.

89. *See generally id.*

90. *Id.* at 223 (Boyle, J., dissenting).

91. *Id.* at 225 (Boyle, J., dissenting).

education, giving them “nearly ‘total independence to decide what to teach and how to teach it, whom to hire and how to use their resources, what hours to operate and how best to meet students’ needs.’”⁹² Finally, she argued that deference given to the legislature to improve public education within the state had to be tempered by state constitutional limits.⁹³

Michigan is now inundated with for-profit charter schools, which make up eighty percent of the state’s charter schools,⁹⁴ and even charter school advocates describe the state’s charter school movement as “the biggest school reform disaster in the country.”⁹⁵

B. *Wilson v. State Board of Education*

Just two years after the Michigan opinion, the California Court of Appeal upheld the legality of its charter schools by looking at legislative power and uniformity between traditional public and charter schools.⁹⁶ The majority found that “the Legislature’s power over our public school system is plenary, subject only to constitutional restraints[,]”⁹⁷ and “[t]he Charter Schools Act represents a valid exercise of legislative discretion aimed at furthering the purposes of education[,]”⁹⁸ harkening back to the market theory that competition will improve the traditional public schools.⁹⁹ In addressing concerns of uniformity, though not constitutionally required, the majority found that charter schools were compatible with the other public schools

because (1) their students will be taught by teachers meeting the same minimum requirements as all other public school teachers; (2) their education programs must be geared to meet the same state standards, including minimum duration of instruction, applicable to all public schools; and (3) student progress will be measured by the same assessments required of all public school students.¹⁰⁰

The court did not address issues of local voter control, and similar to the Michigan decision, the court did not consider whether charter schools actually

92. *Id.* at 226, 228 (Boyle, J., dissenting).

93. *Id.* at 224 (Boyle, J., dissenting).

94. The Editorial Board, *Big Worries About Betsy DeVos*, N.Y. TIMES: OPINION (Jan. 10, 2017), <https://www.nytimes.com/2017/01/10/opinion/big-worries-about-betsy-devos.html> [<https://perma.cc/2QDD-PXRT>].

95. Douglas N. Harris, *Betsy DeVos and the Wrong Way to Fix Schools*, N.Y. TIMES: OPINION (Nov. 25, 2016), http://www.nytimes.com/2016/11/25/opinion/betsy-devos-and-the-wrong-way-to-fix-schools.html?_r=0 [<https://perma.cc/2C2V-P549>].

96. *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745 (Ct. App. 1999).

97. *Id.* at 750.

98. *Id.* at 751.

99. *Id.* at 754.

100. *Id.* at 753.

provided an adequate choice to parents.¹⁰¹

In 2016, the American Civil Liberties Union of Southern California released a report revealing twenty percent of California's 1,200 charter schools had exclusionary policies that discriminated against students with poor academic performance, limited English proficiency, and immigration status.¹⁰²

C. *In re Grant of the Charter School Application of Englewood on the Palisades Charter School*

In 2000, the Supreme Court of New Jersey held that the public funding of its charter schools was constitutional, noting that its state legislature was given the task to “provide for the maintenance and support of a thorough and efficient system of free public schools[.]”¹⁰³ In line with the decision in California, New Jersey found that “[t]he choice to include charter schools among the array of public entities providing educational services to our pupils is a choice appropriately made by the Legislature so long as the constitutional mandate to provide a thorough and efficient system of education in New Jersey is satisfied[.]” emphasizing again a two-pronged approach that granted the legislature discretion but bounded its powers to constitutional limitations.¹⁰⁴ The court did not address issues of local control or the quality of the charter schools.¹⁰⁵

In 2017, research revealed that “almost all of [New Jersey’s eighty-eight charter] schools differ by at least [ten] percentage points from their districts in at least one of three major demographic categories – race, socioeconomic status, or English-language proficiency[.]” effectively contributing to segregation in New Jersey’s public schools.¹⁰⁶

D. *The State ex rel. Ohio Congress of Parents & Teachers v. State Board of Education*

Five years later, Ohio upheld the constitutionality of its charter schools, emphasizing along with other state courts that “legislative enactments are entitled to a strong presumption of constitutionality.”¹⁰⁷ The Ohio charter schools were

101. *Id.* at 745.

102. VICTOR LEUNG & ROXANNE H. ALEJANDRE, *UNEQUAL ACCESS: HOW SOME CALIFORNIA CHARTER SCHOOLS ILLEGALLY RESTRICT ENROLLMENT*, AM. CIVIL LIBERTIES UNION SOUTHERN CAL. 2 (2016), available at https://www.aclusocal.org/sites/default/files/field_documents/report-unequal-access-080116.pdf [<https://perma.cc/4QF8-2EYC>].

103. *In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 753 A.2d 687, 689 (N.J. 2000).

104. *Id.* at 691.

105. *Id.* at 687.

106. Maddie Hanna & Jonathan Lai, *Are charter schools contributing to segregation? An N.J. case study*, INQUIRER (Aug. 31, 2017, 3:01 AM), http://www.philly.com/philly/news/new_jersey/are-charter-schools-contributing-to-segregation-an-n-j-case-study-20170824.html [<https://perma.cc/9RCV-UP8A>].

107. *State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ. et al.*, 857 N.E.2d

created to increase school choice for parents and students,¹⁰⁸ and the Ohio Supreme Court, when addressing concerns of uniformity (which is not a state constitutional requirement)¹⁰⁹ between traditional public and charter schools, determined that charter schools were designed to be experimental and this purpose would be lost if they were forced to operate exactly like traditional public schools.¹¹⁰

Turning to the issue of local control over the school boards, the court again granted discretion to the legislature and held that “[a] board of education is ‘a mere instrumentality of the state to accomplish its purpose in establishing and carrying forward a system of common schools throughout the state.’”¹¹¹ Like the other state opinions, the performance of the charter schools was not evaluated.¹¹²

Ohio now leads the nation with 165 charter closures due to poor academic performance, yet “97.8 percent of Ohio’s low-performing charter schools” are still open.¹¹³

E. League of Women Voters of Washington v. State

The Washington Supreme Court in 2015, sitting en banc, rejected public funding for its charter schools, noting that the schools had to be “‘common schools’ and fit within a general and uniform system.”¹¹⁴ The majority recognized that charter schools were created to increase school choice, but the removal from public control and accountability was concerning.¹¹⁵ Like the other states, Washington charter schools had independent boards with “functions typically handled by an elected school board, including hiring, managing, and discharging employees; receiving and disbursing funds; entering contracts; and determining enrollment numbers.”¹¹⁶ Summing up their decision, the majority stressed that

a common school . . . is one that is common to all children of proper age and capacity, free, and subject to and under the control of the qualified voters of the school district. The complete control of the schools is a most important feature, for it carries with it the right of the voters, through their chosen agents, to select qualified teachers, with powers to discharge them if they are incompetent.¹¹⁷

1148, 1155 (Ohio 2006).

108. *Id.* at 1152.

109. *Id.* at 1156.

110. *Id.* at 1159.

111. *Id.* at 1162.

112. *Id.* at 1148.

113. Doug Livingston, *Study: Ohio has most failed charter schools, which close less often*, AKRON BEACON J. (Aug. 24, 2017, 7:12 PM), <https://www.ohio.com/akron/news/local/study-ohio-has-most-failed-charter-schools-which-close-less-often> [<https://perma.cc/X9B7-4Y2W>].

114. Beale, *supra* note 1, at 536.

115. League of Women Voters of Wash. v. State, 355 P.3d 1131, 1134 (Wash. 2015).

116. *Id.*

117. *Id.* at 1137.

The decision did not address concerns with uniformity (as required by the state constitution) or academic performance of the charter schools.¹¹⁸

Despite this ruling, two charter schools were scheduled to open in the 2017-2018 school year and two more are scheduled to open in the 2018-2019 school year, with one receiving funding from the Bill & Melinda Gates Foundation.¹¹⁹

IV. INDIANA'S CONSTITUTION AND CHARTER SCHOOL LEGISLATION

A. Common Schools and Indiana's Educational Clause

As the concept of common schools began picking up steam in the nineteenth century, Indiana was in the process of drafting its second (and current) state constitution.¹²⁰ The delegates drafted Indiana's education clause with the view that "learning and knowledge [is] essential to the governance, freedom, and well-being of the people of Indiana."¹²¹ From this backdrop came the following constitutional article:

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.¹²²

The duty "to encourage, by all suitable means" gave Indiana's General Assembly the power to experiment with various school reform measures to improve education in the state,¹²³ but this power is tempered by the second clause, which imposes a duty "to provide . . . for a general and uniform system of Common Schools[.]"¹²⁴ The Indiana Supreme Court declared that "the General Assembly is the central power over schools and school affairs,"¹²⁵ but "the performance of this duty, and the exercise of this power by the Legislature, must be within

118. *Id.* at 1135 (explaining "[o]ur inquiry is not concerned with the merits or demerits of charter schools").

119. Claudia Rowe, *More charter schools to open in Washington state, encouraging new network*, SEATTLE TIMES (July 10, 2017, 10:18 AM), <https://www.seattletimes.com/education-lab/two-new-charters-open-this-fall-quietly-encouraging-supporters/> [<https://perma.cc/9NY3-FBA5>].

120. Smith, *supra* note 5, at 325.

121. *Id.* at 331.

122. IND. CONST. art. 8, § 1.

123. Smith, *supra* note 5, at 332.

124. IND. CONST. art. 8, § 1.

125. *Gruber v. State*, 148 N.E. 481, 485 (Ind. 1925); *see also Keller v. Reynard*, 223 N.E.2d 774, 776 (Ind. Ct. App. 1967); *United States v. Bd. of Sch. Comm'rs*, 332 F. Supp. 655, 659 (S.D. Ind. 1971).

limitations elsewhere imposed by the Constitution.”¹²⁶

B. Indiana’s Charter School Legislation

Senate Enrolled Act Number 165, enacted on May 2, 2011, established charter schools in Indiana.¹²⁷ The introduction of charter schools into the state’s public education system was designed to

provide innovative and autonomous programs that . . . [s]erve the different learning styles and needs of public school students[,] [o]ffer public school students appropriate and innovative choices[,] [p]rovide varied opportunities for professional educators[,] [a]llow public schools freedom and flexibility in exchange for exceptional levels of accountability[,] [and] [p]rovide parents, students, community members, and local entities with an expanded opportunity for involvement in the public school system.¹²⁸

Indiana defines a charter school as “a public elementary school or secondary school . . . that . . . is nonsectarian and nonreligious . . . and . . . operates under a charter.”¹²⁹ Those allowed to authorize charter schools in Indiana include certain governing bodies, four-year degree institutions, the executive of a city (i.e. the Mayor of Indianapolis), the charter board, and governing boards of four-year nonprofit colleges or universities.¹³⁰ A charter school organizer is

an entity that: is a nonprofit corporation that is incorporated or registered in Indiana; has been recognized by the Internal Revenue Service to be tax exempt and maintains such tax exempt status; and has *an independent board whose members have been elected or selected under the organizer’s application* and that has entered into a contract under this article to operate a charter school.¹³¹

Authorizers are required to “review . . . the progress of the charter school in achieving the academic goals set forth in the charter.”¹³²

Furthermore, Indiana Code section 20-24-7-15 defines charter schools as school corporations to allow access to the same funding as the traditional public schools.¹³³ Charter schools must comply with federal and state laws, including the state constitution, *except* where certain exemptions apply.¹³⁴ Those exemptions include Indiana statutes that apply to public school corporations, most rules

126. Cerajewski v. McVey, 72 N.E.2d 650, 651 (Ind. 1947).

127. S. 165, 112th Gen. Assemb., First Reg. Sess. (Ind. 2001).

128. IND. CODE § 20-24-2-1(1)-(5) (2017).

129. *Id.* § 20-24-1-4(1)-(2).

130. *Id.* § 20-24-1-2.5(1)-(5).

131. *Id.* § 20-24-1-7(1)-(3) (emphasis added).

132. *Id.* § 20-24-4-1(a)(6)(A).

133. *Id.* § 20-24-7-15.

134. *Id.* § 20-24-8-3(1), (3).

adopted by the state board, and local policies formulated by a public school corporation.¹³⁵

V. THE LEGALITY OF INDIANA'S CHARTER SCHOOLS

Indiana courts have the opportunity to rework the current standard and consider whether charter schools actually perform better than their traditional public school counterparts or spur improvement in the public school system. When a legal challenge is brought against Indiana's charter schools, Indiana courts should ask: (1) Who controls the schools?; (2) What is the quality of Indiana's charter schools?; and (3) Are the charter schools uniform with the traditional public schools?

The analysis should look beyond the legislative text that defines charter schools as public schools and instead consider how charter schools actually operate in practice, reinforcing the argument that “saying a charter school is a public school doesn't necessarily make it so—it must [actually] function as a public school.”¹³⁶

A. *The Indiana Supreme Court on School Choice*

In 2013, the Indiana Supreme Court ruled on the constitutionality of Indiana's Choice Scholarship Program,¹³⁷ a voucher program that provided funds to eligible families to send their children to private schools.¹³⁸ Chief Justice Brent Dickson upheld the statute, reasoning

[w]hether the Indiana program is wise educational or public policy is not a consideration germane to the narrow issues of Indiana constitutional law that are before us In the absence of a constitutional violation, the desirability and efficacy of school choice are matters to be resolved through the political process.¹³⁹

However, the opinion left open room for a challenge to the state's charter schools, especially on the basis of uniformity. Chief Justice Dickson noted the fact that “the voucher-program statute does not alter the structure or components of the public school system,” allowing charter school opponents to challenge the schools based on the structural and content-based differences between the traditional public and charter schools.¹⁴⁰ Further, in *Bonner v. Daniels*, Justice Robert Rucker in his dissent showed a willingness to consider educational quality as one aspect in a challenge to whether the Indiana government failed to provide a general and uniform system of education in the Indianapolis Public Schools.¹⁴¹

135. *Id.* § 20-24-8-4(1)-(2), (4).

136. McDonald, *supra* note 28, at 499.

137. IND. CODE § 20-51-4 (2017).

138. Meredith v. Pence, 984 N.E.2d 1213, 1217 (Ind. 2013).

139. *Id.* at 1216.

140. *Id.* at 1224.

141. 907 N.E.2d 516, 525 (Ind. 2009) (Rucker, J., dissenting).

As of October 2017, less than one percent of distributed vouchers under Indiana's Choice Scholarship Program went to students in failing public schools; in fact, almost all of the vouchers have gone to students who have never enrolled in a public school.¹⁴²

B. Who Controls the Charter Schools in Indiana?

Indiana Code section 20-24-3-1 allows authorizers to grant a charter to organizers, but section 20-24-3-2 limits these grants to non-profit organizers. There is no limit, however, on which education service providers (ESPs) they can contract with.¹⁴³ This means a for-profit ESP can contract with a charter school “for educational design, implementation, or comprehensive management.”¹⁴⁴ The problem with not regulating these ESPs, especially for-profit ESPs, is

[w]hen an [ESP] exercises total control over a school, the motivation to educate is dominated by private, market-based concerns as opposed to public, citizenship concerns. The end, profit, is almost certain to influence the means [T]here are two ways to make money operating schools: cut wages and/or cut services.¹⁴⁵

Allowing for-profit ESPs to operate in charter schools means public tax dollars meant for students are instead diverted to the private sector.¹⁴⁶ In fact, the Indiana Charter School Board only requires that an ESP “deliver strong academic outcomes for its enrolled students, maintain good financial health, operate effectively, and comply with all applicable charter school laws.”¹⁴⁷ Based on data from the 2010-2011 school year, fifteen percent of Indiana charter schools were connected with a for-profit ESP.¹⁴⁸

Related to the “public” nature of charter schools are their governing boards and the lack of local voter control in electing those who sit on the board. In Indiana's traditional public school corporations, members of governing boards are elected by the public based on either community school corporation, residence districts, or electoral district lines.¹⁴⁹ These sitting members are held accountable to the public through general elections, whereas charter school governing boards

142. Niki Kelly et al., *The Academics And Economics Behind School Choice*, HUFFPOST (Oct. 5, 2017, 5:01 AM), https://www.huffingtonpost.com/entry/school-choice-indiana-vouchers_us_59d3ddd5e4b06226e3f413c2 [<https://perma.cc/CB8B-JZJZ>].

143. IND. CODE § 20-24-3-2.5 (2017); *see also id.* § 20-24-1-6.1 (defining education service provider in broad terms).

144. *Id.* § 20-24-1-6.1.

145. McDonald, *supra* note 28, at 502.

146. *Id.* at 508.

147. *Start a School: Application FAQs*, IND. CHARTER SCH. BD., <https://www.in.gov/icsb/2614.htm> [<https://perma.cc/PP3P-NJEY>] (last visited Feb. 7, 2017).

148. *Charter schools in Indiana: Issues*, BALLOTPEdia, https://ballotpedia.org/Charter_schools_in_Indiana#tab=Issues [<https://perma.cc/P42V-C7J9>] (last visited Feb. 7, 2017).

149. IND. CODE § 20-23-4-29.1(d)-(f) (2017).

are composed of members “elected or selected under the organizer’s application.”¹⁵⁰ The only public accountability placed on the charter school governing body is in Indiana Code section 20-24-9-7, requiring organizers who have a website to publish the names of the sitting members on the site.¹⁵¹ Because the private sector can control and profit off of charter schools and voter control is absent from the composition of the governing boards, charter schools do not act as public schools.¹⁵²

C. What Is the Quality of Indiana’s Charter Schools?

This Note stresses that a quality education encompasses more than just academic performance, although this should be taken into consideration for any school evaluation. A holistic analysis should consider at least the following components: academic performance, school financing discrepancies, school stability and transparency, student discipline, and segregation. Each of these issues will be addressed in turn.

Justice Thomas’s opinion examining Ohio’s voucher program centered around the fact that the private schools’ parents could send their children to tended to provide a better education than their public school counterparts.¹⁵³ Although the market theory heralded by charter school advocates points to the need for students to be able to attend quality schools, it is also buttressed by a second goal of improving the traditional public schools they are competing against.¹⁵⁴

Regarding the academic quality of Indiana’s charter schools, based on 2014 school data, “nearly half of the state’s [seventy-six] charter schools [we]re doing poorly or failing.”¹⁵⁵ Eighteen charter schools were open in Marion County in 2014 after several closed, and only half of the eighteen charter schools surpassed Indianapolis Public Schools’ (IPS) test scores.¹⁵⁶ When comparing 2013 school grade data of Marion County charter schools located in the IPS district against the traditional public schools counterparts (IPS), we see the following data:

150. *Id.* § 20-24-1-7(3).

151. *Id.* § 20-24-9-7.

152. Anya Kamenetz, *Bernie Sanders Says He Opposes Private Charter Schools. What Does That Mean?*, NPR: ED (Mar. 15, 2016, 8:12 AM), <http://www.npr.org/sections/ed/2016/03/15/470376273/bernie-sanders-says-he-opposes-private-charter-schools-what-does-that-mean> [<https://perma.cc/FL7Y-ZS2U>].

153. *Zelman v. Simmons-Harris*, 536 U.S. 639, 681 (2002) (Thomas, J., concurring).

154. Goldstein, *supra* note 22, at 140.

155. Sandra Chapman, *Nearly half of Indiana’s charter schools doing poorly or failing*, 13WTHR (Nov. 6, 2014, 6:51 PM), <http://www.wthr.com/article/nearly-half-of-indianas-charter-schools-doing-poorly-or-failing> [<https://perma.cc/TR8V-HE2Q>].

156. Scott Elliott, *Top-rated Indianapolis charter schools more likely to be locally run*, CHALKBEAT (Sept. 1, 2015, 1:03 PM), <http://www.chalkbeat.org/posts/in/2015/09/01/top-rated-indianapolis-charter-schools-more-likely-to-be-locally-run/#.WAYXpZMrJE5> [<https://perma.cc/DV7P-ZR97>].

<i>2013 School Grades of IPS Schools and Marion County Charter Schools</i> ¹⁵⁷					
School Grades	A	B	C	D	F
Charter	5 (20%)	0 (0%)	4 (16%)	6 (24%)	10 (40%)
IPS	10 (15.6%)	8 (12.5%)	9 (14.1%)	16 (25%)	21 (33%)

The data shows that Indianapolis charter schools do not perform any better than their traditional public school counterparts, and in fact, they perform marginally worse. Charter schools in Indiana are currently caught in a downward spiral, doubling their failure rate from 2010 to 2015.¹⁵⁸

Charter school advocates stress that the infusion of choice into the education marketplace will stimulate improvement in the traditional public schools, but comparing the 2013 IPS schools against their 2011 grades, only twenty schools' grades improved (out of fifty-four schools with available grades).¹⁵⁹ Eight of those schools, though, did not even improve to a grade above C.¹⁶⁰ All of this means that students in the IPS district are not necessarily receiving a better education by attending the charter schools, and students still in traditional public schools are not seeing their own schools improve as a result of the "competition" created by the charter schools.

Indiana's charter schools were supposed to educate the poorest students at a lower price tag, raising questions of whether the state legislature supports charter schools to provide students with a chance for a better education or to cut back state spending.¹⁶¹ In recent years, however, charter schools have become more expensive for the state, both in terms of actual financing and the expenses incurred when they are closed for poor performance.¹⁶² Based on data from 2014, on average, Indiana charter schools received \$7,080 per student while traditional public schools only received \$6,415 per student.¹⁶³ Charter schools, however, are failing and closing despite the fact that they "make up [seventy] percent of the [fifty] top funded school corporations in the state when the actual money spent from local, state and federal sources is reviewed."¹⁶⁴ Even more discouraging is that when charter schools fail, the failure results in an additional \$1,623 more

157. IND. DEP'T EDUC., 2013 A-F SCHOOL GRADE RESULTS (2013). Results were calculated by comparing only Indianapolis Public Schools and charter schools located in Marion County. Two charter schools did not receive a grade in 2013.

158. Kris Turner, *Do charter schools deserve more state funding?*, INDYSTAR (Mar. 15, 2015, 6:03 AM), <http://www.indystar.com/story/news/education/2015/03/15/charter-schools-deserve-state-funding/70238244/> [<https://perma.cc/6AFQ-988L>].

159. IND. DEP'T EDUC., *supra* note 157. Results were calculated by comparing only Indianapolis Public Schools and charter schools located in Marion County.

160. *Id.*

161. Turner, *supra* note 158.

162. *Id.*

163. *Id.*

164. *Id.*

spent per student than the costs in a failing public school.¹⁶⁵ Add on to that the fact that sixty-six percent of these top-funded charter schools are failing.¹⁶⁶ All of this data indicates that despite Indiana's intentions to use charter schools as a way to cut costs, those same schools are now costing the state more with unimpressive results.

Even though charter schools receive more funding per student, they tend to close at a higher rate than their traditional public school counterparts.

<i>IPS Schools and Marion County Charter Schools that Have Closed Since the 2013 Grade Report</i> ¹⁶⁷	
Charter	6 (24%)
IPS	2 (3.1%)

In September 2016, a virtual charter school faced with a possible closure quietly transferred its students to a sister school under the noses of the State Board of Education.¹⁶⁸ Closures such as these have a dramatic impact on students who are

165. *Id.*

166. *Id.*

167. IND. DEP'T EDUC., *supra* note 157. For verification of closures, see Scott Elliott, *Monument Lighthouse charter school will close this spring*, CHALKBEAT (Nov. 15, 2013), <http://www.chalkbeat.org/posts/in/2013/11/15/monument-lighthouse-charter-school-will-close-this-spring/> [https://perma.cc/EZ44-TTYF] (reporting on the closure of Monument Lighthouse Charter School); Scott Elliott, *IPS board votes to close Key school, approve school autonomy plan*, INDYSTAR (Oct. 30, 2015, 8:36 AM), <http://www.indystar.com/story/news/education/2015/10/30/ips-board-votes-close-key-school-approve-school-autonomy-plan/74860312/> [https://perma.cc/V7MM-L47F] (closure of Key Learning Community Schools); Dylan Peers McCoy, *Struggling Indy charter school will close at the end of the year*, CHALKBEAT (May 19, 2016), <http://www.chalkbeat.org/posts/in/2016/05/19/struggling-indy-charter-school-will-close-at-the-end-of-the-year/> [https://perma.cc/J5R8-FAAE] (reporting on the closure of Imagine Life Sciences Academy East); The IndyChannel.com Staff, *Two ADI charter schools announce plans to close*, THEINDYCHANNEL (Aug. 22, 4:21 PM), <http://www.theindychannel.com/news/local-news/two-adi-charter-schools-announce-plans-to-close> [https://perma.cc/J3FS-RKAR] (reporting on the closure of Andrew Academy); Jill Glavan, *Parents want answers as number of closed charter schools grows*, FOX59 (Jan. 22, 2015, 10:37 PM), <http://fox59.com/2015/01/22/parents-want-answers-as-number-of-closed-charter-schools-grows/> [https://perma.cc/NKT9-QLRF] (reporting on the closure of University Heights Preparatory Academy); Kris Turner, *2 Indy charter schools to close in June*, INDYSTAR (Jan. 21, 2015, 4:47 PM), <http://www.indystar.com/story/news/2015/01/21/indy-charter-schools-close-june/22124245/> [https://perma.cc/AZN4-SMK3] (reporting on the closure of Fall Creek Academy); Eric Weddle & Stephanie Wang, *Flanner House Elementary to close amid ISTEP cheating allegations*, INDYSTAR (Aug. 21, 2014, 9:28 AM), <http://www.indystar.com/story/news/education/2014/08/21/flanner-house-elementary-closes-amid-istep-cheating-allegations/14381599/> [https://perma.cc/8QPY-6E45] (reporting on the closure of Flanner House Elementary School).

168. Shaina Cavazos, *In danger of closure, virtual charter surprises state board by transferring students to sister school*, CHALKBEAT (Sept. 7, 2016), <http://www.chalkbeat.org/>

forced to change environments, friends, and teachers.¹⁶⁹ As concerning as the higher rate of charter school closures is, there is also a lack of transparency that occurs when opening a charter school.¹⁷⁰ For example, a charter school opening in Bloomington, Indiana, was approved by its authorizer, Grace College, in a closed-door meeting after being denied twice by the Indiana Charter School Board.¹⁷¹ The veil over this approval is so thick that Grace College “will not release the vote total or its staff recommendation—even to the board of [the charter school.]”¹⁷² These anecdotes highlight that unsuspecting parents may not realize how their child’s charter school opened or that the school might have been previously dropped by one authorizer and picked up by a different authorizer.¹⁷³ These pieces of missing information are relevant characteristics a parent might want to know before enrolling his or her child in a charter school but may be unaware of or unable to access.

Discipline is another critical aspect of a quality education that ensures all students can learn in a safe environment, but its implementation can sometimes extend too far, as exemplified by Arlington High School when it was taken over by a charter school.¹⁷⁴ In the first year of its charter school takeover, the school issued 568 suspensions, even though the student body only numbered 518, resulting in the most suspensions for a school in Indianapolis that year.¹⁷⁵ This raised concerns in the community that the suspended students would potentially drop out or pick up criminal records when the school could instead use interventions like detention or Saturday school.¹⁷⁶ The charter school’s rationale for resorting to suspensions instead of in-school alternatives was because the school could not afford the latter.¹⁷⁷

Finally, school integration should be considered when assessing the quality of a school, and Indiana’s charter schools would fail this review. In Indianapolis,

more [public] elementary schools are segregated today than were before busing began. But charter schools are even more likely to be isolated by race. Of the [thirty-eight] charter schools in Indianapolis [in 2016],

posts/in/2016/09/07/state-board-again-postpones-decision-on-failing-online-charter-school/ [https://perma.cc/X6VP-6Z8Z].

169. Noonan, *supra* note 40.

170. Hayleigh Colombo, *Charter school approval fuels new questions*, INDIANAPOLIS BUS. J. (Feb. 6, 2016), <http://www.ibj.com/articles/57079-charter-school-approval-fuels-new-questions> [https://perma.cc/X4GC-X5K5].

171. *Id.*

172. *Id.*

173. *Id.*

174. Robert King, *Arlington High dilemma: When is school discipline too harsh?*, INDYSTAR (Dec. 12, 2014, 10:53 PM), <http://www.indystar.com/story/news/2014/12/12/arlington-high-back-news-security-officers-suspension/20331109/> [https://perma.cc/8UUB-ZQZU].

175. *Id.*

176. *Id.*

177. *Id.*

nearly half have enrollment that is over [seventy-five] percent black.¹⁷⁸

This is a continuing problem with the city's charter schools, as indicated by the 2008-2009 school year, when just one charter school met desegregation requirements.¹⁷⁹ Segregated schools such as these inhibit academic outcomes and fail to prepare students to succeed in an integrated world.¹⁸⁰

D. Do the Charter Schools Fall Within Indiana's Education Clause? – Are the Schools Uniform?

Uniformity is one of the hallmarks of the public school system, and exemptions from certain regulations for charter schools¹⁸¹ defeat the ultimate purpose of Indiana's education clause to ensure that “[k]nowledge and learning . . . essential to the preservation of a free government” is achieved consistently for all students.¹⁸² The most damaging exemption granted to charter schools is a standardized curriculum,¹⁸³ designed to ensure that

each child in each grade . . . receive[s] substantially the same education, thus allowing a student to transfer between districts without significant loss of standing. [However, b]ecause charter schools . . . [can] construct a unique program of instruction, it is not likely that their students c[an] easily transfer [to] other public schools. If a charter school student were removed to a new school and needed remedial work in some areas, the State would, in effect, be paying for the same education twice.¹⁸⁴

This creates a possibility that students who transfer from a traditional public to charter school, one charter school to another, or from a charter school back to a traditional public school will lack the same background information as the other students in the classroom.¹⁸⁵ The curricular exemption also defeats the purpose

178. Dylan Peers McCoy, *How charters became the most segregated schools in Indianapolis*, CHALKBEAT (Aug. 29, 2016, 11:41 AM), <http://www.chalkbeat.org/posts/in/2016/08/29/how-charters-became-the-most-segregated-schools-in-indianapolis/#.WAYaDZMrJE5> [<https://perma.cc/FZP2-A295>].

179. stevehinnefeld, *Study finds Indy charter schools increased segregation*, SCH. MATTERS: K-12 EDUC. IND. (Feb. 29, 2016), <https://inschoolmatters.wordpress.com/2016/02/29/study-finds-indy-charter-schools-increased-segregation/> [<https://perma.cc/K8FH-2LFY>].

180. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (quoting three-judge panel attachment to *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951)); Klein, *supra* note 46; McCoy, *supra* note 178.

181. *See supra* Part IV.

182. IND. CONST. art. 8, § 1.

183. *Charter Schools in Indiana: Background*, *supra* note 32.

184. Beale, *supra* note 1, at 565.

185. Kate Zemike, *A Sea of Charter Schools in Detroit Leaves Students Adrift*, N.Y. TIMES (June 28, 2016), https://www.nytimes.com/2016/06/29/us/for-detroits-children-more-school-choice-but-not-better-schools.html?_r=0 [<https://perma.cc/WR6F-2NMC>] (describing one Detroit student from a charter school in a science program facing difficulty keeping up with the traditional public

of the common school movement to ensure that all students graduate from the local school system with the same educational and civic backgrounds.¹⁸⁶

Another striking exemption concerns teacher licensing, controlling who can actually educate students in school environments. Outside of alternative tracks to receiving a license, the basic floor a candidate must meet for an initial practitioner license is proficiency through a written examination on “[b]asic reading, writing, and mathematics . . . [p]edagogy . . . [and k]nowledge of the areas in which the individual is required to have a license to teach.”¹⁸⁷ If the individual is applying for a license as an elementary school teacher, there are additional “reading instruction skills” to master, such as “phonemic awareness . . . phonics instruction . . . fluency . . . vocabulary; and . . . comprehension.”¹⁸⁸

Indiana grants special licensing exemptions to individuals who wish to teach in a charter school.¹⁸⁹ The most notable exemption is that an individual can teach in the school “while . . . *in the process* of obtaining the license,” whereas traditional public school teachers are generally required to have a license *before* teaching.¹⁹⁰ Furthermore, the applicant is only required to either hold “at least a bachelor’s degree . . . in the content or a related area in which the individual wishes to teach” or have “at least a bachelor’s degree and proof that the individual has passed the state approved content area examination in the subject area that the individual intends to teach.”¹⁹¹ Gone are the requirements of basic knowledge and pedagogy proficiency, and the additional hurdles for elementary school teachers.¹⁹² This lack of uniformity between traditional and charter school teachers creates a circular effect within the uniformity prong: fewer professional requirements of charter school teachers leads to fewer guarantees that charter school students are learning the same educational material with the same level of proficiency as their traditional peers.¹⁹³ Because these charter school exemptions do not guarantee uniform outcomes between traditional public and charter school students, Indiana’s charter schools fall short of Indiana’s educational clause requirements.

school students and his younger brother fearing he would be academically behind if he had to transfer to a suburban public school).

186. Beale, *supra* note 1, at 537-39.

187. IND. CODE § 20-28-5-12(b)(1)-(3) (2017).

188. *Id.* § 20-28-5-12(b)(4)(A)-(E).

189. IND. CODE § 20-28-5-16 (2017).

190. *Id.* § 20-28-5-16(b) (emphasis added).

191. *Id.* § 20-28-5-16(a)(2)(A)-(B).

192. *Id.* § 20-28-5-16.

193. Celeste K. Carruthers, *The Qualifications and Classroom Performance of Teachers Moving to Charter Schools* 8 (Urban Inst.: Nat’l Ctr. for Analysis of Longitudinal Data in Educ. Research, Working Paper No. 27, 2010), <http://www.urban.org/sites/default/files/publication/33376/1001285-The-Qualifications-and-Classroom-Performance-of-Teachers-Moving-to-Charter-Schools.PDF> [<https://perma.cc/C8RD-P357>].

CONCLUSION

Until *League of Women Voters of Washington v. State*, charter schools have survived state constitutional challenges, but these state courts have not engaged in a full-fledged analysis.¹⁹⁴ To examine charter schools properly, state courts should undergo a constitutional analysis in conjunction with asking whether the state's charter schools present a real choice to parents by providing a quality education and promoting improvement within the traditional public schools.

When analyzing Indiana's charter schools under this lens, they should be struck down as unconstitutional. Local Indiana voters are not in control of the schools because charter school boards are selected independently by the organizer, and the schools are tied to private interests through donations and contracts with for-profit ESPs.¹⁹⁵ Indiana's charter schools do not perform better than their traditional public counterparts and therefore do not provide parents with real choice.¹⁹⁶ While some charter schools outperform IPS, on the whole charters perform at the same level (or even worse) than IPS.¹⁹⁷ This means parents are left with two bad choices – poor charter schools and poor traditional public schools. Is this really a genuine choice for parents? Even if this is considered “real choice,” Indiana is now spending more money on their failing charter schools than on their traditional public schools, which should prompt the legislature to question why the state is continuing to spend money on two arguably bad choices.¹⁹⁸ The charters have not even spurred improvement in the traditional public schools,¹⁹⁹ and therefore the second prong of the market analysis fails. Finally, charter schools do not promote the uniformity dictated in the state's education clause because exemptions are granted in critical areas such as curriculum and teacher licensing.²⁰⁰ Based on this holistic framework, Indiana courts, when faced with a legal challenge, should find the state's charter schools to be unconstitutional.

194. *See supra* Part III.

195. *See supra* Part V(A).

196. *See supra* Part V(B).

197. *See supra* Part V(B).

198. *See supra* Part V(B).

199. *See supra* Part V(B).

200. *See supra* Part V(C).

