

CHARTER SCHOOLS, EQUAL PROTECTION LITIGATION, AND THE NEW SCHOOL REFORM MOVEMENT

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As the quality of public education, particularly in large urban school districts, has declined, activists and politicians from all points on the political spectrum have proposed school reforms. Many reformers have suggested versions of "school choice" programs. These efforts propose to alter the school assignment systems common to most public school districts, in which students attend neighborhood schools without regard to preference. While some activists seek parent choice just among the area public schools, others would expand the notion of choice to private or even parochial schools, giving tuition vouchers to students choosing to attend private schools.¹ School choice activists have argued for nearly three decades that opening the public school market will both stimulate competition and increase school quality.² While the choice movement has found support among political conservatives,³ full-scale voucher programs have been defeated largely by the efforts of teachers' unions and the Democratic Party.⁴

The continued woes of public schools have forced even the staunchest defenders of the status quo to examine new methods of improving school systems. Many districts strapped for personnel now hire teachers without degrees in education or teaching certifications.⁵

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¹ See generally Jonathan B. Cleveland, *School Choice: American Elementary and Secondary Education Enter the "Adapt or Die" Environment of a Competitive Marketplace*, 29 J. Marshall L. Rev. 75, 96-98 (1995) (describing various school choice proposals).

² See *id.* at 130 (describing charter schools as part of supply-side movement in education intended to create "disparate" schools and corresponding competition).

³ See Richard Lee Colvin, *School Vouchers Passing Milwaukee Test: Education: They're Working as Planned and Haven't Wrecked the Public System*, L.A. Times, Oct. 26, 1996, at A1 (describing most supporters of vouchers as conservative Republicans seeking to introduce market forces to education).

⁴ See James Peyser, *School Choice: When, Not If*, 35 B.C. L. Rev. 619, 622 (1994) (arguing that education establishment has vested interest in maintaining the status quo); Neal R. Peirce, *Charter Schools—and Those Who Resist Them*, Baltimore Sun, Nov. 4, 1996, at 11A (citing Joe Nathan, charter school expert, claiming that unions or school boards have used political muscle against charter schools in numerous states).

⁵ See Janette Rodriguez, *Out-of-State Teachers Coming to Texas for Jobs*, Fort Worth Star Tel., Sep. 23, 1996, at 11 (citing U.S. Department of Education study saying that

Both the Bush and Clinton administrations have moved to redefine public school goals with the aim of increasing quality through national standards.⁶ Furthermore, as states' rights became a more prominent issue on the political agenda, school reformers followed suit, advocating a shift in control from state and local bureaucracies to individual schools.⁷ Many reformers have attempted to decentralize the power structure, giving individual schools more control over expenditures and curriculum.⁸

Decentralization within the system has converged with the political design of school choice to create a new amorphous category of schools called "charter schools," a hybrid reform effort that combines autonomy and accountability under the umbrella of public education. Charter schools, like any public schools, receive their funding from the local or state education system.⁹ However, these schools receive considerably more autonomy from state and local regulation in terms of student recruitment, curriculum, budget, and staffing. Charter schools must propose an operating format and a set of goals in their charter applications.¹⁰ At the end of the charter period (typically five years), the schools may be closed if they have not met their stated goals.¹¹

Charter schools currently operate in at least thirty states.¹² Although trends vary among these states, charter schools

teacher shortages have forced many districts to hire alternative certification teachers without traditional teacher education backgrounds).

⁶ See Martin Kondracke, *GOP Waffles on Education*, Dallas Morning News, Aug. 30, 1993, at 13A (arguing that Republicans favored centralized national standards under President Bush, but not under President Clinton); 2000 Goals?, *Richmond Times-Dispatch*, Oct. 18, 1993, at A8 (editorializing that Goals 2000 Program which passed House should be renamed 2000 Goals because of its multiple mandates).

⁷ See Stuart Biegel, *The Wisdom of Plyler v. Doe*, 17 *Chicano L. Rev.* 46, 49-50 (1995) (arguing that Republican political victories of 1994 empowered school choice movement, leading to greater decentralization of public schools).

⁸ See Peyser, *supra* note 4, at 624-25 (claiming that school choice liberates both parents and individual schools to develop curricula to "develop character and a moral sense").

⁹ See U.S. Dep't of Educ., *A Study of Charter Schools: First Year Report* (May, 1997) <<http://www.ed.gov/pubs/charter/>>. Charter schools vary by state as each state legislature sets its own regulations. See *infra* notes 34-37 and accompanying text.

¹⁰ See Joe Nathan, *Charter Schools: Creating Hope and Opportunity for American Education 2* (1996).

¹¹ See *id.* at 3.

¹² See The Center for Education Reform, *Charter Schools Legislation and Laws* (July 1997) <<http://edreform.com/laws/chlaws.htm>> (listing states with charter school enabling acts as following: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Illinois, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Wisconsin, and Wyoming).

are among the hottest reform initiatives in public education today.¹³

As some education reformers strive to increase charter school autonomy, others fight to limit or at least to better define the scope of charter schools. Litigation is inevitable as advocates struggle to ensure equal access to education within the charter school movement. It seems likely that charter school litigation will revolve around federal and state equal protection challenges.¹⁴ Opponents of charter schools believe that they may increase school choice only for the most privileged students. In equal protection terms, these opponents fear that charter schools will discriminate, either explicitly or implicitly, by race or socioeconomic status and will deny equal access to public education opportunity. These opponents may follow the lead of education finance plaintiffs and sue under federal or state equal protection clauses.

In June, 1996, the Tenth Circuit decided the only published federal charter school case. In *Villanueva v. Carere*,¹⁵ the court of appeals affirmed a district court's dismissal of a Fourteenth Amendment equal protection challenge to Colorado's Charter School Act.¹⁶ A group of Latino parents sought to enjoin the Pueblo, Colorado school board from closing two public schools and opening a new charter school.¹⁷ Parents sued when their neighborhood schools were closed and some children were forced to ride buses or cross busy intersections to reach new, overcrowded schools.¹⁸ Plaintiffs claimed that the decision to close schools in the predominately Latino neighborhood in conjunction with state approval and oversight of the new charter school was racially discriminatory.¹⁹ Plaintiffs alleged that the Colorado Charter Schools Act violated the parents' equal protection rights under the Fourteenth Amendment.²⁰ In upholding the dismissal of

¹³ See Janita Poe, Budget, Student Pressures Weigh on Charter Schools, Chicago Trib., Jan. 11, 1998, at Metro 1 (describing charter schools as popular alternative to traditional public education).

¹⁴ See *infra* Part II.

¹⁵ 85 F.3d 481 (10th Cir. 1996).

¹⁶ See *id.* at 484.

¹⁷ See *id.* at 483.

¹⁸ See *id.* at 485.

¹⁹ See *id.* at 483.

²⁰ See *id.* The plaintiffs also alleged a violation of Title VI of the Civil Rights Act. See *id.* at 484. The court held that the plaintiffs had failed to show discriminatory impact as required by that Act. See *id.* at 486-87. This Note does not discuss potential Title VI challenges. For a discussion of Title VI litigation in school choice environments, including charter schools, see generally Stuart Biegel, School Choice Policy and Title VI: Maximizing Equal Access for K-12 Students in a Substantially Deregulated Educational Environment, 46 Hastings L.J. 1533 (1995) (arguing that Title VI litigation in public education has potential to strike down school choice and voucher programs).

claims, the Tenth Circuit determined that the plaintiffs had failed to demonstrate discriminatory intent or purpose under the Fourteenth Amendment.²¹

The sudden influx of charter school legislation in the public school landscape and limited state oversight of charter school administration foreshadow further legal challenges. This Note will examine potential federal and state equal protection challenges to charter schools. The Note then suggests both legislative safeguards and individual school designs that may insulate charter schools from such legal challenges while helping to ensure that these schools serve as part of a fair and effective school reform movement.

Part I of this Note gives a short background of charter schools, focusing on their location in the school choice movement and on the large variations among state legislation dealing with charter schools. Part II examines equal protection litigation in the context of public education. This Part describes the federal constitutional roadblocks created by courts' tendencies to apply rational basis scrutiny in education litigation. It also analyzes recent trends in state constitutional litigation and concludes that state litigation provides a more hospitable environment for challenges. Part III assesses charter schools' litigation risks and suggests changes to charter school legislation to help reduce such risks. The Note concludes that specific legislative changes would protect the movement from the costs and risks of litigation and would help both states and individual charter schools provide equal access to the new school reform movement.

I

THE CHARTER SCHOOL MOVEMENT

After several years of debate about school choice, Minnesota became the first state to pass charter school legislation in 1991.²² This legislation provided for the opening of twenty-five charter schools and allowed only limited freedom from state regulations. Over the last five years, approximately thirty states and the District of Columbia have enacted charter school legislation with various restrictions.²³ Political support has increased the visibility of charter schools and created momentum to open hundreds of new schools in the next decade.²⁴

²¹ See *Villanueva*, 85 F.3d at 486-88.

²² See Nathan, *supra* note 10, at 70-71.

²³ See *supra* note 12 for list of states that have charter school enabling acts.

²⁴ See *infra* notes 102-04 and accompanying text.

Charter schools serve as choice schools rather than traditional neighborhood schools; typically, charter schools may enroll any student in the district, rather than being limited to students living in the school's immediate vicinity. These new, expanded choices could significantly alter the student population in some states. As districts open new charter schools, sometimes in large numbers, public school students can choose to attend the new charter schools or to remain in their neighborhood schools. The makeup of these neighborhood schools will change as students leave to attend charter schools. The deregulated charter school environment and the political pressure to open many new schools point to the need for greater vigilance in assessing the new school reform's effects on the public school landscape.

A. Characteristics of Charter Schools

1. State Legislation

Charter schools are public schools which, through state legislation, operate free from most state and local regulations. These schools generally have more autonomy than other public schools in design, staffing, and spending.²⁵ State legislatures pass enabling acts describing regulations and procedures for forming charter schools.²⁶ Typically, these enabling acts determine how many new schools may open within the state and describe the application and approval process for licensing these new schools.²⁷ Individuals or groups may then apply to create and run a charter school, describing how the school will operate and specifying the school's goals.²⁸ Once approved, charter school operators usually receive the average per pupil expenditures for the district or state in which they are chartered.²⁹ At the conclusion of the school's charter (typically five years), state or local officials may renew or revoke the charter, depending on the school's performance.³⁰ Accordingly, the general notion is that charter schools

²⁵ See Tim Simmons, *Reform Without Rules: Why Charter Schools Are All Over the Map*, *Raleigh News & Observer*, Feb. 15, 1998, at A1 (describing schools' freedom from traditional regulation); Congressional Testimony by Cornelia M. Blanchette, Sept. 16, 1997, available in 1997 WL 14150775 [hereinafter *Blanchette Testimony*] (testifying before Subcommittee on Early Childhood, Youth and Families) (same).

²⁶ Congressional Testimony by Gerald N. Tirozzi, June 26, 1997, available in 1997 WL 11234343 (testifying before Subcommittee on Early Childhood, Youth and Families) (describing process by which charter schools are created).

²⁷ See *id.*

²⁸ See *id.*

²⁹ See Nathan, *supra* note 10, at 7 ("[I]t is a key element in the charter school strategy that charter schools will receive the same as, and no more than, the state per-pupil average spent on education.").

³⁰ See *id.* at 2-3 (listing benefits of charter school legislation).

are both more autonomous and more accountable than other public schools.³¹

State enabling acts dictate the procedures that establish individual charter schools. These procedures vary significantly among the states: Most charter schools are created as new entities while others result from changes to existing public schools.³² While some states have a centralized state board to grant and oversee charters,³³ other states give freedom to local districts.³⁴ Some schools release information about students' progress every year while others are examined closely only when applying for a charter renewal. All charter school legislation provides for revocation of the school's charter when the school has significantly failed to meet its stated goals.³⁵ The decision to revoke is usually made by a board that examines evidence of school performance. Most enabling statutes provide for an appeal if the charter is revoked.³⁶

³¹ See Chester E. Finn, Jr. et al., *Charter Schools in Action: What Have We Learned?* 64 (1996) (quoting Lamar Alexander, former U.S. Secretary of Education, calling charter school movement "old-fashioned horse-trading" in its trade of rules and regulations for accountability); see also Opening and Closing Remarks by the President in Roundtable Discussion on Charter Schools, M2 Presswire, Sept. 23, 1997, available in 1997 WL 14463447 [hereinafter President's Roundtable] (calling charter schools "public schools that make a simple agreement: in exchange for public funding, they get fewer regulations and less red tape, but they have to meet high expectations, and they keep their charter only so long as their customers are satisfied they're doing a good job").

³² The U.S. Department of Education study on charter schools reported that about 60% of charter schools are newly-created while about 15% were previously public schools and about 25% were previously private schools. See U.S. Dep't of Educ., *supra* note 9.

³³ See, e.g., Minn. Stat. Ann. § 120.064(4)(b) (West Supp. 1998) ("Before the operators may form and operate a school, the sponsor must file an affidavit with the state board of education stating its intent to authorize a charter school. . . . The state board must approve or disapprove the sponsor's proposed authorization within 60 days of the receipt of the affidavit.").

³⁴ See, e.g., N.H. Rev. Stat. Ann. § 194-B:3(II) (1995) ("Except as expressly provided in this chapter, the duty and role of the local school board relative to the establishment of a charter school shall be in good faith to approve or disapprove the proposed charter school contract . . .").

³⁵ See, e.g., Cal. Educ. Code § 47607 (West Supp. 1998):

(b) A charter may be revoked by the authority that granted the charter under this chapter if the authority finds that the charter school did any of the following:

- (1) Committed a material violation of any of the conditions, standards, or procedures set forth in the charter petition.
- (2) Failed to meet or pursue any of the pupil outcomes identified in the charter petition.
- (3) Failed to meet generally accepted accounting standards of fiscal management.
- (4) Violated any provision of law.

³⁶ See, e.g., Colo. Rev. Stat. Ann. § 22-30.5-108(2) (West 1995) ("A charter applicant or any other person who wishes to appeal a decision of a local board of education concerning a charter school shall provide the state board and the local board of education with a

In some states, charter schools are largely deregulated: They are free to decide their own curricula and admissions policies; to hire, fire, and pay teachers by their own standards; and to spend money as they determine.³⁷ Other states have placed limitations on charter schools, requiring observation of local collective bargaining agreements with extensive local and state oversight.³⁸ Legislative freedoms for charter schools range from the cautious and restrictive standards of Wisconsin and Minnesota,³⁹ to the more liberal and freewheeling plans of Arizona and California.⁴⁰

In Wisconsin, for example, charter schools are free from most state regulations.⁴¹ However, charter schools may hire only certified teachers⁴² and cannot use standardized test results to evaluate teachers.⁴³ Additionally, the state enabling act⁴⁴ requires that at least ten percent of teachers in the district and fifty percent of teachers at the petitioning charter school sign a petition of support for a charter to be granted.⁴⁵

Minnesota, the original charter school state, also has stringent restrictions.⁴⁶ Ninety percent of teachers at a petitioning school must approve the proposed charter,⁴⁷ and teachers must be licensed.⁴⁸ As a

notice of appeal . . . within thirty days . . ."). But see Kan. Stat. Ann. § 72-1907(b) (1997) ("The decision of a board of education to nonrenew or revoke a charter is not subject to appeal.").

³⁷ See Blanchette Testimony, *supra* note 25.

³⁸ The Hudson Institute, a conservative think tank, has divided state legislation into categories based on the relative freedom given to schools. See Finn et al., *supra* note 31, at 48. Their study labels enabling acts that provide the most freedom as "strong" legislation, while acts adhering most closely to traditional public schools structure are "weak." *Id.* Determining factors include whether noncertified teachers may be hired, whether any individual or group can form a school, whether there are automatic exemptions from many state rules and policies, and whether state funds are available for start-up costs and technical assistance. See *id.*; see also Bruce V. Manno, Viewpoint: Study Shows Charter Schools are Promising Reform Strategy, *Tacoma News Trib.*, Oct. 28, 1996, at A9 (summarizing Hudson Institute study).

³⁹ See Finn et al., *supra* note 31, at 109-10 (describing slow progress of movement in Wisconsin).

⁴⁰ See *id.* at 87-93 (summarizing charter laws and results).

⁴¹ See *id.* at 86 (charting and ranking laws of Wisconsin and other states).

⁴² See Wis. Stat. Ann. § 118.19(1) (West Supp. 1997) ("Any person seeking to teach in a public school, including a charter school . . . shall first procure a license or permit from the department . . .").

⁴³ See *id.* § 118.30(2)(c) ("The results of examinations administered under this section to pupils enrolled in public schools, including charter schools, may not be used to evaluate teacher performance . . .").

⁴⁴ *Id.* § 118.40.

⁴⁵ See *id.* § 118.40(1)(m).

⁴⁶ See Finn et al., *supra* note 31, at 107-09 (describing some of charter school regulatory hurdles).

⁴⁷ See Minn. Stat. Ann. § 120.064(4a) (West Supp. 1998).

⁴⁸ See *id.* § 120.064(11).

result of their rigid regulations, Wisconsin and Minnesota have few charter schools.⁴⁹ This correlation can be seen nationwide—states with restrictive enabling acts have fewer charter schools. In states with more freedom, charter schools are becoming a more significant part of the educational landscape.

Arizona, widely viewed as the leader in the charter school movement,⁵⁰ has the most permissive charter school legislation in the country.⁵¹ Charter schools operate free from most state regulations including regulations governing teacher contracts.⁵² Arizona's enabling statute provides very few guidelines and states, "except as provided in this article and in [the charter school's] charter, it is exempt from all statutes and rules relating to schools, governing boards and school districts."⁵³ Additionally, Arizona is the only state that currently grants charters of fifteen years,⁵⁴ rather than the traditional five. Applicants for charters in Arizona design their own recruitment programs and may be granted a charter even before securing facilities to host the schools.⁵⁵ Not coincidentally, just one year after the enactment of its charter school laws, Arizona had 118 charter schools and 16,000 students, the most in the country at that time.⁵⁶

It can be inferred that more permissive legislation is directly linked to greater numbers of charter schools. For states with more charter schools, the impact on the public school landscape inevitably will be greater, and state or federal equal protection challenges from opponents may be more likely. Since most states have limits on the number of charters which may be granted statewide,⁵⁷ a limited

⁴⁹ See Finn et al., *supra* note 31, at 106, 109. Minnesota had 20 charter schools in 1996-97, while Wisconsin, with the "weakest" legislation that the Hudson Institute reviewed, had only six charter schools. See *id.*

⁵⁰ See Hal Mattern, *Arizona's Law Drawing Credit—and Blame—for Charter Proliferation*, *Ariz. Republic*, Sept. 22, 1996, at A10 (describing Arizona law as "strongest" or "too lenient" charter school law, depending on perspective, and citing Hudson Institute study's praise of Arizona law).

⁵¹ See Finn et al., *supra* note 31, at 87 (describing growth of charter school movement in Arizona because of legislation).

⁵² See *id.* at 85 (charting legislative features).

⁵³ See *Ariz. Rev. Stat. Ann.* § 15-183(E)(5) (West Supp. 1997); see also *id.* § 15-183(H) (providing that charter schools "may contract, sue and be sued").

⁵⁴ See *id.* § 15-183(I).

⁵⁵ See Telephone Interview with Monica Liang, School Director of Tertulia (Jan. 12, 1997). Ms. Liang's charter school opened in South Phoenix, Arizona in August, 1996. The charter was granted in 1995 based on an application that included curriculum design but prior to securing any buildings to house the school. See *id.*

⁵⁶ See Finn et al., *supra* note 31, at 87 (projecting rapid growth in Arizona charter school movement).

⁵⁷ See *id.* at 38 (describing legislative hurdles for charter school movement). For example, in Delaware, only five schools may be chartered each year. See *Del. Code Ann. tit. 14,*

number of students will defect from traditional public schools. In this sense, public schools in states with restrictive charter limits cannot be expected to feel market pressure as severely and are unlikely to fail and close merely due to the existence of charter schools. In these limited environments, charter schools simply amount to experiments in school autonomy and curriculum innovation, not in free market education.⁵⁸ The differences among state legislation probably will affect the nature of court challenges, since charter schools play a more substantial role in the public education systems of some states than others.

2. *Charter School Trends*

There were approximately 800 charter schools in operation in thirty states during the 1997-98 school year.⁵⁹ Efforts to study charter school enrollments are difficult, though, because of the constant flux of schools and students. By one estimate, two-thirds of charter schools were created to implement a particular educational vision, while about twenty percent were started to target specific student groups, including at-risk, language minority, and racial minority students.⁶⁰ Many have been designed specifically to aid students with disabilities who have difficulty succeeding in traditional schools.⁶¹ According to a study by the Hudson Institute, sixty-three percent of all charter school students are members of racial minority groups, fifty-five percent live below the poverty line, nineteen percent have a diagnosed disability (compared with ten percent of all students nationwide), nineteen percent have limited English proficiency, and fourteen percent would not otherwise attend school at all.⁶² Among the specialty charter schools are academies for high school dropouts,⁶³ tech-

§ 501 (1996). In California, on the other hand, 100 charter schools may operate in a given year. See Cal. Educ. Code § 47602 (West Supp. 1998).

⁵⁸ See Note, Recent Legislation, 110 Harv. L. Rev. 1651, 1651-56 (1997) (describing new charter school statutes passed in Connecticut and South Carolina, and concluding that limitations on numbers of schools, certification of teachers, and difficulty entering market will prevent charter schools from creating true competition).

⁵⁹ The Center for Education Reform claims that 781 charter schools were operating as of August, 1998, with 505 additional charters already approved. See Center for Education Reform, Charter School Highlights and Statistics (visited Aug. 1, 1998) <<http://edreform.com/pubs/chglance.htm>>.

⁶⁰ See U.S. Dep't of Educ., A Study of Charter Schools: First Year Report: Executive Summary (May 1997) <<http://www.ed.gov/pubs/charter/execsum.html>>.

⁶¹ See Center for Education Reform, Charter School Survey (visited May 24, 1998) <<http://edreform.com/research/css9697.htm>> (citing survey of charter school founders).

⁶² See Manno, *supra* note 38, at A9 (detailing Hudson Institute study).

⁶³ See Peirce, *supra* note 4, at 11A (describing City Academy in St. Paul, Minnesota as accepting only high school dropouts).

nical skills academies,⁶⁴ and schools for the deaf.⁶⁵ The U.S. Department of Education has offered less optimistic assessments, estimating that while charter schools serve a slightly higher portion of students of color than statewide averages, they generally serve a slightly lower percentage of disabled students and limited English proficiency students than traditional public schools, and about the same proportion of low-income students.⁶⁶

While these nationwide estimates seem promising, charter schools vary by state, and in some states the reform movement clearly fails to reach minority students and low-income students. For example, in both Colorado and Georgia, charter schools serve about half as many black students (by percent of total students served) as traditional public schools and serve fewer low-income students.⁶⁷ The Colorado Senate debated repealing the state's charter school legislation but ultimately voted to let it continue indefinitely despite arguments from state Democrats that charter schools failed to reach at-risk students.⁶⁸ In Arizona, by contrast, the statewide percentage of black students in charter schools is three times higher than in other public schools,⁶⁹ and charter schools serve a higher percentage of low-income students.⁷⁰ The variance may reflect the limited state oversight of charter schools; without legislative standards for recruitment and enrollment, states depend a great deal on the efforts of individual school operators.

The admissions policies of charter schools also vary. While most states mandate a random lottery system for admission,⁷¹ other schools are left to devise their own criteria. First-come-first-served admissions, as used in the charter school in *Villanueva*,⁷² place a premium on speed in the admissions process.⁷³ Parents who become aware of the new schools may secure slots for their children before other par-

⁶⁴ See Finn et al., *supra* note 31, at 20.

⁶⁵ See *id.* at 56.

⁶⁶ See U.S. Dep't of Educ., *A Study of Charter Schools: First Year Report: Summary* (May, 1997) <<http://www.ed.gov/pubs/charter/chap3c.html>>.

⁶⁷ See Doug Cumming, '98 Georgia Legislature Weighing Benefits of Charter Schools: Conference in Decatur: Two-day Session Will Focus on Legislation, Expansion and Results From Other States, *Atlanta J.-Const.*, Feb. 9, 1998, at C1 (citing figures from U.S. Department of Education, Georgia Department of Education, and Education Commission of the States).

⁶⁸ See Thomas Frank, *Charter Schools May Get Reprieve*, *Denver Post*, Jan. 26, 1998, at B3.

⁶⁹ See Cumming, *supra* note 67, at C1.

⁷⁰ See *id.*

⁷¹ See *infra* notes 208-09 and accompanying text.

⁷² See *Villanueva v. Carere*, 85 F.3d at 481 (10th Cir. 1996).

⁷³ First-come-first-served admissions allow schools to fill their slots with students from the best informed families. See *infra* notes 205-06 and accompanying text.

ents are even aware of the possibility. Additionally, some schools may take a student's past performance in school into account when enrolling new students.⁷⁴ Some charter schools also have mandatory "contracts" in which students and parents must agree to perform certain tasks, such as volunteering time to clean the school or assisting in other capacities, for the school to guarantee admission.⁷⁵ These variances seem to result from limited state regulation. Different school policies create charter schools that may be designed to serve very different student populations.

B. Arguments from Advocates and Critics

Charter school proponents claim that the movement is the first public school reform effort that brings together school choice, entrepreneurial opportunities for teachers and parents, accountability for results, and competition with other schools.⁷⁶ Because the movement combines these elements to varying degrees depending on the state legislation, supporters vary in their political beliefs and in their goals for school reform. Advocates frequently cite the litany of empirical studies and anecdotal evidence demonstrating the current failures of American public schools as evidence of public support for school reform.⁷⁷

The entrepreneurial nature of charter schools—building new schools from the ground up—drives much of the movement's support.⁷⁸ These advocates point to teachers who create charter schools to highlight a particular pedagogical approach.⁷⁹ Charter school supporters view the movement as a chance to escape the hostilities of school district political battles and allow innovators to create new methodologies.⁸⁰

Advocates also argue that deregulation will increase innovation in public schools. They believe that creative activists will become involved in public education and will create new management strategies

⁷⁴ Most states do not allow past academic performance to be considered in limiting admission, but many do not prohibit consideration of past behavior in school. See *infra* note 214.

⁷⁵ These contracts may be problematic if families cannot meet the terms. See *infra* notes 216-17 and accompanying text.

⁷⁶ See Nathan, *supra* note 10, at 1 (describing benefits of charter schools).

⁷⁷ See *id.* at 11-17 (arguing that need for charter schools exists).

⁷⁸ See *id.* at 17-19 (arguing that entrepreneurship is major force behind charter school movement).

⁷⁹ See e.g., Telephone Interview with Liang, *supra* note 55 (describing how Liang and Jesus Aguirre, former public school teachers, sought chances to institute English/Spanish dual language instruction in lower grades).

⁸⁰ See Nathan, *supra* note 10, at 75 (discussing resistance to change in current system).

and curricula.⁸¹ These advocates believe that traditional public schools and regulations stifle innovation and stagnate the growth of public education. They argue that the lack of state oversight helps create new alternatives for parents.⁸² Parent satisfaction with the programs is demonstrated by the large numbers of charter schools with waitlists.⁸³

More controversial is the charter school role in creating school district choice. For true *laissez-faire* enthusiasts, charter school legislation represents a step in the road to public school choice. Many charter school advocates believe that freedom from regulation will spawn an increase in the number of options for children and parents, and will lead to competition among schools.⁸⁴ If schools are forced to compete for students, students will leave failing and ineffective schools. Schools will then be forced to either improve or lose students, and schools that fail to demonstrate success will close down, leaving only those schools that have survived marketplace accountability.⁸⁵

Charter school supporters claim that accountability from the opening of new schools creates a "ripple effect."⁸⁶ They point to examples in Minnesota and Massachusetts of districts creating new programs shortly after the opening of charter schools, and claim a causal effect from the competitive pressures.⁸⁷

Supporters insist that the ultimate accountability—the threatened closure of the schools through a revoked charter—leads schools to focus on student achievement. They argue that this is a marked improvement from traditional public schools, which have great difficulties firing incompetent staff, let alone closing an entire school.

Advocates also believe that all families should be able to choose which schools their children attend, pointing out that wealthy parents already may choose between public and private schools. Choice advocates dismiss concerns that low-income parents will do a poor job

⁸¹ See *id.* at 76.

⁸² See Simmons, *supra* note 25, at A1 (discussing North Carolina movement and its proponents' arguments that lack of state regulation is good for movement).

⁸³ See Congressional Testimony by Jeanne Allen, Sept. 16, 1997, available in 1997 WL 14150772 (testifying before Subcommittee on Early Childhood, Youth and Families about charter schools).

⁸⁴ See Cleveland, *supra* note 1, at 130 (describing charter schools as part of supply-side movement in education intended to create "disparate" schools and corresponding competition).

⁸⁵ See *id.* at 95.

⁸⁶ See Nathan, *supra* note 10, at 89-90 (arguing that opening charter schools has caused other public schools to improve services).

⁸⁷ See *id.*

choosing schools as paternalistic⁸⁸ and claim that parents of all backgrounds can and will learn to make adequate educational choices for their children.⁸⁹

Finally, advocates argue that charter schools are reaching more minority and low-income children than traditional schools. They point out that nearly two-thirds of charter school students nationwide are nonwhite, and more than half come from low-income families,⁹⁰ demonstrating that the lack of regulation has not been used by most charter school operators to exclude minorities and low-income youth. Advocates tie these figures to the entrepreneurial opportunities created by charter schools, arguing that charter schools are drawing educational innovators who expand opportunities for low-income and minority students.⁹¹

Opponents of charter school reform believe that loose regulation will allow charter schools to siphon the wealthiest and best-educated families from traditional public schools. These opponents fear that traditional neighborhood schools will deteriorate and that the charter school movement will disproportionately burden lower classes and children of color. The school choice agenda drives teachers' unions to oppose charter school legislation that otherwise might be acceptable; unions fear that charter school enabling acts will be the proverbial camel's nose under the education reform tent and that eventually, larger choice programs will be wedged into the national agenda.⁹² In a market economy of public education, opponents particularly fear that the "failing" schools will disproportionately become schools for the urban poor and children of color.⁹³ This siphoning would leave

⁸⁸ See Cleveland, *supra* note 1, at 133.

⁸⁹ See *id.* at 133-34.

⁹⁰ See Richard C. Seder, *Allow Charter Schools to Reach Their Full Potential*, *Christian Sci. Monitor*, Oct. 3, 1997, at 18 (arguing for stronger charter school movement).

⁹¹ See Nathan, *supra* note 10, at 134 (stating that "minority students are over-represented in charter schools").

⁹² See Cleveland, *supra* note 1, at 151-52 (arguing that vouchers will ultimately be necessary to affect fundamental change in public education but that charter schools and school choice are intermediate step: "Unfortunately, such timidity may be politically necessary in light of the education establishment's stranglehold on maintaining its monopoly. Sometimes, to get from A to C, you need to stop at B."). This type of rhetoric alarms teachers' unions and may prevent the charter school movement from ever having its maximum impact.

⁹³ See Carol H. Weiss, *Foreword*, in *Who Chooses? Who Loses?* vi, vii (Bruce Fuller & Richard F. Elmore eds., 1996) [hereinafter Fuller & Elmore, *Who Chooses? Who Loses?*] (stating that critics of school choice fear that such programs will lead to schools catering to a narrow group without concern for greater good). Another chapter in that book argues that both school choice advocates and opponents are overly simplistic in their prediction of school choice outcomes. See Amy Stuart Wells, *African American Students' View of School Choice*, in Fuller & Elmore, *Who Chooses? Who Loses?*, *supra*, at 25, 25. Free

traditional public school students to languish in underfunded, low-quality schools.⁹⁴

Other opponents fear that charter schools will be run by unqualified nonprofessionals.⁹⁵ Unions are especially wary of legislation that would allow charter schools to hire nonunion or uncertified teachers, and legislation that allows schools to set their own teacher salary structure outside of negotiated contracts.⁹⁶ While the national teachers' unions were originally uniformly opposed to all charter school legislation,⁹⁷ they now support charter schools in limited forms.⁹⁸

Despite some persistent and vocal opposition,⁹⁹ many Republicans and Democrats have embraced the notion of charter schools.¹⁰⁰ Charter school legislation and the schools themselves vary so widely from state to state that it is difficult to argue against charter schools as a general proposition; some legislation is very limited, while other

market supporters' assumptions that all parents will act for the educational benefit of their children are naive, and opponents' predictions that only low-income children of color will be left behind are equally inaccurate. See *id.* However, it is true that parents with more education and fewer children are consistently more likely to participate in school choice programs. See, e.g., *id.* at 30-31; see also Richard F. Elmore & Bruce Fuller, Conclusion: Empirical Research on Educational Choice: What Are the Implications for Policy-Makers?, in Fuller & Elmore, *Who Chooses? Who Loses?*, *supra*, at 187, 190; Valerie Martinez et al., Public School Choice in San Antonio: Who Chooses and with What Effects?, in Fuller & Elmore, *Who Chooses? Who Loses?*, *supra*, at 50, 57-58.

⁹⁴ See, e.g., Andrew Cain, Assembly Embraces Charter Schools, *Wash. Times*, Feb. 5, 1998, at C3 (describing debate in Virginia State Assembly and comments from critics that charter schools will siphon money to educate only "the cream of the crop").

⁹⁵ See Robin D. Barnes, Black America and School Choice: Charting a New Course, 106 *Yale L.J.* 2375, 2400 (1997) (arguing that charter schools' lack of professional requirements "can be seen as the equivalent of authorizing paralegals to run law firms and perform routine legal services, tasks that have traditionally only been executed by lawyers").

⁹⁶ See generally Teachers' Unions and Charter Schools, *N.Y. Times*, Nov. 23, 1997, at 4.

⁹⁷ See Gail Russell Chaddock, Teachers Unions Jump on Bandwagon of School Reform, *Christian Sci. Monitor*, Oct. 14, 1997, at 10 (describing shift of National Education Association and American Federation of Teachers away from opposition to charter schools and other reform efforts).

⁹⁸ Some unions support what the conservative Hudson Institute would call "weak" legislation. See Chester E. Finn Jr. & Bruno V. Manno, A Promising Reform Challenges Education's Status Quo, *San Diego Union-Trib.*, Sept. 22, 1996, at G1; see also Jeanne Allen, The NEA and Charter Schools: Gift Horse or Trojan Horse? (visited May 1996) <<http://edreform.com/oped/trojan.html>> (questioning motives of country's largest teachers' union in planning to open and operate five charter schools).

⁹⁹ See, e.g., Steven Susens, Legislators Greet Sundquist Initiatives with Skepticism, *Nashville Banner*, Feb. 3, 1998, at A3 (describing Tennessee Governor's plan to implement charter schools and skeptical response from legislators and state teachers' union).

¹⁰⁰ See Rene Sanchez, Charter Schools Popular Among Politicians, *Raleigh News & Observer*, October 20, 1996, at A31 (describing joint funding support by both Democrats and Republicans).

states encourage greater numbers of schools and greater individual school innovation.¹⁰¹

Federal funding for charter schools increased from \$6 million in 1995 to \$51 million in 1996.¹⁰² President Clinton plugged charter schools on the campaign trail in 1996, and delivered \$17 million in federal funds for charter schools during October 1996 alone.¹⁰³ Clinton has pledged \$40 million in grants to help open more than 500 additional charter schools and has set a goal of opening between 3000 and 4000 charter schools by the turn of the century.¹⁰⁴ Joint support of the Democratic administration and grass-roots conservatives ensures that charter schools will be at the forefront of education reform for the foreseeable future.

II

EQUAL PROTECTION AND PUBLIC EDUCATION

As charter schools become an increasingly significant piece of public education, legal battles over allocation of educational resources are likely to follow. Since education finance litigation over the past twenty-five years has focused on federal and state Equal Protection clauses, these attacks seem to pose the greatest legal danger to the charter school movement.

A. Federal Equal Protection Challenges

1. What is an Equal Protection Challenge?

Equal protection challenges under the Fourteenth Amendment assert either that the state has discriminated against a specific group of plaintiffs or that the state has abridged the plaintiffs' rights.¹⁰⁵ Equal protection litigation played a prominent role in the civil rights movement, as plaintiffs successfully challenged laws that overtly segregated by race.¹⁰⁶ *Brown v. Board of Education*,¹⁰⁷ perhaps the most promi-

¹⁰¹ See *supra* notes 37-56 and accompanying text.

¹⁰² See Sanchez, *supra* note 100, at A31.

¹⁰³ See *id.*

¹⁰⁴ See generally President's Roundtable, *supra* note 31 (describing Clinton's support for charter schools and his claim that new schools would be enough to create ripple effect throughout nation's public schools).

¹⁰⁵ See, e.g., Daniel J. Garfield, Don't Box Me In: The Unconstitutionality of Amendment 2 and English-Only Amendments, 89 Nw. U. L. Rev. 690, 693 (1995) (arguing that traditional Equal Protection Clause interpretation looks to facial discrimination against suspect class or abridgment of rights).

¹⁰⁶ See, e.g., Phillip J. Closius, Social Justice and the Myth of Fairness: A Communal Defense of Affirmative Action, 74 Neb. L. Rev. 569, 584 (1995) (arguing that gains made by equal protection challenges were critical to civil rights movement but dealt only with elimination of "conscious, admitted, on-its-face racial discrimination").

ment Equal Protection Clause case, signaled the use of the Fourteenth Amendment as a tool in the fight for equal access to public education.

Since the Fourteenth Amendment only applies to state-governed activity, a state actor must have been sufficiently entwined in the discriminatory conduct to invoke the Fourteenth Amendment.¹⁰⁸ After determining the threshold question of state action, courts then "track" the analysis based on the type of right violated. While some rights are viewed as "fundamental" and can be violated only in the most compelling circumstances, other rights trigger lesser scrutiny and require a less compelling rationale for abridgment by the states.¹⁰⁹ "Strict scrutiny" is used when the rights of a "suspect class" are violated or when the right abridged is considered a fundamental right.¹¹⁰ Strict scrutiny requires that the state actor have a compelling state interest and that the state action be narrowly tailored to further that interest.¹¹¹ Any state classification by race is considered suspect. However, the Supreme Court has held that poverty is not a suspect classification.¹¹² Classifications based on gender, age, or legitimacy are considered "quasi-suspect classes" and merit an intermediate level of review.¹¹³

If a right is not fundamental, and if no suspect or quasi-suspect class is involved, courts may use a rational basis standard of review.¹¹⁴

¹⁰⁷ 347 U.S. 483 (1954).

¹⁰⁸ The threshold of state involvement that triggers the Fourteenth Amendment may have been raised recently. See *infra* notes 120-27 and accompanying text.

¹⁰⁹ See Roni R. Reed, Education and the State Constitutions: Alternatives for Suspended and Expelled Students, 81 Cornell L. Rev. 582, 589-90 (1996) (describing holding in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), that education is not fundamental right, leading Court to analyze challenged state action with more deferential rational basis standard).

¹¹⁰ See *Villanueva v. Carere*, 85 F.3d 481, 488 (10th Cir. 1996) (dismissing challenge to Colorado Charter School Act, analyzing level of scrutiny to be used in examining state legislative action, and writing that "deference" to state legislation should be "abandoned" when legislative action either disadvantages a "suspect class" or impinges upon exercise of "fundamental right").

¹¹¹ See Reed, *supra* note 109, at 615-16 (describing application of strict scrutiny to school expulsion).

¹¹² See *Rodriguez*, 411 U.S. at 28.

¹¹³ See John Dayton & Anne P. Dupre, Equal Protection of the Laws: Recent Judicial Decisions and Their Implications for Public Educational Institutions, 114 West Educ. L. Rep. 1 (1997), available in Westlaw, WELR database (analyzing Court's standard of review in equal protection decisions).

¹¹⁴ Some commentators have argued that courts actually utilize multiple levels of review rather than the simplistic two-tiered approach. See Stuart Biegel, Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy after *Kadrmas v. Dickinson Public Schools*, 74 Cornell L. Rev. 1078, 1087-99 (1989) (discussing evolution of "heightened" standard of review and place of education litigation within this standard); see also *Rodriguez*, 411 U.S. at 99 (1973) (Marshall, J., dissenting) (arguing that level of scrutiny in equal protection cases should vary with "the constitutional and societal importance of the interest adversely affected and the recognized

Under this more lenient standard, a rational relationship between the state action and the legitimate state objective is sufficient.¹¹⁵ The standard of review used by a court is critical to equal protection analysis; while state actors are potentially allowed to abridge a fundamental right or to use suspect classifications in compelling circumstances, commentators have deemed this scrutiny, "strict in theory, fatal in fact."¹¹⁶ Conversely, courts rarely strike down legislation when the more lenient rational basis standard is applied.¹¹⁷

Race-based equal protection claims are increasingly difficult to prove. Though overt classification by race invokes strict scrutiny, state legislation, for obvious reasons, rarely classifies overtly by race. Plaintiffs still may claim race-based equal protection violations if they can prove discriminatory intent by the state actor.¹¹⁸ This intent or purpose must be a motivating factor in the action and can be deter-

invidiousness of the basis upon which the particular classification is drawn"). Marshall later affirmed that view in his dissent in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 460, 470 (1985) (Marshall, J., dissenting), arguing that the analysis should depend on the classification and nature of the burden or benefit being distributed.

The Supreme Court is loathe to find new fundamental rights though, and has declared explicitly that education is not a fundamental right. See *Rodriguez*, 411 U.S. at 35. Some commentators believe that there is still room for identification of "important" interests and an intermediate level of review. See Biegel, *supra* note 7, at 47-48 (citing heightened standard of review utilized in *Plyler v. Doe*, 457 U.S. 202, 222-23 (1982)). Commentators supporting this analysis of equal protection jurisprudence argue that judges are unlikely to return to a strictly two-tiered analysis of equal protection rights because such analysis is practically outcome-determinative. See Laurence Tribe, *American Constitutional Law* 1610 (2d ed. 1988).

Despite this assessment, courts continue to regularly apply tiered analysis in equal protection cases. See *Vacco v. Quill*, 117 S. Ct. 2293, 2296 (1997) (upholding New York's prohibition on assisted suicide against equal protection challenges); *Villanueva*, 85 F.3d at 488 (applying rational basis standard).

¹¹⁵ See, e.g., *Rodriguez*, 411 U.S. at 40.

¹¹⁶ See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972) (describing Warren Court's two-tiered approach in which "[s]ome situations evoked the aggressive 'new' equal protection, with scrutiny that was 'strict' in theory and fatal in fact; in other contexts, the deferential 'old' equal protection reigned, with minimal scrutiny in theory and virtually none in fact").

¹¹⁷ See *id.* But see *Romer v. Evans*, 517 U.S. 620 (1996) (finding Colorado's Amendment 2 unconstitutional under Equal Protection Clause). The Court used a rational basis review but found that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 1628. This Amendment, though, overtly singled out homosexuals for different treatment.

¹¹⁸ See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that District of Columbia test for police officers was not unconstitutional solely because of racially discriminatory impact but that discriminatory purpose must be proven); *Villanueva*, 85 F.3d at 486 (finding that no intent could be demonstrated).

mined through both direct and circumstantial evidence.¹¹⁹ Race-based equal protection claims are a subset of "suspect class" analysis.

Suspect class claims under the Equal Protection Clause are different from fundamental rights claims. In the former, plaintiffs argue that legislation specifically discriminates against an identifiable class. In the latter, the claim is that legislation infringes on a specific right. The two blend, however, when plaintiffs argue that a specific group is denied a specific right. In education litigation, plaintiffs may claim that their right to equal access to education is denied because they are poor or because they belong to a specific racial group.

2. *How Does Equal Protection Analysis Apply in Public Schools?*

Charter school litigation seems likely to focus on equal protection. School choice opponents fear that deregulated schools will necessarily burden the underclass and children of color. Plaintiff groups may believe that the creation of charter schools has systemic effects on access to education and may choose to challenge charter school legislation. The most likely argument is that the state creation of charter schools has disproportionately burdened a specific identifiable racial or income group. The factual claims essentially would be that while more privileged students have access to the new charter schools, less privileged students are relegated to deteriorating and inadequate neighborhood schools. Litigation, then, is more likely if minorities and low-income students are underrepresented in new charter schools or if neighborhood schools in low-income areas deteriorate or close.

a. State Action and the Fourteenth Amendment. Any challenge to charter schools under the Fourteenth Amendment must first demonstrate state action. Enabling acts, as products of the state legislature, certainly invoke state action; when a state creates law, the action is always subject to constitutional challenge. At issue here is whether the actions and policies of individual charter schools can be challenged under the Fourteenth Amendment.

Traditionally, private bodies that fulfill a public function were automatically viewed as state actors.¹²⁰ The breadth of this definition has, however, been gradually scaled back, and today the definition is

¹¹⁹ See *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (holding that plaintiffs failed to prove discriminatory intent in rezoning decision but allowing that circumstantial evidence and discriminatory impact might prove discriminatory purpose in some cases); *Villanueva*, 85 F.3d at 486 (holding that plaintiffs failed to meet this standard).

¹²⁰ See *Terry v. Adams*, 345 U.S. 461, 469 (1953) (finding Texas Jaybird Party to be state actor when its preprimary nominations inevitably secured Democratic Party nominations for general election); *Smith v. Allwright*, 321 U.S. 649, 664-65 (1944) (holding that Texas

less clear. One recent case, *Rendell-Baker v. Kohn*,¹²¹ involved a private school which allegedly fired teachers in violation of the Fourteenth Amendment's Due Process standards.¹²² Although the school was a private school, it drew more than ninety percent of its funds from the government and was licensed by the state.¹²³ The money also came with state mandates for its use. The school arguably served as a proxy for the state in educating students with difficulty finishing public schools because of drug abuse or other personal problems. In spite of these facts, the Court still found that the school was not a state actor, reasoning that, "[a]cts of such private contractors do not become the acts of the government by reason of their significant or even total engagement in performing public contracts."¹²⁴ *Rendell-Baker* is striking both because of the heavy amount of government funding and because of the school's role as a proxy for public education.

Charter schools are defined in most enabling acts as public schools.¹²⁵ They receive significant funding from the state, are subject to some state regulation, and may be closed down by the state. However, the more freedom given to individual schools, the farther they move away from the state. Many charter schools raise substantial funds through private grants. Their curricula and purpose are determined by individual school officials, and they generally hire and fire teachers by their own standards.¹²⁶

If charter schools are viewed as semi-private entities merely provided as an alternative to existing public schools, then they may not be considered state actors, and the Fourteenth Amendment protections would not apply. However, the nature of charter schools—created through state legislation, approved by state officials, and designed to fulfill state functions—suggests that they are state actors. Though a charter school may closely resemble the school in *Rendell-Baker* with regard to funding and regulation, charter schools are born as free pub-

Democratic Party primary system is sufficiently public in its function to be considered state actor).

¹²¹ 457 U.S. 830 (1982).

¹²² See *id.* at 837.

¹²³ See *id.* at 831.

¹²⁴ See *id.* at 843-44. But see *Milonas v. Williams*, 691 F.2d 931, 939-40 (10th Cir. 1982) (recognizing state action in case similar to *Rendell-Baker* but distinguishing case because plaintiffs were students rather than teachers); Daphne Barak-Erez, A State Action Doctrine for an Age of Privatization, 45 *Syracuse L. Rev.* 1169, 1189 (1995) (questioning whether ruling would be different if case involved students rather than teachers).

¹²⁵ See, e.g., Mass. Gen. Laws Ann. ch. 71, § 89 (West 1996) (stating "[a] charter school shall be a public school, operated under a charter granted by the secretary of education"). Though not all states have such an explicit definition, all enabling acts describe who is in charge of oversight of the schools, and from where state funding will come.

¹²⁶ See *supra* Part I.A.

lic schools for the fulfillment of state public education and subject to review by the state. Furthermore, charter schools must be "public schools," or they might violate state constitutional requirements.¹²⁷ Charter schools probably would be considered state actors, so the question shifts to the level of scrutiny to be applied in a charter school challenge.

b. Education and Fourteenth Amendment Scrutiny. The Supreme Court has previously identified access to education and a basic level of adequacy as important but not fundamental interests.¹²⁸ After the Court's landmark decision in *San Antonio Independent School District v. Rodriguez*,¹²⁹ plaintiffs face a significant burden when suing for public education rights under the Fourteenth Amendment. In *Rodriguez*, low-income families residing in school districts with a low property tax base brought a class action lawsuit against the state.¹³⁰ The district court held that the Texas state system, which financed schools primarily through property taxes, violated the Fourteenth Amendment's Equal Protection Clause.¹³¹ The Supreme Court reversed in a 5-4 opinion, applying the rational basis test to uphold the state finance system.¹³² While *Rodriguez* dealt with Texas's state system of school finance, the Court was explicit in stating that under the federal Constitution, there is no fundamental right to education.¹³³ Additionally, the Court held that poverty is not a suspect classifica-

¹²⁷ See Council of Org. and Others for Educ. About Parochial v. Governor of Michigan, 548 N.W.2d 909 (Mich. Ct. App. 1996) (striking down state charter school legislation because state did not have sufficient control over school to meet state constitutional mandate). Michigan's charter school legislation was originally struck down by Judge William Collette of the Ingham County Circuit Court as unconstitutional since it created ostensibly public schools without sufficient oversight by the state. See *id.* at 911-12. Judge Collette noted that merely defining a charter school as a public school did not make it one. See *id.* at 912-13. He argued that public schools must be under exclusive control of the state and must be open for enrollment to all students in the district. See *id.* Specifically at issue in Michigan was the absence of State Board of Education oversight of the charter schools. This ruling could show that if a charter school is a constitutional public school, it must necessarily have the type of state ties that would make it a state actor for purposes of the Fourteenth Amendment.

For further commentary, see L. K. Beale, Charter Schools, Common Schools, and the Washington State Constitution, 72 Wash. L. Rev. 535, 535-37 (1997) (examining whether 1996 charter school initiative would have violated Washington state constitution's definition of "common schools"); see also *infra* Part II.B (describing state education clauses and impact on state constitutional norms).

¹²⁸ See *Plyler v. Doe*, 457 U.S. 202, 222-23 (1982) (reviewing denial of education to illegal immigrants through intermediate level of review).

¹²⁹ 411 U.S. 1 (1973).

¹³⁰ See *id.* at 5.

¹³¹ See *id.* at 6.

¹³² See *id.* at 56-58.

¹³³ See *id.* at 2.

tion,¹³⁴ signifying that legislation burdening the poor will not automatically merit strict scrutiny.

Education plaintiffs garnered some hope from *Plyler v. Doe*,¹³⁵ another 5-4 decision emanating from Texas's public schools,¹³⁶ which held that children of illegal immigrants may not be completely excluded from public schools.¹³⁷ Justice Brennan, writing for the majority, held that education was not a mere "governmental 'benefit,'" but rather played a "fundamental role in maintaining the fabric of our society," thus meriting an intermediate level of review despite the Court's earlier determination that education was not a fundamental right.¹³⁸ *Plyler* can be partially reconciled with *Rodriguez* because it involved total deprivation of public education while *Rodriguez* dealt with equality of opportunity.¹³⁹ Also, in *Plyler*, children were deprived of education solely because of their parents' immigration status.¹⁴⁰

The *Plyler* Court seemed to utilize an intermediate level of scrutiny.¹⁴¹ The Court did not declare that education was a fundamental right, yet the combination of an important interest and the identification of a disabling status led to a determination that the plaintiffs' equal protection rights had been abridged.¹⁴² However, *Plyler* has generally stood alone;¹⁴³ it has not triggered a heightened standard of review for all education cases, as some litigants had hoped, and rational basis scrutiny remains the federal law norm for education litigation.¹⁴⁴

The Court has also refused to find a fundamental right to public school transportation. This is significant for charter schools since students who live outside of walking distance may require transportation

¹³⁴ See *id.* at 27-29.

¹³⁵ 457 U.S. 202 (1982).

¹³⁶ See *id.* at 230.

¹³⁷ See *id.* at 221.

¹³⁸ *Id.*

¹³⁹ See *id.* at 235 (Blackmun, J., concurring) ("This conclusion is fully consistent with *Rodriguez*. The Court there reserved judgment on the constitutionality of a state system that 'occasioned an absolute denial of educational opportunities to any of its children . . .'" (quoting *Rodriguez*, 411 U.S. at 37)).

¹⁴⁰ See *id.* at 205.

¹⁴¹ See Biegel, *supra* note 114, at 1098.

¹⁴² See *Plyler*, 457 U.S. at 222.

¹⁴³ Chief Justice Burger predicted this result in his dissent. See *id.* at 244 ("By patching together bits and pieces of what might be termed quasi-suspect class and quasi-fundamental rights analysis, the Court spins out a theory custom tailored to the facts of these cases.").

¹⁴⁴ See, e.g., *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458-62 (1988) (using rational basis scrutiny because education is not fundamental right).

to attend. In *Kadrmas v. Dickinson Public Schools*,¹⁴⁵ the Supreme Court ruled that a rural North Dakota family did not have a right to free transportation to the nearest elementary school, which was 16 miles away. In a 5-4 decision, the Court divided over whether *Rodriguez* controlled, or whether *Plyler* mandated a higher level of review.¹⁴⁶ Justice O'Connor's majority opinion followed *Rodriguez* in applying a rational basis standard.¹⁴⁷ Ultimately, *Kadrmas* may have hinged partially on the plaintiff's lack of injury: The plaintiff continued to attend the school despite the school's failure to provide free bus transportation, and thus was not deprived of her education.¹⁴⁸ Instead, she only sought reimbursement for her prior expenditures.

The case stands as a signal, though, of the Court's reluctance to extend *Plyler*'s intermediate level of scrutiny to most public school settings. Equal protection challenges to public schools will most likely be saddled with the burden of overcoming the more lenient rational basis standard of review. It is fairly easy for the state to show a plausible rational basis for most education policies. For charter schools, states can assert legitimate goals of encouraging public school innovation and offering students new options. Under this more lenient standard of review, charter schools would almost certainly be approved, as indeed they were in *Villanueva*.¹⁴⁹

B. State Constitutional Challenges

The lack of success in federal challenges has led many education plaintiffs to state courts. Federalist trends have allowed state courts to exert more independence in viewing state constitutional issues as the Supreme Court has backed off the enforcement of constitutional rights.¹⁵⁰ These trends were exacerbated by the *Rodriguez* decision, which passed responsibility for school equities to the state legislatures and state courts.¹⁵¹

¹⁴⁵ See *id.* at 465.

¹⁴⁶ See *id.* at 458, 470.

¹⁴⁷ See *id.* at 458.

¹⁴⁸ See Biegel, *supra* note 114, at 1098 (asserting that *Kadrmas* facts were weak for plaintiffs seeking extension of *Plyler* reasoning).

¹⁴⁹ *Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996); see also *supra* notes 15-22 and accompanying text.

¹⁵⁰ See Alexandra Natapoff, 1993: The Year of Living Dangerously: State Courts Expand the Right to Education, 92 Educ. L. Rep. 755, 769-71 (1994), available in Westlaw, WELR database (arguing that state courts today are more likely to assume that their constitutions require independent analysis separate from federal constitutional interpretation).

¹⁵¹ See *id.* at 773; see also Peter Enrich, Leaving Equality Behind: New Directions in School Finance Reform, 48 Vand. L. Rev. 101, 105 (1995) (arguing that with exception of *Plyler*, Supreme Court has followed *Rodriguez* rationale and plaintiffs have had significantly more success exploring equity issues in state courts).

Since *Rodriguez* was largely premised on the lack of an explicit constitutional right to education, the presence of education clauses in state constitutions argues for greater vigilance from state courts in ensuring equality of access.¹⁵² The Fourteenth Amendment's Equal Protection Clause is the floor for state court interpretation but not its ceiling, and litigants in school finance reform cases have achieved some success under state constitutional law.¹⁵³ While the courts of at least seventeen states have upheld their school finance systems, thirteen others have rejected their systems as unconstitutional, typically striking the current system and requiring the state legislature to develop a more equitable system.¹⁵⁴

Although there is no fundamental right to education under the federal Constitution, each of the fifty states has an education clause in its constitution declaring a state duty to educate its citizens,¹⁵⁵ and several state courts have declared a fundamental right to education.¹⁵⁶ When a state declares a fundamental right to education, any state act abridging that right will draw strict scrutiny. All state constitutions also contain equal protection clauses that closely mirror the Fourteenth Amendment.¹⁵⁷ Lawsuits that would fail under the Fourteenth Amendment may still succeed in state constitutional challenges. The state constitutional language and the heightened scrutiny employed by some state courts create more fertile ground for education plaintiffs.

To succeed in a state equal protection challenge, a plaintiff must demonstrate standards similar to those required in federal equal protection challenges. There must be state action, and the action must

¹⁵² See Enrich, *supra* note 151, at 157 (claiming that only after *Rodriguez* repudiated equal protection arguments in property funding cases did plaintiffs turn to state constitutional arguments).

¹⁵³ See generally Natapoff, *supra* note 150 (describing state court efforts to strike down education finance systems as unconstitutional).

¹⁵⁴ See Note, *The Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality*, 109 Harv. L. Rev. 2002, 2010 (1996) (collecting cases).

¹⁵⁵ See Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 Temple L. Rev. 1325, 1343-48 (1992) for a list of all 50 such clauses. The clauses vary greatly in strength and wording, but all refer to the state duty to educate its citizens. See, e.g., Cal. Const. art. IX, § 5 ("The legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year.").

¹⁵⁶ See Reed, *supra* note 109 at 596-97 (differentiating between "many" state courts that have found education to be fundamental right for purposes of equal protection analysis and "number of courts" that have found education to be fundamental right without reservation, therefore requiring strict scrutiny analysis under Equal Protection Clause); see also Natapoff, *supra* note 150, at 755-56 (describing plethora of state court actions in 1993).

¹⁵⁷ See, e.g., Cal. Const. art. IV, § 16 ("All laws of a general nature have uniform operation.").

discriminate against a particular class.¹⁵⁸ The same principles of strict scrutiny and rational basis review will apply.

Though some state law cases combine state education clauses with state equal protection guarantees, most simply interpret the education clauses. These clauses vary in language and legislative history,¹⁵⁹ and outcomes of cases asserting state education rights are heavily contingent on the specific constitutional language.¹⁶⁰ State education clauses do not guarantee equal protection analysis.¹⁶¹ State courts may view the right to education as less than fundamental, or simply as creating a basic right to some education rather than as a guarantee of equal access.¹⁶²

Some recent state cases have focused on educational adequacy, not equity.¹⁶³ These efforts attempted to use state education clauses

¹⁵⁸ See, e.g., *Matanuska-Susitna Borough Sch. Dist. v. Alaska*, 931 P.2d 391, 396-97 (Alaska 1997) (describing state's use of sliding scale to determine scrutiny to be applied in accordance with right at stake); *Idaho v. Avelar*, 931 P.2d 1218, 1221 (Idaho 1997) (analyzing whether suspect class or fundamental right is invoked for purposes of applying state equal protection clause); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979) (examining education funding systems under strict scrutiny because state equal protection clause requires such scrutiny for any fundamental right).

¹⁵⁹ See Hubsch, *supra* note 155, at 1343-48 (summarizing state constitutional language); see also, e.g., Ark. Const. art. XIV, § 1 ("Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain general, suitable and efficient free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education."); Ariz. Const. art. XI, § 1 ("The Legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system . . ."); Mich. Const. art. VIII, § 1 ("Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."); W. Va. Const. art. XII, § 1 ("The legislature shall provide, by general law, for a thorough and efficient system of free schools.").

¹⁶⁰ See Hubsch, *supra* note 155, at 1335-36 (giving examples of different education clauses and arguing that "the outcome of an education rights case may depend heavily on the language of the state constitution's education article").

¹⁶¹ See Reed, *supra* note 109, at 594-96 (citing *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) and *Seattle Sch. Dist. No. 1 v. Washington*, 585 P.2d 71 (Wash. 1978) as cases where state courts struck down education funding systems using only education clause and not Equal Protection Clause).

¹⁶² See Hubsch, *supra* note 155, at 1336. Additionally, most states have followed the Supreme Court lead in determining that poverty is not a suspect classification. See *id.* at 1330.

¹⁶³ This notion stems largely from language in the *Rodriguez* decision suggesting that the Texas system in question had succeeded in "provid[ing] each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973); see also Biegel, *supra* note 114, at 1084-85 (arguing that Powell's language in *Rodriguez* was picked up by Rehnquist in later cases); John A. Nelson, *Adequacy in Education: An Analysis of the Constitutional Standard in Vermont*, 18 Vt. L. Rev. 7, 16-17 (1993) (describing benefits of using adequacy standards as guide for education funding).

as a guarantee of a minimum quality standard for public schools. For example, in *Pauley v. Kelly*,¹⁶⁴ the West Virginia Supreme Court examined the state finance system in light of the state constitutional guarantee of "thorough and efficient" schools.¹⁶⁵ The court examined case history from the fifteen other states with similar constitutional language and determined that a minimum quality of education is guaranteed in all such states.¹⁶⁶ In *Pauley*, the court distinguished the state education clause claim from equality arguments and examined only the issue of adequacy of education.¹⁶⁷

Adequacy cases continue. In *Leandro v. North Carolina*,¹⁶⁸ the North Carolina Supreme Court recently held that the state constitution's education clause guarantees a right to a qualitatively adequate education.¹⁶⁹ The court attempted to define adequacy through outcome-oriented standards including basic reading and math skills.¹⁷⁰ The court focused entirely on the state education clause, rather than addressing equal protection.

However, several recent state cases have indicated a greater state court willingness to combine adequacy claims with equality guarantees. In *Tennessee Small School Systems v. McWherter*,¹⁷¹ the Tennessee Supreme Court held that the state's equal protection clause guarantees equal educational opportunities to students.¹⁷² The court wrote:

The essential issues in this case are quality and equality of education. This issue is not . . . equality of funding. Some factors that bear upon the quality and availability of educational opportunity may not be subject to precise quantification in dollars. Other obviously significant factors include geographical features, organizational structures, management principles and utilization of facilities.¹⁷³

Similarly, the Vermont Supreme Court, in *Brigham v. Vermont*,¹⁷⁴ examined the state education clause in combination with equal protec-

¹⁶⁴ 255 S.E.2d 859 (W. Va. 1979).

¹⁶⁵ See id. at 878.

¹⁶⁶ See id. at 869-74.

¹⁶⁷ See id. at 878. The court melded analysis of the state's education clause with the state's equal protection clause. However, the equal protection examination hinged on the status of education as a fundamental right rather than equality of funding. See id.

¹⁶⁸ 488 S.E.2d 249 (N.C. 1997).

¹⁶⁹ See id. at 255.

¹⁷⁰ See id.

¹⁷¹ 851 S.W.2d 139 (Tenn. 1993).

¹⁷² See id. at 140-41.

¹⁷³ Id. at 156.

¹⁷⁴ 692 A.2d 384 (Vt. 1997).

tion guarantees¹⁷⁵ and concluded that the funding of individual school districts need not be exactly equal. However, the court held that the state's funding system failed to meet either constitutional guarantee.¹⁷⁶ The court claimed that the outcome would be the same under both a rational basis and a strict scrutiny standard of review.¹⁷⁷

State educational adequacy litigation is significant because of its role in delineating the scope of the state conferred right to education. However, state charter school litigation would more likely attempt to use both state education and equal protection claims. Many charter school opponents fear that charter schools will partially erode traditional public schools by skimming both students and funds; however, this would be a gradual process rather than a sudden decline in traditional public school resources. To make an adequacy challenge rather than an equal protection challenge, plaintiffs would need to prove a decline in the education received by noncharter school students to below adequate levels. In an equal protection challenge, though, plaintiffs would claim that charter school legislation or individual charter schools deny equal access to some students, a claim that could be made more quickly than an adequacy challenge.

The education clauses of state constitutions and the more fertile history of state law education litigation indicate that plaintiffs challenging charter schools are likely to have more success under state law. Under the Fourteenth Amendment, plaintiffs are likely to succeed only by convincing courts to use strict scrutiny or an intermediate level of scrutiny. The Supreme Court's decision in *Rodriguez* has led courts to use the more deferential rational basis standard when examining state education legislation. State constitutions typically support plaintiffs' arguments that the education system must provide both minimum adequacy and a degree of equal opportunity. State courts have shown a greater willingness to strike down education policy on state constitutional grounds than under the Fourteenth Amendment. Challenges will vary greatly from state to state depending on the specific language of the state constitution and on state court willingness to combine education clauses with equal protection guarantees.¹⁷⁸

¹⁷⁵ See *id.* at 395-96.

¹⁷⁶ See *id.* at 397.

¹⁷⁷ See *id.* at 390.

¹⁷⁸ See, e.g., *McWherter*, 851 S.W.2d at 148 (asserting that "decisions by the courts of other states are necessarily controlled in large measure by the particular wording of the constitutional provisions of those state charters regarding education").

III THE FUTURE OF CHARTER SCHOOL LITIGATION

A. *Potential Challenges*

Loosely designed charter school enabling acts, combined with some charter school procedures, leave room for equal protection challenges. Since education is not a fundamental right under federal constitutional analysis, and since poverty does not create a suspect class, state constitutional challenges against charter schools are more likely to succeed.¹⁷⁹ State courts' efforts to distribute funding for education more equitably indicates a more fertile ground for challenging charter school procedures.¹⁸⁰ This Part examines potential challenges to both state legislation and individual school policies.

1. *Challenging State Charter School Legislation*

In *Villanueva v. Carere*,¹⁸¹ a group of Latino parents brought a challenge against the Colorado Charter School Act.¹⁸² Plaintiffs argued that insufficient state oversight led to racial discrimination against their children through the closing of neighborhood schools and corresponding problems for Latino students in their new noncharter schools.¹⁸³ The action in *Villanueva* could foreshadow future challenges to charter school legislation in both federal and state courts. Future lawsuits challenging state legislation might make equal protection claims that the state's failure to adequately regulate its charter schools has led to discrimination against a specific, identifiable plaintiff group.

One flaw in state charter school legislation is the lack of standards and funding for dissemination of information to public school students and families. Lack of adequate information may prevent some parents from placing their children in charter schools. Additionally, since admission preference is given to those families that already

¹⁷⁹ For a more thorough treatment of state constitutions and school choice programs, see generally Note, *The Limits of Choice*, *supra* note 154 (arguing that state constitutions provide protection against deterioration of schools due to school choice programs).

¹⁸⁰ See *id.* at 107 (arguing that *Rodriguez* is based largely on absence of explicit education provisions in federal Constitution, while state constitution contains express provisions); see also Hubsch, *supra* note 155, at 1331 ("Each state supreme court that has considered the issue . . . has rejected the *Rodriguez* test as inapplicable to equal protection under its state constitution.").

¹⁸¹ 85 F.3d 481 (10th Cir. 1996).

¹⁸² See *id.* at 483.

¹⁸³ See *id.* Plaintiffs argued discrimination because the school closures resulted in overcrowded classrooms at the students' new schools and because the Board failed to consider the quality of educational programs at the old schools before deciding to close them. See *id.* at 486.

have children enrolled in the charter schools,¹⁸⁴ parents who discover charter schools after they are already operating may be too late to overcome the advantage given to early arrivals. Parents applying to charter schools in their second or third year of existence may find most of the slots filled.

Almost no states provide standards for information dissemination.¹⁸⁵ Some states mention the importance of providing information. For example, Minnesota's enabling act says:

The sponsor, the operators, and the department of children, families, and learning must disseminate information to the public on how to form and operate a charter school and how to utilize the offerings of a charter school. Particular groups to be targeted include low-income families and communities, and students of color.¹⁸⁶

Concrete standards for information disbursement are almost nonexistent in state legislation. States typically leave student recruitment to local districts and to individual charter schools.¹⁸⁷

Unlike intradistrict choice programs, charter schools are frequently new schools run out of nonschool buildings including community centers¹⁸⁸ and churches.¹⁸⁹ Their existence may be entirely unknown to many parents in the district. Charter schools beginning in low-income neighborhoods often have to distribute information door-to-door.¹⁹⁰ While schools vigilant in pursuing at-risk students may

¹⁸⁴ Virtually all enabling acts have similar provisions favoring those already enrolled and their siblings. See, e.g., *Ariz. Rev. Stat. Ann.* § 15-184 (West Supp. 1997).

¹⁸⁵ Of all state enabling acts reviewed, none contained specific requirements for amount or method of information distribution. Many failed to even mention the need for information disbursement. None provided funds specifically for the purpose of informing prospective parents.

¹⁸⁶ *Minn. Stat. Ann.* § 120.064 (West Supp. 1998).

¹⁸⁷ Milwaukee's school choice program provides vouchers for students to attend private schools and allows parents to choose among all district schools. See John F. Witte, *Who Benefits from the Milwaukee Choice Program?*, in Fuller & Elmore, *Who Chooses? Who Loses?*, *supra* note 93, at 118, 118-19. Even within disadvantaged groups, though, "choosers" (those students who participate by selecting a nonneighborhood school) and "nonchoosers" (those students who remain in the same school as before the choice program) may be further stratified by family income and education level. See Richard F. Elmore & Bruce Fuller, *Empirical Research on Educational Choice: What are the Implications for Policy-Makers?*, in Fuller & Elmore, *Who Chooses? Who Loses?*, *supra* note 93, at 187, 189-90. Even though charter schools frequently target minorities and poor families, without extensive recruitment efforts these groups may subdivide, allowing the families with more education and information access to charter schools, while others remain in the standard public schools.

¹⁸⁸ See Finn et al., *supra* note 31, at 19 (describing charter school locations).

¹⁸⁹ See Paulette Bolyard, *Church, School Trade Favors*, *Ariz. Repub.*, Aug. 10, 1996, at 4 (describing charter school based in community church).

¹⁹⁰ See, e.g., Telephone Interview with Liang, *supra* note 55. Ms. Liang indicated that she received many inquiries about the school from prospective parents, but when she in-

succeed this way, schools have the power to recruit students with a higher chance of success.

Choice advocates dismiss concerns that low-income parents will have difficulty choosing schools,¹⁹¹ but this ignores the fact that many parents may be altogether unaware that they even have choices. If parents do not know that charter schools exist or cannot ascertain the purpose of each school, they will not make "bad" choices, but will choose through uninformed passivity. The nature of charter schools creates a heightened danger of astute parents choosing before less informed parents.

Choice advocates may argue that it is precisely the freedom of enabling acts that empowers education reformers to create new schools and help the underprivileged. Since enabling acts free charter school operators from state regulations, they are more readily able to experiment with both school curricula and budgets. However, the loose language of the acts leaves significant room for abuse. Schools may be designed in ways that implicitly favor quick-acting, better-informed parents through first-come-first-served admissions policies and the absence of extensive publicity describing the new schools. Implemented on a large scale, charter schools have the potential to tilt school choice, leaving children of poor and ill-informed parents behind, consigned to suffering the deterioration of neighborhood schools.

Another key issue often overlooked in state legislation is the funding of student transportation.¹⁹² Since most charter schools are open to children from the entire school district, the availability of transportation can determine student and parent choice. When no transportation is provided by the district, students again become classified on the basis of parental time and wealth. Students with access to cars or with money to ride the bus can attend charter schools while others lose this choice. Losing the opportunity to attend charter schools may be significant, depending on one's view of the movement.

formed them of the school's location in a low-income neighborhood in South Phoenix, many parents balked. Neighborhood parents were generally less educated about charter schools and were somewhat wary of educational ventures that deviated from the mainstream. The school was forced to recruit door-to-door in an effort to fill its spaces. See *id.*

¹⁹¹ See Cleveland, *supra* note 1, at 133 (dismissing choice opponents' concerns as reflecting "paternalism").

¹⁹² See Biegel, *supra* note 20, at 1540 (arguing that transportation and restrictive admissions procedures are biggest obstacles to equal access in school choice programs). Biegel focuses almost exclusively on Title VI challenges, an area outside the scope of this Note. However, the material is useful both to legislators seeking to improve state enabling acts and to prospective plaintiffs. The lack of transportation funds is a potential source of litigation within the charter school movement.

If charter schools are truly a step toward better public schools, then losing the ability to choose is problematic. Indeed, taken to its logical extreme, students who cannot access the burgeoning charter schools are doomed to the local neighborhood schools, some of which may gradually fail and close.

States' failure to fund transportation leaves schools with difficult budget decisions. If states fail to provide funding for transportation, individual schools have the option of financing their students' transportation or utilizing the money for other purposes.¹⁹³ Leaving these decisions to the goodwill and judgment of school administrators leaves much to chance. Even if most charter schools do make efforts to transport children who live in other areas, some will inevitably spend money on other programs. When transportation saps a great deal of a school's budget, a school may be forced to seek students who do not need those funds. Classification based on parental ability to provide transportation creates serious equal protection questions, since students may be segregated by ability to access the choice schools.

If a child is simply unable to attend a charter school because of transportation, she is in a position more closely akin to the facts of *Plyler v. Doe*,¹⁹⁴ where the Court held that illegal immigrant children could not be completely denied access to school.¹⁹⁵ While public schools in the area are still available—meaning that there is no total deprivation of education—the child is nevertheless unable to exercise an option available to other children. *Plyler* states that equal protection has been denied when “barriers present[] unreasonable obstacles to advancement on the basis of individual merit.”¹⁹⁶ For students unable to participate in school choice because of inadequate parent information or because of lack of transportation, this reasoning seems relevant.

If federal law mandates rational basis review in education litigation as *Rodriguez* indicates, it would be difficult for plaintiffs challenging charter schools to succeed in showing an equal protection violation.¹⁹⁷ Furthermore, plaintiffs would have a difficult time proving the requisite intent for a federal race discrimination claim under

¹⁹³ See, e.g., Telephone Interview with Liang, *supra* note 55. Arizona provides a set per-pupil transportation budget. The amount given was higher in past years, but the state recently discovered that some schools were spending less money and keeping the difference, and therefore reduced funding. See *id.* Liang's school, Tertulia, uses a single van for transportation, and the lack of adequate transportation funds is one of the school's biggest problems. *Id.*

¹⁹⁴ 457 U.S. 202 (1982).

¹⁹⁵ See *id.* at 229.

¹⁹⁶ *Id.* at 222.

¹⁹⁷ See *supra* Part II.A.2.b.

the Fourteenth Amendment.¹⁹⁸ Charter school legislation does not explicitly exclude any racial group. Many enabling acts actually set standards for admission of racial minorities.¹⁹⁹ To prove race-based discrimination under the Fourteenth Amendment, plaintiffs would have to prove discriminatory intent.²⁰⁰ This would be difficult to prove with state enabling acts. Though studies have shown that students who fail to exercise school choice options are often children of less wealthy and less educated parents, poverty and parental education level have not been recognized by the Supreme Court as suspect classifications.²⁰¹ School systems classify "at-risk" students, but a court is unlikely to find that "at-risk" is a suspect classification.²⁰²

To succeed in state courts, plaintiffs first must convince a court that a right to equal access to public education exists. They then must show that the broad enabling statutes have created a choice system that denies equal access to education or that leaves certain students in inadequate schools. Studies showing that economic or racial trends in the class of "choosers" or "nonchoosers" and testimony showing that nonchoosers were unaware of options or unable to participate because of transportation could convince a court to order revision of the charter school initiative. Studies showing that access to charter schools is largely determined by external factors, including poverty and education levels of the families, may require striking down charter school legislation in states that guarantee a fundamental right to education. If plaintiffs challenging charter school legislation can convince a court to apply strict scrutiny to either the enabling acts or to individual school policies, lack of narrow tailoring could prove fatal, particularly to the state enabling acts.

If plaintiffs can establish a *prima facie* case that a certain percentage of prospective families are denied access to charter schools because of state policies (either inadequate distribution of information or lack of transportation funds), a reasonable constitutional challenge

¹⁹⁸ See *supra* notes 114-15 and accompanying text.

¹⁹⁹ See, e.g., Kan. Stat. Ann. § 72-1906(d)(2) (1997) (stating that "pupils in attendance at the school must be reasonably reflective of the racial and socio-economic composition of the school district as a whole"); see also Ariz. Rev. Stat. Ann. § 15-184(B) (West 1997) ("[A] charter school shall not limit admission based on ethnicity, national origin, gender, income level, disabling condition, proficiency in the English language or athletic ability."). Charter schools also must comply with court ordered desegregation.

²⁰⁰ See *supra* notes 118-19 and accompanying text.

²⁰¹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 2 (1973).

²⁰² See *Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996) (rejecting plaintiffs' argument that school district classification of at-risk students created suspect class). In any case, arguing that "at-risk" students are a suspect class seems more likely to succeed when schools are failing to provide equal access to these students rather than specifically reserving spaces for such students.

may be established.²⁰³ This is particularly true if neighborhood schools are inadequate, a distinct possibility given the goals of choice advocates to use market pressures to shut down failing schools. In sum, plaintiffs are more likely to prevail in state constitutional challenges, focusing on the state right to education, the lack of equal access to school choice, and the inadequacy of neighborhood schools.

2. *Challenging Individual Schools*

Families that cannot send their children to charter schools because of specific school policies may choose to sue individual schools. Because they are likely to be considered state actors, schools likely will be bound by state (and federal) equal protection guarantees.²⁰⁴ Generally, constitutional analysis may be different for plaintiffs challenging individual school policies than for those challenging legislative acts. For example, it may be that a state legislature has a rational basis for leaving admissions policies to the school, while an individual charter school does not have a rational basis for a discriminatory admissions policy.

Charter schools that enroll children on a first-come-first-served basis raise the ire of teachers' unions and advocates for the poor, who fear that only the most educated and best informed parents will take advantage of the new schools.²⁰⁵ If they are correct in believing that wealth and education are factors in choice, a first-come-first-served policy exacerbates the problem by placing a premium on parent sophistication and speed. When states defer admission policies to individual charter schools, the schools must uphold the equal protection rights of district students. At its worst, a first-come-first-served system secures spots in new, innovative schools for those parents who regularly read the newspaper and take the initiative to contact new schools.²⁰⁶ Charter schools in need of customers for operating funds may well desire to fill up as soon as possible. In such a scenario, the children of informed and quick-acting parents have a choice while those "out of the loop" have no choice at all.

²⁰³ See Biegel, *supra* note 20, at 1557.

²⁰⁴ See *supra* notes 125-27 and accompanying text.

²⁰⁵ The Tenth Circuit expressed concern with first-come-first-served policies. See *Villanueva*, 85 F.3d at 488 n.3. The court also noted that Congress shared this concern, as indicated in its requirement of lottery-based admissions for the federal Charter Schools Act. See *id.*

²⁰⁶ Telephone Interview with Liang, *supra* note 55. When *Tertulia* was first granted a charter by the state, Ms. Liang received calls from parents who had checked State Board of Education listings and listings in a parent magazine. Typically, these parents were of moderate and upper incomes and were uninterested in the school upon learning of its prospective location. See *id.*

Colorado is one of several states whose enabling acts set no standards for student admissions to charter schools.²⁰⁷ Such deference in admissions standards is anomalous; most states mandate a lottery or other random process when schools are oversubscribed.²⁰⁸ Additionally, the federal Charter School Act requires all charter schools funded by federal money to use a lottery for admissions.²⁰⁹

Even if lottery systems are in place for oversubscribed schools, preference is given to current students,²¹⁰ and educated parents may enroll their children before information is disseminated and thus secure their children's place in the school. In the real world of school enrollment, having a loosely structured mandate for a lottery system may be ineffective. Students do not all submit applications at once. Rather, when a school opens, students gradually enroll as their families learn about the school. At first, there is no lottery because schools are not oversubscribed; early-acting families secure places before the lottery mandate takes effect.

Charter schools have other important admissions decisions to make including whether to grant or deny students admission based on past academic performance or past behavior. Charter schools may be designed with specific academic goals in mind.²¹¹ Indeed, charter schools have additional accountability, since their charters will be revoked or renewed based on their success in meeting their stated

²⁰⁷ States with no overall policy typically require the schools to explain their admissions criteria in the charter application. See, e.g., Cal. Educ. Code § 47605(b)(8) (West Supp. 1998) (stating that charter school applications shall include "[a]dmission requirements, if applicable"); Colo. Rev. Stat. Ann. § 22-30.5-106 (West 1995) ("The charter school application shall be a proposed agreement and shall include . . . [a] description of the charter school's enrollment policy . . ."); R.I. Gen. Laws § 16-77-4(b) (1996) ("The application shall . . . [d]escribe enrollment procedures including the nondiscriminatory criteria for admission in accordance with applicable state and federal law, along with a program to encourage the enrollment of a diverse student population . . ."); Wyo. Stat. Ann. § 21-3-203(b)(viii) (Michie 1997) (charter school applications shall contain "[a]dmission requirements, if applicable").

²⁰⁸ See, e.g., Alaska Stat. § 14.03.265(b) (Michie 1996) ("If it is not possible to accommodate all eligible students who submit a timely application, students shall be accepted by random drawing."); Del. Code Ann. tit. 14, § 506 (1996) ("A charter school shall not . . . [r]estrict student admissions, except by age and grade, or by lottery in the case of over-enrollment . . ."); Ill. Comp. Stat. Ann. §105 5/27 A-4(h) (West 1997) ("If there are more eligible applicants for enrollment in a charter school than there are spaces available, successful applicants shall be selected by lottery."); N.J. Stat. Ann. § 18A: 36 A-8 (West 1997) ("If there are more applications to enroll in the charter school than there are spaces available, the charter school shall select students to attend using a random selection process.").

²⁰⁹ See 20 U.S.C.A. § 8066(1)(H) (West Supp. 1998) (mandating that charter schools "admit[] students on the basis of a lottery, if more students apply for admission than can be accommodated").

²¹⁰ All enabling acts studied granted express preference to students previously enrolled in the school and also to siblings of these students.

²¹¹ See Biegel, *supra* note 20, at 1582.

goals.²¹² Such accountability and external pressures without state-mandated admissions policies could lead schools to admit students with a greater likelihood of long term success.²¹³

Some charter schools currently only accept students who have a "satisfactory" behavior record at previous public schools.²¹⁴ Allowing schools to exclude students with prior behavior problems essentially sets up a choice system that only serves students who already have achieved at least a modicum of success in school. This raises policy questions about the purpose of charter schools. If these schools are effective in raising the performance of at-risk students, why exclude students with prior difficulties in public schools? Some states give charter schools freedom to set standards related to student goals.²¹⁵

The lack of standards for information distribution and charter school admissions creates potential equal protection issues under both the federal and state constitutions. If one distinct group of students has substantially fewer options than other groups of students, particularly in a free market system, equal protection challenges based on poverty or, potentially, on race could be raised. While charter schools created for at-risk youths will presumably utilize appropriate admissions standards, the lack of legislative standards allows the formation of schools that will further stratify public schools by race or class.

Additionally, some charter schools, seeking to increase parent involvement with the schools, have begun to include "contracts" requiring that parents commit time to the school and to the student.²¹⁶ Schools with this requirement face additional difficulties reaching all

²¹² See Finn et al., *supra* note 31, at 72. At least one charter school has already been closed by California. See id. Advocates argue that this is positive—charter schools must reach their goals or be shut down. They will not be allowed to remain open and commit "educational malpractice." Id.

²¹³ Charter school advocates would argue that schools will be judged based on their adherence to their stated charter goals. Therefore, schools that serve disadvantaged groups will be measured based on improvements of their students, not against an external standard.

²¹⁴ See Ellen Williams, *Annual Survey of Texas Law—Education*, 49 SMU L. Rev. 901, 918 (1996). While most enabling acts prohibit admission based on past academic performance, they generally do not contain provisions based on past behavior. See, e.g., Colo. Rev. Stat. Ann. § 22-30.5-106 (West 1995) ("Admission to a school shall not be determined solely on academic abilities or achievements.").

²¹⁵ Many states do not mention admission criteria directly, or have only vague provisions in their enabling acts. See, e.g., R.I. Gen. Laws § 16-77-4(10) (1996) (requiring school admissions plans to be "reflective of the student population of the district").

²¹⁶ The charter school at issue in *Villanueva* had a requirement of 18 hours of community service to the school and a requirement of parent attendance at mandatory meetings. See *Villanueva v. Carere*, 85 F.3d 481, 484 (10th Cir. 1996).

parents and families.²¹⁷ Parent contracts are an example of the potential legal pitfalls involved in decentralized policy. Parent involvement contracts are premised on the notion that a student's achievement rises when his or her parents are more involved in the child's education. However, contracts requiring parent involvement for student admission to schools may violate equal protection rights of the students denied admission. Parents with less time because of heavy employment pressures may be unable to comply with contracts. If a parent cannot make the commitment demanded on a charter school contract, a child could be denied admission.

Under federal analysis, these contracts would probably be analyzed under the rational basis standard, and most likely would be found constitutional. This depends in part on how the contracts play out. Certainly, contracts requiring greater commitments of time and, especially, money or supplies would draw closer examination, though the probable use of rational basis review would likely defeat any challenge.

State equal protection challenges of parent contracts would depend largely on the nature of the contract. Contracts could potentially survive even strict scrutiny if the contract policy was narrowly tailored, providing multiple options to families. For example, contracts might allow a child to bring a neighbor or family friend to conferences if parents are unable or unwilling to attend. The more rigid the contract, though, the more likely it will exclude potential students. As with the transportation funding issue, excluding students in a free market system would likely draw objections on state constitutional grounds in states recognizing a fundamental right to education. Plaintiffs challenging parent contracts under state constitutions might be unsuccessful, but challenges to contracts combined with challenges to transportation inadequacies and discriminatory admissions standards could potentially succeed.

State constitutional challenges have a greater potential for success, particularly in states that view education as a fundamental right. Under strict scrutiny, schools would have to demonstrate that their policies are narrowly tailored. Decentralized and largely unregulated

²¹⁷ See Telephone Interview with Liang, *supra* note 55. Tertulia has a parent contract, but it has gone largely unutilized during the school's first year of operation. However, Ms. Liang intends to implement parental involvement programs more vigorously next year and knows of other charter schools with similar contracts. See also Biegel, *supra* note 7, at 29 (describing plans of Palisades charter school to require parental involvement). The parental involvement requirement at Palisades was scaled back for secondary students after intervention by the Mexican American Legal Defense and Educational Fund and the NAACP, though the elementary level still will have mandatory parent involvement. See *id.*

admissions standards could be struck down in this setting. Again, studies that showed disparities in charter school admissions cutting along race or class boundaries could compel state courts to determine that charter schools violate state equal protection and education clauses.

B. Avoiding Problems—Suggestions for State Legislatures

Most state charter school enabling acts are not narrowly tailored.²¹⁸ Proponents of charter schools may argue that the purpose of the acts is freedom from regulations and is thus contrary to narrow tailoring. However, state enabling acts (and local district procedures) can give charter schools the desired freedoms while still classifying recruitment and admissions procedures. Since charter schools are intended to benefit all students, particularly those who have not achieved in traditional public school settings,²¹⁹ it is appropriate to set some standards with state enabling acts.

As the analysis in Part II indicates, plaintiffs will have a difficult time challenging charter schools under the Fourteenth Amendment, but state constitutional challenges may be more effective.²²⁰ Success would require evidence showing the exclusion of particular students, and a state system that analyzes education and equal protection claims using strict scrutiny. The more factors implicated, though, the greater the likelihood that charter schools will be challenged in court. Schools that have failed to provide adequate information to parents, have restrictive admissions standards, enforce rigid parent contracts, and fail to fund student transportation are ripe for equal protection challenges.

States can insulate themselves from court challenges by changing charter school regulations. The following changes would help the charter school movement reach all students. Regardless of ultimate outcomes, states and individual schools should not devote their limited resources to defending their initiatives in court.

²¹⁸ The ambiguous wording dealing with such issues as student recruitment, admissions, transportation, and funding give too much control to individual schools. The charter school movement is designed to create autonomous local schools, but the state acts fail to guarantee even basic minimum standards in these areas. See *supra* notes 191-93 and accompanying text.

²¹⁹ Most enabling acts have a preamble stating the purpose of charter schools. See, e.g., Cal. Educ. Code § 47601 (West Supp. 1998) ("It is the intent of the Legislature [to] . . . [i]ncrease learning opportunities for all pupils, with special emphasis on expanded learning experiences for pupils who are identified as academically low achieving.").

²²⁰ See *supra* Part II.

1. *Information Distribution*

First, states should require extensive disbursement of information. All parents should know which charter schools are available to their children. This could be accomplished either by requiring new schools to demonstrate district wide recruitment efforts, or preferably by requiring local school districts to disseminate information prior to opening charter schools. While state legislators may wish to avoid spending state money in this way, if they are serious about school reform, information systems must be explicitly created and funded. While many charter schools may make individual efforts to attract at-risk students,²²¹ lack of state regulation in this area leaves a wide path for abuse. By improving the charter school movement's ability to reach all students in a district, state and local boards would save litigation expenses and help alleviate political pressure.

One method of increasing the participation of the least wealthy is to ask all parents to fill out a form "choosing" a school.²²² Thus, when charter schools open in a district, all students would submit a form indicating whether that student wishes to transfer to a charter school or return to a neighborhood school. Inevitably, some parents would choose through abstention. Some commentators, however, have suggested that such a policy would increase the percentage of "choosers."²²³ Though not legally necessary, such a policy would demonstrate an effort to include everyone within the charter school movement. The Cambridge, Massachusetts school choice program has succeeded partially because of its Parent Information Center, which provides families information about the district schools.²²⁴ The city also has created two positions—Citywide Parent Coordinator and Parent Liaison—specifically to help parents unfamiliar with the school choice system make educated decisions for their children.²²⁵

2. *Transportation Funding*

States should also provide transportation funding to ensure that no student is denied the opportunity to attend a charter school merely because she lacks access to transportation. Transportation funding should cover 100% of the cost of busing students who live beyond walking distance.

²²¹ See *supra* notes 61-66 and accompanying text.

²²² See Fuller & Elmore, *Who Chooses? Who Loses?*, *supra* note 93, at 187, 196.

²²³ See *id.*

²²⁴ See Angela G. Smith, *Public School Choice and Open Enrollment: Implications for Education, Desegregation, and Equity*, 74 *Neb. L. Rev.* 255, 270 (1995) (describing features of effective intradistrict choice programs).

²²⁵ See *id.* at 271.

States, rather than charter schools, should fund the costs of transportation. If individual schools are required to pay, they have strong incentives to recruit either neighborhood students or students with resources sufficient to provide their own transportation. This risk damages the educational free market experiment. For states to create competition for students, they must provide fully funded access to all charter schools.

3. *Lottery Systems*

Third, states should bar first-come-first-served admissions by individual schools. Requiring schools to admit students by a lottery system would help to ensure that everyone has an equal opportunity. Additionally, states might set goals encouraging charter schools to admit minority students on a ratio equivalent to district wide enrollment.

Lottery systems should also be regulated more strictly. Current lottery regulations only create lotteries when schools are over capacity. Because first-come-first-served policies allow well-informed parents to act before lotteries are necessary, they should be changed. By combining a lottery for admission with a mandatory choice system, all parents would select a school at the same time. Parents would fill out a form choosing a school (or ranking some or all schools in order of preference), and all forms would be submitted by the same date. District officials would then conduct a lottery for all schools where demand exceeds capacity. This approach would truly combine equal opportunity with free market policies.

4. *Parent Contract Standards*

Finally, though increased parent involvement in schools is desirable, charter schools should not use mandatory contracts with parents requiring either time or money as admissions criteria. Such contracts have the potential to deny children space because their parents are unable to meet the contract provisions. Schools may use suggested contracts, or may create flexible contracts, allowing students to meet provisions according to their families' means. However, students should not be denied admission because of their parents' inability to meet specific contractual demands.

CONCLUSION

Charter schools will play a prominent role in public education during the coming decade. They suit the political agendas of many and hold great promise for developing innovative approaches to public education. Charter schools have the potential to reinvigorate the

public schools in districts that desperately need a boost. However, as states quickly move forward with charter school legislation, they risk establishing a process that merely provides further opportunities for well-informed families while ghettoizing the poor and uninformed. The movement toward deregulation allows schools to exclude the neediest students, either through explicit policies or simply through lack of adequate information.

Ultimately, plaintiffs will have a difficult time showing that charter schools or state enabling acts violate the Equal Protection Clause of the Fourteenth Amendment. Though some opportunities exist for litigation in this area, federal school finance cases demonstrate a general unwillingness to apply high levels of scrutiny to education policies, especially when increased segregation is a mere byproduct of a deregulated environment. However, state constitutions and successful school finance litigation in state courts indicate that state challenges to charter school legislation have a higher chance of success.

Most significantly, several policy changes would allow states to mandate a strong, autonomous charter school movement without depriving access to the schools. Greater state oversight of admissions policies and dissemination of information would close potential avenues of litigation while maintaining the legitimacy of charter schools. These changes would add some costs to charter school legislation, but they would ultimately allow charter schools to reach greater numbers of at-risk students.

It would be a terrible waste of resources if charter schools were consistently tied up in litigation. It would be an even greater waste, though, if the charter school movement failed to reach the neediest public school students.