

PUBLIC GOOD THROUGH CHARTER SCHOOLS?

Philip Hackney*

ABSTRACT

Should nonprofit charter schools be considered “charitable” under § 501(c)(3) of the Internal Revenue Code and be entitled to the benefits that go with that designation (income tax exemption, charitable contribution deduction, etc.)? Current tax law treats them as such; the question is whether there is a good rationale for this treatment. In addition to efficiency and equity, I consider political justice as a value in evaluating tax policy. By political justice, I mean a democratic system that prioritizes the opportunity for more people to have a voice in collective decisions (political voice equality or PVE). Thus, a tax policy that decreases PVE violates the value of political justice. Efficiency theory and equity provide modest help in evaluating the charter question, but the tool of political justice provides important value. When viewed in its entirety, granting tax exemption to charter organizations violates the norm of political justice. The charter movement takes decision-making regarding

* Associate Professor of Law, University of Pittsburgh School of Law. I thank the participants of the Critical Tax 2021 conference, the Law & Society Association 2021 virtual tax panels, the 2022 AMT conference group, the Nonprofit Forum, AALS Committee on Nonprofit and Philanthropy Law 2023 Annual Meeting, the Penn State Law School Faculty Colloquium, and the Seton Hall University School of Law Faculty Colloquium. In particular I appreciate comments from Ellen Aprill, Yariv Brauner, Neil Buchanan, Sam Brunson, Bryan Camp, Harvey Dale, Dominic de Cogan, Sean Delaney, Jim Fishman, Brian Galle, Rory Gillis, Andrew Hayashi, Stephanie Hoffer, Tony Infanti, Ben Leff, Ted Leto, Jill Manny, Omri Marian, Jud Matthews, Lloyd Hitoshi Mayer, Shannon McCormack, Stephanie MacMahon, Susie Morse, Marc Owens, Jennifer Bird Pollan, James Puckett, Dana Brakman Reiser, Steve Ross, Margaret Rysnar, Linda Sugin, Clint Wallace, & Elaine Wilson. I appreciated the fabulous assistance provided by my research assistant Jacob Daugherty, and the support that the University of Pittsburgh School of Law provided.

community education away from a community and gives it to private parties. Instead of the community controlling major educational decisions, charter management organizations control those decisions. Still, valid democratic authorities across the country have chosen to provide some education through charter vehicles. Given the strong interest in keeping tax policy in harmony with democratically chosen policies, the most ideal solution to this conflict would be to maintain tax exemption. However, to be charitable, a charter school and its management organization ought to be democratically operated in some broad sense. The Article thus suggests some ways to increase the democratic accountability of charters.

CONTENTS

I.	INTRODUCTION	698
II.	EDUCATION IN THE U.S. & CHARTER SCHOOLS	707
	<i>A. Short Introduction</i>	707
	<i>B. Charter School Structure</i>	711
III.	POLITICAL JUSTICE AND EDUCATION	717
	<i>A. Why Political Justice as Democracy in Tax Policy?</i>	717
	<i>B. Arguments from Choice</i>	722
	<i>C. Democracy and Education</i>	725
IV.	TAX EXEMPTION, EDUCATION, BENEFITS, THEORY	733
	<i>A. Education as a Charitable Purpose</i>	734
	<i>B. Benefits of Classification as Charitable</i>	740
	<i>C. Theories for Subsidizing Charitable Activity Through Tax</i> <i>Policy</i>	745
	<i>i. Tax Exemption</i>	745
	<i>ii. Charitable Contribution Theories</i>	751
V.	ANALYSIS.....	758
	<i>A. Tax Exemption</i>	758
	<i>B. Charitable Contribution Deduction</i>	769
	<i>C. Possible Solutions to the Harm to PVE</i>	772
VI.	CONCLUSION	775

I. INTRODUCTION

Should Congress grant charitable federal income tax-exempt status and the benefits of the charitable contribution deduction¹ to nonprofit charter schools? In line with a burgeoning movement to consider the value of democracy in tax policy,² I evaluate this question by considering the value of political justice as democracy in addition to the traditional tax policy factors of equity and efficiency. Where tax policy harms political voice equality (PVE)—that is, equality in the opportunity to shape collective choices—we should question that policy.³ On its face, charter schools appear to lower PVE. Prior to a charter school opening, typically a democratically elected local community school board oversees the operation of the school.⁴ After being granted charter status, most decisions are carried out by the charter school’s board and management.⁵ Charter proponents celebrate bringing “choice” to parents and children who previously had to accept what the public school system offered. However, from a PVE perspective, educational decisions are taken from the community and

1. See 26 U.S.C. §§ 501(a), (c)(3), 170.

2. See, e.g., Joseph T. Sneed, *The Criteria of Federal Income Tax Policy*, 17 STAN. L. REV. 567 (1965); James R. Repetti, *Democracy and Opportunity: A New Paradigm in Tax Equity*, 61 VAND. L. REV. 1129 (2008); Linda Sugin, *Invisible Taxpayers*, 69 TAX L. REV. 617 (2016); John R. Brooks, *The Definitions of Income*, 71 TAX L. REV. 253 (2018); Ari Glogower, *Taxing Inequality*, 93 N.Y.U. L. REV. 1421 (2018); Clinton G. Wallace, *Tax Policy and Our Democracy*, 118 MICH. L. REV. 1233 (2020); Jeremy Bearer-Friend, Ari Glogower, Ariel Jurow Kleiman & Clinton G. Wallace, *Taxation and Law and Political Economy*, 83 OHIO ST. L.J. 471 (2022); Philip Hackney, *Political Justice and Tax Policy: The Social Welfare Organization Case*, 8 TEX. A&M L. REV. 271 (2021).

3. Hackney, *supra* note 2, at 273.

4. See, e.g., L. HARMON ZEIGLER, M. KENT JENNINGS & G. WAYNE PEAK, GOVERNING AMERICAN SCHOOLS: POLITICAL INTERACTION IN LOCAL SCHOOL DISTRICTS 1–2 (1974) (describing the traditional school boards as “the bodies legally charged with making authoritative decisions” about school systems); Tara Raam, Note, *Charter School Jurisprudence and the Democratic Ideal*, 50 COLUM. J.L. & SOC. PROBS. 1, 10–11 (2016).

5. See, e.g., Raam, *supra* note 4; Charter Bd. Partners, *Governance FAQs*, NAT’L CHARTER SCH. RES. CTR. (May 25, 2016), https://charterschoolcenter.ed.gov/sites/default/files/files/field_publication_attachment/Governance%20FAQs.pdf [https://perma.cc/98MN-XJSF] (noting that the charter school’s board members are not publically elected).

given to the small group granted a charter. The Article concludes that while troublesome from a political justice perspective because so many jurisdictions have democratically chosen to pursue schooling through charters, ending these benefits provided to similar tax-exempt groups does not make sense. However, given the unique role of primary and secondary public education in shaping a democratic nation, this Article recommends Congress require charter schools to adopt provisions that would make their operation more democratic in nature to maintain their charitable tax subsidies.

Because charters are nonprofits operating public schools and society has long considered education a charitable activity,⁶ this choice to examine the charitable tax subsidies for charter schools may seem far from intuitive and maybe even odd. However, the examination through a political justice lens highlights a significant tension that arises when government uses charities to carry out government functions.⁷ The move may be one by a state to avoid the very democratic process that legitimates the state's authority. It shows that Congress ought to take political justice into consideration when determining whether to grant charitable tax subsidies to such arrangements. Congress should consider whether a democratic process is central to the shaping and delivery of the service the nonprofit is delivering. In the case of primary and secondary education, I argue democracy is central to the furtherance of the charitable purpose. That may not be the case with other government services provided by nonprofits.

Traditional tax efficiency and equity theories provide only modest help in resolving this tax policy matter. Tax-exemption efficiency theorists ask whether the nonprofit form helps to solve market failures.⁸ Charter schools solve no market failure. They are primarily financed through taxes, so there is much less of a free rider problem to

6. 26 U.S.C. § 501(c)(3); see Robert Mark Silverman, *The Nonprofitization of Public Education: Implications of Requiring Charter Schools to be Nonprofits in New York*, 3 NONPROFIT POL'Y F. 1, 1–2 (2012); see *infra* notes 225–32 and accompanying text.

7. See *infra* Part III.

8. See *infra* Part IV.C.i.

solve.⁹ The efficiency claim may be that charters are better than traditional public schools at delivering education than the government, but there is little evidence that charter schools are providing superior student outcomes as compared to public schools. Charitable contribution efficiency theorists ask whether the charitable contribution deduction generates more dollars for public goods than would taxing alone.¹⁰ There is no clear efficiency to be gained here either. Charters primarily rely on tax dollars, not charitable contributions, and public schools also have the ability to seek charitable contributions.¹¹ Perhaps charters as an institutional structure can attract more dollars for education through the charitable contribution than the public school system. Some anecdotal evidence supports this as a possible efficiency.¹² Equity asks whether tax policy treats one taxpayer fairly as compared to other taxpayers. Some equity theorists also argue that equity means the tax system should redistribute money from high-income to low-income individuals.¹³ Equity theories are not well defined, but we can say a couple things. Because both public and private schools are generally provided tax exemption, providing exemption to charters would treat these

9. Jennifer Park, *School Finance*, EDUCATIONWEEK, <https://www.edweek.org/policy-politics/school-finance/2007/12> [<https://perma.cc/S9K9-MVY2>] (June 20, 2011); *General Frequently Asked Questions*, GA. DEP'T EDUC., <https://www.gadoe.org/External-Affairs-and-Policy/Charter-Schools/Pages/General-Frequently-Asked-Questions.aspx> [<https://perma.cc/W94D-TPTP>] (categorizing charter schools as public schools).

10. *See infra* Part IV.C.ii.

11. *See* OFF. OF ELEMENTARY & SECONDARY EDUC., U.S. DEP'T EDUC., INTRODUCTION TO CHARTER SCHOOL FINANCE 2, <https://charterschoolcenter.ed.gov/sites/default/files/upload/learning-modules/Introduction-to-Charter-School-Finance.pdf> [<https://perma.cc/7X3R-94SR>] (“Like other public schools, charter schools receive per student funding from federal, state, and local sources. State and local funding make up the majority of charter schools’ revenues—in excess of 90[%] in most cases.”); Jennifer Hudson, Jennifer Sable & Christopher D. Hill, *Public Charter School Expenditures by School Level*, NAT’L CTR. FOR EDUC. STAT.: NCES BLOG (June 22, 2022), <https://nces.ed.gov/blogs/nces/post/public-charter-school-expenditures-by-school-level> [<https://perma.cc/B9DZ-7HP4>]; *see also* SARAH RECKHOW, FOLLOW THE MONEY: HOW FOUNDATION DOLLARS CHANGE PUBLIC SCHOOL POLITICS 42 (2013).

12. *See infra* Part V.A.

13. *E.g.*, François Bourguignon, *Spreading the Wealth*, FIN. & DEV., Mar. 2018, at 22, 22, <https://www.imf.org/en/Publications/fandd/issues/2018/03/bourguignon> [<https://perma.cc/AH4E-ELVG>].

institutions the same way. Additionally, charters tend to serve a lower income group,¹⁴ so bearing a 0% tax rate is perhaps more appropriate than a top tax rate. However, because charters rely primarily on tax dollars, they likely redistribute no more wealth than the traditional public school they replace. As for the charitable contribution, this deduction is not designed with equity in mind. Only a small group, about 9% of taxpayers, mostly high-income, are able to deduct such contributions.¹⁵ As discussed in Part IV, most accept that the charitable contribution deduction amounts to a subsidy from the government equal to the marginal tax rate times the amount of the deduction. Thus, the government provides significant incentives for the charitable activity of a very small group of citizens in our country and little for everyone else. Although this critique does not apply only to charters, these charitable contribution incentives provided only to a small wealthy class do not meet the first notion of equity. That said, generating donations from high-income individuals to charters would generally result in some redistribution, but this redistribution is likely no more than if they made the donation to a public school. In other words, neither charitable tax theories of efficiency nor equity provide substantial support for the provision of these subsidies.

A political justice analysis suggests there are problems with the state subsidizing charter schools through the Internal Revenue Code (Code)¹⁶ because the system is not supportive of a rational deliberative democracy. By granting tax benefits to a charter school, federal tax

14. DAVID L. SILVERNAIL & AMY F. JOHNSON, ME. EDUC. POL'Y RSCH. INST., *THE IMPACTS OF PUBLIC CHARTER SCHOOLS ON STUDENTS AND TRADITIONAL PUBLIC SCHOOLS: WHAT DOES THE EMPIRICAL EVIDENCE TELL US?* 16 (2014).

15. *How Did the TCJA Affect Incentives for Charitable Giving?*, TAX POL'Y CTR., [hereinafter *TCJA's Impact on Charitable Giving*], <https://www.taxpolicycenter.org/briefing-book/how-did-tcja-affect-incentives-charitable-giving> [https://perma.cc/DM79-V2J7]. Congress significantly raised the standard deduction in the 2017 Tax Act. *See Tax Cuts and Jobs Act of 2017*, Pub. L. No. 115-97, § 11021, 131 Stat. 2054, 2072-73 (2017) (codified as amended at 26 U.S.C. § 63(c)(7)). The Tax Policy Center estimates this change reduced those deducting their charitable contributions from 21% of taxpayers to about 9% of taxpayers. *TCJA's Impact on Charitable Giving*, *supra*.

16. The Internal Revenue Code is located in Title 26 of the United States Code. *Tax Code, Regulations, and Official Guidance*, INTERNAL REVENUE SERV., <https://www.irs.gov/privacy-disclosure/tax-code-regulations-and-official-guidance#:~:text=Internal%20Revenue%20Code&text=The%20sections%20of%20the%20IRC,to%20the%20public%20by%20Congress> [https://perma.cc/7JPH-TGV2] (Jan. 18, 2023).

policy provides support to an endeavor that lowers PVE both in the shaping of the education that takes place in the school and in a long-term sense. The non-democratic education provided to the children likely impacts the ability of those individuals to participate in a democratic endeavor in the future.¹⁷ A key piece of the PVE case, developed more in Part III, is that we should prioritize a democratic form of education at the primary and secondary levels. I mean that in at least two senses: (1) primary and secondary education should be designed to prepare children to effectively participate in our democratic order, and (2) the only way to fairly determine what it means to effectively participate in our democratic order is to employ democratic means. We are not born with the ability to operate a democratic order; the “virtue[s] of toleration” and “mutual respect for reasonable differences of moral opinion” must be taught.¹⁸ Significantly, an education not democratically shaped fails to truly and fairly capture the democratic values the community intends to support and simultaneously fails to teach the deep cooperation needed to build a strong sustainable democracy. The very act of educating the young is more than preparing them to work in a capitalistic economy—it is to collectively realize the cooperation that is needed to shape a democratically led system.¹⁹ To the extent charter schools stand for the proposition that management organizations should decide how to educate children instead of the local community, they fail at the most fundamental purpose and role of primary and secondary education—preparing children to participate in a democratic order.²⁰ In turn, for reasons of the tax design, the charitable tax subsidies also provide

17. See Amy Gutmann, *Undemocratic Education*, in *LIBERALISM AND THE MORAL LIFE* 71, 79–81 (Nancy L. Rosenblum ed., 1989).

18. *Id.* at 75.

19. See *id.* at 77.

20. RICHARD D. KAHLBERG & CLIFFORD JANEY, CENTURY FOUND., PUTTING DEMOCRACY BACK INTO PUBLIC EDUCATION 9–11 (2016), <https://tcf.org/content/report/putting-democracy-back-public-education/> [<https://perma.cc/VG28-TETZ>].

strong incentives to place control of school values and policy in the hands of wealthy donors rather than the local community.²¹

The argument from democracy might naturally lead to a conclusion that states ought not create charter schools at all. Though I am sympathetic to such an argument, the political reality is that the federal, state, and local governments have expressed support for charter schools through democratic processes.²² Why use a political justice lens and then call for a policy that would run counter to policies chosen democratically?²³ The key to answering this question lies in the interest the community has in democratically shaped education. On the strong assumption that charters are here to stay, but in light of the political justice concerns regarding a tax policy that rewards an arrangement that lowers PVE, Congress should modify the Code to push charters to be more democratic in nature.

How might we accomplish such a goal through tax policy? Congress could require charter schools to assess the educational needs of its community every three to five years and report on them publicly, a similar policy to one already imposed on charitable hospitals.²⁴ This could improve the democratic transparency of charters, but we would need something more to ensure a tighter connection to democratic processes. Considering that Congress requires credit counseling organizations to maintain independent board members to receive tax exemptions,²⁵ it could require charters to have voting board members composed of parents, teachers, and members of the local community. This will not cure the problem of schools delinked from a democratic process, but it would enhance the connection to the local community voice. One significant remaining problem is that charter schools

21. See Jeanne M. Powers & Amanda U. Potterton, *The Rich Get Richer: Inequalities in Public School Tax Credit Donations to Charter Schools in Arizona*, 17 POL'Y FUTURES EDUC. 246, 251–53 (2019).

22. See *infra* Part III.B. Many question whether these processes were entirely democratic in nature. Wealthy and powerful private foundations have put substantial money and effort into the creation of charter schools. See RECKHOW, *supra* note 11, at 39–40, 42; MAURICE T. CUNNINGHAM, DARK MONEY AND THE POLITICS OF SCHOOL PRIVATIZATION 1, 5, 7 (2021).

23. See CUNNINGHAM, *supra* note 22, at 44.

24. See 26 U.S.C. § 501(r)(3).

25. § 501(q)(1)(D).

typically do not employ unionized teachers.²⁶ This makes the important voice of teachers weaker than ought to be the case to best promote a democratic order.²⁷ I discuss more possibilities in Part V.

A significant implication of the Article is that our theories for why we ought to exempt organizations from income tax fail to account for the fact that a sizable portion of the funds come from governments rather than from voluntary contributions. In 2011, government funds accounted for one-third of charitable organization revenue.²⁸ Our theories supporting charitable tax policy should take that fact into consideration. Another significant implication is that the idea that education is an inherently charitable purpose, discussed in Part IV.A, is incorrect. The Article shows there are important values we ought to consider in coming to such a conclusion.

“[C]harter schools are publicly funded schools that are typically governed by a group or organization under a legislative contract (or charter) with the state, district, or other entity.”²⁹ As of January 2020, forty-five states and the District of Columbia had adopted charter school legislation.³⁰ Though charters today are largely delinked from a democratic process in their operation,³¹ the history of charters suggests they do have real democratic possibilities. Albert Shanker, identified by some as the originator of the charter idea, was deeply

26. Peter Kauffman, Note, *Unionized Charter School Contracts as a Model for Reform of Public School Job Security*, 88 N.Y.U. L. REV. 1379, 1385 (2013).

27. *Id.* at 1413 n.194 (“Teachers unions play an invaluable role in increasing professionalism . . . and ensuring teachers have a collective voice . . .”).

28. SARAH L. PETTIJOHN, ELIZABETH T. BORIS, CAROL J. DE VITA & SAUNJI D. FYFFE, URB. INST., NONPROFIT-GOVERNMENT CONTRACTS AND GRANTS: FINDINGS FROM THE 2013 NATIONAL SURVEY 1, 4 (2013).

29. KE WANG, AMY RATHBUN & LAUREN MUSU, NAT’L CTR. FOR EDUC. STAT., SCHOOL CHOICE IN THE UNITED STATES: 2019, at 1 (2019), <https://nces.ed.gov/pubs2019/2019106.pdf> [<https://perma.cc/X6QS-VQ9P>].

30. Alyssa Rafa, Ben Erwin, Bryan Kelley & Micah Ann Wixom, *50-State Comparison: Charter School Policies*, EDUC. COMM’N STATES (Jan. 28, 2020), <https://www.ecs.org/charter-school-policies/> [<https://perma.cc/293A-EFVK>].

31. Most decisions in charter schools today are carried out by the charter school’s board and management rather than through a democratic process. *See supra* note 5 and accompanying text.

committed to democracy in schools.³² He supported teachers' unions for charter schools and believed that teachers should be directly involved in shaping school decisions rather than receiving a mandate from a school board.³³ In effect, he wanted schools to be laboratories for democratic reform.³⁴ Some critics of the charter movement also see in it a potential democratization of education.³⁵

A bit more context is worth setting out in this Introduction. The United States discriminated on the basis of race in its schools for a long time.³⁶ Additionally, primary and secondary schools are more segregated today than they were in the 1960s, and studies show that in the South charters have increased segregation.³⁷ Problematically, the inception of the idea of choice in education can be traced to efforts to maintain segregation after *Brown v. Board of Education*.³⁸ In some states, parents had "freedom of choice" to send their children to the public school of their choice.³⁹ In addition to considering tax policy

32. Richard D. Kahlenberg & Halley Potter, Opinion, *The Original Charter School Vision*, N.Y. TIMES (Aug. 30, 2014), <https://www.nytimes.com/2014/08/31/opinion/sunday/albert-shanker-the-original-charter-school-visionary.html> [https://perma.cc/594B-L6CN]. Some identify Ray Budde as the creator of the charter school idea. See Michael A. Naclerio, Note, *Accountability Through Procedure? Rethinking Charter School Accountability and Special Education Rights*, 117 COLUM. L. REV. 1153, 1153 & n.1 (2017).

33. Kahlenberg & Potter, *supra* note 32.

34. *Id.*

35. E.g., Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753, 760 (2000).

36. See John Brittain, Callie Kozlak, Michelle Woolley, Kenneth Chandler, Denise Ballesteros & Francis Nugent, *Racial Disparities in Educational Opportunities in the United States*, 6 SEATTLE J. FOR SOC. JUST. 591 app. A, at 622–24 (2007); Plessy v. Ferguson, 163 U.S. 537, 544 (1896); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) ("Segregation of white and colored children in public schools has a detrimental effect" (quoting, without citation, a Kansas court)).

37. GARY ORFIELD & CHUNGMEI LEE, C.R. PROJECT, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 13–14 (2007), [https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating.pdf](https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf) [https://perma.cc/U6VP-HTBS]; ERICA FRANKENBERG, GENEVIEVE SIEGEL HAWLEY, JONGYEON EE & GARY ORFIELD, C.R. PROJECT & CTR. EDUC. & C.R., SOUTHERN SCHOOLS: MORE THAN A HALF-CENTURY AFTER THE CIVIL RIGHTS REVOLUTION 13–15 (2017), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/southern-schools-brown-83-report/Brown63_South_052317-RELEASE-VERSION.pdf [https://perma.cc/QT6R-W9BD].

38. See Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563, 568 (2001).

39. *Id.*

regarding charters, this Article highlights the way in which our tax system at times enhances segregation. This is, at heart, a problem of democracy. It is a choice to regard some voices as lesser. Even if the charitable tax subsidies are efficient and redistribute wealth, if they work to enhance segregation, they cause harm.⁴⁰ Further, an aggravating factor should not be ignored. The means of providing funds for local school districts creates significant inequality in schooling opportunities. As noted in Part II, states generate funds for school districts primarily based upon taxing the property within that school district. This means poor districts have far less funds to educate their children than wealthy districts. In other words, much of the “choice” involved in a school system is baked into the system before parents are offered a “choice.”

This Article focuses on charter schools and tax policy. However, there are strong implications for private charitable schools and tax policy as well. I discuss some of those implications but do not take a stance on those other matters. This is unsatisfying because the strong implication of my argument is that primary and secondary education ought to be democratically led. Thus, Congress likely ought to apply the same rules to private primary and secondary schools. However, this Article is long enough already, and private schools are different from charters in that they do not get broad governmental support.⁴¹ I do not present the bases in this Article to firmly conclude on the matter of private schools, especially religious ones, and plan to assess these matters in a separate article.

Part II describes public education within the U.S. and the operation of charter schools within that system. I examine political justice as a tax policy critique and its relationship to education in Part III. Part IV

40. I am expressly not addressing matters of same-sex schools or even expressly private, religious schools. Instead, I am only focusing on the act of a public school system working in effect to separate children in primary and secondary schools into racially segregated schools.

41. Jason Lance Wren, *Charter Schools: Public or Private? An Application of the Fourteenth Amendment's State Action Doctrine to These Innovative Schools*, 19 REV. LITIGATION 135, 137 (2000).

reviews the requirements of operating as a charitable organization, considers benefits of that status under federal tax law, and assesses theories for why we might provide such benefits. I analyze these matters in Part V and conclude in Part VI.

II. EDUCATION IN THE U.S. & CHARTER SCHOOLS

A. *Short Introduction*

The notion of common public schools in the U.S. dates back to the beginning of our country.⁴² Inspired to preserve religious community, the Puritans enacted the first education law in the colonies in 1642 and passed the first compulsory law in the colonies in 1647.⁴³ By the 1840s, Horace Mann promoted a common school “to create citizens with the knowledge, skills, and public spirit required to maintain a republic and to protect it from the sources of faction, class, and self-interest that pose the primary threat to its existence.”⁴⁴

There are two competing justifications for public education in America: principles of societal shaping, whether for religious or democratic purposes, and principles related to social mobility/advantage.⁴⁵ In the early 1800s, the principles of democracy were particularly prevalent, represented by thinkers like Mann, and in the late 1800s, the principles of social mobility/advantage became the primary justification.⁴⁶ In the 1900s, democracy and social mobility rationales arguably worked in tandem to justify public education.⁴⁷

42. See CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780-1860*, at 3, 6–7 (Eric Foner ed., 1983).

43. MICHAEL S. KATZ, *A HISTORY OF COMPULSORY EDUCATION LAWS 11–12* (1976); DONALD PARKERSON & JO ANN PARKERSON, *THE STRUGGLE FOR PUBLIC EDUCATION: TEN THEMES IN AMERICAN EDUCATIONAL HISTORY 13–14* (2017); David F. Labaree, *Consuming the Public School*, 61 *EDUC. THEORY* 381, 382 (2011).

44. Labaree, *supra* note 43, at 384.

45. *Id.* at 381, 387.

46. Erika K. Wilson, *Blurred Lines: Public School Reforms and the Privatization of Public Education*, 51 *WASH. U. J.L. & POL’Y* 189, 222–24 (2016).

47. Labaree, *supra* note 43, at 385–86.

Today, market-based reforms dominate, and social mobility purposes seem to be the primary vision of public education.⁴⁸

In the U.S., the general control of primary and secondary education lies with state and local government.⁴⁹ The federal government plays a modest role in the education system, typically delivering funds to the state or local governments to support disadvantaged students.⁵⁰ The education system has traditionally used the “district” model with the local school district holding the operational responsibilities.⁵¹ This model provides local control but tends to have an unequal effect on the funds available for the district schools. School districts generate most of their funds by levying a tax on the real estate within the district.⁵² “Because no state draws its school district boundaries to equalize the value of property within each district, different districts raise different amounts of money for their schools.”⁵³ State governments typically make “appropriations to local school districts[] . . . in an attempt to aid the property-poor districts.”⁵⁴ Some states are more active in trying to remedy the significant inequality created through this local property-based system.⁵⁵

In tandem with the school choice movement, “[t]here have been movements to shift various responsibilities down the chain of command from school board and superintendent to principals and teachers.”⁵⁶ This new structure, termed the “portfolio” model, distributes the operational responsibilities across various public

48. Wilson, *supra* note 46, at 225.

49. See PARKERSON & PARKERSON, *supra* note 43, at 19.

50. Cassandra Jones Havard, *Funny Money: How Federal Education Funding Hurts Poor and Minority Students*, 19 TEMP. POL. & C.R. L. REV. 123, 139–40 (2009).

51. Daniel Kiel, *The Endangered School District: The Promise and Challenge of Redistributing Control of Public Education*, 22 B.U. PUB. INT. L.J. 341, 343 (2013).

52. Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1348 (2004).

53. *Id.*

54. *Id.*

55. See *id.* at 1352–53.

56. Kiel, *supra* note 51.

entities and private operators, typically through charter schools.⁵⁷ The Administrations of Presidents George W. Bush and Barack Obama both promoted the portfolio model.⁵⁸ Both Administrations increased federal funding to develop charter schools and, in some cases, exempted states from the No Child Left Behind Act of 2001.⁵⁹ In Tennessee, for instance, the legislature “removed the cap on charter schools and created a state-level Achievement School District (ASD) with the power to intervene in consistently failing schools by running such schools directly or authorizing a charter school operator to take over the school.”⁶⁰ The Trump Administration increased the appropriation of charter school funding and promoted school choice as well.⁶¹ This movement of authority from the district to the school comes simultaneously with a movement of greater authority to the state.⁶²

The school choice movement, which includes supporters of vouchers, magnet schools, and charter schools, emerged after the *Brown v. Board of Education* decision in 1954.⁶³ School choice is steeped in both modern Conservative and Liberal political heritage. On the Conservative side, Milton Friedman advocated for the movement based on “markets, competition, and limited governmental influence.”⁶⁴ Civil rights groups brought actions against some of these

57. *Id.* at 344.

58. *Id.* at 354.

59. *See id.* at 354–56. *See generally* No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (repealed 2015). In 2015, President Obama signed the Every Student Succeeds Act (ESSA) reauthorizing the Elementary and Secondary Education Act of 1965. Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified in scattered sections of 20 U.S.C.) The ESSA continues a similar policy of encouraging charter schools to take over public schools that are considered to be failing. *See* Nicole Stelle Garnett, *Post-Accountability Accountability*, 52 U. MICH. J.L. REFORM 157, 180–81 (2018) (“While the waivers were eliminated by [the] ESSA, the new law increases funding for charter schools and authorizes (but does not require) states to use these funds to convert failing public schools to charter schools.”).

60. Kiel, *supra* note 51, at 355.

61. *See* Jon Valant, *What Are Charter Schools and Do They Deliver?*, BROOKINGS: POLICY 2020: VOTER VITALS (Oct. 15, 2019), <https://www.brookings.edu/policy2020/votervital/what-are-charter-schools-and-do-they-deliver/> [<https://perma.cc/PDM7-TBN2>].

62. *See* Aaron Jay Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 872–73 (2006).

63. Stephanie R. Logan, *A Historical and Political Look at the Modern School Choice Movement*, 27 INT’L J. EDUC. REFORM 2, 3, 10, 15 (2018).

64. *Id.* at 3.

Conservative efforts and challenged Internal Revenue Service (IRS) policies that granted exemption from income tax to private schools formed to avoid segregation.⁶⁵ While they protested segregated schools, civil rights organizations also created alternative schools for Black students with an aim to increase academic achievement, develop racial pride, and bring attention to the inadequacies of the public schools.⁶⁶

Minnesota adopted the first charter school legislation in 1991 with the intention of giving any educator the ability to open a school.⁶⁷ The federal government authorized the federal funding of public charter schools in 1994.⁶⁸ Charter schools are federally authorized to “improve the . . . education system and education opportunities for all people . . . by supporting innovation in public education in public school settings.”⁶⁹ This federal legislation allows significant flexibility in the structure and funding of charter schools. That structure, discussed more below, is largely determined by the state regulatory regime.

“In the 2000–[20]01 school year, 1,993 charter schools in [thirty-five] states and the District of Columbia served 1[%] of all U.S. public school students.”⁷⁰ By the “2016–[20]17 school year, 7,011 charter schools in [forty-three] states and the District of Columbia served about 6[%] of all public school students.”⁷¹ The enrollment in public

65. Joseph Crespiño, *Civil Rights and the Religious Right*, in *RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S*, at 90, 90–91, 93–94 (Bruce J. Schulman & Julian E. Zelizer eds., 2008).

66. Logan, *supra* note 63, at 4.

67. 1991 Minn. Laws 943, 1124; *Charter Schools*, MINN. LEGIS. REFERENCE LIBR., <https://www.leg.state.mn.us/lrl/guides/guides?issue=charter> [<https://perma.cc/MB3Q-MKRG>].

68. Improving America’s Schools Act of 1994, Pub. L. No. 103-382, § 10302, 108 Stat. 3518, 3825 (1994) (codified at 20 U.S.C. § 8062).

69. 20 U.S.C. § 7221(1).

70. WANG ET AL., *supra* note 29, at 2.

71. *Id.* As of January 2023, forty-five states and the District of Columbia have charter schools. Todd Ziebarth, *Preview of 2023 State Legislative Sessions and Charter Schools*, NAT’L ALL. FOR PUB. CHARTER SCHS.: BLOG (Jan. 20, 2023), <https://www.publiccharters.org/latest-news/2023/01/20/preview-2023-state-legislative-sessions-and-charter-schools> [<https://perma.cc/AE29-EFM4>]; *Charter School Policies: Does the State Have a Charter School Law?*, EDUC. COMM’N STATES (Jan. 2020), <https://reports.ecs.org/comparisons/charter-school-policies-01> [<https://perma.cc/W9DT-NURY>].

charter schools changed by 571.4% between 2000 and 2016, from fewer than half a million students to more than three million students.⁷²

Demographically, during the 2016–2017 school year, “a higher percentage of public charter school students than of traditional public school students were Black . . . or . . . Hispanic,” and a higher percentage of students were poor or near-poor in charter schools than traditional public schools.⁷³ Differences exist geographically as well. Statistically, 57% of public charter schools are located in cities, and 37% of public charter schools are in the West (32% are in the South, 21% are in the Midwest, and 10% are in the Northeast).⁷⁴

Though there are some standout charters, evidence does not show that charter schools are more effective than public schools as a whole. A review of ninety studies in 2012 found that charter school students performed no better than their public school peers.⁷⁵ A review of studies in 2018 found comparable results: charter students performed no better than their public school peers, but some urban charters serving low-income students experienced improved test scores.⁷⁶ Troublingly, one study of charters in the South found that they are increasing racial and socioeconomic segregation.⁷⁷

B. Charter School Structure

Charter schools are not subject to the same state and local laws as public schools.⁷⁸ For instance, they need not follow the curriculum set

72. WANG ET AL., *supra* note 29, at 8 tbl.1.1.

73. *Id.* at 16, 30; see Dennis Epple, Richard Romano & Ron Zimmer, *Charter Schools: A Survey of Research on Their Characteristics and Effectiveness*, in 5 HANDBOOK OF THE ECONOMICS OF EDUCATION 139, 150 fig.5B (2016).

74. *Key Facts About Charter Schools*, CHARTER SCHS. PERSP., <http://www.in-perspective.org/pages/introduction> [<https://perma.cc/AK6F-LWL3>].

75. William H. Jeynes, *A Meta-Analysis on the Effects and Contributions of Public, Public Charter, and Religious Schools on Student Outcomes*, 87 PEABODY J. EDUCATION 305, 305 (2012).

76. Sarah Cohodes, *Charter Schools and the Achievement Gap*, FUTURE CHILDREN, Winter 2018, at 1, 14.

77. See FRANKENBERG ET AL., *supra* note 37, at 12–15.

78. Brown-Nagin, *supra* note 35, at 765; see Kathleen Conn, *For-Profit School Management Corporations: Serving the Wrong Master*, 31 J.L. & EDUC. 129, 140, 145 (2002) (noting that charter schools often need not comply with special education needs, school lunches, or bargaining with union teachers).

by the local school board and can choose whether they require uniforms; they often need not comply with teacher certification rules, testing regimes established for public schools, or contracts with teachers' unions.⁷⁹ A review of fifty states found that states regularly waive substantial requirements that apply to regular public schools.⁸⁰ California, for instance, waives most state laws associated with school districts.⁸¹ New York requires that charters comply with "the same health and safety, civil rights, and student assessment requirements," but that other public school laws generally do not apply.⁸² Pennsylvania acts similarly.⁸³ Texas gives charters a general waiver but then imposes a variety of similar requirements relating to health and safety, accountability, bilingual education, public education information management systems, prekindergarten programs, and criminal history records.⁸⁴ New Jersey allows a charter to request a waiver from all school laws except those regulating "assessment, testing, civil rights[,] student health and safety," and "students with disabilities."⁸⁵

There are three main components of the charter school structure: (1) the legislative or regulatory government authorizer, (2) the organization that holds and operates the charter (which is typically a nonprofit managed by a governing board or developer), and (3) the management company (called education management organizations

79. Conn, *supra* note 78; Libby Nelson, *Everything You Need to Know About Charter Schools*, VOX (Apr. 30, 2014, 12:59 PM), <https://www.vox.com/2014/4/30/18076968/charter-schools> [https://perma.cc/AE22-K43R]. *But see* John O'Connor, *Five Misconceptions About Charter Schools*, STATEIMPACT: FLORIDA (Oct. 3, 2011, 12:02 PM), <https://stateimpact.npr.org/florida/2011/10/03/five-misconceptions-about-charter-schools/> [https://perma.cc/GJL7-FVYG].

80. *See Charter School Policies: What Rules Are Waived for Charter Schools*, EDUC. COMM'N STATES (Jan. 2020) [hereinafter *Charter School Waivers*], <https://reports.ecs.org/comparisons/charter-school-policies-14> [https://perma.cc/5Q8N-9MYW].

81. *See* CAL. EDUC. CODE §§ 47610, 47611 (West 2023); *Charter School Waivers*, *supra* note 80.

82. N.Y. EDUC. LAW § 2854 (McKinney 2023); *Charter School Waivers*, *supra* note 80.

83. *See* 24 PA. STAT. AND CONS. STAT. §§ 17-1715-A, 17-1732-A (West 2022); *Charter School Waivers*, *supra* note 80.

84. TEX. EDUC. CODE ANN. §§ 12.012, -.013, -.055, -.056, -.103, -.104, -.156 (West 2021); *Charter School Waivers*, *supra* note 80.

85. N.J. STAT. ANN. § 18A:36A-11 (West 2023); *Charter School Waivers*, *supra* note 80.

(EMO) or charter management organizations (CMO)).⁸⁶ The focus of this Article is primarily on the charter itself, but it also considers the management organizations.

States employ a dizzying array of authorizers: higher education institutions, independent chartering boards, local education agencies (LEA), non-educational government entities, nonprofit organizations, and state education agencies.⁸⁷ In Texas, there are five types of charter schools, and different authorities can approve the different types.⁸⁸ “Independent school districts [(school boards or LEAs)] authorize and oversee” campus and campus program charters.⁸⁹ Most Texas charters offer open-enrollment and are approved by the commissioner of education.⁹⁰ California primarily relies upon LEAs to make charter decisions, but county offices of education and the state board of education can also issue them.⁹¹ The New Jersey Commissioner of Education has the power to authorize charter schools, which then operate “independently of [the] local board of education.”⁹² In New York, charter authorizing entities include the school district’s board of education (or the chancellor of city school districts with more than one million residents), “[t]he board of trustees of the state university of New York,” or “[t]he board of regents.”⁹³

86. See John Morley, Note, *For-Profit and Nonprofit Charter Schools: An Agency Costs Approach*, 115 YALE L.J. 1782, 1787, 1789–90 (2006); Anne E. Trotter, Suzanne E. Eckes & Jonathan A. Plucker, *Education Management Organizations and Charter Schools: Serving All Students*, 213 EDUC. L. REP. 935, 935–37 (2006).

87. *Authorizer Types Across the Country*, NAT’L ASS’N CHARTER SCH. AUTHORIZERS, <https://www.qualitycharters.org/authorizer-types/> [https://perma.cc/U7XX-CJPU]; see Stephen D. Sugarman & Emlei M. Kuboyama, *Approving Charter Schools: The Gate-Keeper Function*, 53 ADMIN. L. REV. 869, 880–81 (2001) (asserting that the LEA is the most prevalent form of charter sponsorship).

88. *Charter Schools - History of Charter Schools*, TEX. EDUC. AGENCY, <https://tea.texas.gov/texas-schools/texas-schools-charter-schools/charter-schools-history-of-charter-schools> [https://perma.cc/PZ7Z-KDE6].

89. *Id.*

90. *Id.*

91. CAL. EDUC. CODE § 47605 (West 2023); KIRSTEN SLUNGAARD MUMMA & MARTIN R. WEST, CHARTER SCHOOL AUTHORIZING IN CALIFORNIA 4 (2018), https://gettingdowntofacts.com/sites/default/files/2018-09/GDTFII_Report_West.pdf [https://perma.cc/QJ7V-BEZ7]. Some saw California’s effort as problematic, as sometimes an LEA might authorize a charter far from its territory. Sugarman & Kuboyama, *supra* note 87, at 884–86; see also CAL. EDUC. CODE § 47605.5 (West 2023).

92. N.J. STAT. ANN. § 18A:36A-3(a) (West 2023).

93. N.Y. EDUC. LAW § 2851(3) (McKinney 2023).

Who can form a charter? Many states require charters to be organized as nonprofit entities or utilize nonprofit boards.⁹⁴ Five states allow charters to be granted directly to for-profit EMOs.⁹⁵ In Texas, an eligible open enrollment charter school applicant includes “(1) an institution of higher education . . . ; (2) a private or independent institution of higher education . . . ; (3) an organization that is exempt from taxation under [§] 501(c)(3) . . . ; or (4) a governmental entity.”⁹⁶ California does not prohibit “any private person or organization from providing funding or other assistance to the establishment or operation of a charter school.”⁹⁷ After July 1, 2019, a California charter may not operate as a for-profit corporation.⁹⁸ California permits charter boards to include a chartering authority member as a representative on the board of directors.⁹⁹ In New Jersey, teachers, parents, institutions of higher learning, and private entities can form charters.¹⁰⁰ In New York, “teachers, parents, school administrators, community residents[,] or any combination thereof” can submit charter applications.¹⁰¹

What about management organizations? EMOs are typically for-profit entities, while CMOs are typically nonprofit.¹⁰² In thirty-five states and the District of Columbia, the law allows for-profit

94. See, e.g., *Petitioners: Frequently Asked Questions*, STATE CHARTER SCHS. COMM’N GA., <https://scsc.georgia.gov/information-applicants/petitioners-frequently-asked-questions> [<https://perma.cc/VC62-EZ7V>] (“Georgia law requires that charter schools are governed by a non-profit board of directors.”); Kat Sullivan, *Are Charter Schools for Profit?*, NAT’L ALL. FOR PUB. CHARTER SCHS.: BLOG (Jan. 16, 2019), <https://www.publiccharters.org/latest-news/2019/01/16/are-charter-schools-profit> [<https://perma.cc/6EAQ-L597>] (explaining that charter schools are typically not for-profit entities).

95. Trotter et al., *supra* note 86, at 937 & tbl.1 (Arizona, Colorado, New York, Virginia, and Wisconsin).

96. TEX. EDUC. CODE ANN. § 12.101(a) (West 2021).

97. CAL. EDUC. CODE § 47603(a) (West 2023).

98. EDUC. § 47604(b)(1).

99. EDUC. § 47604(c).

100. N.J. STAT. ANN. § 18A:36A-4(a) (West 2023).

101. N.Y. EDUC. LAW § 2851(1) (McKinney 2023).

102. Abby Quirk, *Understanding the Opportunities and Challenges of Charter Management Contracts for Public Schools*, CTR. FOR AM. PROGRESS (Dec. 16, 2021), <https://www.americanprogress.org/article/understanding-the-opportunities-and-challenges-of-charter-management-contracts-for-public-schools/> [<https://perma.cc/U9H4-QBFW>].

corporations to manage a charter, but the charter itself must be a nonprofit entity.¹⁰³ “EMOs generally receive the same per-pupil funding as school districts” and can make a profit by running the school efficiently.¹⁰⁴ Texas regulations provide that a charter management company can be “[a] natural person or a corporation, partnership, sole proprietor, association, agency, or other legal entity that provides any management services to a charter holder or charter school.”¹⁰⁵ As noted above, after July 1, 2019, California prohibits for-profit corporations or for-profit management companies from operating charters.¹⁰⁶ New York too prohibits for-profit companies from managing charter schools.¹⁰⁷ Naturally, even if a state prohibits for-profit management companies, it is possible that the school could be contracting with management companies for things such as payroll.¹⁰⁸

Though the charter school itself is the locus of the Article, much of the litigation and critique of charter schools lies in the use of management organizations. In Pennsylvania, for instance, litigants challenged nonprofit charters that gave up too much power to for-profit management companies.¹⁰⁹ In one case, the litigants successfully attacked the charter on the basis that it served the for-profit management company rather than the public because the charter board was controlled by the same individual who controlled the for-profit

103. Trotter et al., *supra* note 86, at 937 & tbl.1.

104. *Id.* at 942.

105. 19 TEX. ADMIN. CODE § 100.1001(14) (2023).

106. CAL. EDUC. CODE § 47604(b)(1) (West 2023).

107. N.Y. EDUC. LAW § 2851(1) (McKinney 2023). However, New York allowed charters that utilized for-profit EMOs prior to the change in the law in 2010 to continue using them. *See* N.Y.C. CHARTER SCH. CTR., THE PROFIT MYTH: UNDERSTANDING THE STRUCTURE OF NEW YORK CHARTER SCHOOLS 6 (2011), https://schools.nyccharterschools.org/sites/default/files/resources/charter_school_profit_myth.pdf [<https://perma.cc/6AX5-2JUK>].

108. Julia L. Davis, *Contracts, Control and Charter Schools: The Success of Charter Schools Depends on Stronger Nonprofit Board Oversight to Preserve Independence and Prevent Domination by For-Profit Management Companies*, 2011 BYU EDUC. & L.J. 1, 7–8 (2011).

109. Fiona Greaves & Preston Green, *The Legal Issues Surrounding Partnerships Between Charter Schools and For-Profit Management Companies*, 206 EDUC. L. REP. 27, 28–29 (2006); *see* Brackbill v. Ron Brown Charter Sch., 777 A.2d 131, 136 (Pa. Commw. Ct. 2001).

management company.¹¹⁰ Critics argue that for-profit EMOs are focused primarily on their fiduciary duty to generate profits for shareholders and can increase profits by expanding rapidly and standardizing the curriculum.¹¹¹ One commenter on Michigan charter schools discussed that “[s]ome fear that in order to reduce costs, EMOs may encourage charter schools to overlook students who are most expensive to educate, such as those receiving special educational services or those with serious emotional or behavioral problems.”¹¹²

Many EMO/CMO and charter board relationships are subject to problematic conflicts of interest.¹¹³ For instance, Renaissance Charter successfully sued its EMO, Imagine Schools, for breaches of fiduciary duties of care and loyalty in lease transactions.¹¹⁴ The EMO had Renaissance enter into leases without disclosing that it would be on the other side of the transaction.¹¹⁵ The Pennsylvania Cyber Charter School similarly engaged in significant self-dealing.¹¹⁶ In a 2016 audit of CMOs, the U.S. Department of Education found a wide risk associated with Department objectives because of weak charter school controls.¹¹⁷ There is particular concern when the CMO is for-profit.¹¹⁸ In all cases, it appears that contracts with an EMO or CMO present

110. *Butler Area Sch. Dist. v. Einstein Acad.*, 60 Pa. D. & C.4th 207, 211–12, 217 (Pa. Com. Pl. Sept. 10, 2001).

111. *See Conn.*, *supra* note 78, at 140; Trotter et al., *supra* note 86, at 941–43.

112. Trotter et al., *supra* note 86, at 944.

113. *See id.* at 946–47.

114. *Renaissance Acad. for Math & Sci. of Mo., Inc. v. Imagine Schs., Inc.*, No. 13-CV-00645, 2014 WL 7267033, at *9–10 (W.D. Mo. Dec. 18, 2014).

115. *See id.* at *10.

116. PA. DEP’T OF THE AUDITOR GEN., PERFORMANCE AUDIT: PENNSYLVANIA CYBER CHARTER SCHOOL 17–18, 41–42 (2016), <http://www.paauditor.gov/Media/Default/Reports/PACyberCharterSchool,%20Beaver,%20092116.pdf> [<https://perma.cc/F6YG-PXT6>].

117. *See* OFF. OF INSPECTOR GEN., U.S. DEP’T OF EDUC., ED-OIG/A02M0012, NATIONWIDE ASSESSMENT OF CHARTER AND EDUCATION MANAGEMENT ORGANIZATIONS: FINAL AUDIT REPORT 22 (2016), <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2016/a02m0012.pdf> [<https://perma.cc/KRJ8-UKVS>].

118. *See* Davis, *supra* note 108, at 4; R. David Walk, Jr., *How Educational Management Companies Serve Charter Schools and Their Students*, 32 J.L. & EDUC. 241, 245 (2003).

real challenges to boards to make sure charters' interests are sufficiently protected.¹¹⁹

III. POLITICAL JUSTICE AND EDUCATION

There are two central claims of this case for democracy as political justice in assessing tax policy and education: (1) primary and secondary education should build citizens who understand how to shape their collective lives democratically, and (2) the best way to accomplish this goal is for primary and secondary education to be determined in a democratic manner. The strongest democratic system is one with “free and unconstrained public deliberation of all about matters of common concern,” and the primary and secondary education system is central to building that capacity.¹²⁰ This Part first sets out why we should take political justice into consideration in assessing tax policy and discusses what I mean by political justice. It then considers the political justice contentions of charter proponents. Finally, the Part lays out the democratic case for primary and secondary education.

A. *Why Political Justice as Democracy in Tax Policy?*

In addition to the traditional tax policy factors of efficiency and equity, we ought to consider political justice as we design a tax system. By efficiency, I mean tax policy critiques that attempt to maximize the amount of value created in the economy. That typically means tax policy that does the least harm to what would occur in a free market or better replicates what a perfect free market might accomplish.¹²¹ By equity, I mean critiques that consider who should bear a particular tax and by how much as compared to other individuals within the society.

119. See Greaves & Green, *supra* note 109, at 36.

120. Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 67, 68 (Seyla Benhabib ed., 1996).

121. See Ruud De Mooij & Michael Keen, *Taxing Principles: Making the Best of a Necessary Evil*, FIN. & DEV., Dec. 2014, at 50, 50–51, <https://www.elibrary.imf.org/view/journals/022/0051/004/article-A018-en.xml> [<https://perma.cc/HA8Y-7PT2>].

It should also involve questions of redistribution of wealth. By political justice, I mean a system that best respects the political voice of each individual in society in collectively shaping our social world. The ideal model is pure democracy where each member of the community has an opportunity to develop the agenda, discuss the agenda, and have final say on matters on the agenda of a relevant community. This is not a model that is in opposition to majority rule.¹²² The key is that in making those majoritarian decisions, each member of the relevant community is permitted a real opportunity to participate in the entirety of that process.

I presume a democratic system, as opposed to the two primary competing systems, anarchy and guardianship, to be the most just political system.¹²³ Additionally, I draw primarily from deliberative democratic traditions in making my case for the details of a just democratic system because the deliberative approach tries to move us closer to the ideal democratic state.¹²⁴ I acknowledge the importance of liberal and republican approaches to democracy within the U.S. and believe we should consider those traditions in assessing political justice.¹²⁵

Democracy demands more than a right to vote for a representative. The idea of governance by the people comes from the notion that each of us is equal and has the right to shape our own world, which Robert

122. See John G. Matsusaka, *Direct Democracy Works*, 19 J. ECON. PERSPS. 185, 187, 199–200 (2005).

123. See Philip T. Hackney, *Prop Up the Heavenly Chorus? Labor Unions, Tax Policy, and Political Voice Equality*, 91 ST. JOHN'S L. REV. 315, 373 (2017) (discussing why we ought to prefer democracy to anarchy or guardianship). Additionally, I have made the case for what some models of democracy, such as republican, liberal, and deliberative, might demand in the evaluation of social welfare organizations as exempt from income tax. See Hackney, *supra* note 2, at 325.

124. See Benhabib, *supra* note 120; AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 22–23 (2004); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 296 (William Rehg trans., MIT Press 1996) (1992). I am also influenced, in part, by critiques of deliberative democracy to make it a more inclusive system. See, e.g., Iris Marion Young, *Communication and the Other: Beyond Deliberative Democracy*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL*, *supra* note 120, at 120, 122–25.

125. See, e.g., Jürgen Habermas, *Three Normative Models of Democracy*, 1 CONSTELLATIONS 1–3 (1994).

Dahl refers to as “intrinsic equality.”¹²⁶ “A person’s right to participate in the shaping of the world she shares in common with others, which characterizes a well-functioning democracy, is grounded in her fundamental interests as a member of political society.”¹²⁷ This “intrinsic equality” leads to basic principles that each member of a relevant group—*who has attained a certain age suggesting competency*—ought to have the right to set the agenda of the group, develop information, express their voice regarding matters before the group, and vote on any final decisions before the group.¹²⁸ It demands a broad inclusion and equality of voice, or PVE, in collective decision-making. Only those who have reached a certain age have these broad democratic rights.¹²⁹ This recognition of age suggesting competency also highlights the reality that a period exists where children must learn to be citizens before they become entitled to shape their lives in common with other citizens. Though ideal democracy is impossible, we have basic principles of a democratic order: frequent fair elections of individuals to represent the people, the right of all people of a certain competency to vote, and the basic liberal rights of freedom of speech, press, association, and religion.¹³⁰

There are many models of democracy.¹³¹ For ease of analysis though, it is easiest to think of three primary models: republican, liberal, and deliberative.¹³² At the core of republican theory is a belief that it is possible to determine a general will that is representative of the interests of all members of the relevant community.¹³³ Society is then ordered in a harmonious way at the level of the state in furtherance of that general will.¹³⁴ This model leaves a lot of power to the state and

126. ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 85 (1989).

127. THOMAS CHRISTIANO, *THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS* 12 (2008).

128. *See* DAHL, *supra* note 126, at 109–15.

129. *Id.* at 105, 115, 129.

130. *See* Leonardo Morlino, *What Is a ‘Good’ Democracy?*, 11 *DEMOCRATIZATION* 10, 10, 24 (2004).

131. For an in-depth look at these models, see generally DAVID HELD, *MODELS OF DEMOCRACY* (Stanford Univ. Press 3d ed. 2006) (1987).

132. For a discussion of these ideas, see generally Hackney, *supra* note 2.

133. *See* JÜRGEN HABERMAS, *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* 240, 247 (Ciaran Cronin & Pablo De Greiff eds., Mass. Inst. of Tech. trans., MIT Press 1998) (1996).

134. *See id.* at 247.

accords well with what Amy Gutmann refers to as the *family state* theory of education, discussed below in Part III.C, which looks at the relationship of education to democracy.¹³⁵ Modern republican theory, anchored in a Madisonian vision of faction and a concern that a state might be overwhelmed by narrow interests of a minority or even a majority, focuses on the protection of various groups such as religious groups.¹³⁶ On the other hand, the liberal view prioritizes the individual and views politics through a market mechanism.¹³⁷ The state is a neutral arbiter of interests, as those interests within the state fight for the right to direct policy.¹³⁸ Gutmann's other educational theories, *state of families* and *state of individuals* theories, also addressed below, fit fairly well within this liberal democracy.¹³⁹

The deliberative approach is a melding of the two. Deliberative democracy emphasizes the importance of public conversations in shaping policy.¹⁴⁰ It holds that “regulated communication processes can create the necessary conditions for inclusive decision making.”¹⁴¹ Deliberative democratic theorists argue we should establish processes that allow citizens to give one another their reasons for adopting a certain action so all will understand the reasons for any adopted binding decision.¹⁴² Some theorists define it as a governmental form where “free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future.”¹⁴³ The legitimacy of law and state authority is

135. See *supra* Part III.C; AMY GUTMANN, DEMOCRATIC EDUCATION 22–28 (1987).

136. See Hackney, *supra* note 2, at 285, 309–10.

137. HABERMAS, *supra* note 133, at 240–41.

138. *Id.* at 239, 247–48.

139. See *supra* Part III.C; GUTMANN, *supra* note 135, at 28–41.

140. See Hackney, *supra* note 2, at 283, 287.

141. Edda Sant, *Democratic Education: A Theoretical Review (2006-2017)*, 89 REV. EDUC. RSCH. 655, 668 (2019).

142. HELD, *supra* note 131, at 238.

143. GUTMANN & THOMPSON, *supra* note 124, at 7.

based in popular sovereignty and procedures that allow each citizen to be treated as free and equal members entitled to collectively shape their community.¹⁴⁴

Though tax may seem far from democracy, it impacts the democratic balance of our society through its very establishment, the base chosen, the progressive nature of that system, and even through its substantive provisions.¹⁴⁵ It affects political justice through its implementation because of the conscious collective choice to allocate a certain amount of economic production collected from individuals to carry out collectively chosen goals. The amount and choice of base impacts how much collective activity we might engage in, who is going to be impacted, and by how much in that collective choice. When a substantive provision of the Code directly impacts the balance of how and who chooses any collective activity by either taxing or not taxing that activity, political justice is impacted.

Income tax exemption for nonprofit organizations has a direct impact on democratic operation in the U.S. This is clearest in the case of tax-exempt interest groups such as labor unions and business leagues.¹⁴⁶ Because these organizations carry out selfish activity on behalf of members, tax exemption arguably provides a subsidy in those cases equal to the current corporate tax rate times the earnings of a particular exempt entity.¹⁴⁷ That subsidy in turn supports those interest groups that exist and are best able to maximize the benefit.¹⁴⁸ Because

144. See HABERMAS, *supra* note 124, at 110–11.

145. See, e.g., Repetti, *supra* note 2, at 1131; Hackney, *supra* note 2, at 273 & n.4.

146. For a discussion of interest groups and their relationship to tax exempt groups, see generally Philip Hackney, *Taxing the Unheavenly Chorus: Why Section 501(c)(6) Trade Associations Are Undeserving of Tax Exemption*, 92 DENV. U. L. REV. 265 (2015).

147. Many question whether tax exemption for nonprofits is a subsidy. For example, Congress's Joint Committee on Taxation in its tax expenditure budget only includes exemption as an expenditure when there is "a direct business analogue or [a noncharitable organization] compete[s] with for-profit organizations organized for similar purposes." STAFF OF JOINT COMM. ON TAX'N, JCX-23-20, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2020–2024, at 9 (2020); see also Daniel Halperin, *Income Taxation of Mutual Nonprofits*, 59 TAX L. REV. 133, 164 (2006) (concluding that exemption for mutual benefits, like business leagues, amounts to not much of a subsidy other than on capital assets and investment income because most of the expenditures would be deductible in any case). The ability to transfer appreciated assets to these entities without the imposition of an income tax or a gift tax provides other ways of providing a subsidy to the members of these organizations.

148. See Hackney, *supra* note 146, at 267–68.

of the challenge of collective action, that subsidy likely flows in greater amounts to smaller, wealthier interests that find it much easier to organize and thereby access that tax subsidy.¹⁴⁹ This means the policy of exemption puts a finger on the scale for the political voice of those interests best able to make use of the subsidy.¹⁵⁰ Is this good tax policy? It is unlikely that it is efficient or equitable to further wealthy groups that would have organized anyway. A political justice critique also finds problems with designing a tax system that unequally aids parties in their efforts to influence the polity.¹⁵¹

The goal of this Article is to examine the impact that providing charitable tax subsidies to charter schools has on political justice. The next two Sections consider political justice and other arguments made by charter proponents and then what political justice demands in the shaping and delivery of primary and secondary education.

B. Arguments from Choice

School choice promoters argue that the district public school model is a monopoly that fails the U.S. in preparing students for the workforce.¹⁵² Charter supporters are housed in a range of theoretical traditions but typically are organized into those who argue for what they call “choice,” which will be used as shorthand for charter supporters.¹⁵³ They generally either argue that a parent has a fundamental right to decide how their children should be educated or

149. *Id.* at 285 (discussing the implications of the collective-action problem).

150. *See id.* at 271.

151. *See id.* at 281.

152. *See* 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, 79 (1995).

153. School choice includes a number of different models of delivery of education. *See* HARRY BRIGHOUSE, *SCHOOL CHOICE & SOCIAL JUSTICE* 20–21 (2000). There are vouchers that might be provided by a nonprofit entity or by a state or governmental entity that can be used to attend either public schools or private schools. *Id.* at 20. There are various ranges of different options within public schools themselves such as magnet schools that focus on certain themes such as the arts or engineering. *See id.* at 20. Finally, there are charter schools. *Id.* at 21.

that the current government-run primary and secondary education system is not efficient.

Some choice proponents believe that parents have a fundamental right to decide educational matters for their children.¹⁵⁴ Thus, a state has no right to determine how a parent's child should be educated; only the parent can make that decision. This theory typically accepts that the state has the right to mandate education but argues that parents have the right to determine what that education should look like and who should provide that education.¹⁵⁵ These parent-focused choice proponents argue this strengthens parents' connection to their children's education and the ability to choose has a real value in a liberal society.¹⁵⁶ Furthermore, they argue that the common understanding of public schools as places to impart important political values to children has failed and political institutions, not schools, are where our children should derive political values.¹⁵⁷

Michael McConnell exemplifies these theorists. He argues for liberal democratic education where the state publicly supports a wide-range of schooling systems rather than the typical public school district managing the delivery of all public education.¹⁵⁸ McConnell suggests that in a pluralistic society where we require everyone to either educate their children through a public school or pay the costs, we should expect less toleration rather than more because of the anger that this situation creates for the out-parents.¹⁵⁹ He fears that those whose views do not prevail in determining "democratic values" will be treated as "second-class citizens."¹⁶⁰ McConnell contends that our imperfectly

154. E.g., *The Parents' Right to Educate Their Children (I)*, OPUS DEI (June 18, 2013), <https://opusdei.org/en-us/article/the-parents-right-to-educate-their-children-i/> [<https://perma.cc/96KT-5JRQ>].

155. See Yelena V. Solodyankin, *Parental Rights and Responsibilities in Educating Their Children*, ENLIGHTIUM ACAD. (May 3, 2019), <https://www.enlightiumacademy.com/blog/entry/parental-rights-and-responsibilities-in-educating-their-children> [<https://perma.cc/2X98-LJUW>].

156. James A. Peyser, *School Choice: When, Not If*, 35 B.C. L. REV. 619, 620 (1994).

157. *Id.* at 623–24.

158. Michael W. McConnell, *Education Disestablishment: Why Democratic Values Are Ill-Served by Democratic Control of Schooling*, in MORAL AND POLITICAL EDUCATION: NOMOS XLIII 87, 87–88 (Stephen Macedo & Yael Tamir eds., 2002).

159. *See id.* at 98.

160. *Id.* at 102 (internal quotation marks omitted).

democratic culture is not able to consciously socially reproduce a legitimate democratic culture.¹⁶¹

Some choice theorists approach the question instrumentally. Under this approach, public schools are inefficient. They argue that market mechanisms will bring down school costs and raise the quality of education.¹⁶² They posit that teachers' unions harm the efficiency of the delivery of education; these theorists hope that choice might help eliminate teachers' unions.¹⁶³ Some proponents note that school choice can lead to lower costs but the same results,¹⁶⁴ which may free up resources for other equality-related matters like health care. To these theorists, choice creates a greater diversity of options for education. Such diversity will allow the school system to fit the needs of children more precisely.¹⁶⁵

Milton Friedman is a good representative of these choice theorists. To Friedman, the state's obligation to provide education lies in "neighborhood effects."¹⁶⁶ He notes that "[a] stable and democratic society is impossible without a minimum degree of literacy and knowledge on the part of most citizens and without widespread acceptance of some common set of values."¹⁶⁷ Thus, Friedman generally accepts the democratic importance of education for primary and secondary education. Though he recognizes the importance of

161. *See id.* at 93–94.

162. *See, e.g.*, JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 34 (1990).

163. *See* Leo Casey, *The Charter School Challenge*, *NEW LAB. F.*, Winter 2015, at 22, 23 (2015) (pointing out that the New Orleans school system's shift to almost all charter schools following Hurricane Katrina made the "post-Katrina teaching force . . . significantly younger and whiter, supplanting the predominantly African-American and unionized teaching cohort that was illegally dismissed en masse in the wake of the hurricane").

164. *See* JULIAN R. BETTS, LORIEN A. RICE, ANDREW C. ZAU, Y. EMILY TANG & CORY R. KOEDEL, *PUB. POL'Y INST. CAL., DOES SCHOOL CHOICE WORK? EFFECTS ON STUDENT INTEGRATION AND ACHIEVEMENT* 97–98, 103 (2006).

165. *See* ORG. FOR ECON. COOP. & DEV., *SCHOOL CHOICE AND SCHOOL VOUCHERS: AN OECD PERSPECTIVE* 4 (2017), <https://www.oecd.org/education/School-choice-and-school-vouchers-an-OECD-perspective.pdf> [<https://perma.cc/G47J-EQAX>].

166. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 85 (40th anniversary ed. 2002).

167. *Id.* at 86.

schools teaching common values, his solution is to allow private schools but provide vouchers to those schools that meet certain minimum requirements established nationally or by a state.¹⁶⁸ Others, such as John Chubb and Terry Moe, have also argued for a market approach to public schooling.¹⁶⁹ They argue that the traditional district system led to centralized control by an unauthorized elite.¹⁷⁰ To them, the very act of seeking government solutions to school control necessarily leads to a sclerotic bureaucracy.¹⁷¹

If you prioritize a democratic form of education, though, none of these arguments for choice provide a system that will support a rational deliberative democracy. They all put the ability to control the choice of how to educate the children of a community in a smaller group of hands than the larger community. What is the democratic case?

C. *Democracy and Education*

Does a democratic state need to provide education? If so, who should have the authority to determine what that education should look like? Finally, how do we figure out where that authority lies in the federal system of the U.S.? The first question is fairly straightforward with a lot of agreement, while the latter questions are complex with significant disagreement. It is impossible in this Article to do justice to these questions, though I sketch some answers here.

On the first question, in addition to freedom of speech, association, and religion, a fair democratic process demands the state ensure some level of education to all individuals, particularly children.¹⁷² Why should this be true? At an elemental level, for citizens to participate in our democratic governing process, some basic level of education is

168. *Id.* at 89–90.

169. *E.g.*, CHUBB & MOE, *supra* note 162, at 32–33.

170. *See id.* at 35–38.

171. *Id.* at 43–44.

172. *See* BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 28 (1980); THOMAS CHRISTIANO, *THE RULE OF THE MANY: FUNDAMENTAL ISSUES IN DEMOCRATIC THEORY* 295 n.1 (1996); GUTMANN, *supra* note 135, at 45; AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 31 (1996); *see also* Orit Ichilov, *Privatization and Commercialization of Public Education: Consequences for Citizenship and Citizenship Education*, 44 *URB. REV.* 281, 284 (2012).

necessary. “[S]chools are the nurseries that enable democracy to persist.”¹⁷³ Empirical evidence demonstrates a strong correlation between a more educated society and democracy.¹⁷⁴ The U.S. mandates education for primary and secondary school levels,¹⁷⁵ suggesting a norm that the state ought to provide this education. The Supreme Court also recognizes the importance of schools in shaping the democratic character of U.S. citizens.¹⁷⁶

Most see primary and secondary education provided throughout the state as a public good (or at least a quasi-public good);¹⁷⁷ therefore, the state should ensure this education is broadly provided.¹⁷⁸ Education can also be thought of as an “impure public good[] . . . [with] secondary benefits.”¹⁷⁹ Though there are complex definitions, by a public good I mean one in which “one person’s consumption of the good does not reduce its availability to others (i.e., the good is nonrival or in joint supply); and no one can be excluded from the good (i.e., the good is nonexclusive).”¹⁸⁰ Because of the significant problem of free riders associated with public goods, most accept the idea that,

173. Ichilov, *supra* note 172, at 283.

174. Edward L. Glaeser, Giacomo A.M. Ponzetto & Andrei Schleifer, *Why Does Democracy Need Education?*, 12 J. ECON. GROWTH 77, 79 (2007).

175. See KATZ, *supra* note 43, at 11, 17 (describing the long history of compulsory education laws in the U.S. dating back to as early as the Massachusetts Bay Colony).

176. *Ambach v. Norwick*, 441 U.S. 68, 76 (1979).

177. I appreciate that education offered by one school is surely not a public good as I define it in the text. However, if you think of the positive good that comes from the state ensuring some level of education in the broader public, then an educated populace able to engage in self-government becomes a public good that, once available, is available to all and one person’s consumption of it does not deprive others of consuming it as well.

178. Ichilov, *supra* note 172.

179. See Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1398 (1988).

180. *Id.* at 1397; accord BRIGHOUSE, *supra* note 153, at 41 (noting definitions commonly include seven different features: “Jointness in Supply,” “Non-excludability,” “Jointness in Consumption,” “Nonrivalness,” “Compulsoriness,” “Equality,” and “Indivisibility”); Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 387 (1954) (defining “collective consumption goods . . . which all enjoy in common in the sense that each individual’s consumption of such a good leads to no subtraction from any other individual’s consumption of that good”).

generally, public goods ought to be provided by the state.¹⁸¹ Furthermore, people are not born with the ability to engage in deliberation; it is incumbent upon a state interested in democratic self-preservation to teach these skills.¹⁸² Complicating the case, however, is the fact that education provides other skills too, such as how to live a good life and become gainfully employed.¹⁸³

Not everyone bases the obligation of the state to provide education on the fact that it is, in part, a public good. Harry Brighouse, for instance, argues the state must provide education “to deliver on obligations that all adults in a society have to each of the children in that society.”¹⁸⁴ Rather than education being a public good, the state must provide it because everyone has a moral obligation to provide the private right of each child to education.¹⁸⁵ This argument shows the problem with the choice perspective’s claim that parents have the sole right to determine how their children are educated. Parents are not the only people who have a legitimate and important interest in the education of their children. The community also has a significant interest in that endeavor.

The next question—who should be authorized to determine what education should look like—is more controversial. Aristotle suggested a simple, general guide to what education should look like: “The citizen should be moulded to suit the form of government under which he lives.”¹⁸⁶ Most approaches to education can be seen through that lens. Gutmann provides a useful way of evaluating classic answers to this question through this lens.¹⁸⁷ She describes three iconic education theory families describing normative approaches to education policy from the perspective of a government: “the *family state*, the *state of*

181. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 417–18 (1956). Still, from an optimal economic standpoint, it is hard to determine the correct amount of expenditure for that good. *Id.*

182. See GUTTMAN, *supra* note 135, at 50–52.

183. See *id.* at 51; FRIEDMAN, *supra* note 166, at 88.

184. BRIGHOUSE, *supra* note 153, at 40.

185. *Id.* at 45.

186. ARISTOTLE, *POLITICS* 320 (Benjamin Jowett trans., Random House 1943).

187. See GUTTMAN, *supra* note 135, at 22–41.

families, and the *state of individuals*.”¹⁸⁸ She compares these with a democratic state of education.¹⁸⁹

A *family state* theorist believes it is possible to determine what justice and virtue are and then to impart that through education in order to build a harmonious society.¹⁹⁰ Plato forcefully advanced this theory of education.¹⁹¹ The *family state* holds that “[c]itizens of a well-ordered family state learn that they cannot realize their own good except by contributing to the social good, and they are also educated to desire only what is good for themselves and their society.”¹⁹² The authority for determining educational policy rests with the state in this theory.¹⁹³ Anyone who comes from a pure *family state* perspective is unlikely to support choice as it is incumbent upon the state, through whatever process it uses to determine policy, to choose what will be taught in primary and secondary education.

The *state of families* theorist believes parents know best how to educate their child.¹⁹⁴ Gutmann suggests John Locke can be most clearly identified with this notion.¹⁹⁵ Locke believed parents were the “best protectors of their children’s . . . interests.”¹⁹⁶ There is a sense that parents have a “natural right” or some conventional right to direct the education of their own children.¹⁹⁷ Thus, authority over education remains in the hands of parents in this theory. Proponents who argue for choice from the perspective of the right of a parent to control their child’s education find a normative home in the *state of families*.

188. *Id.* at 22.

189. *See id.*

190. *See* Hyman Kuritz, *Benjamin Rush: His Theory of Republican Education*, 7 HIST. EDUC. Q. 432, 440 (1967) (describing the republican theory espoused by Benjamin Rush arguing “that a republican society could not long exist without the widest possible dissemination of public virtue”).

191. GUTTMAN, *supra* note 135, at 23.

192. *Id.*

193. *Id.*

194. *Id.* at 28.

195. *See id.*

196. *Id.*

197. GUTTMAN, *supra* note 135, at 28–29.

The *state of individuals* finds its home in liberal democracy and the thought of John Stuart Mill.¹⁹⁸ It starts with a critique of the *state of families*, namely that children are not the property of their parents.¹⁹⁹ The fundamental principle of this state is to not bias individuals toward any one path; students should be allowed to choose their own path.²⁰⁰ In this theory, authority for determining content is placed in the hands of those who can create a system that will not bias children in any direction.²⁰¹ Instrumental choice theorists find their normative home in the *state of individuals*.

Gutmann proposes a democratic state of education as superior to the other three.²⁰² In this deliberative democratic approach to education, “democracy is not confined to the sphere of political decision-making but extends to participation in the ‘construction, maintenance and transformation’ of all forms of social and political life.”²⁰³ Or as John Dewey says, “democracy is more than a form of government; it is primarily a mode of associated living, of conjoint communicated experience.”²⁰⁴ This case is thus most deeply connected to a democratic tradition. In determining what education should look like, the authority for determining education in this system depends upon a fair democratic procedure. How do you best include the voices of the communities who have an interest in shaping the primary and secondary education systems?

Key to the case for the democratic state is that our primary and secondary education should cultivate character, including moral

198. *Id.* at 33.

199. *Id.* at 33–34.

200. *Id.* at 34; see Ólafur Páll Jónsson, *Desert, Liberalism and Justice in Democratic Education*, 7 *EDUC., CITIZENSHIP & SOC. JUST.* 103, 104 (2012) (noting “the state should be neutral with respect to different philosophies of life”).

201. GUTTMAN, *supra* note 135, at 34.

202. *Id.* at 41.

203. Gert Biesta & Robert Lawy, *From Teaching Citizenship to Learning Democracy: Overcoming Individualism in Research, Policy and Practice*, 36 *CAMBRIDGE J. EDUC.* 63, 65 (2006) (quoting BASIL BERNSTEIN, *PEDAGOGY, SYMBOLIC CONTROL, AND IDENTITY* xxi (Rowman & Littlefield Publishers, Inc. 2000) (1996)).

204. JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 87 (Free Press 1966) (1916).

character.²⁰⁵ To become a part of our democratic order, students ought to be taught to participate in “conscious social reproduction,” the sharing of responsibility for shaping who we are.²⁰⁶ “As citizens, we aspire to a set of educational practices and authorities of which the following can be said: these are the practices and authorities to which we, acting collectively as a society, have consciously agreed.”²⁰⁷ This collective approach to the shaping of education necessarily rejects the three theoretical answers given above. The *family state* would place the authority in a centralized government with people who understand what a good life looks like.²⁰⁸ In today’s pluralistic world, the idea that a centralized state could specifically determine a good life that benefits the entirety of the community is strained. The *state of families* would determine that parents decide for their children.²⁰⁹ Though this might recognize some pluralistic value, it fails to recognize that children do not belong only to the community of their family but also to the state. The *state of individuals* would take a position of scrupulous neutrality so children are not biased against any particular position—that is, it would provide no particular moral compass.²¹⁰ The problem with this liberal approach is it prioritizes some matters by default, such as the language through which the teaching takes place, but more fundamentally, it ultimately propounds freedom of choice as the most important value and that is a value in itself that the individual state is claiming is ultimate over any other virtue.²¹¹ Each of these fails necessarily because these approaches do not allow people in the community who have a right to a role in shaping their own life to shape education, and this is a critical piece of a democratic order.

205. GUTTMAN, *supra* note 135, at 41.

206. *Id.* at 39. There are strong criticisms of Gutmann’s “conscious social reproduction.” See, e.g., David Steiner, *Political Theory, Educational Practice*, 24 PS: POL. SCI. & POL. 498, 498 (1991); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 941 n.15 (1996).

207. GUTTMAN, *supra* note 135, at 39.

208. See *id.* at 42.

209. See *id.*

210. See *id.*

211. See *id.* at 43.

This still does not answer a significant question: Which community should control which decisions? With a federal government, state government, and multiple local jurisdictions, picking the right place is difficult. A deliberative democratic approach would recommend that there be substantial local control.²¹² Such a choice allows more voice rather than less in how policy is set. Indeed, if a major focus of primary and secondary education is teaching “conscious social reproduction,”²¹³ then real involvement at the local level is important and a significant feature. This allows more people to practice, and more students to witness, the act of “conscious social reproduction.”²¹⁴ That said, there are legitimate national and state democratic interests in determining school policy.²¹⁵ Ideally, federal and state level governments could help set larger common culture matters and also help ensure principles like nondiscrimination and non-domination are maintained to help foster an inclusive democratic culture.

A conundrum for the democratic educational theorist is that, although educational policy ought to be set by a democratic process, the majority setting that policy ought not “control the content of classroom teaching so as to repress reasonable challenges to dominant political perspectives.”²¹⁶ Gutmann suggests we allow teachers and teacher unions to play a role in establishing normal boundaries for the students so as not to have a domination of the mind of the student by whatever majority is currently in control of the democratic state.²¹⁷ Gutmann argues that building a democratic theory of education requires parents and the state to “cede . . . authority to professional educators” to ensure a principle of nonrepression.²¹⁸ “Nonrepression is therefore compatible with the use of education to inculcate those character traits, such as honesty, religious toleration, and mutual

212. *See id.* at 73–74.

213. *See* GUTTMAN, *supra* note 135, at 39.

214. *Id.*

215. Over the past years we have seen the battle between federal and state control go back and forth from one to the other. *See* Michael Heise, *From No Child Left Behind to Every Student Succeeds: Back to a Future for Education Federalism*, 117 COLUM. L. REV. 1859, 1861–62 (2017).

216. GUTTMAN, *supra* note 135, at 75.

217. *Id.* at 76.

218. *Id.* at 44.

respect for persons, that serve as foundations for rational deliberation of differing ways of life.”²¹⁹ Additionally, nondiscrimination in the operation of education is key to democratic education—no student can be excluded from the education system based on illegitimate grounds.

What does the democratic school itself look like? Should we allow democracy to be a part of the school itself? Such a school might be like Dewey conceived: “a miniature community, an embryonic society. . . . The aim is not economic value of the products, but the development of social power and insight.”²²⁰ Dewey saw education as critical to creating and maintaining a healthy democracy.²²¹ “[D]emocracy is not confined to the sphere of political decision-making but extends to participation in the ‘construction, maintenance and transformation’ of all forms of social and political life.”²²² The school itself would obviously need discipline of some sort, but there needs to be a balance between that discipline and the opportunity for students to learn to become a part of our participatory political system and learn to engage in “conscious social reproduction.”²²³ In its own way, while schools need not tell students what a good life is, they need to learn the basics of a democratic order, which begins with respect for all individuals, no matter race, gender, or sexual orientation, and an openness to hearing other views.²²⁴ These are moral choices, and they are key to making a democratic order work.

219. *Id.*

220. JOHN DEWEY, *THE SCHOOL AND SOCIETY AND THE CHILD AND THE CURRICULUM* 18 (Univ. Chi. Press 1990).

221. *See* DEWEY, *supra* note 204.

222. Biesta & Lawy, *supra* note 203 (quoting BERNSTEIN, *supra* note 203).

223. *See* GUTTMAN, *supra* note 135, at 39.

224. *See* Elizabeth Anderson, *Fair Opportunity in Education: A Democratic Equality Perspective*, 117 *ETHICS* 595, 596 (2007) (arguing we need to provide education to train leaders to be “systematically responsive to the interests and concerns of people from all walks of life”).

IV. TAX EXEMPTION, EDUCATION, BENEFITS, THEORY

The U.S. has long provided governmental benefits associated with activities our society considers charitable.²²⁵ Congress exempted charitable organizations from the income tax and included education as a favored purpose in the early versions of that tax.²²⁶ In 1917, Congress allowed charitable organization donors to deduct charitable contributions from their income tax.²²⁷ Section 501(c)(3) of the Code opens the door to such benefits today; it describes corporations “organized and operated exclusively for religious, charitable, scientific, . . . or educational purposes,” provided “no part of the [organization’s] net earnings . . . inures to the benefit of any private shareholder or individual.”²²⁸ A charitable organization “must serve a public purpose” and cannot operate “contrary to established public policy.”²²⁹ An organization is “‘operated exclusively’ for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in [§] 501(c)(3).”²³⁰ In our common law heritage, the promotion of education has long been recognized as a charitable purpose under charitable trust law.²³¹ The IRS and U.S. Department of Treasury (Treasury) regulations tell us that education in § 501(c)(3) is used in

225. See JAMES J. FISHMAN, STEPHEN SCHWARZ & LLOYD HITOSHI MAYER, *NONPROFIT ORGANIZATIONS: CASES & MATERIALS* 21–22 (Found. Press 5th ed. 2015).

226. Congress first included education in the income tax enacted in 1894. Act of Aug. 27, 1894, ch. 349, § 32, 28 Stat. 509, 556 (1894). It also included education in the Corporate Excise Tax Act of 1909, and later in the 1913 income tax. Corporate Excise Tax Act of 1909, ch. 6, § 38, 36 Stat. 11, 113 (1909); Revenue Act of 1913, ch. 16, § 2(G), 38 Stat. 114, 172 (1913); see Herman T. Reiling, *Federal Taxation: What Is a Charitable Organization?*, 44 A.B.A. J. 525, 525 (1958).

227. War Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917). Today, donors deduct charitable contributions under 26 U.S.C. § 170. 26 U.S.C. § 170(a)(1).

228. 26 U.S.C. § 501(c)(3).

229. *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983).

230. *Nationalist Movement v. Comm’r*, 102 T.C. 558, 576 (1994) (quoting Treas. Reg. § 1.501(c)(3)–1(c)(1) (as amended in 1990)), *aff’d*, 37 F.3d 216 (5th Cir 1994). Operating “‘exclusively’ for tax-exempt purposes . . . does not mean . . . ‘solely’ or ‘absolutely without exception.’” *Id.* (quoting *Church in Bos. v. Comm’r*, 71 T.C. 102, 107 (1978)).

231. The Statute of Charitable Uses 1601, 43 Eliz. 1 pmbl. (including the “Maintenance of . . . Schooles of Learninge, Free Schooles[,] and Schollers in Universities” as purposes for a charitable trust).

its normal common law charitable trust sense.²³² This Part examines the requirements for qualifying as a charitable educational organization, the tax benefits of that status, and the theories propounded to support providing these benefits through the Code.

A. *Education as a Charitable Purpose*

Treasury regulations describe two primary types of educational organizations: (1) those that instruct “the individual for the purpose of improving or developing [the individual’s] capabilities” and (2) those that instruct “the public on subjects useful to the individual and beneficial to the community.”²³³ This Article focuses on the first and not the latter (and more controversial) second organization.²³⁴ Examples of organizations that further education include “a primary or secondary school, a college, or a professional trade school” with “a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students”; an organization that presents “public discussion groups, forums, panels, lectures, or other similar programs” (including those on television or radio); an organization that presents course of instruction through television or radio; or “[m]useums, zoos, planetariums, symphony orchestras, [or] other similar organizations.”²³⁵ For purposes of this Article, only the non-controversial primary and secondary education is at issue.

There are some limits to the bounds of education. Conducting dog training classes is not tax-exempt, nor is providing administrative

232. See Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended in 2017); Rev. Rul. 71-447, 1971-2 C.B. 230, 230.

233. Treas. Reg. § 1.501(c)(3)-1(d)(3) (as amended in 2017).

234. See, e.g., *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1032–33 (D.C. Cir. 1980) (providing an example of a case that appealed the IRS’s decision that the entity at issue was not an educational organization under the regulations’ definition). For a discussion of the history of the controversy see generally Tommy F. Thompson, *The Availability of the Federal Educational Tax Exemption for Propaganda Organizations*, 18 U.C. DAVIS L. REV. 487 (1985). The IRS later issued a revenue procedure to adopt clearer rules for determining whether organizations met the standard of educational. Rev. Proc. 86-43, 1986-2 C.B. 729, 729.

235. Treas. Reg § 1.501(c)(3)-1(d)(3)(ii) (as amended in 2017).

services to home schooling parents.²³⁶ An organization that primarily conducts a commercial enterprise but engages in educational activities for about 15% of its time does not qualify.²³⁷ Still, the general purpose is broad.²³⁸

Some call education an “inherently charitable” purpose.²³⁹ This means that an organization that promotes education typically need not show that it provides services for free or at low cost to individuals who might not be able to afford the services.²⁴⁰ There is no “charity care” requirement for education.²⁴¹ An educational organization may be ineligible for exemption if it allows its earnings to inure to those who control the organization, operates for the private benefit of some party, or violates public policy.²⁴²

How do these ideas play in the charter school context? The IRS mostly finds that nonprofit charter schools meet the basic requirements of § 501(c)(3).²⁴³ These are nonprofit organizations engaged in education and thus generally inherently charitable. Indeed, the IRS Office of Chief Counsel argued that a nonprofit CMO itself met the requirements of § 501(c)(3), citing to the inherently educational nature of the activity.²⁴⁴ The IRS was worried that the organization might be

236. I.R.S. Priv. Ltr. Rul. 2011-17-035 (Apr. 29, 2011); I.R.S. Priv. Ltr. Rul. 2015-45-031 (Nov. 6, 2015).

237. I.R.S. Priv. Ltr. Rul. 2014-45-018 (Nov. 7, 2014).

238. *See id.* (referencing a case from the U.S. Court of Federal Claims that noted that “education is a broad concept”).

239. *E.g.*, Lloyd Hitoshi Mayer, *The “Independent” Sector: Fee-for-Service Charity and the Limits of Autonomy*, 65 VAND. L. REV. 51, 101 (2012).

240. *See id.* at 101–03.

241. *See, e.g.*, *Cap. Gymnastics Booster Club, Inc. v. Comm’r*, 106 T.C.M. (CCH) 154 (2013) (discussing the need for a charity to qualify to provide services to individuals who “were actually poor, disadvantaged, in financial distress, or otherwise members of any charitable class”); *Am. Campaign Acad. v. Comm’r*, 92 T.C. 1053, 1076 (1989) (“[P]etitioner must establish that the Republican entities and candidates benefiting from the employment of its graduates are members of a charitable class, and within that charitable class do not comprise a select group of members earmarked to receive benefits.”).

242. Before the *Bob Jones University* decision, the IRS issued a revenue ruling providing that a charitable school had to have a “racially nondiscriminatory policy” to qualify under § 501(c)(3). Rev. Rul. 71-447, 1971-2 C.B. 230, 230–31; *Bob Jones Univ. v. United States*, 461 U.S. 574, 579 (1983). Today, charitable schools must fill out Schedule E to the Form 990 to prove that they have a racially nondiscriminatory policy. IRS, U.S. DEP’T OF TREASURY, SCHEDULE E, FORM 990, SCHOOLS (2022), <https://www.irs.gov/pub/irs-pdf/f990se.pdf> [<https://perma.cc/SB4J-UTKA>].

243. *See* Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii), (d)(3) (as amended in 2017).

244. I.R.S. Tech. Adv. Mem. PMTA-2007-00925 (July 9, 2007).

too commercial by focusing on providing services for a fee like a for-profit organization.²⁴⁵

The IRS typically denies or revokes a charter school's exemption when it finds the charter was established to profit those who control the school.²⁴⁶ It often will allege that the charter was operated for too much private benefit.²⁴⁷ An organization is not organized or operated exclusively for exempt purposes unless it serves a public rather than a private interest.²⁴⁸ "Private benefits within the scope of the prohibition may include an advantage, profit, fruit, privilege, gain, or interest."²⁴⁹ In its training materials on private benefit, the IRS finds a charter school managed by an EMO will not qualify for exemption where the people who control the charter also control the EMO and provide strongly EMO beneficial contract terms.²⁵⁰ In *Rameses School of San Antonio, Texas v. Commissioner*, the IRS revoked a charter school's status based on private benefit and inurement.²⁵¹ The charter's founder and CEO was able to adjust the budgets without any oversight from the board, her compensation was in excess of the board-approved salary, there was nonexistent support of expenditures to her, and the school leased property from the founder.²⁵² Such revocations or denials are rare.

Charter schools involve complex entity relationships, such as a for-profit management company operating the nonprofit school.²⁵³ Though such arrangements could implicate impermissible inurement,

245. *Id.*

246. *See* Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 2017).

247. *Id.*; e.g., *Rameses Sch. of San Antonio v. Comm'r*, 93 T.C.M. (CCH) 1092, 1094 (2007).

248. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 2017).

249. *Rameses*, 93 T.C.M. (CCH) at 1095.

250. Andrew Megosh, Lary Scollick, Mary Jo Salins & Cheryl Chasin, *Private Benefit Under IRC 501(c)(3)*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION 135, 149–51 (2001), <https://www.irs.gov/pub/irs-tege/eotopich01.pdf> [<https://perma.cc/L72H-MGST>].

251. *Rameses*, 93 T.C.M. (CCH) at 1097.

252. *Id.* The commissioner of education directed the Texas Education Agency to conduct a financial audit and brought a proceeding before the Texas State Board of Education (SBOE) against the school because of financial mismanagement. *Id.* at 1093. The SBOE revoked Rameses charter. *Id.* at 1093–94.

253. Morley, *supra* note 86, at 1790.

the IRS has long accepted that “a parent corporation and its subsidiary are separate taxable entities so long as the purposes for which the subsidiary is incorporated are the equivalent of business activities or the subsidiary subsequently carries on business activities.”²⁵⁴ This separate entity relationship generally holds in the tax-exempt world as well.²⁵⁵ This means the IRS will disregard the corporate entity when the “corporation or transaction involved was a sham or fraud without any valid business purpose, or a finding of a true agency or trust relationship between the entities.”²⁵⁶ This is “an evidentiary burden that is not easily overcome.”²⁵⁷

However, when two entities, one nonprofit and one for-profit, join to engage in a common enterprise, the IRS will look at that relationship more closely. Typically, these joint ventures are considered partnerships for tax purposes.²⁵⁸ This means the joint venture’s activity is assumed to be the same as that of the nonprofit.²⁵⁹ Generally, two questions arise: (1) is the exempt status of the charity negatively impacted in some way, and (2) does the activity trigger the unrelated business income tax?²⁶⁰ The unrelated business income tax imposes tax on the income from a trade or business that is not substantially related to a charity’s exempt purpose.²⁶¹ The IRS and courts have found that, under certain circumstances, a joint venture will neither harm the nonprofit’s charitable status nor generate unrelated business taxable income.²⁶² For instance, the IRS found no problems with a

254. *For-Profit Subsidiaries of Tax-Exempt Organizations*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION (1986), <https://www.irs.gov/pub/irs-tege/eotopice86.pdf> [<https://perma.cc/2AKS-CV67>]; *accord* *Moline Props., Inc. v. Comm’r*, 319 U.S. 436, 438–39 (1943).

255. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 86-25-078 (Mar. 27, 1986) (providing that a “wholly-owned taxable subsidiary cannot be attributed to [the letter receiver] for purposes of determining whether [the letter receiver’s] exempt status is jeopardized”). *But see* I.R.S. Priv. Ltr. Rul. 2020-05-020 (Jan. 31, 2020) (providing that operation of a political action committee by a subsidiary will constitute participation or intervention in a political campaign by the taxpayer within the meaning of § 501(c)(3)).

256. I.R.S. Gen. Couns. Mem. 39,326 (Jan. 17, 1985).

257. *Id.*

258. *See* Rev. Rul. 98-15, 1998-12 I.R.B. 718, 720–21; 26 U.S.C. § 761(a).

259. *See* Rev. Rul. 98-15, 1998-12 I.R.B. 718, 718.

260. *See* Rev. Rul. 2004-51, 2004-1 C.B. 974.

261. *See generally* 26 U.S.C. §§ 512–514.

262. Rev. Rul. 98-15, 1998-12 I.R.B. 718, 721–22; *Plumstead Theatre Soc’y, Inc. v. Comm’r*, 74 T.C. 1324, 1328 (1980), *aff’d*, 675 F.2d 244 (9th Cir. 1982).

charitable university entering into a joint venture with a for-profit entity to form a limited liability company (LLC) to create video trainings for teachers.²⁶³ Each party held a 50% interest in the LLC, and each party was allowed to appoint three board members.²⁶⁴ Significantly to the IRS, the university exclusively controlled the educational material, whereas the nonexempt organization controlled the location of the trainings.²⁶⁵ This ruling described what is often referred to as an ancillary joint venture²⁶⁶—where a charity enters into a side relationship with a for-profit to carry on some small (or ancillary) part of its operation.²⁶⁷

Sometimes, however, a nonprofit puts its entire operation into a joint venture. Such transactions between hospitals are referred to as “whole hospital joint ventures.”²⁶⁸ The IRS has approved of a nonprofit hospital putting all of its assets into a joint venture and operating a hospital with a for-profit partner.²⁶⁹ The IRS found that this neither ended the charitable status of the nonprofit nor generated unrelated business taxable income. It found that the nonprofit would continue to meet its obligations as a charitable organization as long as “participation in the partnership furthers a charitable purpose, and the partnership arrangement permits the exempt organization to act exclusively in furtherance of its exempt purpose and only incidentally for the benefit of the for-profit partners.”²⁷⁰ Where the nonprofit cedes effective control of its charitable activity, courts have found the nonprofit does not maintain its exempt status.²⁷¹

263. Rev. Rul. 2004-51, 2004-1 C.B. 974.

264. *Id.*

265. *Id.*

266. *See id.*; Nicholas A. Mirkay, *Relinquish Control! Why the IRS Should Change Its Stance on Exempt Organizations in Ancillary Joint Ventures*, 6 NEV. L.J. 21, 24 (2005).

267. Janet James Mahon, *Joint Ventures Between Non-Profit and For-Profit Organizations St. David's Case—Worthy Destination, but Road Under Construction*, 56 TAX LAW. 845, 851–52 (2003).

268. *Id.* at 852.

269. *See* Rev. Rul. 98-15, 1998-12 I.R.B. 718.

270. *Id.*

271. *E.g.*, *Redlands Surgical Servs. v. Comm'r*, 113 T.C. 47, 93, 97 (1999), *aff'd*, 242 F.3d 904 (9th Cir. 2001).

Appreciating the legal concept of private foundations is useful to understand the tax law benefits associated with the charter school ecosystem. Within the charitable world, there are public charities and private foundations. On one hand, public charities tend to have a large public constituency to influence the direction of the charity. Private foundations, on the other hand, are often characterized as having one very wealthy family who makes the primary donation to the organization and also controls the organization.²⁷² The Bill and Melinda Gates Foundation and the Michael Bloomberg Family Foundation are good examples.²⁷³ Because of the control of a charity by a wealthy family, Congress imposes significant restrictions on the activities of private foundations compared to public charities and imposes greater limitations on the ability to donate to them as well.²⁷⁴

Charter schools automatically qualify for the more beneficial public charity status because they are considered “educational organization[s]” under § 170 of the Code.²⁷⁵ This fact is important in itself for benefits available to it, further discussed in Part IV.B. But the private foundation world is important to understanding the charter story as well. Private foundations are exempt from tax as organizations described in § 501(c)(3), just like a charter school typically is, but the primary activity most private foundations engage in is grantmaking.²⁷⁶ Thus, a wealthy donor can contribute substantial dollars to a private foundation and then make grants to carry out charitable activities. Indeed, the evidence is that private foundation grants are a big part of

272. 26 U.S.C. § 509(f)(2). There are four avenues to be described as “other than” a private foundation. § 509(a)(1)–(4). One of the primary ways of meeting this requirement is to have one third of organization support come from the public. See § 509(a)(2)(B).

273. See John J. Chung, *Rethinking the Role of NGOs in an Era of Extreme Wealth Inequality: The Example of the Bill & Melinda Gates Foundation*, 26 ROGER WILLIAMS U. L. REV. 1, 3–4 (2021); *About Us*, BLOOMBERG PHILANTHROPIES, https://www.bloomberg.org/about/?gclid=EAIaIQobChMIhtjWhYuY_QIVMxXUAR0C7ApWEAAYA_SABEgJe9fD_BwE [https://perma.cc/VAK3-LKC5].

274. See 26 U.S.C. §§ 4940–4946; James J. Fishman, *The Private Foundation Rules at Fifty: How Did We Get Them and Do They Meet Current Needs?*, 17 PITT. TAX REV. 247, 248 (2020).

275. Educational organizations normally maintain a regular faculty, curriculum, and a regularly enrolled body of students attending at the place where the organization regularly carries on educational activities. 26 U.S.C. §§ 170(b)(1)(A)(ii), 509(a)(1).

276. See *Private Foundations*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/charitable-organizations/private-foundations> [https://perma.cc/49XW-Q6SF] (Apr. 24, 2023).

the charter story. For example, recent scholarship shows that wealthy private foundations, such as the Bill and Melinda Gates Foundation, the Eli and Edythe Broad Foundation, the W.K. Kellogg Foundation, and the Ford Foundation, have made big grants in education policy in local areas to move education systems towards charter school models.²⁷⁷

In conclusion, from the perspective of current law, as long as a charter educates in a primary and secondary educational context, it should obtain and maintain tax-exempt status. The only way for a charter to lose that status is for someone to be obviously running it to benefit themselves while engaging in financial mismanagement at the same time. The IRS may look at charters run by for-profit EMOs more closely but are highly likely to find those charters as exempt, except in egregious circumstances. As long as the charter enters a contract with the for-profit management company to run the school and exercises oversight, it is unlikely that the IRS will apply joint venture rules requiring the charity board to make the decisions regarding charitable activity, despite the fact that the management company is making most of the educational decisions.

B. Benefits of Classification as Charitable

Educational organizations that qualify as charitable are allowed many federal tax benefits, such as exemption from income tax, the ability to receive tax deductible contributions, and the ability to issue tax-exempt bonds.²⁷⁸

First, a tax-exempt entity pays no tax on its income generally. With a current corporate tax rate at 21%,²⁷⁹ if the charter school generated

277. See RECKHOW, *supra* note 11, at 39; MEGAN E. TOMPKINS-STANGE, POLICY PATRONS: PHILANTHROPY, EDUCATION REFORM, AND THE POLITICS OF INFLUENCE 2 (2016); CUNNINGHAM, *supra* note 22, at 43.

278. See generally 26 U.S.C. §§ 501, 170, 103.

279. Garrett Watson, *Combined Federal and State Corporate Income Tax Rates in 2022*, TAX FOUND. (Sept. 27, 2022), <https://taxfoundation.org/combined-federal-state-corporate-tax-rates-2022/> [https://perma.cc/6KMV-FNF8].

\$100,000 in income in excess of its costs, it would not owe corporate income tax on that activity, generating tax savings of \$21,000 that it could put back into its operation. The charity benefits from this state of affairs only if it generates revenue in excess of expenses. To the extent the charity has such earnings, it arguably receives a benefit from the government equivalent to the tax rate times the earnings.

The Supreme Court has stated that exemption amounts to a subsidy to the organization.²⁸⁰ The determination that exemption is a subsidy is not universally accepted.²⁸¹ It depends upon whether we believe a charity ought to pay tax on its corporate income. The most common reason for taxing corporations is to apply a tax to the corporation's shareholders.²⁸² Because charities have no shareholders and normally no one who appears to be a shareholder, we might contend we ought not tax charities in a normal income tax structure.²⁸³ However, there are other reasons we might apply a tax upon a corporation such as to regulate corporate manager power.²⁸⁴ Daniel Halperin has generally concluded that exemption is not a subsidy except in the case of investment income.²⁸⁵ I discuss more about theories of exemption below in Part IV.C.

Second, such organizations are able to accept charitable contributions that the donor may deduct from their income tax.²⁸⁶ The

280. *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540, 544 (1983) ("Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income.").

281. *See, e.g.*, Philip T. Hackney, *What We Talk About When We Talk About Tax Exemption*, 33 VA. TAX REV. 115, 118 (2013); Daniel Halperin, *Is Income Tax Exemption for Charities a Subsidy?*, 64 TAX L. REV. 283, 284 (2011) (alluding to the fact that, in most cases, exemption is not a subsidy).

282. *See Fact Sheet: Why We Need the Corporate Income Tax*, CITIZENS FOR TAX JUST. (June 10, 2013, 10:38 AM), <https://ctj.org/fact-sheet-why-we-need-the-corporate-income-tax/> [<https://perma.cc/NXX9-RHHQ>].

283. Hackney, *supra* note 281.

284. *Id.* at 119.

285. Halperin, *supra* note 281.

286. 26 U.S.C. § 170. Congress adopted the charitable contribution deduction in 1917. War Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917). Such contributions can come from individuals or corporations. § 170(b). Individuals traditionally have been allowed to deduct up to 50% of their

Joint Committee on Taxation (JCT) estimates that from 2020 to 2024 the charitable contribution deduction for educational organizations will cost the government about \$41.6 billion.²⁸⁷ Because of high standard deductions from the federal income tax, generally only relatively high-income donors are able to make use of the charitable contribution deduction today.²⁸⁸ The Tax Policy Center estimates that recent legislation reduced the number of households deducting their charitable contributions from 21% of households to about 9% of households.²⁸⁹ There are many requirements to obtain a deduction from a charitable contribution including that the contribution not be part of a quid pro quo and must be to an eligible organization.²⁹⁰ If a donor contributes \$100,000 in cash in the year, the donor can deduct that \$100,000 from their income, assuming their adjusted gross income is sufficient.²⁹¹ Top tax rates work out to around a 40% rate,²⁹² meaning a high-income donor who donates \$100,000 would save approximately \$40,000 in federal income tax for that contribution. Another way of thinking about the matter is that the government makes a \$40,000 matching payment to a high-income donor's \$60,000 contribution. The donor may also save on state taxes.²⁹³ While there is debate about whether tax exemption amounts to a subsidy, the

adjusted gross income and corporations 10%. *Id.* More recently, Congress has, at times, allowed individuals to deduct 60% and even 100% of their adjusted gross income. For a thorough analysis of the rules associated with the charitable contribution deduction, see generally Harvey P. Dale & Roger Colinvaux, *The Charitable Contributions Deduction: Federal Tax Rules*, 68 TAX LAW 331 (2015).

287. STAFF OF JOINT COMM. ON TAX'N, JCX-23-20, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2020–2024, at 31 tbl.1 (2020). If health and education organizations are not included, the JCT estimates charitable contribution will cost over \$208 billion over that same period. *Id.* at 32 tbl.1.

288. Congress significantly raised the standard deduction in the 2017 Tax Act. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11021, 131 Stat. 2054, 2072–73 (2017) (codified at 26 U.S.C. § 63(c)(7)).

289. *TCJA's Impact on Charitable Giving*, *supra* note 15.

290. See *Hernandez v. Comm'r*, 490 U.S. 680, 690 (1989); Treas. Reg. § 1.170A-1(h) (as amended in 2020); Rev. Rul. 67-246, 1967-2 C.B. 104; 26 U.S.C. § 170(c)(2). Note that governmental entities could accept charitable contributions as well. See § 170(c)(1).

291. See generally § 170.

292. See Rev. Proc. 2021-45, 2021-48 I.R.B. 764.

293. See, e.g., *Georgia's Peach Education Tax Credit*, GA. FOUND. FOR PUB. EDUC., https://www.gfpe.org/tax_credit/page/georgias-peach-education-tax-credit [https://perma.cc/457V-Y7R6].

dominant view is that the charitable contribution deduction is a government subsidy for the charity.²⁹⁴

As noted, there are many limitations on the ability to deduct charitable contributions; one such limitation relates to the type of charity involved. There are more beneficial rules for donations to public charities than private foundations.²⁹⁵ Because charter schools automatically qualify for public charity status as “educational organization[s],” donors can obtain a fair market value deduction for a contribution of an appreciated asset—such as giving a share of stock bought long ago to a charter—without recognizing the gain inherent in the property.²⁹⁶ Also, as public charities, private foundations can make grants to the charter without the requirement of exercising expenditure responsibility.²⁹⁷ This makes seeking foundation grants much easier, providing a significant source of funds for the charter school movement. The Walton Family Foundation, for instance, pledged \$1 billion to charters in 2016.²⁹⁸ The education sector received charitable contributions amounting to the second most contributions of the charitable sector—about \$40 billion in 2010—though it was still a distant second compared to religious organizations.²⁹⁹

294. Brian Galle, *The Role of Charity in a Federal System*, 53 WM. & MARY L. REV. 777, 786 (2012). The Supreme Court has stated that it is a subsidy as well. *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540, 544 (1983). That said, some critics, such as William Andrews, have argued that the money set aside for charitable contributions is not really income because it is set aside for collective purposes. William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 346 (1972); see also Johnny Rex Buckles, *The Community Income Theory of the Charitable Contributions Deduction*, 80 IND. L.J. 947, 952 (2005).

295. See Matthew Cadrin, *Private Foundations vs. Public Charities: What's the Difference?*, INVESTOPEDIA, <https://www.investopedia.com/financial-edge/1112/the-difference-between-private-foundations-and-public-charities.aspx> (Mar. 8, 2023) (“Public charities generally have higher donor tax-deductible giving limits than private foundations.”); *EO Operational Requirements: Private Foundations and Public Charities*, INTERNAL REVENUE SERV. [hereinafter *EO Operational Requirements*], <https://www.irs.gov/charities-non-profits/eo-operational-requirements-private-foundations-and-public-charities> [<https://perma.cc/QEW9-G5KA>] (July 15, 2022).

296. See 26 U.S.C. § 170(b)(1)(A)(ii), (b)(1), (e)(1) (noting full fair market value deduction generally not available for appreciated property given to private foundations).

297. § 4945(h).

298. Abby Jackson, *The Walmart Family Has Pledged \$1 Billion to Help a Polarizing Kind of School*, INSIDER (Jan. 19, 2016, 3:24 PM), <http://www.businessinsider.com/walmart-family-pledged-1-billion-to-charter-schools-2016-1> [<https://perma.cc/QT67-2JHP>].

299. James Andreoni & A. Abigail Payne, *Charitable Giving*, in 5 HANDBOOK OF PUBLIC ECONOMICS 1, 10 & fig.4 (Alan J. Auerbach, Raj Chetty, Martin Feldstein & Emmanuel Saez eds. 2013).

Third, charters might be able to issue debt upon which the holders will owe no tax: tax-exempt bonds.³⁰⁰ Depending on the laws of the state, the charter might alternatively issue tax-exempt bonds as a governmental entity or have a § 501(c)(3) conduit issue them on its behalf.³⁰¹ So this benefit is mixed in terms of whether it generates from charitable status or not. Charters nationwide issued over \$10 billion in tax-exempt bonds between 1998 and 2017.³⁰² Some of the benefits for charters include the issuance of this debt at low interest rates, a longer term of borrowing than taxable debt in most instances, and the ability to finance up to 100% of a facility's cost.³⁰³ There are many other tax credits and breaks that might be available to charter operators such as taking advantage of New Market Tax Credits³⁰⁴ and Opportunity Zones.³⁰⁵

Historically, charitable status came with many benefits such as extensive liability protection, extra bankruptcy security/safety, and limited application of antitrust law.³⁰⁶ Charities can accept contributions exempt from trust, gift, and estate taxes, access less complex retirement plans under § 403(b), and remain exempt from the

300. 26 U.S.C. §§ 103, 141, 145; Brian Tumulty, *NABL Paper Examines Bond-Financing of Charter Schools*, BOND BUYER (Sept. 30, 2020, 2:15 PM), <https://www.bondbuyer.com/news/nabl-paper-examines-bond-financing-of-charter-schools> [https://perma.cc/6GUT-ZFMQ].

301. Tumulty, *supra* note 300.

302. EUGENE CLARK-HERRERA, MARC BAUER, TODD BREWER, STEFFI CHAN, DARRIN GLYMPH, KATHRYN GARNER & ALISON RADECKI, PUBLIC CHARTER SCHOOLS BORROWING WITH TAX-EXEMPT BONDS 1 (3d ed. 2019), <https://facilitycenter.publiccharters.org/sites/default/files/2019-04/public-charter-schools-book-3rd-edition-orrick.pdf> [https://perma.cc/R5TR-G5DN].

303. *Id.* at 3, 5.

304. 26 U.S.C. § 45D; see Preston C. Green III, Bruce D. Baker & Joseph O. Oluwole, *Are Charter Schools the Second Coming of Enron?: An Examination of the Gatekeepers that Protect Against Dangerous Related-Party Transactions in the Charter School Sector*, 93 IND. L.J. 1121, 1132 (2018).

305. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 13823, 131 Stat. 2054, 2183-88 (2017) (codified as amended at 26 U.S.C. §§ 1400Z-1 to 1400Z-2); Naaz Modan, *DeVos Pushes Charter School Growth Through Opportunity Zone Initiative*, K-12 DIVE (Oct. 11, 2019), <https://www.k12dive.com/news/devos-pushes-charter-school-growth-through-opportunity-zone-initiative/564812/> [https://perma.cc/ZN7T-2Y2N].

306. Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 FLA. L. REV. 419, 421 & n.3 (1998).

Federal Unemployment Tax Act and the federal gambling tax.³⁰⁷ Additionally, there are many regulatory regimes only accessible to organizations described in § 501(c)(3).³⁰⁸ Often getting that designation from the IRS opens up numerous tax benefits, including state income tax exemption as well as sales and use tax exemptions.³⁰⁹

C. *Theories for Subsidizing Charitable Activity Through Tax Policy*

As noted, there are numerous benefits that are accorded to charitable organizations that qualify as exempt under § 501(c)(3). This Section reviews literature supporting those benefits through tax exemption and the charitable contribution deduction.

1. *Tax Exemption*

Why does Congress exempt organizations that promote charitable purposes from the income tax? Some argue the revenue these organizations generate is not income under an ideal income tax, often identified as “income measurement” theory.³¹⁰ The vast majority, though, view exemption through an efficiency lens as a subsidy provided to generate some good with positive externalities, what may be termed “positive externality” theories.³¹¹ These theorists consider which positive externalities should be furthered by the subsidy.³¹² Finally, some argue that the exemption subsidizes, or should subsidize, civic benefits.³¹³ I will term these “civic benefit” theories.

307. 26 U.S.C. §§ 642, 2055, 2522; *see generally* §§ 3301–3311, 4421(2)(B).

308. *See* § 501(c)(3).

309. *See* Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 301 (1976) (noting that “[t]he practice of exempting . . . nonprofit associations from federal income taxation has persisted”); Mark J. Cowan, *Nonprofits and the Sales and Use Tax*, 9 FLA. TAX REV. 1077, 1079 (2010) (describing how multiple states grant nonprofit organizations “broad exemptions” for sales and use tax).

310. *See* Bittker & Rahdert, *supra* note 309, at 313.

311. Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505, 530–31, 536 (2010).

312. *See id.* at 536.

313. *See infra* note 333 and accompanying text; Rob Atkinson, *Tax Favors for Philanthropy: Should Our Republic Underwrite de Tocqueville’s Democracy?*, 6 WM. & MARY POL’Y REV. 1, 5–6, 9 & n.6 (2014).

Noting that many who designed the exemption from federal income tax believed that nonprofits did not earn profits that should be considered income under the Code, Boris Bittker and George Rahdert argued that charities do not have the ability in most situations to calculate their income for income tax.³¹⁴ To them, donations and charitable gifts to beneficiaries are difficult to conceptualize in an income tax.³¹⁵ The crux of this idea is that no income tax can be owed on a nonprofit's activity. Many scholars have rejected this theory.³¹⁶

Evelyn Brody contends that we exempt charities because we envision them, in part, as sovereign.³¹⁷ Through the sovereignty lens, we can see that the government simultaneously defers to the charitable sector but also looks for ways to reduce its power.³¹⁸ This idea could find a home in the civic benefit theories. But it belongs in the income measurement theory because of the sense that this call has on a charity's income: all income excluded. This idea would fit into the civic benefit bucket as well. The sovereignty view must be based in some conception that value exists in the pluralistic liberal democratic model of allowing different charitable organizations to take different approaches to common problems.³¹⁹

If we assume instead that a charity's income should fall within the corporate income tax, what have scholars suggested justifies the exempt treatment? The traditional theory holds that the state should provide a subsidy because the charitable activity benefits the state.³²⁰

314. See Bittker & Rahdert, *supra* note 310, at 304.

315. *Id.* at 307–08.

316. E.g., Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 *YALE L.J.* 54, 55 (1981).

317. Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 *J. CORP. L.* 585, 586 (1998).

318. *Id.* at 629.

319. See *id.* at 596 (“[T]he advantages of pluralism that flow from having a voluntary sector of charitable organizations operating parallel to our governmental system, a sector able to discover new needs and experiment in providing ways of meeting them in a manner that simply is not possible for government agencies.” (quoting PETER SWORDS, *CHARITABLE REAL PROPERTY TAX EXEMPTIONS IN NEW YORK STATE* 18 (1981))).

320. See Galle, *supra* note 294, at 787.

Henry Hansmann posits market failure theory, a positive externality theory.³²¹ There are some goods and services that are subject to contract failure that the nonprofit form of organization structure, including what he calls the “nondistribution constraint,” does some work to solve.³²² The goal, then, of tax exemption should be to identify those markets for goods and services that are subject to contract failure and solvable through the nonprofit form. Critics argue the economic efficiency argument fails to offer a limiting principle as to what should be subsidized.³²³ Many also criticize the idea that the nondistribution constraint actually solves the problem of trustworthiness.³²⁴ Finally, some criticize the idea that all activities engaged in by charities are ones subject to underinvestment and need to be subsidized.³²⁵

In another positive externality theory, Burton Weisbrod argues that charities provide public goods that neither the government nor the private market can provide.³²⁶ Because a government is likely only to provide goods demanded by the median voter, there will always be dissatisfied voters. The voluntary sector, however, is able to provide some of these types of goods in what is referred to as the “government failure” theory.³²⁷ Weisbrod notes that much governmental activity, including education, typically got its start in the voluntary sector.³²⁸

321. See Hansmann, *supra* note 316, at 69.

322. See Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980).

323. See, e.g., Miranda Perry Fleischer, *Equality of Opportunity and the Charitable Tax Subsidies*, 91 B.U. L. REV. 601, 618–19 (2011). John Colombo and Mark Hall suggest a limiting principle could be found in the number of individuals who actually donate to a cause. See Mark A. Hall & John D. Colombo, *The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption*, 66 WASH. L. REV. 307, 398 (1991); Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO ST. L.J. 1379, 1461–62 (1991). Colombo applied his donative theory to education. John D. Colombo, *Why Is Harvard Tax-Exempt? (And Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 ARIZ. L. REV. 841, 881–87 (1993).

324. See, e.g., Evelyn Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 N.Y.L. SCH. L. REV. 457, 459–60 (1996).

325. See Daniel Shavero, *Assessing the “Contract Failure” Explanation for Nonprofit Organizations and Their Tax-Exempt Status*, 41 N.Y.L. SCH. L. REV. 1001, 1006 (1997).

326. See Burton A. Weisbrod, *Toward a Theory of the Voluntary Nonprofit Sector in a Three-Sector Economy*, in ALTRUISM, MORALITY, AND ECONOMIC THEORY 171 (Edmund S. Phelps ed., 1975), reprinted in THE ECONOMICS OF NONPROFIT INSTITUTIONS: STUDIES IN STRUCTURE AND POLICY 21, 21 (Susan Rose-Ackerman ed., 1986) [hereinafter THE ECONOMICS OF NONPROFIT INSTITUTIONS].

327. See Atkinson, *supra* note 313, at 7.

328. See Weisbrod, *supra* note 326, at 33–34.

Saul Levmore suggests something similar with respect to the charitable contribution deduction, thinking of it as a voting mechanism that allows donors to directly express their preferences for certain goods.³²⁹ Some question the logic of the Weisbrod contention. Weisbrod assumes that there are really only two choices: government provision of public goods or charitable provision.³³⁰ However, Brian Galle points out that in a federal system, citizens can move to a jurisdiction that might provide the public good they want.³³¹ This ability to move makes the subsidization theory inefficient in many circumstances as it incentivizes the person considering a welfare enhancing move to stay instead.³³²

Some authors have argued that the tax-exempt organization system and the charitable contribution deduction should be designed to encourage civic benefits. The classic idea is that charitable tax subsidies support pluralism in a democratic society.³³³ Rob Atkinson asserts government should support altruism.³³⁴ More recently, Atkinson criticized his altruism theory because it focuses too much on the giver and not the receiver; in the process, this problematically

329. Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 404–06 (1998). David Schizer similarly argues that the deduction provides a means of experimentation, allows us to directly carry out constituent goals, and provides people to oversee the nonprofits activity. See David M. Schizer, *Charitable Subsidies and Nonprofit Governance: Comparing the Charitable Deduction with the Exemption for Endowment Income*, 71 TAX L. REV. 665, 676 (2018); David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals*, 62 TAX L. REV. 221, 224 (2009).

330. See Bruce R. Kingma, *Public Good Theories of the Non-Profit Sector: Weisbrod Revisited*, 8 VOLUNTAS 135, 135 (1997).

331. Galle, *supra* note 294, at 791–92.

332. See *id.* at 799.

333. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 609–10 (1983) (Powell, J., concurring) (describing the “role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints”); LESTER M. SALAMON, *AMERICA’S NONPROFIT SECTOR: A PRIMER* 14 (2d ed. 1999); Hon. John W. Gardner, *Foreword to AMERICA’S VOLUNTARY SPIRIT: A BOOK OF READINGS*, at ix, xiii–xv (Brian O’Connell ed., 1983); cf. Hackney, *supra* note 146, at 268–69 (arguing that pluralism does not support exemption for business leagues under 26 U.S.C. § 501(c)(6) because the problem of collective action means many business interests that are most in need will never access the subsidy).

334. See Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 509–10 (1990); Rob Atkinson, *Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Syntheses*, 27 STETSON L. REV. 395, 424 (1997); see also Rob Atkinson, *Re-Focusing on Philanthropy: Revising and Re-Orienting the Standard Model*, 4 WM. & MARY POL’Y REV. 1, 62 (2012).

supports whatever any particular individual supports.³³⁵ He suggests that it is possible to justify the exemption as a celebration of a Toquevillian conception of democracy where the good is defined by individuals giving in and of itself rather than the state.³³⁶ However, he thinks a more reasonable justification lies in a neo-classical republican theory.³³⁷ Under this theory, the state would put an emphasis on providing public goods through the state rather than through charity because of the effective tax such a choice places on the virtuous.³³⁸ He adopts a presumption that you cannot get charitable benefits if the state provides a particular good or service.³³⁹

Brakman Reiser suggests that there is a problem with nonprofits not operating in a democratic manner.³⁴⁰ She encourages us to make boards of nonprofits more democratic.³⁴¹ In a similar civic benefit vein, David Brennen calls for “a contextual diversity theory of the charitable tax exemption.”³⁴² This means that the exemption should not just take the “aim of maximizing efficiency, but also . . . the broader aim of advancing conceptions of justice that go beyond positive economic analysis to include fairness and other ideas important to a democratic society.”³⁴³

Miriam Galston considered civic renewal theories, including (1) encouraging cooperation, (2) self-governance, (3) representation in a pluralist democracy, and (4) increasing the moral character of the larger community.³⁴⁴ The cooperative idea means that the subsidy supports people working in groups to develop a more trusting society

335. Atkinson, *supra* note 313, at 43.

336. *See id.* at 39.

337. *Id.* at 8.

338. *See id.* at 100–01.

339. *Id.* at 105.

340. *See* Dana Brakman Reiser, *Dismembering Civil Society: The Social Cost of Internally Undemocratic Nonprofits*, 82 OR. L. REV. 829, 831 (2003).

341. *See id.* at 829–30.

342. David A. Brennen, *A Diversity Theory of Charitable Tax Exemption—Beyond Efficiency, Through Critical Race Theory, Toward Diversity*, 4 PITT. TAX REV. 1, 54 (2006) (internal quotation marks omitted).

343. *Id.*

344. Miriam Galston, *Civic Renewal and the Regulation of Nonprofits*, 13 CORNELL J.L. & PUB. POL’Y 289, 292 (2004).

that is more able to solve its problems.³⁴⁵ The self-governance idea encourages citizens to actively discuss their collective interests to arrive at democratically authentic solutions.³⁴⁶ The representation in a pluralist democracy hopes to increase citizen engagement within the representative political process.³⁴⁷ Finally, the moral perspective suggests that engaging more people in voluntary organization work can build a stronger moral nation.³⁴⁸ Galston notes that civic renewal goals often conflict with one another and that we must be clear which goal we are trying to further.³⁴⁹ Additionally, she points out that empirical evidence neither supports the moral case nor the cooperative case.³⁵⁰ Finally, Galston is skeptical that much can be done in the civic improvement sphere through tax.³⁵¹

Some claim that there is no reason charitable benefits should be provided only to nonprofit organizations. Anup Malani and Eric Posner argue that for-profit firms are more efficient providers of goods and services and thus ought to have access to charitable benefits when they carry out charitable acts.³⁵² At the least, they argue, the government should allow nonprofits to provide nonprofit managers incentive pay to make nonprofits more efficient providers of goods and services.³⁵³ Nina Crimm similarly suggested jettisoning charitable tax subsidies for hospitals and to instead just incentivize the activities we want from all hospitals.³⁵⁴ A number of scholars pushed back against the Malani and Posner argument. James Hines, Jill Horwitz, and

345. *Id.* at 295–96.

346. *Id.* at 306.

347. *See id.* at 309, 314.

348. *Id.* at 315, 316–17.

349. *Id.* at 324–25.

350. Galston, *supra* note 344, at 356.

351. *See id.* at 403–04.

352. Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017, 2065 (2007).

353. *Id.*

354. *See* Nina J. Crimm, *Evolutionary Forces: Changes in For-Profit and Not-For-Profit Health Care Delivery Structures; A Regeneration of Tax Exemption Standards*, 37 B.C. L. REV. 1, 103–04, 111–12 (1995).

Austin Nichols argued that there is no support for the claim that for-profits are more efficient than nonprofits.³⁵⁵ They additionally argued that allowing for-profits to take advantage of charitable incentives would create a significant opportunity for tax arbitrage.³⁵⁶ Galle argued that we want more low-powered incentives in the charity space because high-powered incentives would eliminate the “warm glow” associated with charity and harm the benefits the charitable regime provides, such as monitoring the provision of public goods.³⁵⁷ This move to allow for-profits access to charitable benefits is deeply related to another movement in this nonprofit/for-profit space. Scholars have long discussed the convergence of for-profit and nonprofit activities.³⁵⁸ Today, there is a burgeoning movement to consider more hybrid forms of charitable activity such as the benefit corporation and the low-profit limited liability company (L3C), entities that are for-profit but also have a social-justice-minded mission.³⁵⁹

2. *Charitable Contribution Theories*

The predominant charitable contribution theory is that the contribution helps to subsidize goods that are public in nature.³⁶⁰ When enacted in 1917, proponents argued it was needed so that the income tax did not suppress charitable giving.³⁶¹ Though exemption from tax is a different policy, much of the tax-exempt theories find their cousin in the theory regarding the charitable contribution. Unlike tax exemption, it is generally accepted that the charitable contribution

355. See James R. Hines Jr., Jill R. Horwitz & Austin Nichols, *The Attack on Nonprofit Status: A Charitable Assessment*, 108 MICH. L. REV. 1179, 1182–84 (2010).

356. *Id.* at 1219.

357. See Brian Galle, *Keep Charity Charitable*, 88 TEX. L. REV. 1213, 1213 (2010).

358. See generally TO PROFIT OR NOT TO PROFIT: THE COMMERCIAL TRANSFORMATION OF THE NONPROFIT SECTOR (Burton A. Weisbrod ed., 1998) (consolidating various works that discuss the for-profit–nonprofit dichotomy).

359. See DANA BRAKMAN REISER & STEVEN A. DEAN, SOCIAL ENTERPRISE LAW: TRUST, PUBLIC BENEFIT, AND CAPITAL MARKETS 52–64 (2017) (providing a background information on the benefit corporation and L3C).

360. See Peter Halfpenny, *Economic and Sociological Theories of Individual Charitable Giving: Complementary or Contradictory?*, 10 VOLUNTAS 197, 200 (1999).

361. 55 CONG. REC. 6728 (1917) (statement of Sen. Henry Hollis).

deduction is a government subsidy.³⁶² This is primarily based on the idea that charitable giving is a form of consumption: the donor gets an exchange value of some sort in return for their giving. Indeed, the JCT includes the cost of the charitable contribution deduction in its annual Tax Expenditure Budget.³⁶³ The biggest challenge the charitable contribution suffers from is the contention that if it is a subsidy, it is an “upside-down” subsidy where, troublingly, the wealthy get more of a subsidy than the poor.³⁶⁴ Under this conception, a charitable contribution is no more than consumption by the wealthy individual, upon which they ought to properly pay income tax. For this reason, many have proposed converting the deduction into a uniform credit instead.³⁶⁵

Like tax-exemption theories, one charitable contribution rationale includes a “base-defining” theory.³⁶⁶ William Andrews argued that a primary purpose of the income tax is to set aside a certain amount of total income for collective consumption and the other part for individual consumption.³⁶⁷ To Andrews, a charitable contribution is not personal consumption and thus ought not be taxed.³⁶⁸ Under these assumptions, there is no “upside-down” subsidy because such money is not properly in the income of the donor. Boris Bittker similarly argued that a charitable contribution could be a “[d]ischarge of [m]oral [o]bligation” and thus legitimately excluded from the donor’s

362. See *supra* note 294 and accompanying text; see also Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an “Ideal” Income Tax and Why They Fit Worse in a Far From Ideal World*, 31 STAN. L. REV. 831, 834 (1979); Stanley A. Koppelman, *Personal Deductions Under an Ideal Income Tax*, 43 TAX L. REV. 679, 707 (1988).

363. See STAFF OF JOINT COMM. ON TAX’N., JCX-23-20, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2020–2024, at 9 (2020) (observing the “ability of donors to such nonprofit organizations to claim a charitable contribution deduction is a tax expenditure, as is the exclusion of income granted to holders of tax-exempt financing issued by charities”).

364. See STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES 134–36 (1973) (describing the charitable contribution deduction as an upside-down subsidy).

365. See Dale & Colivaux, *supra* note 286, at 360–61.

366. Buckles, *supra* note 294, at 979 (quoting Brody, *supra* note 317).

367. Andrews, *supra* note 294, at 320–21; see also Buckles, *supra* note 294, at 952 (arguing that the amounts should be excluded as “community income”).

368. Andrews, *supra* note 294, at 346.

income.³⁶⁹ Mark Gergen criticizes Andrews's theory as a simple "repackag[ing]" of the subsidy theory without providing any reason under which collective goods deserve to be considered not income to a donor.³⁷⁰

Gergen argues that the deduction can be justified on two potential grounds: efficiency and equity.³⁷¹ His efficiency notion has a redistribution qualifier. Gergen argues that contributions to churches do not satisfy efficiency, as the evidence shows many church members would give without regard to the deduction.³⁷² But furthermore, there is likely to be little redistribution within churches because churches tend to have equivalent socio-economic status members.³⁷³ However, from an equity standpoint, Gergen thought contributions to churches could be justified; to Gergen, the church contribution has little direct value to the giver, meaning the giver gets little in economic return for their contribution.³⁷⁴ Gergen seems to mean that the donor gets no consumption value from the contribution and thus ought not be taxed on it.

In an optimal tax analysis of the deduction, meaning that the only factor considered is the efficiency of the deduction, Harold Hochman and James Rodgers applied a Pareto analysis to the deduction and found that where the value of the contribution increases with the marginal rate, it is non-optimal.³⁷⁵ Applying a Lindahl model, where the goal is to find the right tax to apply to determine the benefit each person gets from the collective good, they argued that a subsidy as a uniform credit could be justified on the idea that the goods charities provide are public in nature and, thus, provided at suboptimal levels.³⁷⁶

369. Boris I. Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?*, 28 TAX L. REV. 37, 58–59 (1972).

370. Gergen, *supra* note 179, at 1416.

371. *See id.* at 1394.

372. *Id.* at 1438, 1440.

373. *Id.* at 1441.

374. *Id.* at 1442.

375. *See* Harold M. Hochman & James D. Rodgers, *The Optimal Tax Treatment of Charitable Contributions*, 30 NAT'L TAX J. 1 (1977), reprinted in *THE ECONOMICS OF NONPROFIT INSTITUTIONS*, *supra* note 326326, at 224, 228–32 (utilizing a Lindahl solution as the model for how the charitable contribution might work to solve problem of providing public goods the state does not provide).

376. *See id.* at 232.

A government subsidy could help by solving the free rider problem through voluntary mechanisms that allow the government to effectively solve optimal provision of public goods through providing a tax credit to the donors. This analysis is highly limited, though, because it assumes everyone involved wants each collective good chosen through the charitable contribution deduction.

Though he recognized the implications of the Hochman–Rogers analysis, Gergen found that, on the whole, whether it be a credit or a deduction, the deduction should generally move us towards a more efficient arrangement, and thus, the deduction can be justified because it moves us closer to ideal levels of public goods.³⁷⁷ Jeff Strnad suggests that the charitable contribution might be an opportunity at “[l]ogrolling” to get to a more efficient result.³⁷⁸ In other words, those who do not get benefits can demand other tax benefits through the political process.³⁷⁹ Similarly, and importantly, if we provide a charitable contribution deduction, we can offset the revenue loss by raising rates within the marginal rate structure.³⁸⁰

A key piece of the efficiency conception of the charitable contribution is whether the incentive even works. That record is quite mixed. Under an egoistic conception of charitable contributions, government spending should crowd out charitable giving dollar for dollar.³⁸¹ The idea is that every dollar the government spends to help the poor stops a one dollar charitable contribution to benefit the poor.³⁸² Studies show this is not correct.³⁸³ People contribute more to

377. See Gergen, *supra* note 179, at 1403.

378. Jeff Strnad, *The Charitable Contribution Deduction: A Politico-Economic Analysis*, in *THE ECONOMICS OF NONPROFIT INSTITUTIONS*, *supra* note 326, at 265, 273.

379. *Id.*

380. See Joseph J. Cordes, *Re-Thinking the Deduction for Charitable Contributions: Evaluating the Effects of Deficit-Reduction Proposals*, 64 NAT'L TAX J. 1001, 1009–10 (2011).

381. Russell D. Roberts, *A Positive Model of Private Charity and Public Transfers*, 92 J. POL. ECON. 136, 136–37 (1984).

382. *Id.*

383. See Burton A. Abrams & Mark D. Schmitz, *The Crowding-Out Effect of Governmental Transfers on Private Charitable Contributions*, 33 PUB. CHOICE 29 (1978), reprinted in *THE ECONOMICS OF NONPROFIT INSTITUTIONS*, *supra* note 326, at 303, 303–04, 304 tbl. 17–1.

charity than an economic free rider model would suggest.³⁸⁴ Another study found very low price elasticities for charitable giving, suggesting that the contribution deduction had little to do with incentivizing donors to contribute.³⁸⁵ Nevertheless, some studies suggest it can be efficient. Martin Feldstein and Amy Taylor, for instance, found much greater price elasticity—between 1 and 1.5.³⁸⁶ In another study, Feldstein shows that the giving elasticity is different depending on the type of organization.³⁸⁷ Giving to churches is relatively inelastic while giving to hospitals and educational organizations is highly elastic.³⁸⁸ More recent studies have had very mixed results, showing price elasticities between 0.5 and 1.26.³⁸⁹ Importantly, if the price elasticity is closer to 0.5, a reduction in the contribution deduction amount would have positive returns to the Treasury.³⁹⁰

There are a number of other problems for the efficiency case. Tax salience studies show that taxpayers often are either not aware of the subsidy or they underestimate its value. Jacob Goldin and Yair Listokin found that over half of people eligible for the deduction were unaware of its existence, and those who were aware underestimated its value.³⁹¹ Complicating things more, Lilian Faulhaber discusses the likelihood that the deduction is hypersalient.³⁹² By this she means there

384. *See id.*

385. Michael K. Taussig, *Economic Aspects of the Personal Income Tax Treatment of Charitable Contributions*, 20 NAT'L TAX J. 1, 19 (1967).

386. Martin Feldstein & Amy Taylor, *The Income Tax and Charitable Contributions*, 44 ECONOMETRICA 1201, 1221 (1976); *see* Bruce Robert Kingma, *An Accurate Measurement of the Crowd-Out Effect, Income Effect, and Price Effect for Charitable Contributions*, 97 J. POL. ECON. 1197, 1202–03, 1204 (1989) (finding elasticity similar to Feldstein). Another study by Feldstein found comparable results with a price elasticity between 1 and 1.1. Martin Feldstein, *The Income Tax and Charitable Contributions: Part I—Aggregate and Distributional Effects*, 28 NAT'L TAX J. 81, 87, 88, 91, 97 (1975).

387. Martin Feldstein, *The Income Tax and Charitable Contributions: Part II—The Impact on Religious, Educational and Other Organizations*, 28 NAT'L TAX J. 209, 224 (1975).

388. *Id.*

389. Jacob Goldin & Yair Listokin, *Tax Expenditure Salience*, 16 AM. L. & ECON. REV. 144, 151 (2014) (summarizing multiple studies' results).

390. *See* Cordes, *supra* note 380, at 1012.

391. Goldin & Listokin, *supra* note 389, at 148.

392. Lilian V. Faulhaber, *The Hidden Limits of the Charitable Deduction: An Introduction to Hypersalience*, 92 B.U. L. REV. 1307, 1309 (2012).

is a great likelihood that people believe they can take the deduction when they cannot.³⁹³

Shannon McCormack notes that though many supporters point to the positive externalities associated with charitable activity to support the deduction, contributions also cause negative externalities.³⁹⁴ For instance, providing a subsidy for a contribution to a group that advocates for white supremacy likely is not an efficient subsidy; even if there are positive externalities, there are significant negative externalities involved.³⁹⁵ Galle suggests another problem with the government failure theory with multiple governments in a federal system already mentioned above.³⁹⁶ To the extent that the subsidy complicates a citizen's choice in deciding whether to move to a governmental jurisdiction that provides a better mix of goods, the subsidy actually causes inefficiency rather than efficiency.³⁹⁷

Miranda Fleischer argues that the charitable tax subsidy theories developed so far present only weak normative justification.³⁹⁸ Both the efficiency theorists and the pluralist theorists, as she refers to them, fail to consider broader philosophical goals, such as libertarianism, utilitarianism, and equal opportunity.³⁹⁹ Fleischer argues for a need to engage in conversations about distributive justice as we consider these theories because distributive justice is fundamental to charity.⁴⁰⁰ In looking at the possibility of utilizing equal opportunity theories, Fleischer found that there are a range of these philosophies and each

393. *See id.*

394. Shannon Weeks McCormack, *Taking the Good with the Bad: Recognizing the Negative Externalities Created by Charities and Their Implications for the Charitable Deduction*, 52 ARIZ. L. REV. 977, 992 & n.71 (2010).

395. *See id.* at 1009–10.

396. *See supra* notes 331–31 and accompanying text; Galle, *supra* note 294, at 803.

397. Galle, *supra* note 294, at 792–93.

398. *See* Fleischer, *supra* note 311, at 534.

399. *See id.* at 534–35; Fleischer, *supra* note 323, at 621–22; Miranda Perry Fleischer, *Charitable Giving and Utilitarianism: Problems and Priorities*, 89 IND. L.J. 1485, 1491–92 (2014); Miranda Perry Fleischer, *Libertarianism and the Charitable Tax Subsidies*, 56 B.C. L. REV. 1345, 1346 (2015).

400. Fleischer, *supra* note 311, at 537, 548.

one may offer different approaches.⁴⁰¹ In general, Fleischer seems to have found that much of the equal opportunity literature would push towards charitable tax subsidies that did more to “level[] up the poor.”⁴⁰² But she also found that it might also find that hospitals, by reviving those with disabilities, might indeed be acting as charitable in that very act because they are righting a situation that puts the disabled at a significant disadvantage compared to others.⁴⁰³

Thus, there are two primary threads of the normative debate over tax exemption and charitable contribution tax policy: the policies either improve market efficiency or there is an equity to the policy.⁴⁰⁴ The market efficiency thread focuses on the fact that many charitable activities are subject to market failure and ask whether we can get closer to a perfect free market outcome by utilizing tax-exemption for charities or providing the charitable contribution deduction. The goods and services involved must either be public goods or be goods that have some positive externality that are not expected to be supplied at a sufficient level under normal market conditions. It is far from clear that either tax exemption or the charitable contribution deduction as currently designed furthers efficiency. There is a good bit of evidence that it fails on efficiency on a number of fronts.⁴⁰⁵ The design of the charitable contribution deduction that is provided to a very narrow group of donors, most of whom are wealthy, makes the equity argument hard to make. Most who try to make this argument realize that exemption and the contribution deduction would at least need to be reorganized in a way that ensured more redistribution from wealthy to poor than is currently the case.

401. See Fleischer, *supra* note 323, at 662–63.

402. *Id.* at 663.

403. *Id.* at 615–16, 663.

404. Gergen, *supra* note 179, at 1394; see *supra* note 371 and accompanying text.

405. See Gergen, *supra* note 179, at 1393.

V. ANALYSIS

This Article seeks to determine whether income tax subsidies to charter schools are warranted. The focus is on two different tax policies: tax exemption and the charitable contribution deduction. Instead of focusing solely on typical tax policy criteria of efficiency and equity, I argue that political justice is an important value that ought to be considered as well.

A. *Tax Exemption*

This Part V.A considers what theories such as base, efficiency, equity, and political justice might portend for providing exemption from the income tax to charter schools.

If a charity is due exemption from the corporate income tax in a normal income tax under income measurement theory, there is little to say about charters and tax exemption. But it makes little sense to say that a charter cannot account for the money it earns for providing a service to students. It may be complex, but no more complex than lots of other service businesses.⁴⁰⁶ Brody's sovereignty theory may have some hold here given that the organization is directly carrying out work on behalf of the government.⁴⁰⁷ But it does not explain much since plenty of organizations contract to conduct government business (including education) and still pay taxes.⁴⁰⁸ Perhaps the corporate tax is intended to be a tax on shareholders alone, and the lack of shareholders in a charity means charitable organization earnings ought not be part of the base.⁴⁰⁹ But, because there are many ways to still

406. See Hansmann, *supra* note 316, at 59.

407. See *supra* notes 317–18 and accompanying text; Brody, *supra* note 317, at 599, 601.

408. See, e.g., *What are Government Entities and Their Federal Tax Obligations?*, INTERNAL REVENUE SERV., <https://www.irs.gov/government-entities/federal-state-local-governments/government-entities-and-their-federal-tax-obligations> [<https://perma.cc/5Z5C-D7XR>] (Mar. 9, 2023).

409. See Hackney, *supra* note 283, at 118; cf. Hansmann, *supra* note 316, at 62–63 (discussing an argument against taxing “they must ultimately spend all of their income on the purposes for which they were formed”).

deliver earnings to those who control such an organization, any such base-defining theory must first define the goods and services that belong outside the base of an income tax; none of these theories explain why providing education through a charter falls into that realm.

What about efficiency theories? These are described in positive externality theories above. Hansmann's market failure theory may help some.⁴¹⁰ Is there a contract failure associated with primary and secondary education? As discussed in Part III.B, there is agreement that primary and secondary education provide a public good or the service comes with significant positive externalities. The primary public good, or quasi-public good, of primary and secondary education broadly is a populace capable of engaging in self-governance.⁴¹¹ Without a forced collective solution, parents will invest less in primary and secondary education than is ideal from a societal perspective.⁴¹² Many parents would likely either free ride on the fact that the good is provided, or not invest in the right level of education for their children because they will not recoup the cost through the benefits they receive.⁴¹³ This means that the United States is unlikely to obtain the right level of primary and secondary education without some economic intervention. There is also an element of contract failure that Hansmann discusses, such as situations where individuals are purchasing services, such as international relief, for a third party.⁴¹⁴ With primary and secondary schooling, parents choose education for their children and are reliant on the school to provide services that the parent cannot constantly witness. A nonprofit structure may be more trustworthy than a for-profit in ensuring that these services are provided to the children.

Problematically for the charter case, market failure theory focuses on whether a nonprofit would provide the service more efficiently than a for-profit organization and could be aided via tax-exemption to

410. See *supra* notes 321–21 and accompanying text.

411. See Hansmann, *supra* note 322, at 895.

412. See *id.* at 848–49.

413. See *id.* at 849.

414. *Id.* at 846.

overcome the barriers to raising money in a situation of contract failure.⁴¹⁵ A nonprofit might provide the service more efficiently than a for-profit because of the nondistribution constraint placed on the nonprofit.⁴¹⁶ But the government operates public schools and also has a nondistribution constraint and more direct accountability to the public.⁴¹⁷ Additionally, by utilizing the power to tax, the government has already solved the problem of contract failure involved in providing primary and secondary education.⁴¹⁸

The question is whether the nonprofit can provide the service more efficiently than the government. Under typical conceptions, the likely question is whether the nonprofit can provide greater quality for the same or less amount of money than the government. Chubb and Moe argue that the government system is highly inefficient because of bureaucracy.⁴¹⁹ Schools could be more efficient if those burdens were lifted and more control were provided to single schools, as is often the case with charters.⁴²⁰ Given that charters generally do not outperform public schools,⁴²¹ it is not clear this prognostication is correct. Although some charters might be more efficient as to quality and cost than government-run schools, the evidence is against the case.⁴²²

It is worthwhile to observe that contract failure theory simply does not apply to nonprofits providing government services like in the case of charters. This is because the relevant comparison is not between nonprofit and for-profit where market failure makes delivery difficult but between nonprofit and government. Given that this is a lot of the work of the charitable sector, we likely need new efficiency theories to explain why we might prefer nonprofits to the government in these

415. See Hansmann, *supra* note 316, at 86–87.

416. See *id.* at 56, 86.

417. See Osamudia R. James, *Predatory Ed: The Conflict Between Public Good and For-Profit Higher Education*, 38 J. COLL. & U. L., 45, 65 (2011).

418. See Hansmann, *supra* note 316, at 68.

419. CHUBB & MOE, *supra* note 162, at 40–41, 45.

420. *Id.* at 40–41.

421. See *supra* notes 75–76 and accompanying text.

422. See *supra* note 355 and accompanying text.

situations. The Chubb and Moe argument that government is necessarily ineffective in providing a particular service is on the right path, but it would not only have to prove that it is more efficient but also would have to justify why other values like political justice are not equally implicated in the decisions regarding such goods or services.

A related problem for using market failure theory is that once a contract failure is observed, the question turns to whether a nonprofit's lack of owners makes it difficult for the nonprofit to obtain the right level of resources. This analysis is also conducted in comparison to a for-profit organization that has the opportunity to seek out equity investors. For instance, in 2021, 57.7% of hospitals were organized as charitable organizations.⁴²³ Although some hospitals, like rural ones, experience challenges in raising the necessary resources,⁴²⁴ many urban hospitals likely have little difficulty raising money, making a benefit to them likely inefficient under this theory. What does the market look like for charters? As public schools, charters receive significant funds from the government based on the tax dollars from the district in which they operate.⁴²⁵ With such robust funding, it is unlikely that charters are lacking in the ability to raise funds because of their nonprofit status. Perhaps efficiencies are gained by the charter spending money differently than a public school, but there is little reason to believe this is the case. Indeed, charter schools may harm access to education to non-charter students if they draw too much money away from the public school system generally. Studies show increases in charter school government funding sometimes comes with decreased ability of the community public schools to stay solvent.⁴²⁶

423. *Hospitals by Ownership Type*, KAISER FAM. FOUND., <https://www.kff.org/other/state-indicator/hospitals-by-ownership/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> [https://perma.cc/2JRM-JCV3].

424. See Jonathan E. Fried, David T. Liebers & Eric T. Roberts, *Sustaining Rural Hospitals After COVID-19: The Case for Global Budgets*, 324 JAMA 137, 137 (2020).

425. See *supra* notes 51–53 and accompanying text.

426. David Arsen & Thomas DeLuca, *Which Districts Get into Financial Trouble and Why: Michigan's Story*, 42 J. EDUC. FIN. 100, 123 (2016).

Another challenge to applying the theory is determining the service or good to evaluate. Is a charter providing the service of education or is it instead housing assets, receiving and disbursing funds, and providing a governance structure for contracting with a management company? Arguably, a charter is like a mini-school board for one school that contracts out most decisions to a management company. It is not clear there is a market failure in those services. It just avoids democratic methods of making these types of decisions. This highlights some of the challenges utilizing market failure theory—utilizing a broad category like education may disguise the service or good actually being provided by the nonprofit.

It may be that charters could demonstrate an efficiency by generating more donations in districts that are severely lacking in funds than the public school system. A complication to such a claim is that public schools have the ability to attract charitable dollars just like the nonprofit charters. One recent study showed that public schools attracted modestly more non-public dollars such as from philanthropy per pupil than did charter schools.⁴²⁷ That said, as discussed in Part II, charters tend to service a larger number of minority and poor students than do public schools. Furthermore, there is anecdotal evidence that charter schools have the potential to generate more private foundation grants.⁴²⁸ In New Orleans, for instance, according to one study, charter schools operate on a more than \$24,000 per-pupil budget, whereas the public schools operate on less than \$12,000.⁴²⁹ This difference is attributed to attracting voluntary contributions and private foundation grants.⁴³⁰ Testing results from that school system, however, do not suggest the extra funds have made a difference: “[O]n average, the

427. See Patrick J. Wolf, *Foreword* to MEAGAN BATDORFF, LARRY MALONEY, JAY F. MAY, SHEREE T. SPEAKMAN, PATRICK J. WOLF & ALBERT CHENG, *CHARTER SCHOOL FUNDING: INEQUITY EXPANDS* (2014), <https://files.eric.ed.gov/fulltext/ED581409.pdf> [<https://perma.cc/G6X2-WM9Q>].

428. See RECKHOW, *supra* note 11, at 39–40.

429. Michael Deshotels, *Converting Public Schools into Charters*, *LA. EDUCATOR* (June 16, 2022), https://louisianaeducator.blogspot.com/2022_06_12_archive.html [<https://perma.cc/GEX9-TNEQ>].

430. *Id.*

other school systems in the state have 31% of students achieving proficiency in the [four] basic subjects tested. This compares to 18% achieving proficiency in the new reformed Orleans system.”⁴³¹

In the end, market failure theory is not a great fit for examining this question. Though the idea of education and its market challenges fit within the range of services that a charity might excel at providing, because the government solves the problem with tax dollars, the theory does not aid in solving how to think about a new question: whether a nonprofit charity might be more efficient at providing education through tax dollars than the government. Nevertheless, a potential ability to more efficiently use its charitable status to attract dollars to the cause of primary and secondary education could support, in part, granting the benefit of tax-exemption to charters, although the evidence is not strong for this claim.

How does the government failure theory fare? Though it has a superficial relationship, it is not a great fit. Under this theory, it is assumed that the government only provides the services that the median voter wants;⁴³² some people want different services than what the government provides. The government can consider offering some more modest support through charitable tax subsidies to aid such minority voter endeavors. It is an odd fit for charters, as again this is the government, in part, operating through a nonprofit itself. If charters provide a service desired by the non-median voter, then the government does not only provide services to the median voter. It is hard to know how we could determine whether any charity is in fact providing some service desired by a non-median voter that actually enhances efficiency in the goods and services collectively offered. Charters use the idea of market competition to achieve a type of efficiency by providing underprovided types of education. Perhaps charters can prove the need and efficiency in part by whether parents choose a particular school over others or by showing that charters are able to help with some particular undersupplied type of education in

431. *Id.*

432. Weisbrod, *supra* note 326, at 23.

the relevant market. Still, if as mentioned above, the movement of money from the school district to the charter school harms the relevant budget as to other students, it may be that overall the charter is harming that type of efficiency by impeding on the goods desired by the majority. It might be that lower powered incentives that Weisbrod imagined, such as tax exemption alone without tax dollars associated with government failure theory, is a better fit to the idea involved. This is likely more representative of the majority interest in a democracy. In the end, government failure theory privileges economic efficiency over notions of political justice.

What about theories of equity? In a typical tax equity question, we might consider whether those who should be taxed associated with a particular activity are being taxed at the right rate. One comparison is between how other nonprofit primary and secondary schools are taxed. Private nonprofit schools are widely exempted from the income tax as charitable organizations.⁴³³ This factor would point toward allowing public charters to also be exempted from income tax. The analysis would not stop there though because the nonprofit itself, of course, bears no tax—it is the people associated with the nonprofit that might bear tax. Thus, many ask whether the beneficiaries of a charity ought to pay a tax at the corporate rate.⁴³⁴ Given that charters tend to serve a poorer population than traditional public schools, not applying a tax to charter schools would seem a reasonable result. But the question is more complicated because we must consider who is likely to bear the incidence of the corporate tax in the case of charters. It is possible it could be borne by those who provide the services to the charter—those who control the management company. This would happen if those managing the school obtained a smaller return as the result of a corporate income tax being imposed on the activity. Or perhaps all the members of the community would bear the incidence because they

433. See *Buettner-Hartsoe v. Baltimore Lutheran High Sch. Ass'n*, No. 20-3132, 2022 WL 2869041, at *2 (D. Md. July 21, 2022) (discussing tax exempt status of private schools in Title IX context).

434. *E.g.*, Fleischer, *supra* note 311, at 515.

have to raise taxes to provide a sufficient level of education to students. Thus, it is impossible to know who would bear the tax involved, and this equity analysis does not provide much help.

If the question of equity is instead whether charters redistribute wealth from wealthy to poor individuals, the case is not strong. There is no reason to believe that the charter system is redistributing wealth. Charters primarily use tax dollars from the local community,⁴³⁵ meaning they add nothing to redistribution in the main case. They may even subject that money to more opportunities for loss.⁴³⁶ It seems likely, at least, that it is more costly to monitor separate nonprofit organizations than the public school system.⁴³⁷ Also, as discussed in Part II.A, because of how it draws funding, we know that public education is not a major motivating force of redistribution. Wealthy districts simply have more resources available than poor districts, and charters do not change this reality.⁴³⁸ It is possible that the charter system results in more money going to wealthy interests through paying CMOs rather than supporting the traditional public school system. If the individuals who are controlling the organization are the ones benefitting from any subsidy or exemption, the fact that some lower income students benefit in part from access to the charter school does not make the system redistributive. As noted above, it is possible that charters are more effective than public schools at generating private foundation grants and voluntary contributions. But, if CMOs are receiving the benefit of this fundraising then the case for redistribution fails. Again, this equity case is unclear.

What about civic benefit theories? Atkinson has made both a liberal democratic case for charity and a neo-classical republican case for

435. See *supra* notes 51–53 and accompanying text.

436. See Leslie S. Kaplan & William A. Owings, *Funding School Choice: Implications for American Education*, 44 J. EDUC. FIN. 199, 202 (2018) (citing a 2016 federal audit showing significant concerns about the financial controls of EMOs and CMOs, putting charter money from government at risk).

437. See Steven Rathgeb Smith & Kirsten A. Grønbjerg, *Scope and Theory of Government-Nonprofit Relations*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 221, 228 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006) (discussing the need to build oversight regimes to manage situations where the government contracts out with private nonprofits).

438. See Powers & Potterton, *supra* note 21, at 252–53. For a discussion of the different types of resources and the discrepancy between rich and poor districts, see McUsic, *supra* note 52, at 1347–53.

charity.⁴³⁹ Under the liberal theory, a benefit of charitable tax subsidies is that they are neutral and allow individuals to pick and further the good in a liberal democratic pluralistic model.⁴⁴⁰ More recently, Atkinson has changed course and argues for a neo-classical republican theory in which the state primarily decides the good.⁴⁴¹ Under this conception, as mentioned above, where the state already provides a service, we should establish a presumption against using a nonprofit to accomplish the role.⁴⁴² It is hard to figure out how these conceptions cut within the charter school model. The charter is the government, but just the government using a nonprofit to carry out its activities. On the whole, though, if the motivation is the republican conception that the state has the ability to determine the good for society, then it seems likely that, under this theory, providing charitable subsidies to charters might be problematic. Arguably, Brennen's approach of contextual diversity to consider fairness and other ideas important to democratic society would similarly find interest in the state carrying out this activity.

From the political justice standpoint, even if charter schools redistributed wealth and even if they had some enhancements of quality, it is not clear we should favor them. If the system takes decisional control away from communities over a core democratic function of primary and secondary education and gives it to wealthy interests through private foundation and management company control, we might find a political justice harm. Though there is a movement from wealthy to poor individuals meeting normal distributive justice concerns, the consequent removal over the power

439. See *supra* notes 336–36 and accompanying text; Atkinson, *supra* note 313, at 62, 105 (discussing a Tocquevillian justification of charity where each person defines the good and a neo-classical republican theory where the state performs more of the public goods than do outside providers).

440. *Id.* at 63–64.

441. See *supra* notes 337–37 and accompanying text; Rob Atkinson, *For-Profit Managers as Public Fiduciaries: A Neo-Classical Republican Perspective*, 19 FLA. STATE U. BUS. REV. 1, 44, 45, 47 (2020).

442. See Atkinson, *supra* note 313, at 105.

of those communities to shape the educational life on their own is a significant political justice harm to that community all the same.⁴⁴³

So, what might political justice have to say on the question of tax-exemption for charters? Political justice demands that tax policy not harm PVE but rather enhance it.⁴⁴⁴ PVE matters on any decision involving a collective activity, especially when the activity is core to a democratic function.⁴⁴⁵ Where the matter is influence over public representation or legislation before our representatives, we should have particular concern regarding PVE.⁴⁴⁶ Thus, where tax policy enhances the political interests of small, wealthy business interest groups through exemption for business leagues, we should reconsider such a policy. This policy gives more political voice to the most powerful interests and less voice to lower income diffuse interests.⁴⁴⁷ Such policy could cause harm by exacerbating differences in political power that exists naturally. Similarly, we might maintain and enhance tax benefits for labor interests that experience significant collective action problems and objectively are not well-represented before our political system.⁴⁴⁸

As developed in Part III.C, the activity overseen by a charter school is core democratic collective activity. This activity should be collectively shaped. The process itself serves as an example to students about the deep cooperation needed to operate a democratic order and uses the one process that allows the local community to have a voice in shaping the values taught by the school. Upon the authorization of a charter school, that control is mostly given to whoever controls the charter.

Granting federal government support to a charter through tax exemption harms PVE by giving aid to policy that undermines core

443. See, e.g., IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 15 (2011 ed.) (arguing against the obsessive focus on only distributive justice and asking us to focus instead on “the elimination of institutionalized domination and oppression”).

444. See Hackney, *supra* note 2, at 288–91.

445. *Id.* at 273.

446. See *supra* Part III.A.

447. See Hackney, *supra* note 146, at 269.

448. Hackney, *supra* note 123, at 376.

local democratic activity. Choices that a typically elected school board usually made and oversaw before are handed to individuals who win charter authorization: charter board members and the CMOs.⁴⁴⁹ Most educational charter decisions are made by CMOs or EMOs.⁴⁵⁰ Here, governmental oversight primarily exists only on whether to revoke the charter or not.⁴⁵¹ Some state and federal laws continue to apply to these organizations, but the fundamental decision on values to teach and how to educate are left to the charter itself.⁴⁵² Thus, the local community loses its right to make decisions about the school, even as to validly passed laws regarding the operation of public schools, but the community still supports that school through tax dollars and other benefits that come with the charitable designation. Additionally, by losing this process, the students fail to learn about cooperation essential to a democratic community and fail to be taught community values that have been shaped by a democratic process. They are instead taught that their community does not have the ability to make decisions for itself. They need experts to determine what values they should be taught instead. This factor becomes more troubling considering the fact that, as developed in Part II.A, charters serve an even larger population of Black and Hispanic students than does the public school system.

As discussed above, some efforts related to charter schools include efforts to eliminate teachers' unions.⁴⁵³ Many charters bring in new teachers, some of whom have no certification to teach and most of whom are non-union members.⁴⁵⁴ As discussed in Part III.C, teachers and unions can play a key role in maintaining nonrepression of minority students and their ideas, which are so critical to a democratic

449. *See supra* notes 4–5 and accompanying text.

450. *See supra* Part II.B.

451. *See General Frequently Asked Questions, supra* note 9.

452. *Id.*

453. *See supra* note 163 and accompanying text.

454. This practice has been analyzed extensively in Louisiana. *See* Deshotels, *supra* note 429; Casey, *supra* note 163, at 23.

order. When we begin to dismantle that system, those protections may also begin to fall apart. Thus, this breaking down of the traditional public school and deprofessionalizing of teachers comes with another significant cost to PVE.

These harms to PVE suggest that we should reconsider the adoption of charters. Given that this case supports the greater good, it could also warrant choosing to end exemption from tax. However, forty-five states, the District of Columbia, and the federal government adopted the charter system through democratic means.⁴⁵⁵ Under these circumstances, ending tax-exemption for charter schools while maintaining it for primary and secondary education seems likely the wrong direction. But, at the same time, it is problematic to allow the charitable tax system to further governmental systems that avert democratic control.

School choice through charters allows the potential for very local control. That is part of the appeal of “choice.” Ostensibly, a parent gets more educational choice for their children through market mechanisms. This is not a democratic form of control though.⁴⁵⁶ Considering the harm to PVE furthered by tax policy itself by supporting this arrangement, we could adopt rules for tax-exemption that foster a more democratic charter operation. I consider solutions in Part V.C.

B. Charitable Contribution Deduction

This Part V.B considers the theories regarding the charitable contribution deduction from the perspective of base, efficiency, equity, and political justice. The arguments are similar to exemption arguments, but because of distinctly different policy concerns, the arguments take somewhat different forms. Nevertheless, the right to the charitable contribution deduction flows directly from the choice to

455. See *supra* note 30 and accompanying text.

456. David E. Meens & Kenneth R. Howe, *NCLB and Its Wake: Bad News for Democracy*, 117 TCHRS. COLL. REC. 1, 20 (2015).

exempt an organization from tax. It is one of the many benefits that come from that designation.⁴⁵⁷

Few accept Andrews's base argument.⁴⁵⁸ He claims that these contributions are not properly within the base of the income tax because the donor does not use the money for personal consumption.⁴⁵⁹ As developed in Part IV.C, most, however, see that there is an element of consumption to the donation and argue that the theory does not help us to determine what activities are legitimate common goods or services.⁴⁶⁰ Of course, in the case of primary and secondary education, we do have some agreement that the state has some significant duty to provide this service.⁴⁶¹ Nevertheless, in the case of charters, evidence shows a lot of the money coming through the charitable contribution deduction is coming in great quantity from a narrow group of private foundations engaged in trying to shape policy to their interests.⁴⁶² This suggests there is a personal consumption element to these contributions. Thus, the base argument does not help much.

What about the charitable contribution efficiency argument? Education broadly delivered is certainly a public good, or a good with positive externalities, that could be legitimately furthered through the charitable contribution deduction. Whether the deduction is efficient for charter schools depends upon whether the contributions made are encouraged through the contribution deduction itself. The evidence discussed in Part IV.C is not strong that the charitable contribution is actually efficient in this sense. It depends on the activity. If price

457. THOMAS K. HYATT & BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT HEALTHCARE ORGANIZATIONS* 27–30 (4th ed. 2013).

458. *E.g.*, Gergen, *supra* note 179, at 1416.

459. Andrews, *supra* note 294, at 346.

460. *See supra* Part IV.C.ii.

461. *See Elementary and Secondary Education Expenditures*, URB. INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/elementary-and-secondary-education-expenditures> [<https://perma.cc/C4QB-5DKJ>] (noting that, in 2020, spending on elementary and secondary education was the second largest expenditure).

462. *See supra* notes 272–76 and accompanying text.

elasticity is low, then we have no reason to believe the donor is giving more to education than they would if the government just taxed them and gave the money to education itself.⁴⁶³ One thing that complicates this question further is that the alternative is not a for-profit operator but a government operator. A local government can also accept charitable contributions, meaning that it would be hard to show that charters as a structure are more efficient at seeking out charitable contributions than the public school system.

What about equity? As a subsidy that supports only about 9% of taxpayers and supports wealthy taxpayers with a greater deduction, the equity of the tax policy itself is hard to support.⁴⁶⁴ The government is only choosing to support the charitable interests of a very select group of people, and this is far from equitable. Given that charters tend to supply their services to lower income students than the typical public school, it is possible that this results in some redistribution of wealth. Again, it is not clear that charters are accomplishing this goal, as the government has the same ability to attract these types of dollars.

Finally, reviewing the charitable contribution deduction through a political justice lens shows the deep problem with having such a deduction only for those with high incomes. Only high-income individuals and those with control over private foundation wealth are really incentivized by this system to make contributions.⁴⁶⁵ This, in turn, means that the charters who are educating the children of our community can be expected to be taught the values these high-income and wealthy interests are interested in pushing. The problem does not stop there. Our tax policy is designed to provide subsidies for these contributions but not for ordinary citizens.⁴⁶⁶ It means the government is enhancing the collective activity choices of high-income donors with substantial dollars, but it provides nothing to those choices of the other 90% of taxpayers. That cannot be just, even if it is “efficient” and even if it does redistribute income.

463. See Taussig, *supra* note 385.

464. *TCJA's Impact on Charitable Giving*, *supra* note 15.

465. See *id.*

466. *Id.*

C. *Possible Solutions to the Harm to PVE*

Congress has adopted rules of a democratic nature to apply to the charitable sector before. As noted in Part IV.A, Congress considers public charities, which have a broad public constituency, more legitimate charities than private foundations.⁴⁶⁷ This recognizes the importance of broad community voice in carrying out collective activity. Congress requires a tax-exempt organization to broadly disclose information about its activities on an annual basis.⁴⁶⁸ It does this, in part, to serve a democratic accountability function.⁴⁶⁹ Congress requires credit counseling organizations to have independent members on their boards to ensure they take the larger community into account rather than the narrow interests of individuals wanting to profit from the operation.⁴⁷⁰ Congress requires hospitals to study and publicly report on community health needs.⁴⁷¹ These efforts allow more community voice and input into the activities of charitable organizations. These are moves that enhance the political justice of the charitable tax subsidies.

Congress should consider similar provisions for charter schools. Congress could require a charter to conduct a localized community education needs assessment and publish it every three to five years. This could provide the democratic value of transparency. Additionally, providing community members on the charter's board with a vote could both make the charter operation more democratically accountable and maintain an organization that cooperatively shapes the policies of the charter rather than accepting the control by those

467. See *supra* Part IV.A; *EO Operational Requirements*, *supra* note 295 (explaining that private foundations are “subject to various operating restrictions” since “they are less open to public scrutiny”).

468. The information is disclosed on Form 990. IRS, U.S. DEP'T OF TREASURY, FORM 990, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (2022), <https://www.irs.gov/pub/irs-pdf/f990.pdf> [<https://perma.cc/WT8W-Z395>].

469. See Philip Hackney, *Dark Money Darker? IRS Shatters Collection of Donor Data*, 25 FLA. TAX REV. 140, 179–80 (2021) (discussing the democratic function of Form 990 public reporting).

470. 26 U.S.C. § 501(q)(1)(D).

471. § 501(r)(3).

who form the charter. Additionally, charter schools could appoint children who are old enough to a non-voting position on the board to demonstrate to the children of the school the cooperation necessary to run a democratic order. Teachers too ought to be represented on the charter's board. Furthermore, because the charter board itself often does not run the organization on a day-to-day basis, Congress would need to require nonprofit CMOs to adopt the same type of democratically led board. Congress should also consider prohibiting a charitable charter from entering into a contract with a for-profit charter for similar reasons. These latter organizations are making significant collective educational decisions and are influenced in those decisions more in meeting their fiduciary duty to earn a profit rather than to represent the interest of the community at large.⁴⁷²

Community boards are no panacea. Within the public company realm, evidence shows that adopting independent directors has not ensured those directors fulfill their function of stopping a corporate board from taking actions in the interest of those who control the organization.⁴⁷³ So I make these recommendations with recognition of its imperfection. I also accept that allowing the public to engage in long, deliberative political debate may not wind up with the best solutions. It does not necessarily improve the quality of participation. As such, it is possible that greater deliberation may lead to worse outcomes.⁴⁷⁴ Because of our diverse, pluralistic society, some may argue that we are better off with many groups getting to choose their paths of education separately rather than forcing communities to resolve the question of how to best educate children.⁴⁷⁵ I do not accept this pessimism and continue to believe the best method of deciding collective choices lies in a fair democratic process. Finally, I also recognize that allowing small homogenous groups to make decisions for the group may lead to “conformity, intolerance, and the

472. See *supra* note 111 and accompanying text.

473. See Yaron Nili, *Board Gatekeepers*, 72 EMORY L.J. 91, 129–30 (2022).

474. See David Lefrançois & Marc-Andre Ethier, *Translating the Ideal of Deliberative Democracy into Democratic Education: Pure Utopia?*, 42 EDUC. PHIL. & THEORY 271, 272 (2010).

475. See HELD, *supra* note 131, at 236 (discussing that the ideal of democracy cannot be achieved in large, diverse societies because a general will cannot be achieved).

personalization of politics.”⁴⁷⁶ This will continue to be a problem—as it already is today—but I hope that educating our children in a truly democratic way can lead to the real understanding that our cooperation with one another to govern ourselves is both important and can only be done when we do not bring these forces of exclusion to the table.

Ideally, Congress would also prohibit charters from prohibiting teachers’ unions from their ranks. This effort harms an important force in an educational system to ensure broad inclusion of a pluralistic student body.

What does this analysis suggest for the rest of the charitable sector? First, scholars should reconsider our charitable tax exemption theories in light of the fact that around one-third of the money that goes to charities comes from government contracts.⁴⁷⁷ We tend to think of a charity as an independent, third sector that carries out voluntary activity on its own and raises money from individuals to carry out that work. But many charities, like charters, are private nonprofit groups contracted to do work on behalf of the government. Thus, the lack of owners from whom to seek operating capital is lessened in these circumstances. The question becomes whether charitable organizations are more efficient at carrying out the contract activity than a for-profit organization or the government itself. This would be a refocus of the charitable tax policy agenda. Notably this makes this work different than Weisbrod’s market efficiency minded theory.

Second, and relatedly, Congress should look more closely at policies allowing exemption for nonprofit organizations providing governmental services. These policies allow government support for governmental activities that are typically conducted by nonprofits non-democratically. This may cause harm to PVE. The question is whether the activity involved is one that should be democratically shaped. Where it is a distinct service with little judgment call that does not

⁴⁷⁶ *Id.*

⁴⁷⁷ PETTIOHN ET AL., *supra* note 28.

require a collective answer, it is unlikely that Congress needs to be involved. One might consider, for instance, whether a hospital is involved in activity that needs collective judgment calls. Those judgment calls may not be as significant to collective choice as primary and secondary education, but there is good reason to believe the larger community has interest in how a hospital decides to service the community.

Third, it suggests Congress ought to reconsider requirements for private primary and secondary schools to obtain charitable tax-exemption. This is a core democratic activity that should be more democratically conceived. Without looking closer at the specific issues of private education, it is impossible to come to any conclusions here. Religious schools present particularly tough challenges.⁴⁷⁸ This is an unsatisfying answer, but the Article is long enough already and the bases for applying these concepts to private schools are not set forth within. Nevertheless, charitable tax subsidies for private primary and secondary schools should be reconsidered in light of PVE concerns.

VI. CONCLUSION

The charter case viewed through a political justice analysis suggests that impact on PVE can help us think through ways to better target policies of tax exemption and the charitable contribution deduction. Efficiency and equity are helpful factors but alone they fail to provide a complete analysis. In fact, both quite weakly provide support for charter schools. Congress should require more from charitable organizations than a good purpose that either is efficient or redistributes wealth. Community decisional power matters too, particularly in cases of core democratic activity such as primary and secondary education. It would be better if neither Congress nor states adopted the charter model. However, because Congress and states adopted this model through democratic means and education is accepted as a core charitable purpose, we should not end charitable tax

478. See Hackney, *supra* note 2, at 317.

subsidies for charter schools. Nevertheless, it makes good sense to use tax policy to provide greater democratic accountability for these organizations that train our children to be a part of our democratic order.