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## The Comparative Legal Landscape of Educational Pluralism

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# THE COMPARATIVE LEGAL LANDSCAPE OF EDUCATIONAL PLURALISM

Nicole Stelle Garnett\*

Introduction.....	456
I. Mapping the Educational Pluralism on Two Axes.....	462
II. Educational Pluralism in Four Contexts.....	466
A. <i>Low Funding, High Autonomy: The United States</i> .....	466
1. Government funding.....	468
2. Autonomy of Privately Operated Schools.....	480
B. <i>High Funding/High Autonomy: Australia</i> .....	487
1. Government funding.....	488
2. Autonomy.....	495
C. <i>High-Funding/Low-Autonomy: India</i> .....	500
1. Government Funding.....	503
2. Private School Autonomy.....	510
D. <i>Low-Funding/Low-Autonomy: Greece</i> .....	515
1. Government Funding.....	517
2. Private School Autonomy.....	518
III. Accountability v. Control: Four Questions from the Comparative Context.....	522
A. <i>School Staffing</i> .....	523
B. <i>Student Enrollment</i> .....	525
C. <i>Curriculum</i> .....	526
Conclusion.....	528

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## INTRODUCTION

In the United States, debates about private and faith-based education tend to focus on questions about government funding: which kinds of schools should the government fund (and at what levels)? Should, for example, students be able to use public funds to attend privately operated schools? Faith-based schools? If so, what policy mechanisms should be used to fund private schools—vouchers, tax credits, direct transfer payments? How much funding should these schools receive? The same amount as public schools or less? As a historical matter, the focus on funding in the United States makes sense because only public (that is, government-operated) elementary and secondary schools historically received government funding.<sup>1</sup> Indeed, although demands that the government fund schools outside of the public sector span over a century and a half,<sup>2</sup> proponents of public funding for private schools have—until quite recently—faced seemingly insurmountable political and legal hurdles.<sup>3</sup>

Over the past three decades, this has begun to change. Parental choice has exploded onto the American educational scene in large part due to the advent and exponential growth of charter schools (which are publicly funded, but privately operated).<sup>4</sup> During this same time period, and especially after the Supreme Court cleared the constitutional path in *Zelman v. Simmons-Harris*,<sup>5</sup> the footprint of private-school choice also has

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1. See MARGARET F. BRINIG & NICOLE STELLE GARNETT, LOST CLASSROOM, LOST COMMUNITY: CATHOLIC SCHOOLS' IMPORTANCE IN URBAN AMERICA 16-17 (2014). In this Article, unless otherwise indicated, I use the term “public schools” to describe government-operated schools and “private schools” to describe those operated by private entities. The terms do not translate perfectly across national contexts, *e.g.*, in Australia, public schools are “government schools” and in Kenya, some “church-sponsored” religious schools are arguably public schools. I chose to use the terms most familiar to American readers. On the other hand, I use the term “government funding” rather than “public funding” because conceptions of the public-private distinction in other countries are not necessarily the same as ours.

2. *Id.*

3. Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 VAND. L. REV. 1, 23-29 (2017) [hereinafter Garnett, *Sector Agnosticism*].

4. *Id.* at 13-15.

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

expanded, albeit much more incrementally.<sup>6</sup> Charter schools are authorized in forty-three states and the District of Columbia.<sup>7</sup> Roughly six percent of American public school children attend public charter schools, although that share is much higher in many urban districts.<sup>8</sup> Over half of the states and the District of Columbia now have at least one private-school choice program enabling some children to use public funds at private schools, although the existing programs are all limited in scope (some dramatically so) and participation rates lag far behind charter and district public school enrollments.<sup>9</sup> All told, approximately 520,000 students currently participate in a private-school-choice program in the U.S. (less than one percent of K-12 enrollment), and total expenditures in these programs (approximately \$2.6 billion) is only 0.35 percent of total education expenditures.<sup>10</sup>

As the footprint of parental choice has grown in the U.S., issues of accountability—specifically, questions about the regulation of privately operated schools receiving public funds—are coming to play a bigger role in education policy debates. For example, in 2015, Congress overhauled the Elementary and Secondary Education Act, which is now known as the “Every Student Succeeds Act,” or “ESSA.”<sup>11</sup> ESSA requires states to subject charter schools to the same academic accountability requirements as district public schools, including requiring them to administer the same standardized tests and report their results

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6. Garnett, *Sector Agnosticism*, *supra* note 3, at 22-29.

7. *Id.* at 14-15.

8. In 2017-18, more than forty percent of students were enrolled in charter schools in seven districts, more than thirty percent in 21 districts, more than 20 percent in 64 districts, and more than ten percent in 214 districts. KEVIN HESLA, ET AL., A GROWING MOVEMENT: AMERICA'S LARGEST CHARTER PUBLIC SCHOOL COMMUNITIES 2-3 (13th ed. 2019), [<https://perma.cc/P4YG-QT6U>].

9. Garnett, *Sector Agnosticism*, *supra* note 3, at 10; *see* NAT'L CTR. FOR EDUC. STAT., PRIVATE SCHOOL ENROLLMENT (last updated May 2020), [<https://perma.cc/B4R3-M65Q>].

10. *See* AMERICAN FEDERATION FOR CHILDREN, SCHOOL CHOICE GUIDEBOOK 5-6 (2019) [hereinafter GUIDEBOOK], [<https://perma.cc/3PE6-J9EW>]; *see also* NAT'L CTR. FOR EDUC. STAT., FAST FACTS: EXPENDITURES), [<https://perma.cc/YPD9-ASAJ>], (last visited Sept. 20, 2020).

11. U.S. DEP'T OF EDUC., EVERY STUDENT SUCCEEDS ACT (ESSA) [<https://perma.cc/E56N-TYHK>], (last visited Sept. 20, 2020).

in the same way as district public schools.<sup>12</sup> While private schools, even those receiving public funds, are not subject to ESSA's accountability requirements, several states with voucher programs (Indiana, Louisiana, Ohio, and Wisconsin) require participating schools to comply with state testing and reporting requirements—although, except in Indiana, only for voucher recipients.<sup>13</sup> And, while charter schools and private schools participating in parental choice programs continue to enjoy considerable operational autonomy, demands for states to hold schools in both sectors “accountable” for a range of other academic and non-academic factors abound.<sup>14</sup>

This Article uses comparative case studies to illustrate how these debates about funding and accountability can be helpfully reframed as a single debate about the appropriate level of institutional pluralism in K-12 education. Funding and autonomy are the twin legal levers of the pluralistic delivery of K-12 education. This is because the extent of institutional pluralism in the K-12 education context is determined primarily by two factors: *first*, which types of schools does the law require

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12. See Nicole Stelle Garnett, *Post-Accountability Accountability*, 52 MICH. J. L. REFORM 157, 184-86 (2018).

13. *Id.* at 182-84.

14. To give just one example, during her contentious confirmation hearings, U.S. Secretary of Education Betsy DeVos stumbled over the question of whether private schools participating in parental choice programs should be subject to the same accountability standards as public schools. Valerie Strauss, *Six Astonishing Things Betsy DeVos Said—and Refused to Say—at her Confirmation Hearing*, WASH. POST (Jan. 18, 2017), [<https://perma.cc/8KTV-2G2G>]. See, e.g., THOMAS B. FORDHAM INSTITUTE, PUBLIC ACCOUNTABILITY & PRIVATE SCHOOL CHOICE (2014), [<https://perma.cc/7LL8-EHWG>]; NAT'L CONF. OF STATE LEGISLATURES, IMPROVING SCHOOL CHOICE IN THE STATES (2014), [<https://perma.cc/7VZF-JR5G>]; ANNENBERG INSTITUTE FOR SCHOOL REFORM AT BROWN UNIVERSITY, PUBLIC ACCOUNTABILITY FOR CHARTER SCHOOLS: STANDARDS AND POLICY RECOMMENDATIONS FOR EFFECTIVE OVERSIGHT (2014) [<https://perma.cc/K4UH-G6XZ>]; Arianna Prothero, *There Is No Oversight: Private-School Vouchers Can Leave Parents on their Own*, EDUC. WEEK (Nov. 14, 2017), [<https://perma.cc/2AYL-5Q4B>]; Dylan Peers McCoy, *How Indiana Holds Private Schools Accountable*, THE ATLANTIC (May 12, 2017), [<https://perma.cc/HCK6-LZVA>]; Marcus A. Winters, *What Underlies the So-Called Charter School 'Special Education Gap'*, REALCLEAR EDUC. (June 20, 2014), [<https://perma.cc/C7VB-QHT5>]; ERICA FRANKENBERG ET AL., CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS (2010), [<https://perma.cc/5QJL-T79G>]; GROVER J. “RUSS” WHITEHURST ET AL., CENTER ON CHILDREN AND FAMILIES AT BROOKINGS, SEGREGATION, RACE AND CHARTER SCHOOLS: WHAT DO WE KNOW? (2016), [<https://perma.cc/2CHJ-MP7E>].

the government to fund (and at what level)? And, *second*, to what extent does the law preserve the autonomy of schools (both funded and unfunded) to operate free from government control?

The historical resistance to funding privately operated schools in the U.S. is relatively anomalous in other national contexts, but so too is the relative autonomy enjoyed by private providers of K-12 education.<sup>15</sup> While proponents of parental choice frequently observe that most other nations fund both private and public schools, sometimes at equal levels, they tend to overlook the fact that the funding often comes at the expense of government control.<sup>16</sup> As a result, in countries where funding for private schools is more broadly available, education-policy debates tend to focus on the flip side of the pluralism equation—that is, on government control.<sup>17</sup> Chile is case in point. In 1981, Chile introduced a universal education voucher system for students in elementary and secondary private (including faith-based) schools.<sup>18</sup> As a result, a majority of Chilean children attend private schools.<sup>19</sup> Approximately fifty-three percent of Chilean children attend a publicly subsidized private school, and another eight percent attend unfunded private schools.<sup>20</sup> Inspired by the Nobel Laureate Milton Friedman’s case for market-driven education reform, the Chilean system garners both praise and criticism for embodying maximal educational freedom.<sup>21</sup> But does it? Over time, Chile has imposed a number of restrictions

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15. See ASHLEY ROGERS BERNER, MANHATTAN INST., *THE CASE FOR EDUCATIONAL PLURALISM IN THE UNITED STATES* 4-7 (2019), [<https://perma.cc/975A-WQLH>].

16. *Id.* at 12-13.

17. *Id.*

18. RICHARD MURNANE & EMILIANA VEGAS, FUTUREED, *WHAT CHILE TEACHES US ABOUT SCHOOL VOUCHERS* (2018), [<https://perma.cc/E6SF-JKDK>].

19. ORG. FOR ECON. COOP. AND DEV., *EDUCATION IN CHILE* 45 (2017) [<https://perma.cc/A2TA-93EJ>].

20. *Id.*

21. See, e.g., MARIANO NARODOWSKI, EDCHOICE, *THE CHILE EXPERIMENT* 1-3 (2018), [<https://perma.cc/9FAA-KZS3>]; José Luis Drago and Ricardo D. Paredes, *The Quality Gap in Chile’s Education System*, 104 CEPAL REV. 161 (2011); Gregory Elacqua, *The Impact of School Choice and Public Policy on Segregation: Evidence from Chile*, 32 INT’L J. EDUC. DEV. 444 (2012); Juan Pablo Valenzuela et al., *Socioeconomic School Segregation in a Market-Oriented Educational System. The Case of Chile*, 29 J. OF EDUC. POL’Y 217 (2014); Diane Ravitch, *The Disaster of Free-Market Reform in Chile: Is This Our Model?*, DIANE RAVITCH’S BLOG (Mar. 27, 2015), [<https://perma.cc/JE6U-A3HG>].

on schools receiving government funds that significantly limit the autonomy of schools participating in the program.<sup>22</sup> In 2008, for example, Chile required all schools receiving vouchers to participate in a standardized-test-based accountability system.<sup>23</sup> At the same time, Chile adopted a variable funding regime (known as the “Preferential School Subsidy Law”) that both provides higher-value vouchers for lower-income students and gives schools serving more disadvantaged student populations additional bonuses.<sup>24</sup> As a condition for receiving these additional subsidies, however, private schools were required to agree not to charge any additional fees to the preferred students.<sup>25</sup> More recently, the 2015 Inclusion Law (*Ley de Inclusión*) further restricted the autonomy of subsidized schools by prohibiting them from charging *any* student (not just those receiving preferential subsidies) fees above the voucher amount and from using any selection criteria (including religious or academic considerations) in school admissions.<sup>26</sup> The *Ley de Inclusión* also excludes for-profit schools from participating in the voucher program.<sup>27</sup> In addition to these restrictions placed on schools receiving government funds, all private schools in Chile, funded and unfunded, must comply with an extremely regimented national curriculum that, among other things, dictates the number of seat minutes of instruction that children must receive in a variety of subjects.<sup>28</sup> A new reform proposal currently under consideration would require all private schools to admit a certain percentage of low-income students, regardless of whether they receive public funds.<sup>29</sup> The Chilean experience, and many others—including

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22. See Richard J. Murnane et al., *The Consequences of Education Voucher Reform in Chile* 4-5 (Inter-American Dev. Bank Working Paper, Paper No. 833, 2017), [<https://perma.cc/G8JQ-94FR>].

23. *Id.*

24. *Id.*

25. *Id.* at 5.

26. PAULO SANTIAGO ET AL., ORG. FOR ECON. COOP. AND DEV., REVIEWS OF SCHOOL RESOURCES: CHILE 53 (2017), [<https://perma.cc/3RDQ-3NKA>].

27. *Id.*

28. *Id.* at 54.

29. See, e.g., Josephina Martinez, *Machuca Law in Chile: Is Such a Measure Applicable to Shorten the Educational Gap?*, AMÉRICA ECONOMÍA (Feb. 9, 2019), [<https://perma.cc/Z8RW-MSQH>]; Natacha Ramírez,

those studied in this Article—illustrate that the comparative landscape of institutional pluralism in K-12 education is complex and multifaceted and its elements shifting and contested.<sup>30</sup> Government funding does not, alone, guarantee educational pluralism because government funding is often accompanied by government control of private schools. Government funding fosters educational pluralism only when paired with autonomy for non-public schools.

This Article begins to map the comparative landscape of educational pluralism along the two axes described above: funding and autonomy. It does so by describing the funding available to, and legal rules governing the operation of, private schools in four national contexts: the United States (Low-Funding/High-Autonomy), Australia (High-Funding/High-Autonomy), India (High-Funding/Low-Autonomy), and Greece (Low-Funding/Low-Autonomy).<sup>31</sup> These comparative accounts illustrate that government control and government funding are two distinct issues: in some contexts—India, for example—government-funded private schools relinquish nearly all operational autonomy, so much so that they begin to look functionally like public schools.<sup>32</sup> In others—for example, Australia—government-funded private schools are subject to certain academic accountability requirements but otherwise enjoy substantial operational autonomy.<sup>33</sup> In still others, the government controls the operation of private schools even when they receive no government funds (and, indeed, are not entitled to receive them.)<sup>34</sup>

While this Article’s analysis is primarily descriptive, it has important normative implications for ongoing debates about parental choice in the United States. Parental-choice proponents

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*Experts Differ on the Impact of the “Machuca Law,” but Agree on the Need to Audit Admission to Paid Schools*, EMOL (Jan. 18, 2019), [<https://perma.cc/HWP2-XN6D>].

30. See generally Berner, *supra* note 15.

31. See *infra* Section II.

32. See *infra* Section II.C.2.

33. See NANCY KOBER, CTR. ON EDUC. POL’Y, LESSONS FROM OTHER COUNTRIES ABOUT PRIVATE SCHOOL AID: HIGHER PUBLIC FUNDING FOR PRIVATE SCHOOLS USUALLY MEANS MORE GOVERNMENT REGULATION 9-10 (1999).

34. *Id.* at 8.



in the United States (including, admittedly, myself) have long assumed that government funding will foster and preserve institutional pluralism by leveling the competitive playing field between government- and privately operated schools by bringing faith-based and private schools within the financial reach of families of modest means.<sup>35</sup> But the comparative landscape of educational pluralism suggests the importance of attending to the question of where regulations cross the line between holding schools accountable and subjecting them to government control. Specifically, the comparative legal lens highlights several regulatory areas where this question arises. These areas, which are discussed in the final section of this paper, include: first, the selection of teachers and school leaders; second, control over the composition of the student body; and third, school curriculum.<sup>36</sup>

### I. MAPPING THE EDUCATIONAL PLURALISM ON TWO AXES

Before embarking on the regulatory mapping exercise described above, a few words about how this Article defines “educational pluralism” are in order. The goal of this Article is not to contribute to the rich philosophical debates about the meaning and benefits of “pluralism” in general. Rather, as used here, educational pluralism is used descriptively as a shorthand way to refer to the pluralistic institutional delivery of K-12 education—that is, as a way of describing a plurality of types of school operators. This definition presumes institutional pluralism; it requires a diversity of schools operated by a diversity of institutional actors. This definition of educational pluralism draws heavily on Ashley Berner’s work, including her recent book, *No One Way to School: Pluralism and American Public Education*.<sup>37</sup> Berner describes educational pluralism as a system in which “governments fund and hold accountable a wide variety of schools, including religious ones, but do not necessarily

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35. See BERNER, *supra* note 15, at 5-6.

36. See *infra* Section III.

37. See ASHLEY ROGERS BERNER, *NO ONE WAY TO SCHOOL: PLURALISM AND AMERICAN PUBLIC EDUCATION* 3 (Lance D. Fusarelli et al. eds., 2017).

operate them.”<sup>38</sup> Institutional pluralism in K-12 education might be justified (or criticized) on both philosophical and utilitarian grounds, although—again—this Article makes no effort to engage these questions.<sup>39</sup> Institutional pluralism is distinct from parental choice, since parents can be given choices among a range of schools in a monolithic system.<sup>40</sup> The latter is the case in many, perhaps most, public school districts today.<sup>41</sup> A plural system of schools is also distinct from a diverse system, since monolithic systems can and do operate a diversity of school types (such as themed-based magnet schools that are common in many urban school districts in the United States).<sup>42</sup>

Government funding of privately-operated schools is necessary but not sufficient for a pluralistic education system.<sup>43</sup> Educational pluralism can (and does) exist without government funding of private schools.<sup>44</sup> Indeed, some degree of pluralism exists in almost all countries (except for the handful that prohibit

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38. *Id.*

39. Philosophically, as Berner explains, “[p]luralistic systems rely upon the voluntary sector to help deliver education[,]” because “[e]ducation is not a neutral enterprise. Schools instruct children, whether explicitly or implicitly, about meaning, purpose, and the good life. Pluralism acknowledges the non-neutrality of education and thus supports a mosaic of schools that differ from one another in significant ways.” BERNER, *supra* note 15, at 6. From a utilitarian perspective, plural systems of education may also promote student achievement and civic engagement, although not all do. *See* BERNER, *supra* note 37, at 77-80. This Article leaves to one side the important and deeply contested questions about how to evaluate the “success” of pluralistic educational systems, as well as equally important and contested questions about which elements of plural systems might lead them to outperform monolithic systems and which might lead them to do worse. *See, e.g.*, Ludger Woessman, *Why Students in Some Countries Do Better*, EDUC. NEXT (last updated July 20, 2006), [<https://perma.cc/B9VU-SUZN>] (finding that students perform better in countries with higher levels of private school enrollment).

40. Theoretically, they might also be assigned to different schools in a plural system. *See* James G. Dwyer, *The Parental Choice Fallacy in Education Reform Debates*, 87 NOTRE DAME L. REV. 1837, 1839-40 (2012).

41. *See* Garnett, *Sector Agnosticism*, *supra* note 3, at 12-13.

42. *See id.*

43. *See* BERNER, *supra* note 15, at 6 (“Schooling is complex . . . . [P]luralism is designed to promote two in-school factors that exercise an independent, positive effect on academic and civic outcomes: a strong school culture; and a robust academic curriculum.”).

44. *See id.* at 8-9 (explaining that some private schools naturally achieve the principles advanced by a well-designed plural system).

private schools altogether),<sup>45</sup> regardless of whether public funding is made available to private schools or private-school students. That said, a government's decisions to fund non-government schools can promote pluralism by reducing the costs of private-school operations.<sup>46</sup> Government funding may also require schools operated by non-government providers more accessible to students of modest means.<sup>47</sup> On the other hand, government funding of privately-operated schools promotes pluralism only when accompanied by respect for operational autonomy.<sup>48</sup> Educational systems characterized by government funded, but pervasively controlled, private schools likely will be less plural than those characterized by unfunded, but relatively autonomous private schools.<sup>49</sup> In the latter, as in the United States, the level of institutional pluralism will be determined by the level of private resources available to fund private schools (and those schools will usually be accessible only to families who are wealthy enough to pay tuition).<sup>50</sup> Relatedly, when government funding comes at the expense of relinquishing operational autonomy, the level of pluralism will be determined by the extent to which private schools are allowed to preserve their autonomy by opting out of the funding system.<sup>51</sup> In fact, many countries have three sectors of schools: public schools, publicly funded/privately operated schools, and privately funded/privately operated schools.<sup>52</sup> This situation mirrors in significant ways the public/charter/private distinction in the United States, although charter schools are legally designated as public schools in all states and may not be religious.<sup>53</sup> In some

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45. See Charles Bremner & Stephen Gibbs, *Private Schools Row: What Can We Learn From Other Countries?*, THE TIMES (Sept. 24, 2019), [<https://perma.cc/2FA4-6NEE>] (noting that Cuba and North Korea ban private schools).

46. See Harro Van Brummelen, *Effects of Government Funding on Private Schools: Appraising the Perceptions of Long-term Principals and Teachers in British Columbia's Christian Schools*, 18 CAN. J. EDUC. 14, 19 (1993).

47. See BERNER, *supra* note 15, at 16.

48. See Brummelen, *supra* note 46, at 22, 25-26.

49. See KOBER, *supra* note 33, at 8, 13.

50. BRINIG & GARNETT, *supra* note 1, at 164-65; *see also* BERNER, *supra* note 15, at 5.

51. See Brummelen, *supra* note 46, at 23, 26.

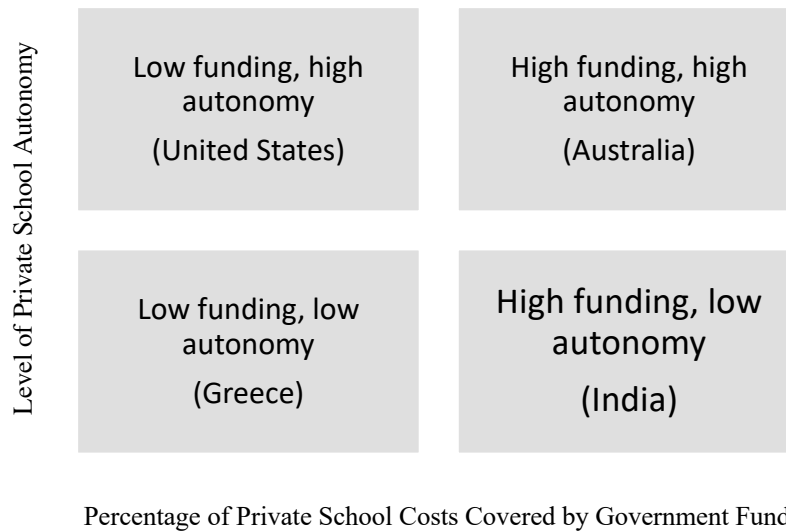
52. See KOBER, *supra* note 33, at 4-8.

53. See Garnett, *Sector Agnosticism*, *supra* note 3, at 46-47.

countries, however, the government closely controls (even manages) all private schools, even though they are not entitled to receive public funds.<sup>54</sup>

The relationship between government funding and school autonomy can be mapped along two axes, as depicted in Figure 1. Figure 1 also indicates national contexts representing each of the four possible combinations of autonomy and funding.<sup>55</sup>

Figure 1



Obviously, this matrix represents a highly stylized summary of incredible policy complexity. A realistic depiction of the combination of funding and autonomy would yield a scatter plot graph, with more plural systems concentrated in the top right-hand corner of the graph, and less plural systems in the bottom left-hand corner.

54. See *infra* Section II.D and accompanying discussion.

55. José Pablo Arellano, the former Chilean Minister of Education, introduced me to this spatial depiction of educational pluralism in a conference presentation at the University of Notre Dame's Rome Global Gateway. See also *infra* Section II.

## II. EDUCATIONAL PLURALISM IN FOUR CONTEXTS

This section provides an overview of these twin inputs into educational pluralism—the levels of government funding and institutional autonomy afforded private schools—in national contexts falling into the four quadrants in Figure 1: Low Funding, High Autonomy (United States),<sup>56</sup> High Funding, High Autonomy (Australia),<sup>57</sup> High Funding, Low Autonomy (India),<sup>58</sup> and Low Funding, Low Autonomy (Greece).<sup>59</sup>

### A. Low Funding, High Autonomy: The United States

In the United States, the primary driver of educational pluralism is the fact that K-12 public education is delivered by over 13,000 local school districts, which are special purpose local governments that operate independently of one another and with some autonomy from state and federal regulators.<sup>60</sup> The second is private schooling. During the 2019-2020 school year, about 56.4 million students attended elementary and secondary schools in the United States.<sup>61</sup> Approximately ninety percent of these students attended public schools, and ten percent attended private schools.<sup>62</sup> An additional 1.7 million students (approximately three percent of the total K-12 population) were homeschooled.<sup>63</sup> Over three-quarters of all private-school students attend faith-based schools, although the share of students enrolled in faith-based schools, and especially Catholic schools, has been declining for several decades.<sup>64</sup> Until recently, the only

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56. *See infra* Section II.A.

57. *See infra* Section II.B.

58. *See infra* Section II.C.

59. *See infra* Section II.D.

60. Maya Riser-Kositsky, *Education Statistics: Facts About American Schools*, EDUC. WK. (Jan. 3, 2019), [<https://perma.cc/SDY2-HMUL>].

61. NAT'L CTR. FOR EDUC. STAT., FAST FACTS: BACK TO SCHOOL STATISTICS, [<https://perma.cc/8YME-WY87>].

62. *Id.*

63. Riser-Kositsky, *supra* note 60; NAT'L CTR FOR EDUC. STAT., FAST FACTS: HOMESCHOOLING, [<https://perma.cc/7DPX-PCE3>].

64. COUNCIL FOR AM. PRIV. EDUC., PRIVATE SCHOOL STATISTICS AT A GLANCE, [<https://perma.cc/R2PE-5V75>].

government funds available to private schools and private-school students was through a handful of federal and state programs that provide modest, primarily in-kind, assistance (for example, transportation, books, free lunches, remedial tutoring, and professional development for teachers).<sup>65</sup> For example, ESSA provides federal funds for a number of supplemental education programs (including remedial tutoring, English language instruction, and professional development).<sup>66</sup> While the vast majority of federal education funds go to support public schools, private school students and teachers are entitled to access some federal funds under limited circumstances.<sup>67</sup>

Over the past few decades, this has begun to change. More than half of all states and the District of Columbia now have at least one private-school choice program that funds scholarships for students in private schools, a majority of which have been enacted in the last decade.<sup>68</sup> However, most of these programs are quite modest in both scope and scale: the money expended through them—approximately \$2.6 billion—is only about .03 percent of total K-12 education spending in the United States, and less than one percent of American children (approximately 520,000) currently attend private schools using the funds that these programs provide.<sup>69</sup> Additionally, forty-five states and the District of Columbia authorize charter schools, which are privately operated schools (that are by law designated as “public”).<sup>70</sup> Six percent of public school students attend a charter

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65. See KOBER, *supra* note 33, at 14-15.

66. See COUNCIL FOR AM. PRIVATE EDUC., PRIVATE SCHOOLS AND THE EVERY STUDENT SUCCEEDS ACT 12-13, 15 (2016), [<https://perma.cc/62H2-2949>].

67. Federal law requires school districts receiving these funds to ensure the “equitable participation” of private schools and students in these programs. *Id.* at 16. The circuitous “equitable participation” funding mechanism makes it difficult to know how much funding private schools receive through these programs (and how much they may be entitled to receive but never collect), especially because public school districts have little incentive to be aggressive about distributing funds to nonpublic schools. See NAT’L CATH. EDUC. ASS’N, ACCESSING FEDERAL PROGRAMS (2020) [<https://perma.cc/FV27-YCKP>].

68. See GUIDEBOOK, *supra* note 10, at 7.

69. See *id.* 10 at 8-10; NAT’L CTR. FOR EDUC. STAT., FAST FACTS: BACK TO SCHOOL STATISTICS (2020), [<https://perma.cc/C6S6-ZJMP>].

70. See ED. COMM’N OF THE STATES, 50-STATE COMPARISON: CHARTER SCHOOL POLICIES (2020), [<https://perma.cc/XT4U-XGR5>]. I have elsewhere argued that charter

school, although charter school market share is much higher in many urban districts—over forty percent in seven districts, over thirty percent in twenty-one districts, and over twenty percent in sixty-four districts.<sup>71</sup>

### *1. Government funding*

In the United States, debates about public funding of private schools date to the mid-nineteenth century, a time when the growth of public or “common” schools coincided with an exponential increase in immigration from countries with large Catholic populations.<sup>72</sup> A Protestant ethos pervaded most early public schools. Catholics, who were at first eager to take advantage of the opportunity for a free education, began to object to the mistreatment and evangelization of their children in public schools, many of which were either unwelcoming of Catholic students, determined to evangelize them, or both.<sup>73</sup> Their demands for accommodation (for example, that Catholic students be permitted to read the Catholic *Douey-Rheims* version of the Bible rather than the Protestant *King James* version) often fell on deaf ears and sometimes provoked mob violence.<sup>74</sup>

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schools should also be considered private schools, but they are legally designated “public” in all states and in federal law. Garnett, *Sector Agnosticism*, *supra* note 3, at 52-58.

71. NAT’L CTR. FOR EDUC. STAT., PUBLIC CHARTER SCHOOL ENROLLMENT (2020), [<https://perma.cc/MB6D-N4ZQ>]; HESLA, *supra* note 8, at 2-3.

72. BRINIG & GARNETT, *supra* note 1, at 11.

73. *See, e.g., id.*; JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM 112-19 (2003); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 221-29 (2002).

74. *See, e.g., MCGREEVY, supra* note 73, at 40. The most spectacular of these incidents was the “1844 Philadelphia Bible Riots,” which were triggered by Catholic demands that their children be permitted to opt out of religious exercises or read the Catholic Douay-Rheims Bible. BRINIG & GARNETT, *supra* note 1, at 13-14.

Following a flurry of polemical newspaper articles arguing that Catholics were attempting to convert public schools into “infidel” institutions, a riot ensued. *Id.* at 14. Over the next three days, nativists burned Catholic neighborhoods, churches and schools. *Id.* Subsequently, a grand jury issued a statement blaming Catholics for the riots, asserting that the violence resulted from “the efforts of a portion of the community to exclude the Bible from our Public Schools.” Hugh J. Nolan, *Francis Patrick Kenrick, First Coadjutor Bishop*, in THE HISTORY OF THE ARCHDIOCESE OF PHILADELPHIA 113, 181 (James F. Connelly ed., 1976). The violence in Philadelphia departed in scale, but not in kind, from other anti-Catholic attacks. As Philip Hamburger has observed, “[i]n the 1830s[,] Protestants initiated the practice of burning down Catholic churches . . . . For decades afterwards, Protestant mobs

Eventually, Catholics gave up. As Joseph Viteritti has observed, Catholic schools were founded “in the spirit of protest” by Catholic leaders who had grown weary of unsuccessfully demanding that their children be accommodated in public schools.<sup>75</sup> At the first national meeting of United States bishops in 1852, the fiery Bishop of New York, “Dagger John” Hughes, led the charge for the formation of an independent Catholic school.<sup>76</sup> As Bishop Hughes explained, the public school practice of putting Protestant material “into the hands of *our own* children, and that in part at our expense, was . . . unjust, unnatural, and at all events to us intolerable. Accordingly, through very great additional sacrifices, we have been obliged to provide schools . . . in which to educate our children as our conscientious duty required.”<sup>77</sup> At the conclusion of the meeting, the bishops issued a mandate requiring all parishes build and operate Catholic schools and all Catholic parents send their children to them.<sup>78</sup>

At the time, Catholic leaders hoped that they could secure government funding for their schools. As early as 1840, Hughes had demanded that New York public school officials award Catholic schools “a proportional, per-pupil share of public education funds for the students that they enrolled.”<sup>79</sup> “In making his case, Hughes cited both New York City’s historical practice of distributing public funds to quasi-denominational Protestant schools and the dominant Protestant character pervading the public schools.”<sup>80</sup> The state legislature responded in 1842 by explicitly prohibiting public funds from flowing to *sectarian* schools; two years later, the legislature passed additional legislation making the *King James Bible* mandatory reading in all

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sporadically indulged in open conflict, often stimulated by both settled ministers and less respectable but gifted street preachers . . . who . . . incited Protestants to attack Catholics and torch their houses and churches.” HAMBURGER, *supra* note 73, at 216-17.

75. U.S. DEP’T OF EDUC., PRESERVING A CRITICAL NATIONAL ASSET: AMERICA’S DISADVANTAGED STUDENTS AND THE CRISIS IN FAITH-BASED URBAN SCHOOLS 76 (2008).

76. BRINIG & GARNETT, *supra* note 1, at 11.

77. LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL 1825-1925 84 (1987).

78. BRINIG & GARNETT, *supra* note 1, at 15.

79. *Id.* at 16.

80. *Id.*



public schools.<sup>81</sup> Neither Hughes' demands nor the negative response to them were unique. In the years following the Civil War, Catholic demands for government funding for their schools on equality grounds increased.<sup>82</sup> The call for government funding, however, universally backfired—fueling new waves of nativism and conspiracy theories that Catholics were engaged in a concerted effort to destroy American democracy.<sup>83</sup>

The nativist reaction to Catholic demands (and fear of the destabilizing, antidemocratic effects of Catholic schools) prompted an effort to amend the federal constitution to prohibit forever the funding of religious schools. In 1875, James G. Blaine, then Speaker of the United States House of Representatives, proposed an amendment to the United States Constitution prohibiting any public funds from flowing to “sectarian” schools.<sup>84</sup> That anti-Catholic animus fueled this effort is not disputed. Expressing support for the Blaine Amendment, President Grant referred to the “Romish Church” as a source of “superstition and ignorance” and charged that it was seeking to overthrow the American public school system.<sup>85</sup>

While the federal Blaine amendment narrowly failed to secure approval in Congress, its defeat hardly spelled the end to efforts to enshrine the no-funding principle in American law. Congress thereafter required new states to adopt similar language in their state constitutions as a condition of statehood.<sup>86</sup> Other states voluntarily amended their own constitutions. Today, thirty-seven states' constitutions contain some language restricting the public funding of religious schools (sometimes along with other

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81. JORGENSEN, *supra* note 77, at 75; HAMBURGER, *supra* note 73, at 220.

82. *See e.g.*, HAMBURGER, *supra* note 73, at 335-37.

83. *Id.* at 335-36 n.1.

84. JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 151-53 (1999); Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 FIRST AMEND. L. REV. 45, 60-71 (2003). On the 19th Century “school wars,” *see generally* JORGENSEN, *supra* note 77.

85. Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L. J. 43, 51 (1997); JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925 29 (1955). His views were widely shared. In the debate over the amendment, for example, one senator asserted that Catholics—instigated by their “universal, ubiquitous, aggressive, restless, and untiring” Church—were seeking to destroy the common school system. JORGENSEN, *supra* note 77, at 139.

86. BRINIG & GARNETT, *supra* note 1, at 17.

private schools or other kinds of religious institutions).<sup>87</sup> As Justice Alito documented in his recent concurrence in *Espinoza v. Montana Department of Revenue*, it is well known that the federal Blaine Amendment, and many of the state constitutional provisions modeled on it, were “prompted by virulent prejudice against immigrants, particularly Catholic immigrants” and adopted with the explicit goal of preventing Catholic schools from receiving public funds.<sup>88</sup> By the end of the nineteenth century, it had become clear that public support for private schools would be the rare exception to the rule,<sup>89</sup> and faith-based school operators had become resigned to going it alone.<sup>90</sup>

The argument that the government should directly fund students in private schools was resuscitated in 1955 by Nobel Laureate economist Milton Friedman. Friedman argued that the injection of competition into the market for K-12 education, enabled by what he called “vouchers,” would improve overall academic performance across educational sectors.<sup>91</sup> Beginning in the Reagan administration, conservatives seized upon Friedman’s free-market rhetoric, promoting parental choice as a way of improving the educational prospects of disadvantaged children and of reforming struggling public schools.<sup>92</sup> During the early 1980s, for example, President Reagan urged Congress to give low-income children the option of attending private schools as an alternative to the federal funding of remedial instruction in public schools.<sup>93</sup> The idea languished, however, until two events in 1990 ignited the modern parental choice movement. The first was the publication of John Chubb and Terry Moe’s influential book,

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87. HAMBURGER, *supra* note 73, at 335; Kyle Duncan, *Secularism’s Laws, State Blaine Amendments and Religious Persecution*, 72 *FORDHAM L. REV.* 493, 514-15 n.95 (2003).

88. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2268 (2020) (Alito, J., concurring).

89. *See, e.g.*, Nathan S. Chapman, *Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause*, 96 *NOTRE DAME L. REV.* (forthcoming 2020).

90. *See Pierce v. Society of Sisters*, 268 U.S. 510, 514, 519 (1925).

91. *See* Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 123, 125, 127 (Robert A. Solo ed., 1955).

92. Robert Pear, *Reagan Proposes Vouchers to Give Poor a Choice of Schools*, *N.Y. TIMES* (Nov. 14, 1985), [<https://perma.cc/PN3B-PNXV>].

93. *Id.*

*Politics, Markets, and America's Schools*.<sup>94</sup> Chubb and Moe, like Friedman, saw parental choice in education as a means of igniting competition with public schools. “Choice,” they asserted, “has the capacity *all by itself* to bring about the kind of transformation that, for years, reformers have been seeking to engineer in myriad other ways.”<sup>95</sup> The second was the emergence of a successful, if unusual, political coalition in Wisconsin. African American activists in Milwaukee—led by former Milwaukee school superintendent Howard Fuller and a state legislator named Polly Williams—combined forces with Republican Governor Tommy Thompson to secure the passage of the nation’s first modern school voucher program.<sup>96</sup> Initially, the Milwaukee Parental Choice Program entitled poor public school children in the city of Milwaukee to spend a portion of their public education funds at secular private schools; the program was expanded to include religious schools in 1995.<sup>97</sup> Ohio followed suit in 1995, enacting a private-school choice program for disadvantaged children in Cleveland, most of whom opted to attend religious schools.<sup>98</sup>

Even after these initial inroads, private-school choice faced major legal and political obstacles. The constitutionality of permitting parents to expend public resources at private religious schools remained unsettled until more than a decade after the Wisconsin program was enacted. This was problematic because the vast majority of private schools in the United States, especially affordable ones, are religiously affiliated.<sup>99</sup> Beginning

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94. JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990).

95. *Id.* at 217.

96. HOWARD FULLER, *EDUCATION NEXT, THE ORIGINS OF THE MILWAUKEE PARENTAL CHOICE PROGRAM* (2015), [<https://perma.cc/A278-FGS2>]. Since the mid-nineteenth century, Maine and Vermont have maintained “town tuitioning” programs, which permit students in towns without public high schools to use public dollars to attend other public or private secular schools. *See* EDCHOICE, *THE ABCS OF SCHOOL CHOICE*, 43, 73 (2019) [hereinafter *THE ABCS OF SCHOOL CHOICE*]. Illinois and Minnesota have very modest nonrefundable parental tax credit programs. *See id.* at 101, 145.

97. *See* *Jackson v. Benson*, 578 N.W.2d 602, 607–10 (Wis. 1998) (summarizing the history of the Milwaukee Parental Choice Program).

98. *Zelman v. Simmons-Harris*, 536 U.S. 639, 645–47 (2002).

99. STEPHEN P. BROUGHMAN ET AL., *NAT'L CTR. FOR EDUC. STAT., CHARACTERISTICS OF PRIVATE SCHOOLS IN THE UNITED STATES: RESULTS FROM THE 2017-18 PRIVATE SCHOOL UNIVERSE SURVEY 2* (2019), [<https://perma.cc/53ND-VYJC>].

with the U.S. Supreme Court's landmark decision in *Everson v. Board of Education*, which incorporated the First Amendment's Establishment Clause, the U.S. Supreme Court had issued a series of arguably inconsistent opinions about whether, and under what circumstances, the government could publicly assist faith-based schools.<sup>100</sup> After *Everson*, which approved of publicly funded transportation to faith-based schools, the Court held, *inter alia*, that the government could lend secular textbooks—but not maps—to faith based schools, rejected as unconstitutional salary supplements for teachers of secular subjects, upheld state tax deductions for school tuition, and permitted a publicly funded sign language interpreter to assist a Catholic school student.<sup>101</sup> Although the Court appeared to be warming to public benefits being extended to religious organizations on a neutral basis, predicting how the Court would rule on the voucher questions required reading the legal tea leaves. It was only in 2002, in *Zelman v. Simmons-Harris*, when the Supreme Court rejected an Establishment Clause challenge to the Cleveland voucher program, that the federal constitutional question was settled, and the constitutional path cleared for the expansion of private-school choice.<sup>102</sup>

*Zelman* put an end to speculation about whether vouchers violated the First Amendment's Establishment Clause, but significant state constitutional hurdles to parental choice remained. Following *Zelman*, many commentators predicted that state constitutional limits on the government funding of private and faith-based schools—the Blaine Amendments described

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100. *Everson v. Board of Educ.*, 330 U.S. 1, 14-16 (1947); *Zelman*, 536 U.S. at 646-47, 661-63.

101. *Everson*, 330 U.S. at 16-17; *Board. of Educ. v. Allen*, 392 U.S. 236 (1968) (upholding a textbook-lending program); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (invalidating salary supplements for teachers of secular subjects); *Meek v. Pittenger*, 421 U.S. 349 (1975) (invalidating state program that lent instructional materials including maps, charts, recordings and films to religious schools); *Wolman v. Walter*, 433 U.S. 229 (1977) (invalidating program that provided educational resources other than textbooks to religious schools); *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding state tax deduction for private school tuition); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (upholding use of a publicly funded sign language interpreter in a religious school); *Mitchell v. Helms*, 530 U.S. 793 (2000) (overruling *Meek* and *Wolman*).

102. *Zelman*, 536 U.S. at 646-47, 662-63.

above—would remain major impediments to the expansion of private-school choice.<sup>103</sup> Contrary to post-*Zelman* predictions, however, these provisions have not proven to be an insurmountable obstacle to the expansion of parental choice. Blaine Amendment challenges to private-school choice programs have been, by and large, rejected.<sup>104</sup> While a number of lower courts have relied upon Blaine Amendments to invalidate private-school choice programs, only three state supreme courts have done so.<sup>105</sup> Moreover, in June 2020, the U.S. Supreme Court decided a case that effectively precludes Blaine Amendment challenges to private-school-choice programs in most states. In *Espinoza*, the Court held that the Montana Supreme Court violated the Free Exercise Clause when it invalidated a program giving a \$150 tax credit for contributions to an organization that provides scholarships to students who attend private schools.<sup>106</sup> The Montana court concluded that, because some of the participating students attended faith-based schools, the program violated the state’s Blaine Amendment, which forbids “any direct or indirect appropriation or payment” for “any sectarian purpose or to aid any church, school, academy . . . controlled in whole or in part by any church, sect, or denomination.”<sup>107</sup> While acknowledging that the tax-credit program did not violate the federal Establishment Clause, Montana argued that it had an important interest in maintaining a greater degree of church-state separation than required by the federal constitution.<sup>108</sup> The U.S.

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103. See, e.g., Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151, 151 (2003); Garnett, *Theology of the Blaine Amendments*, *supra* note 84, at 45-47; Ira C. Lupu & Robert W. Tuttle, *Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 919-20 (2003).

104. *Magee v. Boyd*, 175 So. 3d 79, 143 (Ala. 2015); *Meredith v. Pence*, 984 N.E.2d 1213, 1230-31 (Ind. 2013); *Hart v. State*, 774 S.E.2d 281, 294 (N.C. 2015); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211 (Ohio 1999); *Jackson v. Benson*, 578 N.W.2d 602, 632 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998).

105. *Cain v. Horne*, 202 P.3d 1178, 1184-85 (Ariz. 2009); *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 351 P.3d 461, 475 (Colo. 2015); *Espinoza v. Montana Dep’t of Revenue*, 435 P.3d 603, 615 (2018), *cert. granted* 139 S.Ct. 2777 (2019).

106. *Espinoza v. Montana Dep’t of Revenue*, No. 18-1195, slip op. at 1-2, 21-22 (S. Ct. June 30, 2020).

107. *Id.* at 3.

108. *Id.* at 3, 18.

Supreme Court disagreed, holding that all discrimination against religious organizations is subject to the most exacting constitutional scrutiny and that Montana's interest in enforcing its Blaine Amendment was not a compelling one.<sup>109</sup> While questions about the scope of *Espinoza*'s holding will be tested in later litigation, the decision clears away, in many states, a major legal hurdle to expanding parental choice. *Espinoza* eliminates a political hurdle as well, since Blaine Amendments are a bogeyman frequently trotted out by parental choice opponents in legislative battles.

The political hurdles to the expansion of private-school choice have always been at least as significant as the legal hurdles. Until recently, private-school choice has been the proverbial "third rail" in education policy for a variety of reasons—the opposition of teachers' unions being the most significant one.<sup>110</sup> One challenge facing private-school choice programs has been a sharp divergence between its historical base of support (conservative Republicans), and its intended beneficiaries (disadvantaged minority children). Conservatives championed school choice at the national level, but defection by state legislators has been a perennial impediment to program implementation.<sup>111</sup> Opposition among suburban Republicans, who are, generally speaking, happy with their district public schools, has impeded efforts to enact parental choice programs in a number of states.<sup>112</sup>

Fear of the potentially destabilizing effects of private school choice arguably fueled the movement to enact charter school laws, which in turn took the wind out of the sails of the

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109. *Id.* at 18.

110. See, e.g., TERRY M. MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA'S PUBLIC SCHOOLS 14, 327–29 (2011) (discussing teacher union opposition to private school choice); Michael Heise, *Law and Policy Entrepreneurs: Empirical Evidence on the Expansion of School Choice Policy*, 87 NOTRE DAME L. REV. 1917, 1932 (2012) ("Understandably, and with considerable justification, school choice supporters reflexively blamed teachers unions for school voucher initiative losses . . .").

111. See Kevin Carey, *How School Choice Became an Explosive Issue*, THE ATLANTIC (Jan. 24, 2012), [<https://perma.cc/6Y37-CXU3>]; James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L. J. 2043, 2088–89 (2002).

112. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L. J. 2043, 2088–89 (2002).

private-school choice movement. “At least until recently, a tacit political truce existed between supporters of district public schools and proponents of charter schools, since charter schools historically have been perceived as a ‘safer’ and more ‘constrained’ version of parental choice—one that is both ‘public’ and ‘secular.’”<sup>113</sup> “As a result, and in contrast to private-school choice, charter schools historically enjoyed broad, bipartisan political support.”<sup>114</sup> Within debates about educational finance, many moderate reformers traditionally advocated for charter schools as an alternative to private-school choice programs such as tax credits or vouchers.<sup>115</sup> For example, Michael Heise has demonstrated that the likelihood that a state enacted or expanded a charter program increased along with the “threat” of private-school choice.<sup>116</sup> Heise hypothesizes that opponents believed that the appetite for private-school choice would decrease as the range of public school choice options increased, labeling this reality as “ironic.”<sup>117</sup> School-voucher proponents often intentionally established private voucher programs in order to fuel demand for publicly funded vouchers, but their efforts backfired and instead fueled the political support for charters, which in turn decreased demand for private-school choice.<sup>118</sup>

The jury is out on whether Heise’s prediction will prove correct over the long term. The charter school truce over school choice has unraveled in recent years as charter market share has increased—so much so that commentators frequently refer to the debates over charter schools as a “war.”<sup>119</sup> And, during this same time period, for a variety of reasons, private-school choice has gained significant momentum. Fueled in part by a shift in

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113. Garnett, *Sector Agnosticism*, *supra* note 3, at 25.

114. *Id.* at 25–26.

115. *See* Heise, *supra* note 110, at 1919.

116. *Id.* at 1925, 1929–30.

117. *Id.* at 1931.

118. *Id.* at 1929–30.

119. *See, e.g.*, Richard D. Kahlenberg & Halley Potter, *Restoring Shanker’s Vision for Charter Schools*, AM. EDUCATOR, 2014–2015, at 4, 5 [<https://perma.cc/975U-ZHC5>] (“Proposed to empower teachers, desegregate students, and allow innovation from which the district public schools could learn, many charter schools instead prized management control, reduced teacher voice, further segregated students, and became competitors, rather than allies, of regular public schools.”)

messaging away from a discussion of “markets” and toward the imperative of giving poor parents options for their children, the coalition supporting private-school choice has expanded and diversified.<sup>120</sup> As Terry Moe has observed, “[t]he modern arguments for vouchers have less to do with free markets than with social equity. They also have less to do with theory than with the commonsense notion that disadvantaged kids should never be forced to attend failing schools and that they should be given as many attractive educational opportunities as possible.”<sup>121</sup>

There are reasons to believe that the private-school-choice footprint will grow in the years to come. Support for private-school choice remains highest among disadvantaged and minority parents, and proposals to adopt new programs or expand existing ones increasingly garners support across party lines.<sup>122</sup> Moreover, the private-school-choice menu has diversified to include devices that are more politically palatable (and less legally vulnerable) than vouchers. Beginning with Arizona in 1997, eighteen states have adopted “scholarship-tax-credit programs” that incentivize private donations to private scholarship organizations rather than funding them directly with public funds.<sup>123</sup> More recently, six states have enacted “education

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120. See Moe, *supra* note 110, at 329.

121. *Id.*

122. CATRIN WIGFALL, CTR. OF THE AM. EXPERIMENT, NATIONAL POLL SHOWS TREMENDOUS SUPPORT FOR SCHOOL CHOICE POLICIES (2020), [<https://perma.cc/5BJ3-VSXU>]; TOMMY SCHULTZ, AM. FED’N FOR CHILD., NATIONAL SCHOOL CHOICE POLL SHOWS 67% OF VOTERS SUPPORT SCHOOL CHOICE (2019), [<https://perma.cc/37Q9-GJWU>]; NEAL MCCLUSKEY, CATO INSTITUTE, AFRICAN AMERICANS SPEAK FOR THEMSELVES: MOST WANT SCHOOL CHOICE (2017), [<https://perma.cc/22CU-75RZ>].

123. GUIDEBOOK, *supra* note 10, at 4-5. Scholarship tax credits also may offer a way around the state constitutional restrictions discussed above. For example, while the Arizona Supreme Court relied on the state’s Blaine Amendment to invalidate a voucher program, it had previously rejected a Blaine Amendment challenge to the state’s scholarship-tax-credit program, suggesting that tax credits may be an option even in states with restrictive Blaine Amendments. *Kotterman v. Killian*, 972 P.2d 609-10, 625 (Ariz. 1999). And, in *Arizona Christian School Tuition Organization v. Winn*, the U.S. Supreme Court held that the plaintiffs in the case lacked standing to challenge the program because the funds at issue—private donations incentivized by the tax credit program—were not governmental, effectively immunizing them from federal Establishment Clause challenges. *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129, 143, 146 (2011). Several state courts have followed suit, holding that taxpayers lack standing to challenge scholarship-tax-credit programs. See, e.g., Travis Pillow, *Judge Dismisses Lawsuit Challenging Florida Tax Credit Scholarships*, REDEFINED (May 18, 2015), [<https://perma.cc/UV5Y-TN4J>].



savings account” programs that empower parents to spend state education funds on a range of educational expenses, including private-school tuition, and/or “bank” it for later use.<sup>124</sup> Today, as mentioned in the Introduction, more than half of states and the District of Columbia have publicly funded private-school-choice programs.<sup>125</sup> All told, in 2019, there were fifty-five private-school-choice programs in the United States, approximately half of which are voucher programs.<sup>126</sup> The largest programs include scholarship-tax-credit programs in Florida (~101K participants), Arizona (~96K participants) and Pennsylvania (~38K participants) and voucher programs in Indiana (~36K participants), Wisconsin (~40K participants), and Ohio (~52K participants).<sup>127</sup>

All that said, many private-school choice programs are poorly designed, and all of them are more limited in scope than charter-school programs. Almost all of them are limited in eligibility, compared to the universal access guaranteed by charter school laws.<sup>128</sup> The largest programs are either means-tested or both means-tested and limited to either students exiting failing schools or students residing in a particular city or school district.<sup>129</sup> Half of all programs target students with special needs (or even particular special needs such as autism or dyslexia), and approximately half of all programs are scholarship-tax-credit programs, which incentivize donations to scholarship funds but do not directly provide government funding for students to attend private schools.<sup>130</sup> Many scholarship-tax-credit programs generate very little choice: for example, in 2019, 416 and 369 students participated in New Hampshire’s and Kansas’s scholarship-tax-credit programs, respectively.<sup>131</sup> The per-pupil scholarship amount provided in scholarship-tax-credit programs tend to be, on average, approximately half of those provided in

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124. See GUIDEBOOK *supra* note 10, at 4-5.

125. *Id.* at 5.

126. *Id.*

127. *Id.* at 8-9.

128. See *id.* at 10-11.

129. GUIDEBOOK, *supra* note 10, at 10.

130. *Id.* at 4, 10-11.

131. *Id.* at 8.

voucher programs (in 2019, \$3,035 and \$5,848, respectively).<sup>132</sup> Even when voucher programs are included in the calculus, scholarships provided by private-school choice programs tend to be significantly lower than the per-pupil allocation provided to charter schools (which in turn tend to receive less money than district public schools).<sup>133</sup> A recent study by Patrick Wolf and his colleagues at the School Choice Demonstration Project found that charter schools receive, on average, \$5,721 (or twenty-nine percent) less per pupil than district public schools.<sup>134</sup> Still, the 2014 weighted average for charter school per student revenue was \$14,200, nearly \$10,000 more than the average scholarship amount in a private-school-choice program in 2016.<sup>135</sup> It is not surprising, therefore, that nearly ten times as many students attended charter schools than participated in a private-school-choice program in 2016.<sup>136</sup> Thus, while the funding landscape in K-12 education has shifted rather dramatically in the last three decades, the shift has primarily favored charter schools. Even if charter schools are considered private schools—and, I have elsewhere argued that they should, despite being designated public schools in all state and federal laws—the government funding of private schools in the United States is the exception to the rule.<sup>137</sup> A decision by the U.S. Supreme Court that faith-based schools can be charter schools, and perhaps also that states must permit faith based charter schools, would have a major destabilizing effect on this equilibrium. In the wake of *Espinoza*, these things are live possibilities—indeed Justice Breyer raised these questions in his dissent in *Espinoza*—but only after protracted litigation.<sup>138</sup>

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132. *Id.* at 5.

133. PATRICK J. WOLF ET AL., SCHOOL CHOICE DEMONSTRATION PROJECT, DEPARTMENT OF EDUCATION REFORM, UNIVERSITY OF ARKANSAS, CHARTER SCHOOL FUNDING: INEQUITY IN THE CITY 4, 5 (2017) [<https://perma.cc/YUH4-U4Q8>].

134. *Id.* at 11.

135. *Id.*; AM. FED’N FOR CHILD. GROWTH FUND, SCHOOL CHOICE YEARBOOK 11 (2016), [<https://perma.cc/JU68-FJVE>]. In 2015-2016, \$4,902 was the average scholarship amount in private school choice programs. *Id.*

136. *See id.* at 6; *see* GUIDEBOOK, *supra* note 10, at 6.

137. *See* Garnett, *Sector Agnosticism*, *supra* note 3, at 46-47.

138. *Espinoza v. Montana Dep’t of Revenue*, No. 18-1195, slip op. at 19 (S. Ct. June 30, 2020) (Breyer, J., dissenting).

## 2. *Autonomy of Privately-Operated Schools*

The autonomy enjoyed by private schools in the United States essentially is the inverse of the level of government funding available to them, which is to say that private schools enjoy substantial freedom from government regulation and oversight.<sup>139</sup> Private school regulations, which are almost exclusively the purview of state law, vary across a number of factors, but are almost universally minimal. For example, approximately half of all states require private schools to register with state education officials, secure approval to operate, or both.<sup>140</sup> No state requires accreditation to operate, although eleven require it for a subset of schools or permit schools to use accreditation to satisfy other mandated requirements.<sup>141</sup> Approximately half of all states require private schools to comply with certain health regulations (such as employing a school nurse),<sup>142</sup> all require basic reporting and record keeping (such as student enrollment and demographic data),<sup>143</sup> and most mandate that schools remain in session some minimum number of school days (or instructional hours).<sup>144</sup> While private schools are usually exempt from state curricular mandates, forty states do regulate curriculum in some way:<sup>145</sup> for example, a handful of states require that a private school's curriculum roughly approximate the public school curriculum (although there is reason to believe that these requirements are

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139. See U.S. DEP'T OF EDUC., STATE REGULATION OF PRIVATE SCHOOLS 317-25 tbl.A1 (2009), [<https://perma.cc/9D4J-ASVL>].

140. *Id.* at 326-27 tbl.A2. Eighteen states require private schools to register, and 18 require approval. *Id.*

141. *Id.*

142. *Id.* at 330-32 tbl.C.

143. *Id.* at 328-29 tbl.B.

144. See, e.g., U.S. DEP'T OF EDUC., *supra* note 139, at 51 (Florida), 97 (Kansas), 103 (Kentucky), 109 (Louisiana), 118 (Maine), 125 (Maryland), 158 (Montana), 164 (Nebraska), 171 (Nevada), 176 (New Hampshire), 188 (New Mexico), 192 (New York), 201 (North Carolina), 207 (North Dakota), 212 (Ohio), 220 (Oklahoma), 225 (Oregon), 230 (Pennsylvania), 242 (Rhode Island), 253 (South Dakota), 268 (Texas), 288 (Virginia); 294 (Washington), 301 (West Virginia), 307 (Wisconsin), 313 (Wyoming).

145. *Id.* at 328-29 tbl.B.

under- or unenforced).<sup>146</sup> Some states mandate that private schools teach certain core subjects; others mandate that they adopt a curriculum approved by an association of private schools.<sup>147</sup> And still others are silent on the matter of curriculum.<sup>148</sup> Approximately half of the states require private schools to administer a standardized test of their choice in some grades, but most of them do not require the schools to report the results.<sup>149</sup> No state requires all private schools to participate in the state accountability process as a whole.<sup>150</sup> However, as discussed below, at least three states do require schools participating in a private-school choice program to administer state-mandated standardized tests.<sup>151</sup> Additionally, a few states condition the awarding of high school diplomas on successful performance on a state-mandated high school graduation exam.<sup>152</sup> Only two states, North Dakota and Nevada, require private schools to employ certified teachers, although just over half of states require certification for certain categories of employees (for example, school leaders) and for certain types of schools (for example, secular but not faith-based schools).<sup>153</sup>

Private schools, as employers, are generally subject to state and federal employment and nondiscrimination regulations, although these laws generally permit faith-based schools to

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146. Recently, regulations adopted by the New York State Education Department, which would authorize local school district officials to investigate whether private schools are complying with a state law requiring that private schools have a curriculum that is “substantially equivalent” to those of public schools, have provoked protests. Leslie Brody, *New York Private-School Oversight Proposal Sparks More Ire*, WALL ST. J. (July 23, 2019), [<https://perma.cc/B328-SR22>]. A state court invalidated the original regulations as violating New York administrative law requirements, but regulators have made clear their intent to reenact them. Peter Murphy, *Under Assault: New York’s Private and Parochial Schools*, CITY J. (Sept. 5, 2019), [<https://perma.cc/9UGG-NSPJ>].

147. See U.S. DEP’T OF EDUC., *supra* note 139, at 328-29 tbl.B.

148. *Id.*

149. Arianna Prothero & Alex Harwin, *Private School Choice Programs Fall Short on Transparency, Accountability*, EDUC. WEEK (Feb. 28, 2020), [<https://perma.cc/PL5X-PMVP>].

150. *Id.* at 328-29 tbl.B.

151. JOSH CUNNINGHAM, NAT’L CONF. OF STATE LEGISLATURES, *IMPROVING SCHOOL CHOICE IN THE STATES: ACCOUNTABILITY IN PRIVATE SCHOOL CHOICE PROGRAMS 4* (2014), [<https://perma.cc/MSH9-PC89>].

152. See, e.g., U.S. DEP’T OF EDUC., *supra* note 139, at 115, 215.

153. *Id.* at 170, 207, 317-25 tbl.A1.

consider religion in certain hiring decisions. Moreover, the Free Exercise Clause precludes certain employment decisions from any government regulation or judicial scrutiny.<sup>154</sup> In 2012, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, the U.S. Supreme Court unanimously ruled that the Free Exercise Clause protects religious organizations from any government regulation or judicial scrutiny of employment decisions concerning “ministerial” employees.<sup>155</sup> More recently, in *Our Lady of Guadalupe School v. Morrissey-Berru*, decided in July 2020, the Court clarified that this “ministerial exception” covers all teachers whose duties include religious instruction or advancement of the school’s religious mission even if the teacher has neither a ministerial title nor formal religious training.<sup>156</sup> In *Our Lady of Guadalupe School*, the Court considered whether the Free Exercise Clause precluded the federal courts from scrutinizing the decisions of Catholic schools to dismiss elementary school teachers whose duties included religious instruction.<sup>157</sup> In his majority opinion, Justice Alito concluded, for seven members of the Court, “What matters, at bottom, is what an employee does. And implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.”<sup>158</sup> Thus, “[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school’s independence in a way that the First Amendment does not allow.”<sup>159</sup>

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154. See *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Emp. Opportunity Comm’n*, 565 U.S. 171, 188 (2012); U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, NONDISCRIMINATION IN EMPLOYMENT PRACTICES IN EDUCATION (1991), [<https://perma.cc/8J7B-FZYV>].

155. *Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n*, 565 U.S. 171, 195-96 (2012).

156. See *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, No. 19-267, slip op. at 11, 25-27 (S. Ct. July 8, 2020).

157. *Id.* at 1.

158. *Id.* at 18.

159. *Id.* at 26-27.

The First Amendment’s “ministerial exception” does not extend to all employment decisions, nor does it cover schools’ relationships with students.<sup>160</sup> This is important because some nondiscrimination requirements extend to schools’ relationships with students. Federal tax regulations prohibit racial discrimination by all tax-exempt non-profit entities (including most private schools).<sup>161</sup> Schools receiving federal funds (for example, those participating in the federal free and reduced price lunch program) are prohibited from discriminating against students on the basis of race or sex (although an exemption exists for single-sex schools), and are required to make certain accommodations for students with disabilities under the federal Rehabilitation Act.<sup>162</sup> Secular, but not religious, schools are subject to the Americans with Disabilities Act as well.<sup>163</sup> Subject to the nondiscrimination provisions described above, private schools otherwise enjoy substantial freedom to set their own admissions criteria, including academic criteria and—in the case of faith-based schools—preferences for co-religionists.<sup>164</sup>

Although a 2014 report by Andrew Catt found that a majority of programmatic regulations mirror pre-existing regulations of private schools, most private-school choice programs impose some additional regulations on participating schools.<sup>165</sup> All private-school-choice programs regulate the

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160. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n*, 565 U.S. 171, 195-96 (2012).

161. INTERNAL REVENUE SERVICE, PUB. NO. 557, TAX-EXEMPT STATUS FOR YOUR ORGANIZATION 50 (2019), [<https://perma.cc/DZW8-E4QS>]; *see e.g.*, INTERNAL REVENUE SERVICE, FORM NO. 5578, ANNUAL CERTIFICATION OF RACIAL NONDISCRIMINATION FOR A PRIVATE SCHOOL EXEMPT FROM FEDERAL INCOME TAX (2019), [<https://perma.cc/4H8V-JUAZ>]; *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-05 (1983) (rejecting a free exercise challenge to these regulations as applied to private religious college and school).

162. *See generally*, Michael J. Petrilli, *Are Private Schools Allowed to Discriminate?*, EDUC. NEXT, (June 5, 2017), [<https://perma.cc/V9V7-HZJG>]; EMP. ASSISTANCE AND RES. NETWORK ON DISABILITY INCLUSION, THE REHABILITATION ACT OF 1973 (REHAB ACT) (2020), [<https://perma.cc/82AY-NFSS>].

163. Petrilli, *supra* note 162 (“Religiously-controlled schools are exempted from [] ADA requirements unless they receive federal funding.”).

164. *Id.*

165. ANDREW D. CATT, EDCHOICE, PUBLIC RULES ON PRIVATE SCHOOLS: MEASURING THE REGULATORY IMPACT OF STATE STATUTES AND SCHOOL CHOICE PROGRAMS 4, 8-10 (2014), [<https://perma.cc/8HR9-HVKX>].

quality of schools by mandating certain predictive “inputs.”<sup>166</sup> For example, all programs require—at a minimum—that participating private schools comply with state regulations of private schools generally.<sup>167</sup> Many limit participation to accredited schools and/or establish minimum qualification requirements for teachers—usually a bachelor’s degree and/or substantial teaching experience.<sup>168</sup> A handful of programs establish basic curricular minimums beyond those required of nonparticipating private schools, such as the teaching of civic and character education.<sup>169</sup> Several voucher programs (but no tax-credit-scholarship programs) regulate private schools over the admission of students, for example, by requiring the random selection of scholarship recipients.<sup>170</sup> Washington, D.C.’s, voucher law prohibits schools (including faith-based schools) from considering religion in admissions, and Maryland’s voucher program extends the non-discrimination mandate to include LGBTQ status.<sup>171</sup> The Milwaukee Parental Choice Program, which is the nation’s oldest voucher program, precludes participating schools from charging tuition above the voucher amount.<sup>172</sup>

Although private schools are exempt from the academic accountability requirements mandated for district and charter schools by federal law, many, but not all, private-school choice programs also subject participating schools to limited academic accountability requirements.<sup>173</sup> Many require participating schools to administer standardized tests and report the results to state regulators.<sup>174</sup> Several voucher programs require

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166. See GUIDEBOOK, *supra* note 10, at 12-13.

167. See *id.* at 12.

168. 10See, e.g., *id.* at 33 (Georgia); 58 (Oklahoma); 70 (Washington D.C.); 71-73 (Wisconsin).

169. See, e.g., *id.* at 35 (Indiana); 71-73 (Wisconsin).

170. See, e.g., THE ABCS OF SCHOOL CHOICE, *supra* note 96, at 39.

171. See *id.* at 31, 45; Liz Bowie, *Maryland Banned a School from Voucher Program Over Anti-LGBT Views. It says That Violates Religious Freedom.*, BALTIMORE SUN (July 15, 2019), [<https://perma.cc/A6U6-QK7E>].

172. THE ABCS OF SCHOOL CHOICE, *supra* note 96, at 75 (Milwaukee Parental Choice Program).

173. See GUIDEBOOK, *supra* note 10, at 12-13.

174. *Id.*

participating students (but, with the exception of Indiana, not all students in participating schools) to take the same standardized assessments as district and charter schools.<sup>175</sup> In Indiana, all schools participating in the Choice Scholarship Program receive an A-F grade based upon student performance on the state exam.<sup>176</sup> Schools receiving a “D” or an “F” for two or more consecutive years may not accept new scholarship students until the school’s grade rises to a “C” or above for two years.<sup>177</sup> Each school participating in Louisiana’s Student Scholarship for Educational Excellence Program receives a “Scholarship Cohort Index” based upon performance on the states’ exam, and schools must receive a score of 50 or above to remain eligible to admit new recipients.<sup>178</sup> A number of programs also mandate that schools communicate with parents about students’ progress.<sup>179</sup>

The accountability requirements imposed on charter schools are more comprehensive than those imposed upon schools participating in private-school-choice programs, although charter schools enjoy significant operational autonomy.<sup>180</sup> In order to advance the goal of encouraging educational innovation, states also automatically exempt charter schools from many state and local education regulations, including, importantly, teacher collective bargaining requirements and curriculum

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175. See THE ABCS OF SCHOOL CHOICE, *supra* note 96, at 32, 37-40, 63-64, 75-76.

176. *Id.* at 37-38.

177. *Id.* at 38.

178. *Id.* at 40.

179. GUIDEBOOK, *supra* note 10, at 89.

180. For example, roughly half of state charter school laws require charter school teachers to have the same licensure and certification as public school teachers, a third require some percentage of teachers in a school to be certified (varying between 50 and 90 percent), and the remainder do not require licensure at all. See EDUC. COMM’N OF THE STATES, CHARTER SCHOOLS: DO TEACHERS IN A CHARTER SCHOOL HAVE TO BE CERTIFIED? (2018), [<https://perma.cc/2Q5Z-L8KL>]. Until recently, the federal charter school program required schools to hire only certified teachers as a condition of receiving federal funds. See Stephen Sawchuk, *ESSA Loosens Reins on Teacher Evaluations, Qualifications*, EDUC. WEEK (Jan. 6, 2016) [<https://perma.cc/7D7B-EBJB>]. Congress’s decision to drop the certification requirement—known as the “highly qualified” teacher requirement—in the ESSA was heralded as a victory by charter school proponents. *Id.* (internal quotations omitted); NAT’L ALL. FOR PUB. CHARTER SCHS., CHARTER SCHOOLS ONE STEP CLOSER TO BIG WIN WITH SENATE PASSAGE OF ESSA (2015), [<https://perma.cc/S3U2-M8VU>].



requirements.<sup>181</sup> Most state laws require charter schools to undergo the same accreditation procedures as public schools, to administer the same standardized tests,<sup>182</sup> to admit students based upon a randomized lottery if demand exceeds capacity,<sup>183</sup> and to serve at least some range of students with special needs in the same manner as public schools.<sup>184</sup> Federal law also imposes accountability requirements on charter schools through the Charter Schools Program, which provides federal funds to states to create new charter schools, disseminates information about charter schools, replicates and expands high quality charter schools, and helps find and fund facilities for charter schools.<sup>185</sup> In keeping with the devolution of authority for accountability to states, ESSA eliminated many of the conditions previously placed on federal charter school funding, giving the states relatively broad autonomy to set their own accountability measures.<sup>186</sup> ESSA further establishes charter school autonomy as a specific goal and prioritizes funding states that give charter schools operational autonomy and treats charter schools and district public schools equitably in terms of funding.<sup>187</sup> However, in

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181. See TODD ZIEBARTH, NAT'L ALL. FOR PUB. CHARTER SCHS., MEASURING UP TO THE MODEL: A RANKING OF STATE CHARTER SCHOOL LAWS 9 (7th ed. 2016) [hereinafter "MEASURING UP TO THE MODEL"] [<https://perma.cc/EKA4-Q4RQ>].

182. NAT'L ALL. FOR PUB. CHARTER SCHS., CHARTER SCHOOL ACCOUNTABILITY 2 (2014), [<https://perma.cc/KG4B-UR5P>].

183. See MEASURING UP TO THE MODEL, *supra* note 181, at 11.

184. While charter schools are bound by the Individuals with Disabilities Education Act (and private schools are not), federal law allows states to make alternative arrangements for disabled children. See U.S. DEP'T OF EDUC., PROVISIONS RELATED TO CHILDREN WITH DISABILITIES ENROLLED BY THEIR PARENTS IN PRIVATE SCHOOLS 1 (2011), [<https://perma.cc/5FAU-R32T>]. While critics allege that charter schools intentionally exclude or expel disabled students disproportionately, supporters argue that charter schools are less likely to diagnose students with minor learning disabilities. See MARCUS A. WINTERS, MANHATTAN INSTITUTE, WHY THE GAP? SPECIAL EDUCATION AND NEW YORK CITY CHARTER SCHOOLS (2013), [<https://perma.cc/28BX-3G2V>]; Stephanie Banchemo & Caroline Porter, *Charter Schools Fall Short on Disabled*, WALL ST. J. (June 19, 2012), [<https://perma.cc/TUD7-7SRL>].

185. U.S. DEP'T OF EDUC., WELCOME TO ED'S CHARTER SCHOOLS PROGRAM (2015), [<https://perma.cc/4A43-DWAQ>].

186. CHRISTY WOLFE, NAT'L ALL. FOR PUB. CHARTER SCHS., CHARTER SCHOOLS AND THE EVERY STUDENT SUCCEEDS ACT (ESSA), 3, 4, 10, 11, 16 (2016), [<https://perma.cc/Q7P7-2DJC>].

187. JAMIE DAVIES O'LEARY, THOMAS B. FORDHAM INST., REVAMP OF CHARTER SCHOOLS INCENTIVIZES (MOSTLY) THE RIGHT THINGS (2016), [<https://perma.cc/3F8S-46RF>].

exchange, ESSA requires that charter schools be treated the same as district public schools with respect to reporting regulations and prioritizes funding for states that adopt accountability policies that guarantee state oversight over charter school performance.<sup>188</sup> Furthermore, ESSA gives the federal Department of Education more direct oversight to ensure that federal funds are only distributed to schools meeting the statute's definition of a "High Quality Charter School."<sup>189</sup> ESSA does not specifically mandate that any punitive steps be taken against failing charter schools, although states must intervene to address the performance of district public and charter schools scoring in the bottom five percent of state accountability metrics or falling at or below a sixty-seven percent graduation rate.<sup>190</sup> Additionally, several states mandate the closure of persistently underperforming charter schools.<sup>191</sup>

### B. High Funding/High Autonomy: Australia

In sharp contrast to the United States, all private schools in Australia are publicly funded.<sup>192</sup> In fact, government funds cover a majority of recurring expenses in most private schools.<sup>193</sup> These funds are primarily provided by the national government (or Commonwealth), and to a lesser extent by the six state and two

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188. WOLFE, *supra* note 186, at 11, 14, 26; GINA MAHONY ET AL., NAT'L ALL. FOR PUB. CHARTER SCHS., CHARTER SCHOOLS AND THE EVERY STUDENT SUCCEEDS ACT (ESSA), 9, 12, 16, 24 (2016), [<https://perma.cc/KYL2-PBAU>]; Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified as amended at 20 U.S.C. § 6301).

189. This definition turns on student proficiency, growth, and other academic indicators. WOLFE, *supra* note 186, at 27.

190. See Alyson Klein, *The Every Student Succeeds Act: An ESSA Overview*, EDUC. WEEK, (Mar. 31, 2016) [<https://perma.cc/H46Q-Y7ER>].

191. See EDUC. COMM'N OF THE STATES, CHARTER SCHOOLS – DOES THE STATE HAVE A CHARTER SCHOOL LAW? (2014), [<https://perma.cc/V6DD-YPSG>]; EDUC. COMM'N OF THE STATES, CHARTER SCHOOLS: DOES THE STATE SET A THRESHOLD BENEATH WHICH A CHARTER SCHOOL MUST AUTOMATICALLY BE CLOSED? (2018), [<https://perma.cc/5RZJ-T2GZ>].

192. Kevin Donnelly, *The Australian Education Union: Opposing School Choice and School Autonomy Down-Under*, J. OF SCH. CHOICE, 2015, at 628.

193. See *id.* at 627, 629.

territorial governments.<sup>194</sup> Australian private schools also enjoy substantial operational autonomy from government control, although less so than United States private schools.<sup>195</sup> Not surprisingly, in light of the fact that private schools in Australia receive more funding, on average, than those in other countries, Australia has one of the highest proportions of students attending non-public schools across OECD (Organization for Economic Co-operation and Development) countries.<sup>196</sup> As of 2019, 65.7 percent of students were enrolled in public schools, 19.5 percent in Catholic schools and 14.8 percent in other types of private schools, which are known in Australia as “Independent Schools.”<sup>197</sup> Independent schools include faith-based schools that are not Catholic (for example, Protestant, Jewish, Islamic) as well as secular private schools.<sup>198</sup>

**Table 1: Enrollment in Public and Private Schools**<sup>199</sup>

Student enrolments by school affiliation, Australia, 2014-2018						
		2014	2015	2016	2017	2018
Public		2,406,495	2,445,130	2,483,802	2,524,865	2,558,169
Non-public	Catholic	757,749	765,539	767,050	766,870	765,735
	Independent	529,857	540,304	547,374	557,490	569,930
<b>Totals</b>		<b>3,694,101</b>	<b>3,750,973</b>	<b>3,798,226</b>	<b>3,849,225</b>	<b>3,893,834</b>

### *1. Government funding*

Government funding of private and faith-based schools (and especially the latter) was a feature of early Australian education policy (to the extent that such a thing existed), but then disappeared for nearly a century, and only reemerged in the

194. MARILYN HARRINGTON, PARLIAMENT OF AUSTR. DEP'T OF PARLIAMENTARY SERV., AUSTRALIAN FUNDING FOR SCHOOLS EXPLAINED 1-2 (2011), [<https://perma.cc/6YC4-J74Z>].

195. See Donnelly, *supra* note 192, at 630.

196. *Id.* at 629.

197. AUSTR. BUREAU OF STAT., SCHOOLS (2018), [<https://perma.cc/K5TW-FQDV>].

198. INDEP. SCHS. COUNCIL OF AUSL., INDEPENDENT SCHOOLS OVERVIEW, [<https://perma.cc/78SK-Z7GD>].

199. AUSTR. BUREAU OF STAT., SCHOOLS (2019), [<https://perma.cc/N5C8-9BN4>].

second half of the twentieth century.<sup>200</sup> The first settlement in Australia—the penal colony in New South Wales—was established in 1787.<sup>201</sup> It included thirty-six children (seventeen of convicts and nineteen of marines).<sup>202</sup> There were apparently no provisions made for their education, although as settlement expanded—eventually encompassing six autonomous colonies—it became clear that establishing schools was a necessary task.<sup>203</sup> It was also a difficult one, and colonial authorities eagerly embraced and encouraged all those willing to take it on, including first Anglican and later Catholic missionaries.<sup>204</sup> By the early decades of the nineteenth century, colonial governments were funding schools operated by missionaries, and in some cases making fledgling efforts to establish secular schools as well.<sup>205</sup> In the late 1840s, New South Wales attempted to solidify a dual system of publicly funded schools.<sup>206</sup> State aid was given to the Denominational Schools Board and the National Schools Board was charged with establishing and supervising non-denominational schools.<sup>207</sup> By 1850, this dual system had been adopted in all but one of the Australian Colonies.<sup>208</sup> The system proved to have significant limitations, including the proliferation of schools in more prosperous centers and inadequate provision of education in remote areas.<sup>209</sup> In response, several colonies passed legislation bringing the state-aided denominational schools and the secular schools under the supervision of a single school board, with both enjoying continued public support.<sup>210</sup>

Between 1872 and 1895, all of the Australian colonies passed legislation guaranteeing the provision of free, compulsory, and

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200. Ann R. Shorten, *The Legal Context of Australian Education: An Historical Exploration*, 1 AUSTL. N.Z. J. OF L. EDUC. 1, 7-8, 21 (1996).

201. *Id.* at 5.

202. *Id.* at 7.

203. *See id.*

204. *See id.* at 7-8.

205. Shorten, *supra* note 200, at 7.

206. *Id.*

207. *Id.*

208. *Id.* at 7-8.

209. *See id.* at 8.

210. Shorten, *supra* note 200, at 8.

secular education.<sup>211</sup> These statutes required parents to send their children to public schools for secular education, although exceptions were made in a variety of circumstances (including enrollment in an approved denominational school).<sup>212</sup> These compulsory education statutes also abolished public aid for denominational schools.<sup>213</sup> Thus, as in the United States, the “compromise” position of the Australian colonies came to be that parents had a right to send their children to faith-based schools, but not the right to have their choice to do so funded by the government.<sup>214</sup> Nevertheless, non-governmental denominational schools—especially low-cost Catholic schools—continued to grow during the first half of the twentieth century.<sup>215</sup>

In the second half of the twentieth century, Catholic schools in Australia began to experience financial difficulties.<sup>216</sup> Similar difficulties had prompted piecemeal efforts to shore up parochial school finances in the United States (such as the subsidy program that led to the U.S. Supreme Court’s pronouncement of the “Lemon Rule” in *Lemon v. Kurtzman*),<sup>217</sup> which effectively erected a constitutional roadblock to public funding. In Australia, however, these financial difficulties led to a substantial reversal of the century-old policy of funding only secular public schools.<sup>218</sup> Prior to 1964, there was no direct Australian Government funding for school education in the states (only in the Australian Capital Territory).<sup>219</sup> Thereafter, the Commonwealth of Australia passed a number of statutes

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211. *Id.*

212. *Id.* at 9.

213. *Id.*

214. *Id.* at 8-9.

215. Shorten, *supra* note 200, at 16. The reasons for this growth are not entirely distinct from the reason for the growth of Catholic schools in the United States, especially concerns among members of the Australian (primarily Irish) Catholic community about hostility and discrimination by the dominant Anglican hierarchy. See Don Anderson, *The Interaction of Public and Private School Systems*, 36 AUSTRALIAN J. EDUC. 213, 216 (1992).

216. Harrington, *supra* note 194, at 3.

217. *Lemon v. Kurtzman*, 403 U.S. 602, 606-07, 612-13 (1971).

218. See Craig Campbell, *Public and Private in Australian Schooling*, DEHANZ (Jan. 24, 2014), [<https://perma.cc/5MW3-CL33>]; Harrington, *supra* note 194, at 2-3.

219. Harrington, *supra* note 194, at 2.

reversing course and appropriating funds to support both government and private schools.<sup>220</sup>

Since then, the Commonwealth has become the largest source of funding for private schools in Australia.<sup>221</sup> The precise formula by which the government funds schools in Australia is complex, but can be briefly summarized as follows: the Commonwealth bears the primary responsibility for funding private schools, but also funds public schools to a lesser extent.<sup>222</sup> The states and territories bear primary responsibility for funding public schools, but all of them fund non-public schools as well.<sup>223</sup> Thus, the funding for public and private schools are mirror images at the Commonwealth and state levels; the Commonwealth provides the majority of funding for private schools and a minority of funding for public schools;<sup>224</sup> the states and territories provide the majority of funding for public schools and a minority for private schools.<sup>225</sup> Basically, eighty percent of Commonwealth education funding goes to private schools and twenty percent to public schools.<sup>226</sup> Government funding is allocated on a per pupil basis according to the enrollment at a given school, public and private.<sup>227</sup> The formula used to determine the amount of funding received by a school takes into consideration the socioeconomic status of students enrolled in the school.<sup>228</sup> Schools (both public and private) receive a higher per pupil dollar amount for more-disadvantaged students, and schools

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220. For example, the *States Grants (Science Laboratories and Technical Training) Act 1964* and *States Grants (Secondary School Libraries) Act 1969* gave money to government and non-government schools for specific purposes. *Id.* at 3. The *States Grants (Independent Schools) Act 1969* authorized payments to non-government schools for a flat rate of \$35 per primary school student and \$50 per secondary student. *Id.* In 1972, the *States Grants (Capital Assistance) Act 1971-72* authorized \$20 million for capital expenditures on government primary and secondary schools. *Id.* In 1973, the Act was extended to include non-government schools. *Id.* at 3.

221. *Australian Education Act 2013* (Cth) s 35A.

222. *Id.*

223. AUSTRALIAN GOV'T DEP'T OF EDUC., SKILLS AND EMP., HOW ARE SCHOOLS FUNDED IN AUSTRALIA? (2020), [<https://perma.cc/DC8B-EEUL>.]

224. *Australian Education Act 2013* (Cth) s 35A.

225. *How are Schools Funded in Australia?*, *supra* note 223.

226. *Australian Education Act 2013* (Cth) s 35A.

227. *Id.* at ss 32-33.

228. *Id.* at s 35.

enrolling larger percentages (“loadings”) of disadvantaged students are entitled to additional funding.<sup>229</sup> The precise SES (socio-economic score) formula was recently amended in such a way that benefited Catholic schools, which tend to enroll more disadvantaged students than independent schools.<sup>230</sup> The current Commonwealth per pupil expenditures, and projected increases for public, Catholic, and independent schools are provided in Table 2.

**Table 2: Change in Government Funding from 2018 to 2029<sup>231</sup>**

	Avg. annual per student increase from 2018-2029 (from 2017 base)	2018 per student funding (\$)	2029 per student funding (\$)	2018-2029 per student increases (from 2017 base) (\$)	Avg. 2018 CW share of needs based funding
<b>Public</b>	4.8%	\$2,914	\$4,762	\$2,039	17.5%
<b>Catholic</b>	3.8%	\$9,272	\$13,852	\$4,997	78.6%
<b>Independent</b>	3.7%	\$7,743	\$11,400	\$4,070	74.9%

The Commonwealth sends its share of total education funding to the State/Territory governments, which are responsible for transferring the private schools’ share to the “approved authority” for the schools.<sup>232</sup> In the case of Catholic schools, there is a designated approved authority for each state.<sup>233</sup> Independent

229. *Id.* at ss 32-35, 35A.

230. See Peter Goss, *Explaining Australia’s School Funding Debate: What’s At Stake*, THE CONVERSATION (July 18, 2018), [<https://perma.cc/K9JA-A6NK>].

231. AUSTRALIAN GOV’T DEP’T OF EDUC., SKILLS AND EMP., WHAT IS THE QUALITY SCHOOLS PACKAGE AND WHAT DOES IT MEAN FOR MY SCHOOL? (2020), [<https://perma.cc/65R4-8CXR>].

232. AUSTRALIAN CURRICULUM ASSESSMENT AND REPORTING AUTH., NATIONAL REPORT ON SCHOOLING IN AUSTRALIA 32 (2017), [<https://www.acara.edu.au/docs/default-source/default-document-library/national-report-on-schooling-in-australia-20170de312404c94637ead88ff00003e0139.pdf?sfvrsn=0>].

233. See generally, CATH. SCHS. NSW, ABOUT US, [<https://perma.cc/NF6J-6JLX>]; CATH. EDUC. COMM’N OF VICT., ABOUT US – OVERVIEW, [<https://perma.cc/E2BQ-4PB5>]; CATH. EDUC. ARCHDIOCESE OF CANBERRA & GOULBURN, ABOUT US – OUR ROLE (2020), [<https://perma.cc/Y6YB-BPAJ>]; CATH. EDUC. TAS., CATHOLIC EDUCATION COMMISSION TASMANIA (2020), [<https://perma.cc/PTW2-9N79>]; CATH. EDUC. N. TERR., GOVERNANCE, [<https://perma.cc/RDN3-WLJD>]; QUEENSL. CATH. EDUC. COMM’N, WHO WE ARE, [<https://perma.cc/U7BQ-5U4B>]; CATH. EDUC. S. AUSTL., EDUCATION IN SOUTH AUSTRALIA, (2016), [<https://perma.cc/HN2U-GJAU>]; CATH. EDUC. W. AUSTL., ORGANISATIONAL STRUCTURE, [<https://perma.cc/GA39-3SR8>].

schools have no central governing body, although the largest “systems” within the Independent sector are Lutheran, Anglican, and Seventh Day Adventist.<sup>234</sup>

Australian law further establishes the minimum requirements for state and territorial support of both public and private schools, which must meet (but may exceed) these minimums.<sup>235</sup> These funds are distributed in the same way as the Commonwealth funds.<sup>236</sup> The current breakdown of state shares of funding for public and private schools in 2013 is included in Table 3.<sup>237</sup>

**Table 3: State Share of Education Funding (2013)**

State	Starting Share for Public Schools	Starting Share for Non-Public Schools
New South Wales	70.73%	25.29%
Victoria	65.30%	19.70%
Queensland	65.90%	23.80%
Western Australia	85.87%	27.63%
South Australia	75.00%	19.72%
Tasmania	72.93%	21.50%
Australian Capital Territory	92.11%	36.97%
Northern Territory	54.40%	15.09%

234. INDEP. SCH. AUSTL., INDEPENDENT SCHOOLS OVERVIEW (2020), [<http://isa.edu.au/about-independent-schools/about-independent-schools/independent-schools-overview/>].

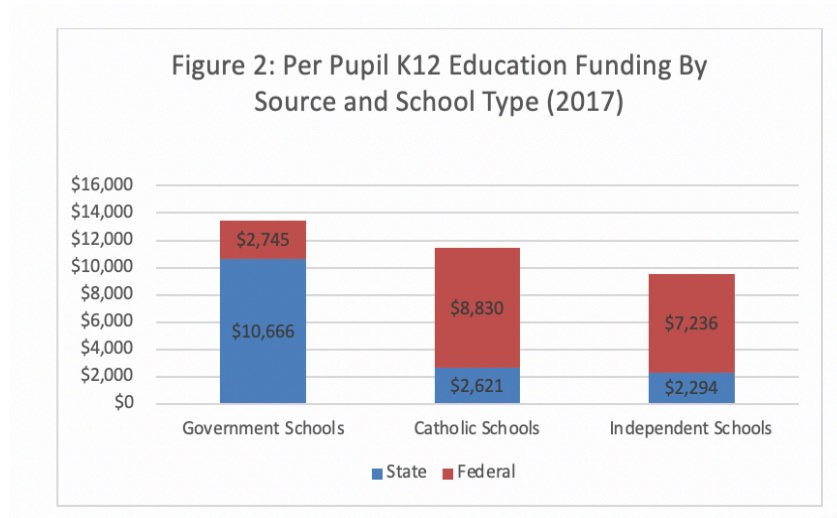
235. NAT’L SCH. RESOURCING BD., ANNUAL REVIEW OF STATE AND TERRITORY COMPLIANCE WITH SECTION 22A OF THE AUSTRALIAN EDUCATION ACT 2013 4 (2020), [<https://perma.cc/9HLE-MW68>].

236. *See id.* at 3-4.

237. *Australian Education Regulation 2013*, (Cth) s 10A. Recent reforms to Australian law provide that the state’s share of support for private schools will be equal to or exceed fifteen percent of total government funding by 2023. NAT’L SCH. RESOURCING BD., *supra* note 235, at 4.

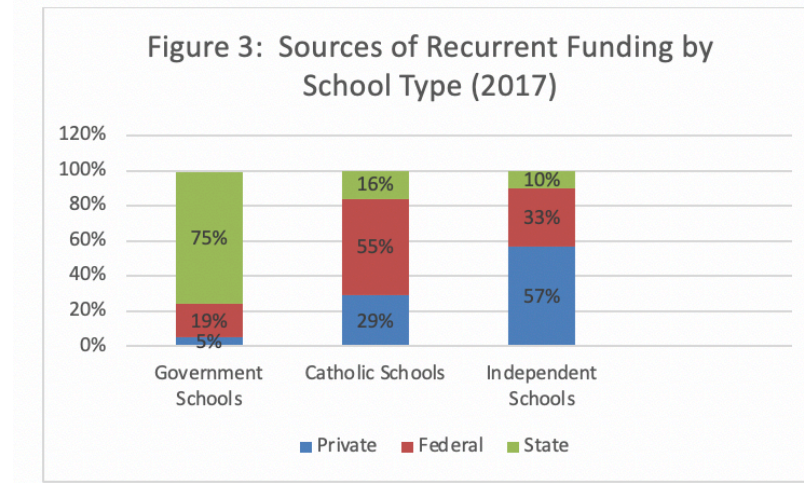


Figure 2, below, shows the total per pupil amount of public funds, by source, received by public and private schools in Australia in 2017.<sup>238</sup>



238. NAT'L CATH. EDUC. COMM'N, THE FACTS ON SCHOOL FUNDING IN AUSTRALIA (2018), [<https://perma.cc/W6DX-68JG>].

Figure 3 breaks down the amount of recurring costs covered by government funds versus private sources, such as tuition.<sup>239</sup> Private schools receive little support for capital costs, most of which are covered by schools' fees and philanthropic donations.<sup>240</sup>



## 2. Private School Autonomy

In Australia, private schools are subject to both Commonwealth and state/territorial regulations.<sup>241</sup> Three main laws (as amended) govern the Commonwealth's role in education in Australia: the Australian Education Act 2013 establishes the framework for the Commonwealth's responsibility for education; the Australian Education Regulation 2013 sets further conditions for both public and private schools receiving Commonwealth funding; and the Australian Education Act of 2013 as amended in

239. *Id.*

240. KEVIN DONNELLY, FRASER INST., REGULATIONS AND FUNDING OF INDEPENDENT SCHOOLS: LESSONS FROM AUSTRALIA\_ 6 (2017), [<https://perma.cc/3FT7-K2YN>].

241. *Australian Constitution* s 51 (setting forth the powers of the Commonwealth, which do not include education); *Australian Constitution* s 107 (providing that all functions not vested in the Commonwealth are reserved to the Commonwealth or the states).

2018 sets additional conditions for private schools receiving funding.<sup>242</sup>

In general, these laws provide substantial autonomy for private schools, although less autonomy than enjoyed by private schools in the United States.<sup>243</sup> The largest limitation on private-school autonomy is curricular. All schools, public and private, in Australia must commit to the 2008 Melbourne Declaration of Educational Goals for Young Australians, which mandates both a standard curriculum and a standard national assessment.<sup>244</sup> The Declaration requires all schools to implement the Australian Curriculum from “Foundation” (kindergarten) to Year 10 (sophomore year).<sup>245</sup> While the Curriculum allows schools and teachers substantial instructional flexibility, many teachers express concerns that the required content is so substantial that they must sacrifice depth in favor of breadth of coverage.<sup>246</sup> One survey found that teachers worried that there was “[s]o much mandatory content...that some argued it was taking up more than the total teaching time available in a school year.”<sup>247</sup> Faith-based

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242. AUSTRALIAN EDUCATION ACT 2013 (2020), [<https://perma.cc/VTP9-AU53>]; *Australian Education Act 2013* (Cth) s 23.

243. See INDEP. SCH. AUSTL., AUTONOMY AND ACCOUNTABILITY (2020), [<https://perma.cc/5N56-AXHB>].

244. *Id.* Two states, Victoria and Western Australia, impose additional curricular requirements. VICTORIAN CURRICULUM & ASSESSMENT AUTH., FREQUENTLY ASKED QUESTIONS, [<https://perma.cc/NS82-2YAY>]; CATH. EDUC. W. AUSTL., CURRICULUM K-12, [<https://perma.cc/BX6C-PPSZ>]. In the remaining states, only the Commonwealth curriculum is required. See CATH. EDUC. ARCHDIOCESE OF CANBERRA & GOULBURN, ACT CURRICULUM, [<https://perma.cc/KW2Q-8PLG>]; CATH. EDUC. TASMANIA, LEARNING AND TEACHING, [<https://perma.cc/2LNH-Y5C5>]; N. TERRITORY BD. OF STUDIES CURRICULUM, PEDAGOGY, ASSESSMENT & REPORTING T-12 5 (2018), [<https://perma.cc/882Z-QAU4>]; CATH. EDUC. S. AUSTL., EDUCATION IN SOUTH AUSTRALIA, [<https://perma.cc/DHA2-JDVK>]; CATH. EDUC. ARCHDIOCESE OF CANBERRA & GOULBURN, NSW CURRICULUM (2020), [<https://perma.cc/3DGN-Y9TC>].

245. AUSTRALIAN GOV'T DEP'T OF EDUC., SKILLS AND EMP., AUSTRALIAN CURRICULUM (2020), [<https://perma.cc/F4NP-VML8>].

246. See AUSTRALIAN GOV'T, REVIEW OF THE AUSTRALIAN CURRICULUM: FINAL REPORT 3 (2014), [<https://perma.cc/5UAC-4EUH>].

247. *Id.* at 5. The Curriculum is organized around learning areas, general capabilities, and cross-curriculum priorities. *Id.* at 3. From year 1 to year 10, the curriculum lists eight learning areas: English, math, science, health and physical education, humanities and social sciences, the arts, technologies, and languages (choice of one of 15 languages). *Id.* at 47. The general capabilities include skills and abilities that aim to help prepare students to learn, live, and work in the 21<sup>st</sup> century. See *id.* at 131. There are seven general capabilities:

school leaders, in particular, have argued that the mandatory curricular requirements impact the time available for extra-curricular offerings and interfere with “their ability to imbue the total curriculum with the values, beliefs and teachings that constitute their unique nature and mission.”<sup>248</sup> All private schools in Australia are also required to participate in the National Assessment Program, which mandates testing on literacy and numeracy for all students in grades three, five, seven, and nine, and for selected students in a handful of other subjects in other grades.<sup>249</sup>

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literacy, numeracy, information and communicant technology capability, critical and creative thinking, personal and social capability, ethical understanding, and intercultural understanding. AUSTRALIAN GOV'T, REVIEW OF THE AUSTRALIAN CURRICULUM: FINAL REPORT 131 (2014). Cross-curriculum priorities are Aboriginal and Torres Strait Islander Histories and Culture, Asia and Australia's Engagement with Asia, and sustainability. *Id.* at 135-36, 138.

248. *Id.* at 5; see also AUSTRALIAN PRIMARY PRINCIPALS ASS'N, SCHOOL AUTONOMY IN PRIMARY EDUCATION 6 (2014).

249. *Australian Education Regulation 2013* (Cth) s 43. An approved authority for a school must ensure that the school participates in the National Assessment Program (NAP) by requiring that the schools complete the following:

Assessments	Frequency	Who
NAP annual assessment in reading, writing and language conventions	Once a year	Students in each of years 3, 5, 7 and 9
NAP annual assessment in numeracy	Once a year	Students in each of years 3, 5, 7 and 9
NAP annual assessment in science literacy	Once a year (from the year determined by the Ministerial Council)	Students determined by the Ministerial council
NAP sample assessment in science literacy	Once in 2015 and in each year determined by the Ministerial Council	Selected students in year 6
NAP sample assessment in civics and citizenship	Once in 2016 and in each year determined by the Ministerial Council	Selected students in years 6 and 10
NAP sample assessment in ICT literacy	Once in 2017 and in each year determined by the Ministerial Council	Selected students in years 6 and 10
PISA assessment in reading, math and scientific literacy, innovation	Once every 3 years beginning in 2015	Selected students aged 15
TIMSS assessment in math and science	Once every 4 years beginning in 2015	Selected students in years 4 and 8
PIRLS assessment in reading literacy	Once every 5 years beginning in 2016	Selected students in year 4

Both the Commonwealth and state/territorial governments require private schools to register with the appropriate education authorities.<sup>250</sup> Most states require that private schools maintain enrollment records as well as records demonstrating that schools are sufficiently staffed by “fit and proper” individuals.<sup>251</sup> Most also require private schools to establish a statement of philosophy as well as a plan of instruction and assessment to ensure curricular goals are met.<sup>252</sup> Many also require schools to provide certain information to parents and other members of the school community;<sup>253</sup> several mandate that schools hold parent-teacher conferences and issue student report cards.<sup>254</sup> Some states further require schools to agree to submit to periodic inspections and evaluations by public authorities.<sup>255</sup> Several states require schools to be accredited.<sup>256</sup> Not surprisingly, given the level of government funding in Australia, many of these requirements focus on finances.<sup>257</sup>

Private schools in Australia have substantial freedom to hire and fire teachers and school leaders, although—unlike the United States—all of the states and territories require that private schools employ the equivalent of certified teachers.<sup>258</sup> Private

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250. See, e.g., NSW GOV'T, NON-GOVERNMENT SCHOOLS, [https://perma.cc/P4SG-TSGD] (last updated Sept. 10, 2020); *Education Act 2015* (NT) s 124 (Austl.) (“Non-Government school[s] must be registered”); *School Education Act 1999* (WA) ss 156, 158 (Austl.); *Education Regulations 2017* (Tas) sch 2 (Austl.).

251. *Education Regulations 2017* (Tas) sch 2 (Austl.).

252. *Id.*; *Education Act 2004* (ACT) s 88 (Austl.); *Education Act 1990* (NSW) pt 3 div 1 s 8, div 2 s 10 (Austl.); *Education (Accreditation of Non-State Schools) Act 2017* (Qld) ch 2 div 2 (Austl.); *Education and Training Reform Regulations 2017* (Vic) sch 4 (Austl.).

253. *Id.*; *Education Act 2004* (ACT) s 103 (Austl.); *Education Act 2015* (NT) s 142 (Austl.).

254. See *Education and Training Reform Regulations 2017* s 3.

255. See, e.g., *Education Act 2004* (ACT) s 122 (Austl.); *Education Act 2016* (Tas) s 186 (Austl.); *Education Act 2015* (NT) s 148 (Austl.); *School Education Act 1999* (WA) s 176 (Austl.).

256. *Education Act 2004* (ACT) s 82 (Austl.); *Education Act 2015* (NT) ss 124, 125 (Austl.); QUEENSLAND DEP'T OF EDUC., NON-STATE SCHOOLS RECURRENT GRANT POLICY 1-2 (2020), [https://perma.cc/RUA6-AB39]; NSW EDUC. STANDARDS AUTH., NSW GOV'T, REGISTRATION SYSTEMS AND MEMBER NON-GOVERNMENT SCHOOLS (NSW) MANUAL 9 (2020), [https://perma.cc/TAB6-9WSW].

257. *Australian Education Regulation 2013* pt 5 div 2.

258. See, e.g., CATH. EDUC. DIOCESE OF CAIRNS, TEACHING IN A CATHOLIC SCHOOL, (2020) [https://perma.cc/35AR-DS7B]; CATH. EDUC. COMM'N OF VICTORIA, TEACHING IN

schools generally also have the right to select students, although several states regulate disciplinary proceedings (including suspensions and expulsions) to some extent.<sup>259</sup> All of the major Commonwealth civil rights laws expressly exempt religious schools from certain anti-discrimination provisions, although the scope of these exemptions varies.<sup>260</sup> For example, the Australian Sex Discrimination Act 1984 contains the most important exemptions for religious liberty.<sup>261</sup> The law makes it lawful for a religious educational institution to discriminate based on a “person’s sex, sexual orientation, gender identity, marital or relationship status or pregnancy” for purposes of hiring or firing staff, provided that the school’s decision “is conducted in accordance with the doctrines, tenets, beliefs, or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.”<sup>262</sup> All the states and territories extend these religious exemptions to the selection of students, although some of the state exemptions are more limited (for example, to religion).<sup>263</sup> As discussed in section

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CATHOLIC SCHOOLS, [https://perma.cc/PA4W-QU8F] (last visited Oct. 2, 2020); AUSTL. CAP. TERRITORY GOV’T, REGISTRATION OF NON-GOVERNMENT SCHOOLS IN THE ACT 20 (2015), [https://perma.cc/EFM6-98K7]; TCHRS. REGISTRATION BD. TAS., FREQUENTLY ASKED QUESTIONS: TASMANIAN TEACHERS, [https://perma.cc/LHA6-G82E] (last visited Oct. 2, 2020); CATH. EDUC. S. Austl., WORKING IN CATHOLIC EDUCATION (2016) [https://perma.cc/6CDR-3NL5]; TCHR. REGISTRATION BD. W. AUSTL., WHO NEEDS TO BE REGISTERED IN WA? (2020), [https://perma.cc/J67H-V7MS]; NEW S. WALES EDUC. STANDARDS AUTH., GETTING ACCREDITED FOR THE FIRST TIME [https://perma.cc/46AS-R8CA] (last visited Oct. 2, 2020).

259. *Education Act 2004* (ACT) ss 104,105 (Austl.); *Education Act 2015* (NT) s 162 (Austl.); *Education Act 2016* (Tas) s 248 (Austl.).

260. See, e.g., *Sex Discrimination Act 1984* s 38 (Austl.); *Equal Opportunity Act 2010* s 83 (Austl.).

261. *Sex Discrimination Act 1984* s 38 (Austl.).

262. *Id.*

263. See *Equal Opportunity Act 2010* s 83 (Austl.); *Discrimination Act 1991* (ACT) s 46 (Austl.); *Anti-Discrimination Act 1998* (Tas) ss 51,51A (Austl.); *Anti-Discrimination Act 1977* (NSW) ss 31A, 49ZH (Austl.); *Anti-Discrimination Act 1992* (NT) s 30 (Austl.); *Anti-Discrimination Act 1991* (Qld) s 41; *Equal Opportunity Act 1984* (SA) pt 3 div 7 s 50 (Austl.); *Sex Discrimination Act 1984* s 38 (Austl.).

three of this Article, these exemptions have become the focus of significant debate.<sup>264</sup>

### C. High-Funding/Low-Autonomy: India.

In many countries in the developing world, substantial government funding is available to private schools, but those funds come at the cost of operational control by the government.<sup>265</sup> In these contexts, some elite private schools opt out of funding to maintain some level of autonomy.<sup>266</sup> At the other end of the income spectrum, thousands of unfunded, low-cost private schools serving low-income children fly below the regulatory radar, effectively operating in the underground economy and avoiding government oversight altogether.<sup>267</sup> This section provides an overview of the funding and regulation of private schools in one such country: India.

With over 1.5 million schools enrolling 260 million children, India “is home to the largest and most complex education system in the world.”<sup>268</sup> It is also one of the oldest formal education systems in the world. As early as 5000 B.C., the “Gurukul” system of schools was established.<sup>269</sup> Gurukuls were residential schools, usually in a teacher’s home or a monastery, which educated the children of the high castes in religion, philosophy, literature, warfare, statecraft, medicine, astrology, and history.<sup>270</sup> By the turn of the first millennium, several universities had also been established, each of which specialized in a particular field of

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264. See, e.g., Paul Karp, *Scott Morrison Will Change the Law to Ban Religious Schools Expelling Gay Students*, THE GUARDIAN (Oct. 12, 2018), [<https://perma.cc/RW3L-2TWB>]; Paul Karp, *What is the Religious Discrimination Bill and What Will It Do?*, THE GUARDIAN (Aug. 29, 2019), [<https://perma.cc/7XBL-DUVX>].

265. See BRITISH COUNCIL, THE SCHOOL EDUCATION SYSTEM IN INDIA: AN OVERVIEW 23 (2019), [<https://perma.cc/3DXM-PDJZ>], [hereinafter BRITISH COUNCIL].

266. *Id.*

267. ANDREW KERN, FOUND. FOR ECON. EDUC., HOW UNDERGROUND PRIVATE SCHOOLS ARE OUTPERFORMING GOVERNMENT SCHOOLS IN DEVELOPING NATIONS (2019), [<https://perma.cc/Z9AC-3KB4>].

268. BRITISH COUNCIL, *supra* note 265, at 6.

269. Nikhil Chandwani, *The Importance of the Gurukul System and Why Indian Education Needs It*, TIMES OF INDIA (Mar. 8, 2019), [<https://perma.cc/6VQF-5RN8>].

270. Dinesh Chand, *Education System in Pre-Independence India*, 1 INT’L J. OF APPLIED RES. 110, 110 (2015).

study.<sup>271</sup> British records reveal that education was widespread in the eighteenth century, with a school in most temples, mosques, and villages.<sup>272</sup> In this system, the Hindu elementary schools were quasi-public.<sup>273</sup> Their teachers were village officers, supported not by fees but by “presents.”<sup>274</sup> Although theoretically open to all students, most of the pupils in these schools were from the three upper-most castes.<sup>275</sup> Muslim education was established later, during the Middle Ages, and was primarily carried out by private tutors employed by well-to-do families, although the tutors were allowed to take in other students.<sup>276</sup> Interestingly, almost half of the students in these schools were Hindu.<sup>277</sup> In the pre-colonial period, a number of Christian missionaries had also established schools throughout India.<sup>278</sup> In fact, the first formal Christian educational enterprise outside of Europe was established by Franciscan missionaries in Goa in 1542.<sup>279</sup> Additional mission schools followed in relatively short order in other parts of India throughout the sixteenth century.<sup>280</sup> These original mission schools tended to focus on educating orphans and those from the lower castes, and the language of instruction was primarily the vernacular.<sup>281</sup>

The modern education system in India was established by the British colonial government in the eighteenth and nineteenth centuries.<sup>282</sup> Beginning in the late 1700s, the British East India Company began to establish English-speaking schools for the

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271. V.A. Ponnemil, *Brief History of Education in India*, NEWKERALA.COM, [https://perma.cc/V4GJ-MH5T] (last visited Sep. 17, 2020).

272. *Id.*

273. See Avinash, *History of Indian Education*, THE EDUCATIONIST (Nov. 3, 2015), [https://perma.cc/FR36-3S8T].

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. Avinash, *supra* note 273.

279. The Jesuits assumed control of the school in 1542, and St. Francis Xavier raised its status to a college in 1548. FR. NICHOLAS TETE, *Catholic Education in India: Challenge, Response, and Research*, INT’L HANDBOOK OF CATHOLIC EDUCATION – CHALLENGES FOR SCHOOL SYSTEMS IN THE 21ST CENTURY 693 (G.R. Grace and J. O’Keefe, eds., 2007).

280. See Avinash, *supra* note 273.

281. *Id.*

282. *Id.*



elite castes.<sup>283</sup> In 1813, Parliament enacted a Charter requiring the East India Company to assume some responsibility for the education in the colony.<sup>284</sup> The spread of western-style schools, with English language instruction, prompted a backlash and led to what became known as the “Oriental-Occidental Controversy” between those (including both members of the local population and some in the East Indian Company) who supported the strengthening and expansion of traditional schools and colleges and those who demanded western-style education.<sup>285</sup> The controversy was ultimately resolved by Lord Macaulay, who arrived in India in 1834 during the controversy and strongly criticized the traditional system of education.<sup>286</sup> In his famous “Minute on Indian Education,” Macaulay argued that education based on Sanskrit and Arabic was of no use to India’s development, proclaiming, “a single shelf of a good European library was worth the whole native literature of India and Arabia.”<sup>287</sup> This view was codified in the English Education Act of 1835, which reallocated East Indian Company funds to support English language instruction.<sup>288</sup> Subsequently, however, the Company funded both Western and traditional forms of education.<sup>289</sup> After 1835, increasing numbers of Christian schools and universities providing western-style instruction in English were founded by missionaries; many of these institutions remain extant today.<sup>290</sup>

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283. *Id.*

284. *Id.*

285. A. Vasantha, *The “Oriental-Occidental Controversy” of 1839 and Its Impact on Indian Science*, in SCIENCE & EMPIRES, BSPS VOL. 136, 49, 49 (Patrick Petitjean, et al. eds., 1992); see Avinash, *supra* note 273.

286. See Avinash, *supra* note 273.

287. See *Macaulay’s Minute*, *Minute by the Hon’ble T. B. Macaulay, dated the 2nd February 1835*, in SELECTIONS FROM EDUCATIONAL RECORDS, PART I: 1781-1839 107, 109 (H. Sharp, ed., 1920).

288. See N.S.R. Murphy, *The History of English Education in India: A Brief Study*, 2 J. FOR RSCH. SCHOLARS AND PROS. OF ENGLISH LANGUAGE TEACHING, 1-3 (2018).

289. Avinash, *supra* note 273.

290. Rudolf C. Heredia, *Education and Mission: School as Agent of Evangelisation*, ECON. & POL. WKLY., Sept. 1995, at 2334.

India won its independence in 1947 and ratified its first constitution three years later.<sup>291</sup> At the time of independence, the educational system in India was both qualitatively and quantitatively inadequate and characterized by extreme regional, caste, and gender imbalances.<sup>292</sup> Only eighteen percent of the population was literate and only one third of children were enrolled in primary schools.<sup>293</sup> The initial expansion of the education sector was limited by India's economic position, but "continued steadily until the end of the 20th century."<sup>294</sup> Since then, "India has made great progress towards achieving universal primary education."<sup>295</sup> "The World Bank reports that between 2000 and 2017, elementary school enrollment increased by more than 33 million: from 156.6 million in 2000–01 to 189.9 million in 2017–18."<sup>296</sup> "While achievement varies greatly between India's [twenty-nine] states and seven union territories, two-thirds of these have claimed to have achieved universal primary enrollment."<sup>297</sup>

### 1. Government Funding

Primary and secondary schools in India are operated both by the government (at various levels, including the central government, states, and a complex array of local government bodies), and by private entities. "Primary education has been decentralized in most of the parts of India[,] with authority for operating primary schools delegated to District Boards of Education (DBEs)."<sup>298</sup> Secondary schools tend to be operated by state governments.<sup>299</sup> Among schools in the private sector, there

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291. Prachi Deshmukh Odhekar, *India*, JOHNS HOPKINS SCH. OF EDUC. 5 (2012), [<https://perma.cc/73D9-B8B2>].

292. Geeta Gandhi Kingdon, *The Progress of School Education in India*, 23 OXFORD REV. OF ECON. POL'Y 168, 171 (2007).

293. GOV'T OF INDIA, EDUCATIONAL STATISTICS AT A GLANCE 22 tbl.25, 28 tbl.29 (2018), [<https://perma.cc/C6YM-BMG7>].

294. BRITISH COUNCIL, *supra* note 265, at 6.

295. *Id.*

296. *Id.*

297. *Id.*

298. Odhekar, *supra* note 291, at 3.

299. *Id.* at 3.

are three distinct types of institutions: aided, recognized unaided, and unrecognized.<sup>300</sup> “Those that are ‘aided’ (often called ‘government-aided’ schools) receive financial support from the government and are largely free to students (although nominal fees may be collected).”<sup>301</sup> Government-aided schools are managed privately but tightly regulated. They receive regular maintenance grants, and sometimes facilities, from the government, local body, or other public authority.<sup>302</sup> The bulk of funding appears to come from states and covers teacher salaries and facilities upkeep.<sup>303</sup> Additionally, the central government is supposed to refund aided private schools for enrolling low-caste children which comply with the Right to Education mandate discussed below.<sup>304</sup> Theoretically, these reimbursements function as a kind of voucher program for the disadvantaged students, although they do not always occur.<sup>305</sup> Unaided, but recognized, private schools must comply with certain criteria to qualify for recognition, discussed below, but enjoy substantial autonomy from most government regulations.<sup>306</sup> While they sometimes receive small amounts of funding from government sources, private unaided schools support themselves primarily through student fees.<sup>307</sup> These schools tend to be large, run by religious or other non-profit entities, and located in urban areas.<sup>308</sup> Finally, the fastest growing segment of K-12 schools in India are unrecognized, low-cost private schools.<sup>309</sup> Unrecognized low-fee private schools tend to be small, serving poor children in areas (especially rural areas) where other educational options are scarce and/or low quality.<sup>310</sup> Gaps in information about Indian K-12 education, particularly in the number and types of schools and the number of students enrolled in them, likely make an accurate

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300. *Id.* at 7.

301. BRITISH COUNCIL, *supra* note 265, at 21.

302. *Id.* at 21, 23.

303. *Id.* at 36.

304. *See* Kingdon, *supra* note 292, at 190.

305. *See id.* at 190-91.

306. *See infra* section C.2.

307. BRITISH COUNCIL, *supra* note 265, at 21.

308. *See* Odhekar, *supra* note 291, at 10.

309. *See* Kingdon, *supra* note 292, at 192.

310. Odhekar, *supra* note 291, at 10.

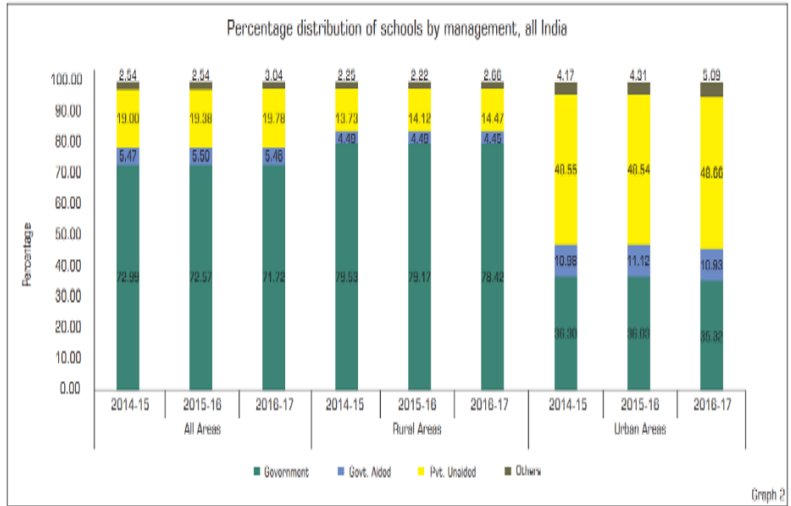
summary of the complex Indian K-12 education system impossible. Even official data on recognized schools likely is inaccurate, but it provides the most complete picture available.<sup>311</sup>

What is clear is that the number of private schools (aided and unaided) in India has been growing rapidly, as summarized in Figure 4.

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311. See Kingdon, *supra* note 292, at 83-87.

**Figure 4: India Percentage of K-12 Schools by Management and Funding<sup>312</sup>**



312. NAT'L INST. OF EDUC. PLAN. & ADMIN., U-DISE FLASH STATISTICS 2016-17 10 graph 2 (2016), [<https://perma.cc/B9JA-BRXK>].

In 2017, just over half of all elementary and secondary schools in India were classified as government, twelve percent were classified as government-aided and just under a third as private unaided.<sup>313</sup> Madrasas and Tribal/Social Welfare Department schools each constitute less than two percent of schools nationwide.<sup>314</sup> In 2016, the government estimated that approximately 82 million children were enrolled in private unaided schools, and 30 million in government-aided private schools.<sup>315</sup> As indicated in Figure 5 and Table 4, however, the breakdown both in the number of schools and in enrollment varies by age group, with the percentage of government schools falling at secondary and higher secondary levels.

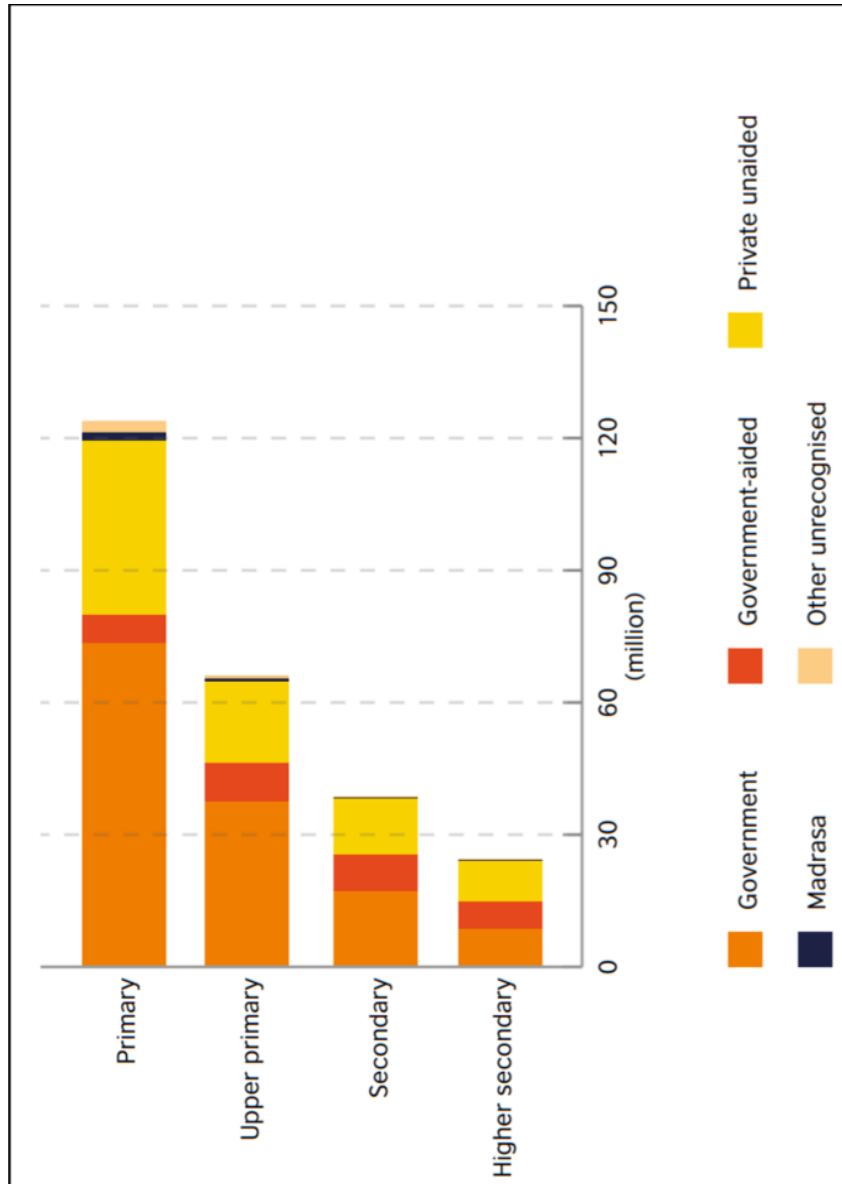
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313. BRITISH COUNCIL, *supra* note 265, at 21-22 fig.7.

314. *Id.*

315. NAT'L INST. OF EDUC. PLAN. & ADMIN., *supra* note 312, at 7.

Figure 5: India K-12 Enrollment by School Type, 2016-2017<sup>316</sup>



316. BRITISH COUNCIL, *supra* note 265, at 22 fig.8.

**Table 4: India Number of Schools by Level and Management/Funding: 2015-16<sup>317</sup>**

	Type		Number
Number of Schools*	Level-wise	Primary	840546
		Upper Primary(in total)	429624
		Secondary(in total)	139539
		Senior Secondary(in total)	112637
		<b>Total</b>	<b>1522346</b>
	Management-wise	Government	1102783
		Government Aided	83787
		Private Unaided	335776
		<b>Total</b>	<b>1522346</b>

These national averages mask wide variations among the states of India. “For example, the northern states of Haryana and Uttar Pradesh have tallied private enrollment above 50 percent in 2014 while the eastern state of West Bengal posted private enrollment under 10 percent in 2016 [].”<sup>318</sup>

Furthermore, official numbers undoubtedly underreport the number of children in private unaided schools.<sup>319</sup> These statistics fail to capture unregistered low-cost private schools or alternative models of schooling (including home schooling by individual or groups of families), for which enrollment is difficult to estimate.<sup>320</sup> There is no question that the proliferation of low fee private schools has dramatically increased the percentage of students attending private schools in India.<sup>321</sup> These schools, which charge modest fees, are categorized as “for profit” and are mostly unregulated.<sup>322</sup> They are seen as problematic by the Indian education establishment and are controversial among education reformers generally. Many parents prefer them to the government and government-aided schools especially in urban

317. GOV'T OF INDIA, *supra* note 293, at 7 tbl.6.

318. Tamo Chattopadhyay & Maya Roy, *Low Fee Private Schools in India: The Emerging Fault Lines 3* (Nat'l Center for the Study of Privatization in Educ., Working Paper No. 233, 2017), [<https://perma.cc/X8Q3-8NPD>].

319. *Id.*

320. Odhekar, *supra* note 291, at 8-9; Chattopadhyay, *supra* note 318, at 3.

321. *See* Odhekar, *supra* note 291, at 8; Chattopadhyay, *supra* note 318, at 3-4.

322. *See* Odhekar, *supra* note 291, at 10.



areas, which tend to be of low quality.<sup>323</sup> As one study suggested, “the continuing decline of the quality of the state education system has led, by default, to one of the highest levels of privatization of education in the developing world.”<sup>324</sup> There is some contested evidence that these schools outperform other schools available to poor parents, but other studies suggest that the private-school benefits disappear when student background is taken into account.<sup>325</sup> There is no question that students attending *registered* private schools dramatically outperform those who attend government schools.<sup>326</sup> While selection effects are difficult to isolate, a number of scholars have demonstrated that, controlling for demographics, the beneficial private-school effects persist.<sup>327</sup>

## 2. Private School Autonomy

For about a quarter of a century following India’s independence, the various states oversaw education, and the central government ran a small number of schools, universities, and institutes.<sup>328</sup> The Supreme Court of India held, in 1993, that education is a fundamental constitutional right flowing from Article 21’s right to life.<sup>329</sup> A 1976 constitutional amendment transferred education onto the “Concurrent List,” a list in the Indian Constitution of policy areas that must be dealt with in a concurrent manner between the central government and the state governments.<sup>330</sup> Since then, the central government has formulated certain educational policies which state governments

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323. *Id.* at 8.

324. Stephen P. Heyneman & Jonathan M.B. Stern, *Low Cost Private Schools for the Poor: What Public Policy is Appropriate?*, INT’L J. OF EDUC. DEV., 2013, at 1, 4 [<https://perma.cc/28ZQ-CSE6>].

325. *Id.* at 7-8; see also JUSTIN SANDEFUR, CTR. FOR GLOB. DEV., SEVEN QUESTIONS ABOUT LOW-COST PRIVATE SCHOOLS IN INDIA THAT WE CAN FINALLY ANSWER (2013), [<https://perma.cc/ZUV4-NWCR>].

326. Kingdon, *supra* note 292, at 187.

327. *See id.*

328. Odhekar, *supra* note 291, at 5.

329. *Id.* at 6; Unni Krishnan, J.P. & Ors. v. State of Andhra Pradesh & Ors., (1993) 1 SCR 594, 601, 605 (India).

330. Odhekar, *supra* note 291, at 5.

must follow, although it ultimately leaves many policy decisions to the states.<sup>331</sup>

In 1968, the central government formulated the first comprehensive national education policy, which addressed a number of basic issues, including free compulsory primary education, teacher qualifications and salaries, and equalizing educational opportunity.<sup>332</sup> Perhaps most importantly, the 1968 National Policy on Education outlined a “three language formula,” requiring that, from secondary education onward, instruction in schools should be in English, the local dialect, and Hindi.<sup>333</sup> This three-language policy remains in place, despite decades of controversy. Most primary education in many government schools is conducted in local dialects—estimates of the number of instructional dialects range from 300 to 1,600—although English prevails in some regions and Hindi in others.<sup>334</sup> Demand for English language instruction drives enrollment in private schools, which tend to emphasize English medium instruction. This itself is controversial.<sup>335</sup> A second national education policy, enacted in 1986 and amended in 1992, focused on the need to expand access to primary education.<sup>336</sup> In 2009, the central government ratified the Right of Children to Free and Compulsory Education Act, which made primary education a fundamental right.<sup>337</sup> The Act’s particular goal was to raise enrollment among minority, disadvantaged, and tribal populations by making primary schooling free and compulsory.<sup>338</sup> Importantly, Section 12 of the Act, the “Right to Education” provision (“RTE”), requires all public and private schools to set aside 25 percent of their seats for students in certain disadvantaged and minority categories.<sup>339</sup> This requirement applies to both aided and unaided private schools, with one

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331. *See id.* at 5-6.

332. *Id.* at 5.

333. *Id.*

334. *See* BRITISH COUNCIL, *supra* note 265, at 26-27.

335. *Id.* at 27.

336. Odhekar, *supra* note 291, at 5-6.

337. *Id.* at 7.

338. *See id.*

339. *Id.* at 11-12; *Society for Un-aided Private Schools of Rajasthan v. Union of India & Another*, (2012) 6 SCC 6 (India).

important exception: in 2012, the Supreme Court of India held that the RTE quota could not be constitutionally imposed on private, unaided minority religious or tribal schools.<sup>340</sup> The court reasoned that applying it to these schools violated a provision of the Indian Constitution guaranteeing the right of all Indian citizens to establish private and religious schools.<sup>341</sup>

The remainder of this section briefly outlines the regulation of private schools in India, with a few important caveats: the first is that, as one report recently observed, “The regulation of private schools in India remains an understudied topic, with little literature on the theory and practice of regulation[.]”<sup>342</sup> It is quite clear that education regulations are sometimes applied haphazardly and that often the regulations governing both aided and unaided private schools are often disregarded. The second is that accurate information about private schools and their regulation is not readily available.<sup>343</sup> Moreover, states exercise concurrent regulatory authority with the central government and not all state sources are available in English.<sup>344</sup>

What is clear is that the regulation of aided and unaided schools diverges sharply, with unaided schools enjoying substantial autonomy and aided schools operating under substantial government control.<sup>345</sup> All schools, aided and unaided, technically must secure government recognition to

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340. Odhekar, *supra* note 291, at 11-12; Society for Unaided Private Schools of Rajasthan v. Union of India & Another, (2012) 6 SCC 37 (India).

341. Society for Unaided Private Schools of Rajasthan v. Union of India & Another, (2012) 6 SCC 37 (India). Article 30 of the Indian constitution grants minorities the right to establish educational institutions based on religion or language, providing “(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.” India Const. art. 30, cl. 1.

342. SHRUTI AMBAST ET AL., VIDHI CENT. FOR LEGAL POL’Y, REGULATION OF PRIVATE SCHOOLS IN INDIA 1 (2017) [hereinafter AMBAST], [<https://perma.cc/7LBP-426Y>].

343. Geeta Gandhi Kington, *The Private Schooling Phenomenon in India: A Review* 2-4 (IZA Inst. of Lab. Econ., Discussion Paper No. 10612), [<https://perma.cc/G3QK-ST2N>].

344. See AMBAST, *supra* note 342, at 5 (“We have examined executive orders issued by States where they were easily available. However, because of a lack of English-language translations as well as time constraints, it is not possible to examine all the executive orders, notifications and circulars issued by the State Government which have a bearing on unaided private schools.”).

345. Odhekar, *supra* note 291, at 10.

operate (although many thousands do not and are completely unregulated).<sup>346</sup> In order to secure government recognition, private unaided schools must satisfy certain requirements regarding infrastructure, teacher qualifications, and salaries.<sup>347</sup> The RTE requires all schools other than those owned or controlled by a government agency certify that the school is not run for profit, that it conforms to constitutional values, that the school buildings are used only for purposes of education, that the school will be made available for inspection by education authorities, and the school will furnish certain reports to the local and state authorities.<sup>348</sup> Unaided schools otherwise enjoy substantial autonomy from government control. Unaided schools can establish their own fee structure;<sup>349</sup> however, for-profit schools are prohibited and fees that are too high are illegal.<sup>350</sup> Unaided schools can also select their own instructional and leadership staff—although teachers must meet minimum qualifications established by the National Council for Teacher Education and supplemented in some states by additional regulations;<sup>351</sup> they may also establish admission criteria (entrance exams, interviews, etc.) and implement their own curriculum and examinations.<sup>352</sup>

On the other hand, private aided institutions operate much like government schools. “Curricula, study materials, syllabus and examinations at all levels are similar to or the same as government schools in the same district, and students usually take either one of the two main Indian secondary school exams...or comparable state-level exams managed by the state education boards.”<sup>353</sup> Fees (if any) are nominal and are collected from the

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346. *Id.*; See Model Rules Under the Right of Child to Free and Compulsory Educ. Act, 2009, Section 11, [hereinafter Model Rules], [<https://perma.cc/GLW5-Q5QP>].

347. Odhekar, *supra* note 291, at 10.

348. Model Rules, *supra* note 346, at Section 11.

349. See *Pramati Educational and Cultural Trust & Others v. Union of India & Others*, (2014) 8 SCC 63-65 (India) (holding that the right of minority groups to establish schools under Art. 30 of the Constitution prohibits compelling private, unaided schools to provide a free education).

350. The Right of Children to Free and Compulsory Education Act, 2009, § 13 (India).

351. See Model Rules, *supra* note 346, at Part VI.

352. BRITISH COUNCIL, *supra* note 265, at 23.

353. See *id.* The national curriculum is developed by the National Council of Educational Research and Training. *Id.* at 17. Its requirements include general objectives,

students according to government regulations.<sup>354</sup> Even the recruitment of faculty members follows the norms of government schools.<sup>355</sup> Since the 1970s, teachers have received “their salary directly from the state and are recruited by a government appointed commission,” although the private-school administration technically control the teachers’ day-to-day conduct.<sup>356</sup> “There is no specific criteria for the admission of students in [aided] institutions, but this is somewhat dependent on the proportion of funding that is provided by the government.”<sup>357</sup> All government and private-aided schools must have a “School Management Committee,” made up of parents (75 percent), local authority officials, and teachers.<sup>358</sup> These committees are supposed to meet once a month to monitor the school environment.<sup>359</sup> The draft National Education Policy of 2019, discussed below, makes provisions for strengthening the authority of the School Management Committees to ensure that they are the “de facto regulator” of all schools.<sup>360</sup>

India’s education system is at an important crossroads. In May 2019, the Committee for Draft National Education Policy submitted a report proposing a new education policy that reforms all levels of education, from early childhood through higher education.<sup>361</sup> The draft policy addresses every aspect of education in the nation, including the regulation of private

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subject objectives, general schemes of studies, and detailed syllabi and instructional materials. *Id.* The national curricular framework is technically a suggestive framework for the states. *See id.* Although the states have to include all the components of the common core, they have flexibility to adapt it according to their cultural, political and social preferences. *See* BRITISH COUNCIL, *supra* note 265, at 17-18. However, the NCERT curriculum framework is developed in collaboration with all the states and union territories, and most the states accept the national curriculum as it is. *Id.* State boards of secondary education and CBSE also set curricula for their respective schools. *Id.* Public schools and government-aided schools have to follow these curricula. *See id.* at 23.

354. *See id.* at 21.

355. BRITISH COUNCIL, *supra* note 265, at 23.

356. Odhekar, *supra* note 291, at 10.

357. BRITISH COUNCIL, *supra* note 265, at 23.

358. *Id.* at 24.

359. *Id.*

360. *See id.*

361. MINISTRY OF HUM. RES. DEV., GOV’T OF INDIA, DRAFT NATIONAL EDUCATION POLICY (2019), [<https://perma.cc/7346-HQ2N>].

schools.<sup>362</sup> The policy would impose the same regulations on schools, government and private, aided and unaided: “[r]egulation of private schools will be conducted within the same framework as public schools, and all policies above will apply equally to public and private schools.”<sup>363</sup> The proposal specifically indicates that private unaided schools would be required to form school management committees, implement the standard curriculum and pedagogy, and conform to regulations on teacher qualifications and student-teacher regulations.<sup>364</sup> The Catholic Bishops Conference of India, which oversees 30,000 K-12 schools, colleges, and universities, has decried the draft policy as a “fairy tale” that completely disregards minority rights.<sup>365</sup> The organization has also expressed concern about the ongoing efforts to revise the national curriculum, joining other commentators worried that the revisions are biased and at times wildly inaccurate because of the influence of the Hindu nationalist party currently in control of the central government.<sup>366</sup>

#### D. Low-Funding/Low-Autonomy: Greece.

Like India, formal education in Greece has ancient roots. Indeed, western education arguably began in ancient Greece. The modern Greek education system, however, began when the dictatorship in Greece ended in 1974.<sup>367</sup> The following year, the new Greek democracy enacted a Constitution.<sup>368</sup> Though it has since been revised many times—most recently in 2008—the 1975 Constitution forms the foundation of Greek law to this day.<sup>369</sup>

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362. *Id.* at 189.

363. *Id.* at 190.

364. *See id.* at 191.

365. *National Draft Education Policy Overlooks Minority Rights: CBCI to HRD*, INDIA TODAY (July 29, 2019), [<https://perma.cc/8Q54-C57B>].

366. *See* CHRISTOPHE JAFFRELOT, CARNEGIE ENDOWMENT FOR INT’L PEACE, BJP HAS BEEN EFFECTIVE IN TRANSMITTING ITS VERSION OF INDIAN HISTORY TO NEXT GENERATION OF LEARNERS (2019), [<https://perma.cc/Y4SN-874A>]; Akshaya Nath, *Draft Education Policy Faces Backlash Over Hindi Imposition, Tamil Nadu Leaders Warn of Protest*, INDIA TODAY (June 3, 2019), [<https://perma.cc/VZ5H-FUDJ>].

367. *See Constitutional History*, HELLENIC PARLIAMENT, [<https://perma.cc/4SLM-WE4X>], (last visited Oct. 3, 2020).

368. *Id.*

369. *See id.*

The Greek Constitution makes direct reference to both religion and education and is rather detailed with regard to both topics. Addressing education, Article 16, Section 4 states:

Education constitutes a basic mission for the State and shall aim at the moral, intellectual, professional and physical training of Greeks, the development of national and religious consciousness and at their formation as free and responsible citizens.<sup>370</sup>

The same Article states that education shall be free to the public and “shall be an obligation of the state.”<sup>371</sup>

The resulting education system is extremely centralized. Indeed, the Greek government wields more power over education than nearly any other European country.<sup>372</sup> Unlike many international systems, the Greek education is intensely top-down, with nearly all meaningful decisions taking place at high levels of government.<sup>373</sup> The Ministry of Education, Research and Religious Affairs maintains the vast majority of control over education, though some additional institutes and ministries assist.<sup>374</sup> The organizational hierarchy is structured as follows: (1) The Ministry of Education and Religious Affairs, (2) regional directorates of primary and secondary education, (3) primary directorates of primary and secondary education, and (4) the school units.<sup>375</sup> The Ministry makes all the decisions regarding curriculum, textbooks, allocation of teaching time, teacher education and training protocols, teacher salaries, and school financing.<sup>376</sup> The regional and local levels generally only apply the guidelines laid out for them at the higher levels of government.<sup>377</sup> Perhaps most restrictive is the ban on local schools hiring and firing their own teaching staff; those decisions

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370. ORG. FOR ECON. CO-OPERATION AND DEV., EDUCATION FOR A BRIGHT FUTURE IN GREECE 25 (2018), [<https://perma.cc/5R85-7XAT>] (emphasis omitted) [hereinafter EDUCATION FOR A BRIGHT FUTURE IN GREECE].

371. *Id.* (internal quotations omitted).

372. *See id.* at 28.

373. *Id.*

374. *Id.* at 66.

375. *See* EUROPEAN COMM’N, GREECE: ORGANISATION AND GOVERNANCE (2020), [<https://perma.cc/DZ9S-EY9P>].

376. *Id.*

377. *See id.*

are made exclusively by the central government.<sup>378</sup> Under Greek law, only officially recognized institutes of higher learning may grant government-certified degrees to graduates.<sup>379</sup>

### 1. Government Funding

There is no public funding available for private schools in Greece.<sup>380</sup> However, the Greek public education system does not maintain a firm “wall” between church and state, and there are certain “religious” public schools available to students.<sup>381</sup> The first kind of schools in this category are the Ekklesiastika Gymnasias and Lykeias, meaning ecclesiastical lower and upper secondary schools.<sup>382</sup> The primary purpose of these schools is to provide training for Greek Orthodox clergy and secular

378. See EDUCATION FOR A BRIGHT FUTURE IN GREECE, *supra* note 370, at 28.

379. See *id.* at 211.

380. ORG. FOR ECON. CO-OPERATION AND DEV., EDUCATION POLICY IN GREECE: A PRELIMINARY ASSESSMENT 34-35 (2017), [<https://perma.cc/DH99-3KWB>]; see generally Theodore Fortsakis, *The Importance of Private Schools in Greece*, EUROPEAN BUS. REV. (July 19, 2016), [<https://perma.cc/LMX4-7YX9>].

381. Greece does not have an officially “established” religion, but Article 3 identifies the Greek Orthodox Church as the “main” religion of Greece. See Anca Parmena, *Struggle for Sacred After EU Integration: Constitutional Developments Concerning Religion and Freedom of Religion in Greece, Cyprus, Romania and Bulgaria*, 33-34 REVUE DES SCIENCES POLITIQUES 226, 229 (2012); see EUROPEAN COMM’N, POPULATION: DEMOGRAPHIC SITUATION, LANGUAGES AND RELIGION (2020), [<https://perma.cc/72CP-WL74>].

Article 13 provides most of the detail regarding Constitutional rules regarding religion in Greece, providing:

1. Freedom of religious conscience is inviolable. The enjoyment of civil rights and liberties does not depend on the individual’s religious beliefs.
2. All known religions are free and their rites of worship shall be performed unhindered and under to the protection of the law. The practice of rites of worship must not offend public order or the good usages. Proselytism is forbidden.
3. Ministers of all known religions are subject to the same supervision of the State and to the same obligations towards it as those of the prevailing religion.
4. No person shall be exempt from fulfilling his obligations to the State or may refuse to comply with the laws by reason of his religious convictions.
5. No oath shall be imposed or administered except as specified by law and in the form determined by law also specify its type. *Id.*

These constitutional provisions are supplemented with statutes on the topic of religion. *Id.* Law 4301/2014 outlines the rules for how a religion can be “recognized” by the state, with a process that requires a minimum of 300 adherents and an application. *Id.* Religious entities that apply and qualify are indexed in the Religious Legal Persons books. *Id.*

382. EUROPEAN COMM’N, ORGANISATIONAL VARIATIONS AND ALTERNATIVE STRUCTURES IN SECONDARY EDUCATION (2019), [<https://perma.cc/VTD7-YPLC>] [hereinafter *Variations*].



executives.<sup>383</sup> Despite their religious affiliation, the state tightly controls the operation of these schools.<sup>384</sup> Attending students study certain religious topics not normally covered, but they are also responsible for the same state-enacted curriculum as secular school students.<sup>385</sup> And, even the content of religious curriculum comes from the central government.<sup>386</sup> Each year, the Ministry stipulates the exact curriculum and textbooks for courses such as “New Testament” and “Liturgical Life of the Church.”<sup>387</sup> The second kind of religious public schooling available to Greek students are the Muslim madrasas.<sup>388</sup> Only students who are members of the Muslim minority in Thrace may attend these institutions and, like the ecclesiastical schools, the Ministry oversees their operation and curriculum.<sup>389</sup> The same core curriculum that applies to secular school students is still mandatory, and additional religious classes include topics such as “Quranic Interpretation” and “Islamic Law.”<sup>390</sup>

## 2. Private School Autonomy

Full-time attendance to private school is relatively rare in Greece.<sup>391</sup> In 2011, only three percent of all Greek students attended privately managed schools.<sup>392</sup> In 2012, that figure was estimated to be seven percent of all Greek students.<sup>393</sup> Accordingly, the current percentage likely sits between five to eight percent of all Greek students, especially since the recent economic crisis likely slowed any expansion of private

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383. *Id.*

384. *See id.*

385. *Id.*

386. *See id.*

387. *Variations, supra* note 382.

388. *Id.*

389. *See id.*

390. *See id.*

391. *See* ORG. FOR ECON. CO-OPERATION AND DEV., STRONG PERFORMERS AND SUCCESSFUL REFORMERS IN EDUCATION: EDUCATION POLICY ADVICE FOR GREECE, STRONG PERFORMERS AND SUCCESSFUL REFORMERS IN EDUCATION 103 (2011), [<https://perma.cc/Q98B-7S25>] [hereinafter EDUCATION POLICY ADVICE FOR GREECE].

392. *Id.* at 104.

393. *See* ORG. FOR ECON. CO-OPERATION AND DEV., EDUCATION AT A GLANCE 2014: OECD INDICATORS 416 (2014), [<https://perma.cc/DB4W-CY24>].

schooling.<sup>394</sup> One secondary source estimates that “there are 1,100 private schools in Greece out of a total of some 13,000 schools nationwide[.]”<sup>395</sup> That source’s figure includes all schools from kindergarten to “high school” and might include part-time private instruction as well.<sup>396</sup> Another source reported that the number of full-time private schools for post-kindergarten children is around 300, a figure that seems more in line with the five to eight percent attendance rates.<sup>397</sup>

Furthermore, students who choose to attend private schools still pay taxes towards the public education system; in fact, now-abolished tax laws used to require *additional* taxes from students who chose to attend private schooling.<sup>398</sup> However, “private” school in Greece can imply several different things. First, there are private Greek schools that cater largely to Greek nationals.<sup>399</sup> Second, there are “international schools” that almost exclusively provide education services for foreign nationals living in Greece.<sup>400</sup> These operate almost entirely outside of government control, and attendance by Greek nationals is largely forbidden.<sup>401</sup> Finally, there is private “frontistiria” education, or supplemental classes, which is referred to as “shadow education” in some contexts.<sup>402</sup> More than just basic tutoring, this part-time private education is extremely common in Greece, and is highly regulated.<sup>403</sup>

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394. See Fortsakis, *supra* note 380.

395. Maria Spiliopoulou, *Private School Registrations in Greece on the Rise After Memorandum Exit*, ATHENS NEWS AGENCY (Sep. 3, 2018), [<https://perma.cc/CJ8L-E5YV>].

396. *See id.*

397. *See Greece Reconsiders a Tax on Private Education*, THE ECONOMIST (Oct. 30, 2015), [<https://perma.cc/2N5P-8AC6>].

398. *See id.* (explaining that a 23% VAT was imposed on Greek private schooling as a mechanism to patch budget holes); *see also* EUROPEAN COMM’N, GREECE: EARLY CHILDHOOD AND SCHOOL EDUCATION FUNDING (2020), [<https://perma.cc/4KDW-9J2N>] (explaining how public education is financed through the state budget).

399. *See* EUROPEAN COMM’N, GREECE: ORGANISATION OF PRIVATE EDUCATION (2020), [<https://perma.cc/MD9Z-S7T9>] [hereinafter GREECE: ORGANISATION OF PRIVATE EDUCATION].

400. *Id.*

401. *See id.* (explaining how Greek nationals may attend international schools but only after receiving permission by the Ministry of Education, and under certain conditions).

402. EDUCATION FOR A BRIGHT FUTURE IN GREECE, *supra* note 370, at 39.

403. *See id.* at 39-40.

With the exception of the international schools, regulation of private education in Greece is pervasive.<sup>404</sup> Private schools require state permission—in the form of a license from the Minister of Education—to operate.<sup>405</sup> And, like their public counterparts, private Greek schools are controlled and regulated by the Ministry of Education and Religious Affairs.<sup>406</sup> These regulations require private schools to function like public schools.<sup>407</sup> They must follow public school teaching schedules, use the same government-approved textbooks, and focus on the same curriculum as public schools.<sup>408</sup> The state plays a major role in the hiring and inspecting of private school teachers as well.<sup>409</sup> The end result is that education in both school formats are near mirror-images.<sup>410</sup> Deviations from state-school curriculum are hypothetically possible, but very difficult to obtain, as deviations require the government to approve of both “[t]he validity of the curriculum” and “[t]he pedagogical content of teaching.”<sup>411</sup>

Though public education in Greece is widely attended and free, most students still purchase additional education.<sup>412</sup> Frontistiria refers to classes that students can purchase from private providers.<sup>413</sup> They attend this extra education in groups, and the setting is similar to regular schooling.<sup>414</sup> In addition, some students purchase services from private tutors, usually in a one-on-one setting.<sup>415</sup> Spending on frontistiria classes and private tutoring is extensive, with the European Union estimating that

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404. See generally EURYDICE, EUROPEAN UNION, PRIVATE EDUCATION IN THE EUROPEAN UNION: ORGANISATION, ADMINISTRATION AND THE PUBLIC AUTHORITIES’ ROLE 69-71 (2000), [<https://perma.cc/FM8D-SKJ2>] [hereinafter PRIVATE EDUCATION IN THE EUROPEAN UNION].

405. GREECE: ORGANISATION OF PRIVATE EDUCATION, *supra* note 399.

406. See PRIVATE EDUCATION IN THE EUROPEAN UNION, *supra* note 404, at 69.

407. See *id.* at 70.

408. See *id.*

409. See *id.* at 70-71.

410. See generally EDUCATION POLICY ADVICE FOR GREECE, *supra* note 391, at 104; see also EDUCATION FOR A BRIGHT FUTURE IN GREECE, *supra* note 370, at 40-41; FANI STYLIANIDOU ET AL., EDUC. RESEARCH CTR., ATTRACTING, DEVELOPING AND RETAINING EFFECTIVE TEACHERS 31 (2004).

411. See GREECE: ORGANISATION OF PRIVATE EDUCATION, *supra* note 399.

412. See EDUCATION FOR A BRIGHT FUTURE IN GREECE, *supra* note 370, at 39.

413. *Id.*

414. See *id.* at 39-40.

415. See *id.* at 39.

parents spend the equivalent of over twenty percent of the nation's public-school budget on additional education.<sup>416</sup> This represents serious private expenditure on top of the free public education. A 2014 study of "shadow" education found that 99 percent of students in their final year of secondary school attended either a frontistiria, private lessons, or both.<sup>417</sup> This incredibly high level of private education participation late in a student's career is easily explained. After their last year of secondary school, students must take an exam to determine if and where they can attend university.<sup>418</sup> Most private lessons focus on these exams and, essentially "reteach" the relevant material from the public-school curriculum.<sup>419</sup> Government regulation of frontistirias is comprehensive. Each frontistiria must receive a government permit, pay start-up fees to the state, and allow government inspections.<sup>420</sup> However, frontistiria curriculum is not regulated in the way full-time schools are regulated. Non-frontistiria private tutoring is also common but is much more concealed.<sup>421</sup> Many tutors do not register their services with the government or state tutoring income for tax purposes.<sup>422</sup> This alternate form of private tutor is often referred to as "shadow education."<sup>423</sup>

In response to criticism from international actors like the European Union and the Organization for Economic Cooperation and Development, the Greek began to consider ways to decentralize some control over education in 2016.<sup>424</sup> The current reform goals center around providing greater autonomy for schools and higher education institutes. Out of six stated

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416. *Id.* at 76-77.

417. EDUCATION FOR A BRIGHT FUTURE IN GREECE, *supra* note 370, at 39.

418. *Id.* at 47.

419. *See id.* at 40.

420. *Id.*

421. Athanasios Verdis, School Effectiveness and Educational Evaluation in Greece, 34-36 (2002) (Ph.D. thesis, University of London, Institute of Education).

422. *See* EDUCATION FOR A BRIGHT FUTURE IN GREECE, *supra* note 370, at 40, 117; *see also* MARK BRAY, NESSE, THE CHALLENGE OF SHADOW EDUCATION: PRIVATE TUTORING AND ITS IMPLICATION FOR POLICY MAKERS IN THE EUROPEAN UNION 52 (2011); Verdis, *supra* note 421, at 34-36.

423. EDUCATION FOR A BRIGHT FUTURE IN GREECE, *supra* note 370, at 39-40.

424. *See* EURYDICE, EUROPEAN COMM'N, GREECE ONGOING REFORMS AND POLICY DEVELOPMENTS (2020), [<https://perma.cc/5ZDY-PGR6>].

objectives, the highest priority is “[g]reater autonomy in school units and Universities.”<sup>425</sup> Though Greece has verbalized these goals as priorities, there has not yet been much meaningful change in the structure of the education system. Control remains extremely tight, and local school units still do not have control over curriculum, funding, hiring and firing of staff, or textbook choice.<sup>426</sup>

### III. ACCOUNTABILITY V. CONTROL: FOUR QUESTIONS FROM THE COMPARATIVE CONTEXT.

As the footprint of parental choice expands in the United States, questions about accountability are gaining prominence in education-policy debates that previously focused primarily on funding. As I have previously written, there is an inherent tension in debates about accountability policies in the parental-choice context. On the one hand, there is little question that parental-choice programs are more successful when parents have access to high-quality options.<sup>427</sup> Therefore, policy makers have reason to believe that the law should regulate the quality of schools participating in choice programs (perhaps to the extent of precluding persistently failing schools from further participation). On the other hand, excessive regulation may deter the best schools from participating in the first place, leaving parents to select among schools that have little choice but to comply in order to secure access to public resources.<sup>428</sup>

The comparative analysis of education policies conducted in this Article highlights a second tension in debates about accountability in the parental-choice context. Viewing parental-choice policies as a means of advancing the goal of educational pluralism brings into clear focus the need to hold the line against subjecting privately operated schools to government control while still holding them accountable for their performance. This

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425. *See id.*

426. *See* EDUCATION FOR A BRIGHT FUTURE IN GREECE, *supra* note 370, at 28-29, 41; *see also* COUNS. OF ECON. ADVISORS, MINISTRY OF FIN., NATIONAL REFORM PROGRAMME - GREECE 28-32 (2015), [<https://perma.cc/DEG3-4YNH>].

427. *See* Garnett, *supra* note 12, at 171, 188.

428. *See id.* at 196-97.

is because, as the previous discussion demonstrates, government funding of private schools increases educational pluralism only when the regulations attending the receipt of those funds do not cross the line between “accountability” and “control”. It is hardly self-evident, of course, where the line between these two lies—and what types of regulations fall on either side of it. That question deserves its own treatment and is beyond the scope of this Article. Thus, rather than draw conclusions about the boundary between “accountability” and “control,” the remainder of this Article instead highlights three areas of education policy where the question of accountability *versus* control emerges across contexts: first, the freedom to hire and fire teachers and school leaders who are supportive of the schools’ unique missions and pedagogical goals; second, the ability to set admission criteria for students; and, third, control over curriculum. The remainder of this Article provides a few examples of each area.

### A. School Staffing

Disagreement about the appropriate degree of government control over private schools’ staffing decisions is a persistent feature of education policy debates across all national contexts, especially where private schools receive public funding. In the United States and Australia, where private schools enjoy fairly robust autonomy to hire and fire teachers and school leaders, these debates have tended to focus on the tension between religious liberty and non-discrimination norms. In 2016, for example, Maryland became the first state to prohibit any school, regardless of religious affiliation, from discriminating on the basis of LGBTQ+ status as a condition of participating in a voucher program.<sup>429</sup> In Australia, where all private schools receive government funds, religious schools’ decisions about school staffing are generally exempt from certain non-

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429. See GUIDEBOOK, *supra* note 10, at 42. In February 2020, a federal district court rejected a religious liberty challenge to this requirement. Liz Bowie, *In First Round of Maryland School Voucher Lawsuit, Court Denies Christian School’s Reinstatement*, BALTSUN (Feb. 7, 2020), [<https://perma.cc/KF9S-EUKX>].

discrimination laws.<sup>430</sup> These exemptions remain a perennial source of controversy and have recently taken center stage in debates about whether Australia should enact general religious liberty legislation.<sup>431</sup>

Elsewhere, government funding comes at the cost of surrendering all control over staffing decisions. In many countries, the government supports private schools by paying teaching salaries.<sup>432</sup> In some, as in India, teachers in government-funded schools are effectively public employees who are recruited by the government and assigned to private schools by public education officials.<sup>433</sup> In some countries, including France and Austria, teachers have “civil-servant status[,]” meaning they receive the same salary as public-school teachers and are selected by government authorities with the input of private-school officials (France) or the option to reject unsuitable candidates (Austria).<sup>434</sup> In other countries, private schools enjoy even less control over the teachers who are assigned to them. Many African nations nationalized most private schools, including religious schools, during the post-colonial period.<sup>435</sup> These schools are now operated by government officials as “church sponsored” public schools.<sup>436</sup> Although the sponsoring organizations maintain varying degrees of control over religious instruction,<sup>437</sup> they have effectively no control over the selection of teachers and

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430. Renae Barker, *Transparency Is the Way Forward for Religious Exemptions to Anti-Discrimination Laws*, ABC RELIGION & ETHICS (Oct. 16, 2018), [<https://perma.cc/W83F-585V>].

431. See Paul Karp, *Religious Discrimination Bill: What Will Australians Be Allowed To Say and Do If It Passes?*, GUARDIAN (Dec. 13, 2019), [<https://perma.cc/HQW9-GADK>].

432. KOBER, *supra* note 33, at 6.

433. See Odhekar, *supra* note 291, at 10.

434. KOBER, *supra* note 33, at 12.

435. IGOR KITAEV, UNESCO INT’L INST. FOR EDUC. PLAN., PRIVATE EDUCATION IN SUB-SAHARAN AFRICA: A RE-EXAMINATION OF THEORIES AND CONCEPTS RELATED TO ITS DEVELOPMENT AND FINANCE 28-29 (1999).

436. See Theodorah M. Mabeya et al., *Role of Church Sponsor in Management of Secondary Schools: Impact on Academic Performance and Conflict Concerns in Kenya*, 2 J. EDUC. ADMIN. & POL’Y STUD. 31, 31-32 (2010), [<https://perma.cc/S84G-T8MY>].

437. See *id.* at 32-34; Jill Olivier & Quentin Wodon, *Faith-Inspired Education in Ghana: A Historical Case Example*, 12 REV. FAITH & INT’L AFFS. 27, 27-28, 32 (2014), [<https://perma.cc/8XZC-E8XY>]; Stephen Muoki Joshua, *The ‘Church’ as a ‘Sponsor’ of Education in Kenya: A Historical Review (1884-2016)*, CRITICAL INVESTIGATIONS INTO HUMANITARIANISM IN AFR. (March 2, 2017), [<https://perma.cc/UV8H-DX2Y>].

school leaders, lacking even a veto over those who are openly hostile to the schools' religious mission.<sup>438</sup>

### B. Student Enrollment

In the United States, private schools generally enjoy total autonomy to select their students and set admission criteria, even for students participating in private-school-choice programs.<sup>439</sup> An exception is the Louisiana voucher program, which precludes private schools from selecting among program participants.<sup>440</sup> This regulation has been cited as a possible cause of the disappointing performance of students in the program. As Patrick Wolf has suggested, restraints on student admissions appear to have led the best private schools in Louisiana to opt out of the program altogether.<sup>441</sup> Outside of the United States, however, government control over private schools' enrollment decisions are quite common, especially for schools that receive public funding.<sup>442</sup> As discussed in the introduction, for example, Chile now prohibits all schools participating in its voucher program from using any selection criteria and instead mandates selection by lottery if supply exceeds demand.<sup>443</sup> Ireland recently enacted legislation prohibiting Catholic schools from giving preferences in admissions to baptized Catholics.<sup>444</sup> "Subsidized religious schools in British Columbia-Canada, France, and elsewhere cannot reject students because they have a different religious

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438. See Joyline Mukwairu Njeru, *The Role of Sponsors Participation in Management of Public Secondary Schools In Maara District, Tharaka Nithi County-Kenya 17-18* (June 2013) (Research project in partial fulfillment of Master's degree, University of Nairobi) [<https://perma.cc/8UMJ-8BW8>] (explaining that although the sponsor has no direct staffing authority, they can attempt to "recommen[d] and accept[] the principal to head their sponsored schools []" through consultation).

439. See JOSH CUNNINGHAM, *NAT'L CONF. STATE LEGISLATURES, ACCOUNTABILITY IN PRIVATE SCHOOL CHOICE PROGRAMS 3-4* (2014), [<https://perma.cc/9HZ8-P4ER>].

440. Patrick J. Wolf, *What Happened in the Bayou?*, *EDUC. NEXT* (Aug. 13, 2019), [<https://perma.cc/ZXE8-3HCT>].

441. *Id.*

442. KOBER, *supra* note 33, at 8-9.

443. SANTIAGO ET AL., *supra* note 26, at 53.

444. Sean Murray, *'No More Baptism Barrier': Catholic Schools Won't Use Religion as Admission Criteria, Says Bruton*, *THE JOURNAL.IE* (June 28, 2017), [<https://perma.cc/2GJE-M9V4>].



faith.”<sup>445</sup> Germany and Finland prohibit subsidized private schools “from rejecting students because of family income[,]” and Belgium prohibits discrimination on the basis of ideology.<sup>446</sup> “Finland establishes attendance zones for private schools.”<sup>447</sup> Publicly subsidized private schools in many African nations are subject to universal education mandates that can overwhelm them with more students than they can effectively teach.<sup>448</sup>

### C. Curriculum

Mandatory curricular mandates represent by far the most common and most comprehensive restriction on private schools’ autonomy in other nations. These requirements stand in sharp contrast to the United States where private schools typically do not have to follow state curricular mandates or take the standardized tests administered to public school students, even if they participate in private-school-choice programs.<sup>449</sup> Even in Australia, as discussed previously, where they are publicly funded and enjoy relatively broad operational autonomy, all private schools must adhere to the national curriculum and take government-mandated standardized tests.<sup>450</sup> Similarly, in Denmark and Belgium, “subsidized private schools must follow the same national curriculum as public schools, although they may retain control over their teaching methods [ ] .”<sup>451</sup> In other countries, private schools, funded and unfunded, must use state-designated course materials and adhere to regulations mandating essentially every detail of the school day, including “seat minute”

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445. KOBER, *supra* note 33, at 9.

446. *Id.*

447. *Id.*

448. See Efosa Ojomo, *The Push for “Free” Universal Education in Africa Often Falls Short—Here’s a Better Way*, CHRISTENSEN INST. (July 9, 2019), [<https://perma.cc/Z2D3-2ZQG>].

449. See Garnett, *supra* note 12, at 183-84. As recent debates surround New York’s decision to force Orthodox Jewish Yeshivas to comply with a state law mandating that private school instruction be “substantially equivalent” to public schools’, efforts to impose even broad curricular mandates on private schools are seen as controversial in the U.S. See, e.g., Eliza Shapiro & Jeffery C. Mays, *Why New York’s Inquiry into Yeshivas Mysteriously Stalled*, N.Y. TIMES (Dec. 18, 2019), [<https://perma.cc/4ZV4-9ZQD>].

450. See *supra* Section II.B.

451. KOBER, *supra* note 33, at 9.

requirements.<sup>452</sup> For example, “[i]n Chile, there is a single national curriculum” that mandates which textbooks to use as well as plans of study (including “curricular areas to be covered and associated weekly time”).<sup>453</sup> Similarly, Kenya recently overhauled its K-12 curriculum—in part to provide greater flexibility and different instructional pathways for secondary students—but the system remains extremely regimented.<sup>454</sup> “In Germany, Ireland, [and] Portugal, . . . private schools must adhere to government course syllabi.”<sup>455</sup> “Spain and Italy, among others, define the curriculum goals and content for *all* private schools, subsidized or not.”<sup>456</sup> “Luxembourg requires the most heavily subsidized private schools to use the same teaching methods as public schools.”<sup>457</sup> “The provincial government in Alberta, Canada, sets standards for instructional materials, while the government of Greece[,]” as discussed previously, “regulates curriculum and instructional materials for private schools even though no funding is available.”<sup>458</sup>

Government mandated curricular requirements often interfere in a particular way with faith-based schools’ instructional practices. For example, many African nations have a mandatory “religious education” curriculum in all schools (public and private) that glosses over denominational distinctions and practices and relegates faith formation to after-school hours.<sup>459</sup>

Ireland recently proposed a new curriculum framework that limits the hours during which religious instruction is permitted in private schools and replaces it with a “wellness”

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452. See, e.g., SANTIAGO ET AL., *supra* note 26, at 52, 54-55.

453. *Id.* at 54-55.

454. MINISTRY EDUC., REPUBLIC OF KENYA, NATIONAL CURRICULUM POLICY 5 (2018), [<https://perma.cc/2BW3-HCE6>].

455. KOBER, *supra* note 33, at 9.

456. *Id.*

457. *Id.*

458. **Error! Bookmark not defined.***Id.*

459. See, e.g., Richardson Addai-Mununkum, *Rethinking Christian Religious Education in Ghana: History, Challenges and Prospects*, 23 J. RES. ON CHRISTIAN EDUC. 294, 294-95 (2014); Samuel Awuah-Nyamekye, *Religious Education in a Democratic State: The Case of Ghana, passim* (conference paper, June 2010); Manos Antoninis, *Tackling the Largest Global Education Challenge? Secular and Religious Education in Northern Nigeria*, 59 WORLD DEV. 82, 83-84 (2014).

component that Catholic leaders have condemned as antithetical to their faith.<sup>460</sup> And, as noted previously, India's efforts to overhaul its education policy have been characterized by concerns that the national curriculum has been coopted by Hindu nationalist interests to such an extreme extent that the content not only disregards minority rights but is, at times, wildly inaccurate.<sup>461</sup> Through the lens of these policies, American debates about curricular reforms, such as the heated controversy over whether New York should enforce the law requiring private schools to maintain a "substantially equivalent" curriculum to that of public schools—which has focused in a particular way on Orthodox Jewish schools in New York City—seem mild in comparison.<sup>462</sup>

## CONCLUSION

As part of the fiscal stimulus bill enacted in the midst of the coronavirus pandemic, Congress extended certain billions of dollars in financial benefits to small businesses, including private and faith-based schools.<sup>463</sup> Education Secretary Betsy DeVos acted quickly to block state efforts to exclude private schools from receiving more education funding.<sup>464</sup> For some private

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460. Emma O Kelly, *NCCA Proposals Include Doubling Time Spent on Social, Health Education*, RTE (Feb. 25, 2020), [<https://perma.cc/98VF-FE6G>]; Katherine Donnelly, *Church's Backlash Blocks Change in Religion Classes*, INDEPENDENT.IE (Nov. 28, 2016), [<https://perma.cc/4C4Y-G6M3>].

461. See *supra* notes 363-66 and accompanying text.

462. Eliza Shapiro, *Do Children Get a Subpar Education in Yeshivas? New York Says It Will Finally Find Out*, N.Y. TIMES (Dec. 3, 2018), [<https://perma.cc/2ES2-V66F>]; Shapiro & Mays, *supra* note 449.

463. See Valerie Strauss, *DeVos Drops Controversial Rule Giving Coronavirus Aid to Private Schools After Judge Said It Was Illegal*, WASH. POST (Sept. 10, 2020), [<https://perma.cc/HNU7-P3KM>]. But see Frederick M. Hess & Brandan Bell, *Some Private Schools Are Struggling, Too. Let's Not Forget Them.*, THE DISPATCH (May 21, 2020), [<https://perma.cc/Q6EL-PR79>]; Andrew Ujifusa, *Want To Help Public Schools? Give Private Schools COVID-19 Relief, Groups Declare*, EDUC. WK. (May 14, 2020), [<https://perma.cc/FQV7-9LHF>].

464. Erica L. Green, *DeVos Demands Public Schools Share Pandemic Aid with Private Institutions*, N.Y. TIMES (May 27, 2020), [<https://perma.cc/W2H9-9MZH>]. But see Strauss, *supra* note 463 (noting on September 4, 2020, Federal Judge for the District of Columbia, Dabney Friedrich, ruled that "the Cares Act's K-12 education funding was intended to be

schools in the United States, these benefits are a matter of life and death. After they were forced to close in March 2020, dozens of private schools announced that they would not reopen in the fall.<sup>465</sup> Many more expressed concerns that the financial stress of the closures (and resulting declining enrollments) would force them to follow suit. These concerns have prompted some to urge for the restructuring of K-12 education funding, including a dramatic expansion of private-school-choice.<sup>466</sup> As a lifelong school-choice proponent, I agree that reconsidering the exclusion of private and faith-based schools is a matter of great urgency. I fear that we have come to this point too late for many schools that serve American children, including thousands of our most vulnerable students. As a student of comparative education policy, I also believe that parental-choice proponents, including myself, have failed to consider the tradeoffs between funding and autonomy in other countries. The time has come to reconsider that as well.

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distributed to public and private elementary and secondary schools using a formula based on how many poor children they serve[.]” and DeVos’ determination that the formula should instead be “based on the total number of students in the school[.]” violated the law and congress’ intentions).

465. Hess & Bell, *supra* note 463.

466. Scott Walker, *Vouchers, Scholarships and Tax Credits Will Help Low-Income Families Implement School Choice*, WASH. TIMES (May 28, 2020), [<https://perma.cc/DE58-7SSU>]; Laura Meckler, *As Pandemic Tests Private Schools, Betsy DeVos Pushes School Choice*, WASH. POST (June 15, 2020), [<https://perma.cc/EM79-KHTE>]; see Hess & Bell, *supra* note 463.