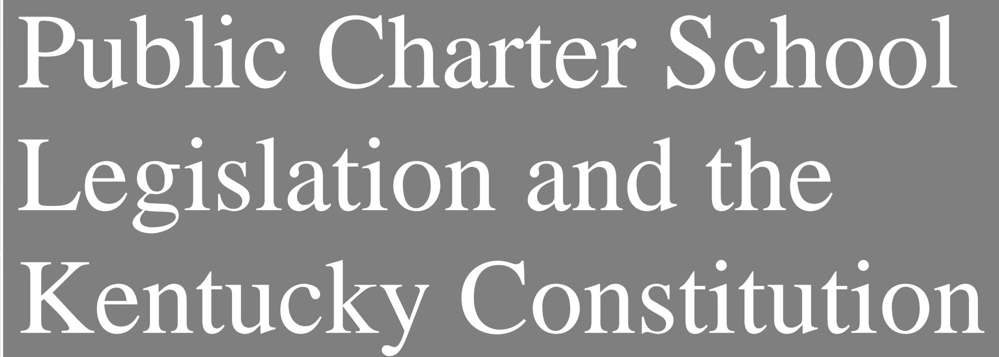

Public Charter School Legislation and the Kentucky Constitution

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EXECUTIVE SUMMARY

The Kentucky Constitution vests the General Assembly with broad discretion to shape the state's public school system. Section 183 of the Constitution states: "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State." Ky. Const. §183. As the highest court in the state has observed, that charge is "as broad as it is possible to frame an authority to the legislature to deal with the common schools in any way it should desire." *Louisville v. Bd. of Educ.*, 195 S.W.2d 291, 293 (1946). Accordingly, a long line of Kentucky cases confirms the considerable deference the courts must give the General Assembly when it exercises its judgment as to how best to craft an efficient common school system.

In recent years, the General Assembly, like the legislatures of many States, has come to question whether a common school system operated exclusively through elected local school boards is the most efficient system for public education, or whether the common school system would benefit if some common schools operated under differently constituted boards. To that end, legislation has been proposed to authorize the creation of charter schools that would be governed by boards consisting principally of parents of the students that attend them, operating with the approval and under the oversight of an entity authorized by the State Board of Education to approve charter school applications. These schools would not replace the existing common schools, but rather would complement them, offering another option for students to obtain a free education at a public school. While that would undoubtedly be a significant change from the manner in which the common schools have operated to date, it would hardly mark the first time the General Assembly has made structural reforms in an effort to make the common school system more efficient. Over the decades, the General Assembly has shifted school governance from district-level to county-level school boards, and from city-controlled districts to independent districts. And while those reforms were considered substantial—even "radical"—at the time, the Kentucky courts recognized that those kinds of express, system-wide efforts to improve the efficiency of the common school system fit comfortably within the broad discretion Section 183 affords.

Nonetheless, some have suggested that the Kentucky Constitution constrains the General Assembly to operate the common school system exclusively through the existing elected school boards. The source of any such constraint is illusive. Plainly, it cannot be found in the text of Section 183, which clearly grants the General Assembly broad authority to decide what reforms will make the common school system most efficient. It is therefore incumbent upon those who seek to impose such a constraint to identify a constitutional provision that establishes a restriction on the General Assembly's authority in terms that are as clear as Section 183's grant of authority. That, they cannot do. To be sure, Sections 184 and 186 of the Constitution impose constraints on the General Assembly that are relevant to the common school system, but those constraints have nothing to do with how common schools may be constituted. Instead, they concern only

how the common schools shall be *funded*, constraining the General Assembly to use funds raised for the common schools to support the common schools. Moreover, the first of those provisions says not a word about school boards, school districts, or elected officials. And while the second provision contemplates the *existence* of "school districts," it certainly does not mandate that all common schools operate under the control of those districts—or, for that matter, under the control of any other designated entity. Instead, it just charges the General Assembly with "prescrib[ing] the manner of the distribution of the public school fund among the school districts and its use for public school purposes." Ky. Const. §186.

Nor do decisions from the Kentucky courts clearly constrain the General Assembly to operate the common school system through the existing elected school boards. To be sure, many cases have recognized that common schools have traditionally operated within a school district, under the oversight of a school board with elected members. But the courts have also repeatedly recognized that "school districts are creatures of the legislature, and the legislature has the power under section 183 ... to alter them or even do away with them entirely." *Bd. of Educ. v. Bd. of Educ.*, 250 S.W.2d 1017, 1019 (Ky. 1952). To the extent language in some cases could be read to suggest otherwise, none of those cases concerned an express effort by the General Assembly to make a system-wide reform to the common school system to improve its overall efficiency; instead, they concerned only efforts to use common school funds to fund special-purpose or other schools operating *outside* the common school system. Indeed, we are aware of no case in which the Kentucky courts invalidated a general reform to the common school system as a whole that was enacted in furtherance of the General Assembly's considered judgment as to how best to provide an efficient common school system. Accordingly, whatever obstacles to the creation of charter schools may exist, the Kentucky Constitution should not be one of them.

I. The Kentucky Constitution Affords The General Assembly Broad Discretion To Shape The Common School System.

The Kentucky Constitution gives the General Assembly broad discretion to shape the common school system. Section 183 of the Constitution states that the General Assembly "shall, by appropriate legislation, provide for an efficient system of common schools throughout the State." Ky. Const. §183. As the Kentucky courts have observed, that provision "is as broad as it is possible to frame an authority to the legislature to deal with the common schools in any way it should desire." *Louisville v. Bd. of Educ.*, 195 S.W.2d 291, 293 (1946). Indeed, so long as the commons schools retain "the one main essential" of a common school system—"they are free schools, open to all the children of proper school age residing in the locality, and affording, so long as the term lasts, equal opportunity for all to acquire the learning taught in the various common school branches," *Louisville v. Commonwealth*, 121 S.W. 411, 412 (Ky. 1909)—questions regarding "[w]hat system will be most efficient … rest[] within the discretion of the General Assembly," *Prowse v. Bd. of Educ. for Christian Cnty.*, 120 S.W. 307, 308 (Ky. 1909). Accordingly, "the court will not substitute its judgment for the judgment of the Assembly, and will not interfere with the action of the Legislature, unless a palpable effort to evade the mandate of the Constitution should appear." *Id.*; *see also, e.g.*, *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 216 (Ky. 1989) ("legislative discretion—in this specific matter of common schools—is to be given great weight"); *Madison Cnty. Bd. of Educ. v. Smith*, 63 S.W.2d 620, 621 (Ky. 1933) (Section 183 "leaves to legislative discretion the best method of providing for an efficient system of common schools"); *Elliot v. Garner*, 130 S.W. 997, 998 (Ky. 1910).

Consistent with that understanding, the Kentucky courts have been loath to interfere with the General Assembly's efforts to decide what kinds of entities are best suited to operate a common school. For instance, in *Prowse*, Kentucky's high court sustained a law that "substitute[d] a county board, having control of all the schools in the county, for the district boards of trustees heretofore existing." 120 S.W. at 308. As the court explained, "[i]n obeying the constitutional mandate to provide an efficient system of common schools the Legislature must necessarily have the discretion of choosing its own agencies, and conferring upon them the powers deemed by it necessary to accomplish the ends aimed at." *Id.* at 309; *see also, e.g.*, *Williamstown Graded Free School Dist. v. Webb*, 12 S.W. 298, 300 (Ky. 1889) (concluding that legislature "certainly has the constitutional power" to delegate authority to "prescribe the course of study, and the qualifications of [school] teachers").

In 1934, through "a comprehensive revision of the school laws," the General Assembly took the "radical" step of establishing "independent school district[s]" that operate entirely "free from the control of" cities. *Louisville*, 195 S.W.2d at 292. While that step engendered some disputes about whether and to what extent the cities could continue to fund common schools within their borders, no one doubted the General

Assembly's power under Section 183 to "revolutionize[]" the common school system in this manner. *Id.* at 649. To the contrary, in resolving the funding questions that arose, the Court of Appeals reiterated that the General Assembly has "broad power" to "deal[] comprehensively with the common schools." *Id.* at 650-51. And in 1952, the court made explicit the breadth of the General Assembly's power to restructure the common school system, explaining that the "school districts are creatures of the legislature, and the legislature has the power under section 183 ... to alter them or even do away with them entirely." *Bd. of Educ. v. Bd. of Educ.*, 250 S.W.2d 1017, 1019 (Ky. 1952).

Given the remarkable breadth of the General Assembly's authority to shape the common school system under Section 183 and the cases interpreting it, any constraints on that broad authority must be found elsewhere in the Constitution. But the other constitutional provisions dealing with common schools say nothing about how common schools may be *structured* in pursuit of an efficient system of common schools; instead, they deal only with how common schools may be *funded*. Specifically, Section 184 provides:

> [A]ny sum which may be produced by taxation or otherwise for purposes of common school education, shall be appropriated to the common schools, and to no other purpose. No sum shall be raised or collected for education other than in common schools until the question of taxation is submitted to the legal voters, and the majority of the votes cast at said election shall be in favor of such taxation: Provided, The tax now imposed for educational purposes, and for the endowment and maintenance of the Agricultural and Mechanical College, shall remain until changed by law.

Ky. Const. §184. And Section 186 provides:

> All funds accruing to the school fund shall be used for the maintenance of the public schools of the Commonwealth, and for no other purpose, and the General Assembly shall by general law prescribe the manner of the distribution of the public school fund among the school districts and its use for public school purposes.

Ky. Const. §186.

By their plain terms, these provisions do not limit the General Assembly's broad authority under Section 183 to structure the common school system as the General Assembly sees fit. And the history underlying these provisions only underscores that conclusion. The provisions are the product of an unfortunate chapter in the early funding of the state's public school system. In the nineteenth century, Kentucky received substantial funds from the federal government, which the state was meant to dedicate to public education. *See Talbott v. Ky. State Bd. of Educ.*, 52 S.W.2d 727, 729 (Ky. 1932). That money was supplemented by state taxes imposed specifically for educational

purposes. The resulting funds, however, were not all used for their intended purpose; they were often "borrowed" by other departments of the state government or lost to mismanagement. *See Agric. & Mech. Coll. v. Hager*, 87 S.W. 1125, 1127 (Ky. 1905). In addition, the funds were sometimes directed to "denominational schools or institutions of private enterprise" rather than public schools. *Id.* In response to these problems, the Kentucky Constitution of 1850 included the precursor to Sections 184 and 186, requiring state funds designated for the common school system to be used only for that purpose. Ky. Const. of 1850, art. I, §11 (superseded 1891).

As is clear from the cases interpreting and applying them, those provisions have always been directed at prohibiting the diversion of common school funds away from the common school system, not at constraining the General Assembly's power to shape that system. For instance, in *Halbert v. Sparks*, 72 Ky. 259 (1872), the Court of Appeals invalidated state legislation that authorized the diversion of common school funding from the Lewis County common schools to a local private school. *Id.* at 262. In doing so, however, the court made a point of reiterating that "[t]he General Assembly has the undoubted power to pass laws regulating the manner in which the common school fund shall be devoted to the purposes for which it has been set apart." *Id.* The problem, in the courts view, was that "these laws, as far as practicable, should be general in their application." *Id.* The legislation before it, by contrast, was "[s]pecial legislation," designed not to "sustain[] the common schools contemplated by the constitution and established by the legislature," but rather to divert common school funding to a school that was not part of that system at all. *Id.* The same is true of most of the other cases in which the courts have invalidated efforts to fund certain schools—those efforts were invalidated because the schools were not part of the common school system at all. *See, e.g.*, *Underwood v. Wood*, 19 S.W. 405 (Ky. 1892) (diversion of common school funds to private school that operated outside the common school system and charged its students tuition); *Sherrard v. Jefferson Cnty. Bd. of Educ.*, 171 S.W.2d 963 (Ky. 1942) (use of common school funds to pay for transportation of students to private schools).

The Kentucky courts have likewise viewed with suspicion efforts to use common school funds to fund something other than the common school system itself. In *Collins v. Henderson*, 74 Ky. 74 (1874), the Court of Appeals rejected the argument that the General Assembly retains discretion to use the common school fund for things that it believes would benefit the common schools, rather than for the schools themselves. That case involved an effort to use common school funds to purchase a particular book for every common school district in the state. *Id.* at 77. The court held the law inconsistent with the precursor to Section 184, reasoning that if the legislature could use common school funds in that manner, "then there are almost innumerable objects equally in aid of common schools to which the fund may be appropriated with equal legality." *Id.* at 90. As a result, "the constitutional provision, which was clearly intended to place important limitations on the legislative department, would be frittered away by construction until it could answer no valuable purpose in preserving to posterity the blessing of a cheap and

certain common-school education." *Id.* As that holding reflects, the problem in *Collins* was not with the kinds of schools that the General Assembly sought to aid (the aid was directed exclusively to the common schools); it was with the manner in which it sought to aid them.

In the decades following *Collins*, the Kentucky courts invalidated various efforts to use the common school fund to pay for something other than the schools themselves. *See, e.g.*, *Louisville v. Leatherman*, 99 Ky. 213 (1896) (invalidating city's effort to tax local schools to pay for construction of street); *Bd. of Educ. v. Bd. of Trustees*, 113 Ky. 234 (1902) (invaliding law that authorized use of common school funding to fund public libraries). But none of those cases called into question the General Assembly's broad discretion to impose general, system-wide reforms on the common school system. Moreover, "[a]s years went by," the courts' view as to "what is to be embraced in the terms 'education,' 'common schools,' and 'common school system' .... considerably liberalized," and the courts ceased imposing strict restrictions even on how funding could be used within the common school system. *Dodge v. Jefferson Cnty. Bd. of Educ.*, 181 S.W.2d 406, 408 (Ky. 1944) (collecting cases). Accordingly, over time, the courts reached the conclusion that, just like Section 183, "Section 184 … leaves to the law-making body the determination of what is an efficient educational system, and to that body wide discretion in choosing the method of supplying an efficient system." *Id.* at 409 (citation omitted).

II. Public Charter Schools Are Consistent With A Common School System.

Viewed against that backdrop, there are strong arguments that the proposed charter school legislation is consistent with the Kentucky Constitution. The legislation is not an effort to divert funding *away* from the common school system, but rather is an exercise of the General Assembly's broad discretion to structure that system in the manner that it deems most efficient. The legislation is, in other words, a core exercise of the General Assembly's authority under Section 183. Whatever limits the Constitution may impose on funding decisions and the like, the proposed legislation does not run afoul of any clear limitation on the General Assembly's broad and explicit power under Section 183.

First and foremost, the proposed charter schools satisfy "the one main essential" of a common school system: "they are free schools, open to all the children of proper school age residing in the locality, and affording, so long as the term lasts, equal opportunity for all to acquire the learning taught in the various common school branches." *Louisville*, 121 S.W. at 412. Like existing common schools, they will be open to "all resident children within the statutory age." *Agric. & Mech. Coll.*, 87 S.W. at 1126; Ky. Rev. Stat. §158.030(1); *see* Proposed Bill sec. 3(5)(a) (public charter school "shall be open to any student who is eligible for attendance in a noncharter public school"). Like existing common schools, they will be "supported in whole or in part by public taxation," Ky. Rev. Stat. §158.030(1), and will not charge tuition. *See Sherrard*,

171 S.W.2d at 966 (“the words ‘common schools’ … mean ‘public’ or ‘free’ schools maintained by the State at public expense”); Proposed Bill sec. 4(4) (public charter school “shall not charge tuition”); *id.* sec. 10 (describing proposed public funding). And like existing common schools, they will be public schools, not “private, parochial or sectarian.” *Sherrard*, 171 S.W.2d at 966; *see* Proposed Bill secs. 1(11), 4(2) (charter school shall be a “public school” and “shall not engage in any sectarian practice”).

Where charter schools differ, of course, is in their organizational structure. They are not operated by a school board with elected trustees, but rather are operated by a parent-majority governing board, pursuant to the school’s approved charter. Proposed Bill secs. 7(3)(k), 7(7)(g). But there is nothing constitutionally suspect about that. While common schools currently operate under the governance of local school boards, that is a product of the General Assembly’s broad discretion “to delegate any of [its] duty [to maintain a common school system] to institutions such as the local boards of education.” *Rose*, 790 S.W.2d at 216; *cf. Williamstown*, 12 S.W. at 300 (“If the legislature can declare that a person shall be qualified to teach a common school …, it can equally provide that the trustees of [a] school shall pass upon his or her qualifications.”). In short, both the current structure of the common schools and the current role of local school boards are the product of statutory judgments of the General Assembly, not commands of the Kentucky Constitution. As the Court of Appeals has made clear, the “school districts are creatures of the legislature, and the legislature has the power under section 183 ... to alter them or even do away with them entirely.” *Bd. of Educ.*, 250 S.W.2d at 1019. The only constraint on the legislature’s authority to delegate oversight over the common schools is that it “must provide a mechanism to assure that the ultimate control remains with the General Assembly, and assure that [the delegee] also exercise[s] the delegated duties in an efficient manner.” *Rose*, 790 S.W.2d at 216.

The proposed legislation provides those mechanisms for charter schools, as the governing board of a charter school is established through, and operates pursuant to, a system over which the State Board of Education exercises considerable control. The process begins with the selection of charter school “authorizers,” which must be approved by the Board itself, based on an application that includes (inter alia) information about the authorizer’s “strategic vision for chartering,” “budget and personnel capacity and commitment to execute the duties of quality charter authorizing,” and “performance framework ... for the oversight and evaluation of the public charter school.” Proposed Bill sec. 6. Once approved, an authorizer may review and approve applications for a new public charter school, and enter into a charter contract with the governing board of a proposed school specifying how the school will be established and operate. Proposed Bill sec. 3(2)(c), 7. The governing board, which must have parents of current charter-school students as a majority of its members, is responsible for governing the school’s operations. Proposed Bill sec. 3(2)(b), (3)(a). But the Board-approved authorizer must continue to oversee and monitor the school, and may revoke its charter if the school materially violates the law or its charter. Proposed Bill sec. 3(2)(i), 7(7)(h),

8(6). Thus, just as with existing common schools, a charter school would operate under the authority of a governing board that itself operates under the ultimate authority of the state.

The only question, then, is whether the Constitution constrains the General Assembly in its selection of entities to which it is willing to delegate educational duties. There is no constitutional provision that expressly constrains the General Assembly's discretion, and there is considerable authority recognizing the flexibility the General Assembly has in structuring the common schools. The General Assembly has experimented with several different forms of control over the years, shifting from district boards to county boards, *Prowse*, 120 S.W. at 308, and from city-controlled school boards to independent ones, *Louisville*, 195 S.W.2d at 293-93. And the General Assembly has by no means demanded strict uniformity in common school organization; to this day, both county and independent school districts are permissible. *See, e.g.*, Ky. Rev. Stat. 160.010, 160.020. As those and other developments reflect, "[n]o one dreamed when a new Constitution came to be framed, in 1891, that the Commonwealth had tired in her efforts to furnish the best system her resources could provide for the education of the youth of the state, or intended to take a step backward." *Agric. & Mech. Coll.*, 87 S.W. at 1127. Accordingly, the General Assembly has not just the power, but the obligation, to continue developing the common school system in keeping with its judgment as to how best to discharge its constitutional mandate to "provide for an efficient system of common schools throughout the State." Ky. Const. §183.

Courts in other states have applied similar reasoning to conclude that their constitutions allow their state legislatures to integrate public charter schools into their common school systems. The Michigan Supreme Court, for instance, upheld the Michigan charter schools act on the ground that the state legislature has the primary duty of "defining the form and the institutional structure through which public education is delivered," and could properly expand that institutional structure to include charter schools. *Council of Orgs. & Others for Educ. About Parochiaid v. Governor*, 566 N.W.2d 208, 216 (Mich. 1997). Although charter schools are not directly operated by the state, the court determined that the state satisfied its constitutional obligations by retaining "ultimate and immediate control" over charter schools through its power to approve or revoke their charters. *Id.* The appellate courts in California have likewise upheld the state's charter school statute as within the legislature's "sweeping and comprehensive powers in relation to ... public schools," explaining that the legislature continues to exercise "ultimate control" over charter schools despite delegating the responsibility for immediate oversight to the local chartering authority. *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125, 1134-35 (1999); *see also, e.g.*, *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Educ.*, 857 N.E.2d 1148, 1157 (Ohio 2006) (charter school statute falls within the "legislative authority and latitude to set the standards and requirements for common schools").

To be sure, the Kentucky legislature to date has required the trustees of its local school boards to be elected, leading to the oft-repeated formulation that common schools are schools "taught in a district laid out by authority of the school laws, under the control of trustees elected under those laws, by a teacher qualified to teach under those laws." *Collins*, 74 Ky. at 82; *see also, e.g.*, *Hodgkin*, 242 S.W.2d at 1010; *Sherrard*, 171 S.W.2d at 966. But the courts have never specifically held that the Constitution *requires* the General Assembly to confine the definition of common schools to schools operating under the control of an entity with elected members. Instead, most cases have just repeated the requirements of then-existing Kentucky statutes. *Cf. Boulder Valley Sch. Dist. RE-2 v. Colo. State Bd. of Educ.*, 217 P.3d 918, 928 (Colo. Ct. App. 2009) (rejecting argument that Colorado Constitution requires all public schools to be "governed by locally elected officials"); *Council of Orgs.*, 566 N.W.2d at 218 (similar). There is thus no reason to think the General Assembly could not provide for school boards with members who are appointed rather than elected. Moreover, most cases in which the courts concluded that a school could not receive common school funds involved private schools that concededly were operating wholly outside the common school system, not public schools open to all students in a locality and operating pursuant to the common school statutes. *See, e.g.*, *Halbert*, 72 Ky. at 262 (private academy "not acting under the control or supervision of the officers of the common-schools"); *Underwood*, 19 S.W. at 406 (private school that charged tuition); *Sherrard*, 171 S.W.2d 963 (Ky. 1942) (private and parochial schools). Those cases thus did not squarely present any questions regarding the extent of the General Assembly's power to alter the organizational structure of the common schools through generally applicable legislation.

Indeed, we have located only two cases—both readily distinguishable—in which a court has identified constraints on the General Assembly's power to alter or expand (as opposed to fund something outside of) the common school system. The first, *Pollitt v. Lewis*, 108 S.W.2d 671 (1937), involved an effort to impose a new tax to fund a junior college. In concluding that the tax did not qualify as an effort to raise funds for the common schools, and thus had to be put to a vote to comply with Section 184, the court noted that "a junior college such as here proposed is, and can be, no part of the common school system." *Id.* at 674. It is not even clear that the General Assembly had claimed otherwise, as the court noted that "common school" was at the time statutorily defined (as it still is today, *see* Ky. Rev. Stat. 158.030) to "mean[] an elementary and/or secondary school of the Commonwealth supported in whole or in part by public taxation." *Id.* at 673-74. But in all events, the court grounded its conclusion in Section 184's Agricultural and Mechanical College proviso, which expressly contemplates that colleges are not part of the common school system. *Id.* *Pollitt* thus says nothing one way or another about K-12 education or who the General Assembly may authorize to operate a common school.

The second case is *Hodgkin v. Board for Louisville & Jefferson County Children's Home*, 242 S.W.2d 1008 (Ky. 1951), a case that has been invoked by opponents of the proposed legislation. That case involved legislation that attempted to take pre-existing,

publicly funded schools established for a special purpose (namely, educating children who had been sent to a locally run children's home) and fund them with common school funds. The legislation followed an earlier legislative effort to accomplish the same result by treating the public agency running the home as its own school district. *See Williams v. Bd. for Louisville & Jefferson Cnty. Children's Home*, 204 S.W.2d 490 (1947). . That earlier effort ran afoul of a Kentucky constitutional provision restricting state officers from simultaneously serving as state and local officials. *See id.* at 491-92. The *Hodgkin* court plainly viewed the new act with a jaundiced eye, and concluded that it was an impermissible effort to circumvent *Williams* and accomplish the same end by a different means. *Hodgkin*, 242 S.W.2d at 1010 ("In the 1950 Act now before us, the Legislature has, in effect, attempted to make the home a school district without using those words.") In the course of rejecting the perceived end-run around *Williams*, the *Hodgkin* court framed the question as "whether a school operated by any public authority other than a regular school district may constitutionally receive a portion of the Common School Fund." *Id.* at 1009. The court concluded that "in order for there to be a common school there must be a common school *district*," *id.* at 1010, and *Williams* had already rejected an effort to treat the home as its own school district.

Opponents of charter schools have seized on the *Hodgkin* decision, but they ignore the special circumstances that gave rise to *Hodgkin* and the narrow scope of the decision. *Hodgkin* involved a pre-existing, special-purpose home and school that had traditionally been funded outside the "common school" system. It also involved a failed prior effort to treat the home as a school board in violation of a constitutional provision that has no relevance to charter schools. The court viewed the case as an effort to circumvent a prior precedent and to fund pre-existing special-purpose schools from common school funds. The case was, in short, about preventing an end-run around *Williams* and preventing the use of common school funds for pre-existing special-purpose schools, not about reforming the common school system by introducing new, differently structured common schools open to all pupils. It would take a considerable extension of *Hodgkin* to view it as casting doubt on the General Assembly's ability to reform the common schools by altering their governing structure. Moreover, extending *Hodgkin* in that manner would bring it into conflict with earlier decisions approving substantial changes in the structure of the common school system and affirming the General Assembly's broad authority in that regard. *See, e.g., Bd. of Educ.*, 250 S.W.2d at 1019 ("school districts are creatures of the legislature, and the legislature has the power under section 183 ... to alter them or even do away with them entirely"); *Louisville*, 195 S.W.2d at 293 (Section 183 is "as broad as it is possible to frame an authority to the legislature to deal with the common schools in any way it should desire"). The *Hodgkin* court itself certainly did not claim to be reaching any sweeping conclusion, as it went out of its way to indicate that it was not deciding the propriety of the funding for schools associated with the state houses of reform, which were altered by same legislative act. *Hodgkin*, 242 S.W.2d at 1009, 1010.

Finally, it is not even clear that *Hodgkin* remains good law, as it invoked constitutional and statutory provisions that have since been repealed. In particular, *Hodgkin* relied on a proviso to Section 186's funding restriction that no longer exists. At the time, Section 186 included a proviso indicating that "*each school district* in the Commonwealth" must receive a certain threshold amount of funding. The court construed that specific reference to funding "each school district" to mean that the General Assembly may not distribute common schools funds directly to a school itself, but instead may *only* distribute such funds to a school *district*. Notably, Section 186 no longer contains the "each school district" language. The provision was amended in 1953 (shortly after *Hodgkin*) to eliminate the proviso specifically directing funding on a per pupil basis; it now simply instructs the General Assembly to "by general law prescribe the manner of the distribution of the public school fund among the school districts and its use for public school purposes." *Id.* Similarly, the *Hodgkin* court relied on a statute that an earlier case had described (in passing) as providing that "the Common School Fund 'can be paid only to school districts and not to another department of the state government or to a private institution.'" 242 S.W.2d at 1010 (quoting *Jefferson Cnty. Bd. of Educ. v. Goheen*, 207 S.W. 567, 569 (1947) (citing Ky. Rev. Stat. 157.040). But that, too, is no longer Kentucky law; the statute at issue was repealed shortly after Section 186 was amended.

Thus, nothing in *Hodgkin* stands as an obstacle to an effort to reform the common school system by altering the governing structure of the common schools to allow charter schools. *Hodgkin* and its concern with taking existing special-purpose schools funded outside the common school system and funding them through the common school fund are simply inapposite to efforts at such structural reform. Indeed, the far more apposite precedents are those that recognized the General Assembly's authority to "revolutionize" the structure of the common schools by transferring authority from districts to counties and from locally controlled districts to independent districts. *Louisville*, 195 S.W.2d at 649; *Prowse*, 120 S.W. 308-09.[1]

To that end, there are steps that the General Assembly can take to reinforce its intent to reform the common school system. For example, the legislation could be revised to make clear that public charter schools are intended to operate as part of the common school system, in furtherance of the General Assembly's charge to make that system an efficient one. On a related note, the bill could also be revised to amend the

[1] In all events, even accepting the dubious proposition that a common school must be controlled by or funded through a school district, at least some of the proposed charter schools would satisfy that requirement. Under the proposed legislation, a "local county or independent school district" may apply for state approval to become a charter school authorizer. Proposed Bill sec. 1(3)(c). If it is approved as an authorizer, the district may then review and approve (or deny) charter school applications, and revoke the charter of any school that violates its charter contract. Proposed Bill secs. 7, 8(6). Moreover, if a charter school is authorized by a district (rather than by one of the other permissible authorizers), then the local school board is responsible for funding the charter school at the same level as noncharter schools in the district. Proposed Bill sec. 10(2).

statutory definition of "common school" to state explicitly that charter schools are common schools, and to eliminate any language that might be read to suggest otherwise. While it is certainly true that "[n]either the ipse dixit of [the] court[s] nor the pronouncements of the Legislature can make an institution a part of the common school system contrary to the mandate of the Constitution," *Pollitt*, 242 S.W.2d at 1009, the legislature's judgment as to what system of common schools will best serve the children of Kentucky "is to be given great weight." *Rose*, 790 S.W.2d at 216. Accordingly, if it is the General Assembly's considered judgment that the common schools should have the flexibility to be governed by a parent-majority board, freed from many of the constraints under which local school districts must operate, then the General Assembly should make that considered judgment explicit in the state statutes, and that judgment in turn should be entitled to substantial respect in the courts.

Outside Kentucky, there is one recent decision from the Washington Supreme Court holding that common schools must be under the control of the local school district. *League of Women Voters of Wash. v. State*, 355 P.3d 1131, 1137 (Wash. 2015). In reaching that conclusion, the court relied entirely on its own hundred-year-old precedent in *School District No. 20 v. Bryan*, 99 P. 28 (1909), which stated that under the Washington Constitution a "common school" must be "under the control of the qualified voters of the school district." *Bryan*, 99 P. at 30. Whatever the merits of that holding as a matter of Washington law, it cannot be squared with the many Kentucky cases holding that the General Assembly (not local districts) has ultimate control over the common school system. *See, e.g.*, *Louisville*, 195 S.W.2d at 293. Although *Bryan* cited several early Kentucky cases, 99 P. at 30-31, it did so only to show that the Kentucky courts were vigilant in preventing common school funds from being diverted to other purposes; *Bryan* did not (and could not) assert that the Kentucky Constitution required local school district control over common schools. At any rate, to the extent that the Washington Supreme Court has adopted a static conception of the common school system—limiting it to the kinds of common schools that existed a century ago—its view contrasts sharply with the dynamic approach taken by the Kentucky courts. *See Dodge*, 181 S.W.2d at 408 (explaining that what constitutes a common school "has been considerably liberalized"); *Williamstown*, 12 S.W. at 300. In Kentucky, the fact that the General Assembly used local trustees to govern common schools a hundred years ago does not mean that it must make the same choice today.

III. To The Extent Public Charter Schools Do Not Qualify As Common Schools, Then They May Be Funded Outside The Common School System.

While the General Assembly has the authority to expand the common school system to include public charter schools, if the courts were to conclude otherwise, that would not necessarily mean that the General Assembly may not authorize the creation of public charter schools. It would simply mean that those schools cannot be funded through common school funds. The General Assembly could still pursue the option of

appropriating other funds to pay for charter schools. While the extent of the General Assembly's power to fund educational institutions outside the common school system is an open question in the Kentucky courts, we believe the better reading of the Constitution is that it does not constrain the General Assembly's power to do so.

By its terms, Section 184 states that "[n]o sum shall be *raised or collected* for education other than in common schools" unless approved by the voters or falling under the Agricultural and Mechanical College proviso. Ky. Const. §184 (emphasis added). When this provision was adopted, it was common for Kentucky and its local governments to levy specific taxes for educational purposes. *See, e.g.*, *Williamstown*, 12 S.W. at 299 (discussing act authorizing Williamstown school trustees to levy a property tax for school purposes). Today, however, the state no longer imposes taxes specifically earmarked for education; instead, all state revenue (with a few specified exceptions) is credited to the state's general fund, and the state then appropriates money from that general fund for its schools. Ky. Rev. Stat. §47.010; *see Univ. of the Cumberlands v. Pennybacker*, 308 S.W.3d 668, 678 (2010).

It is not clear whether Section 184 applies only (as its plain language indicates) to limit expenditure of any funds specifically "raised or collected" for education, or whether it instead applies more broadly to constrain the General Assembly's power to *appropriate* funds for education. In a few early twentieth-century cases, the Court of Appeals read Section 184 as a broad "limitation upon legislative power to *expend* money for education other than in common schools." *Pollitt*, 108 S.W.2d at 672 (emphasis added)); *see also Talbott v. Ky. State Bd. of Educ.*, 52 S.W.2d 727, 730; *Agric. & Mech. Coll.*, 87 S.W. at 1129. But the court later called that interpretation "questionable" and suggested that Sections 184 and 186 "neither authorize appropriations of the 'Common School Fund' to schools outside the common school system *nor do they bar the use of other state funds for such schools*." *Butler v. United Cerebral Palsy of N. Ky.*, 352 S.W.2d 203, 207 (Ky. 1961) (quoting *Hodgkin*, 242 S.W.2d at 1010); *see also Higgins v. Prater*, 14 S.W. 910, 912 (1890) (Kentucky Constitution does not "forbid aid by the state to an educational institution other than a common school"). Indeed, in *Hodgkin*, the lone case in which the Court of Appeals invalidated an effort to incorporate a new type of school into the common school system, the court specifically noted that its conclusion that the school in question was *not* a common school did "not prevent an appropriation of state funds to aid the home [that operated the school] in performing a function that is of a general benefit to the state." *Hodgkin*, 242 S.W.2d at 1010. On that view, Section 184 should impose no restriction on the legislature's ability to create and fund public charter schools outside the common school system, as long as the money used to support those schools is not taken from the funds set aside for common schools.

The Kentucky Supreme Court recognized but did not resolve this issue in *University of the Cumberlands v. Pennybacker*, decided in 2010. In *Pennybacker*, the court considered whether the General Assembly could appropriate funds to build a

pharmacy school on the campus of the University of the Cumberlands, a private university affiliated with the Kentucky Baptist Convention, and to establish a scholarship available to students attending that pharmacy school. 308 S.W. at 671. The court held that the appropriation violated section 189 of the Kentucky Constitution, under which no state funds "raised or levied for educational purposes" may be "appropriated to, or used by, or in aid of, any church, sectarian or denominational school." Ky. Const. §189. It concluded that this language prohibited "all public funding of sectarian or religious colleges," regardless of whether the funds at issue had been specifically levied for educational purposes. *Pennybacker*, 308 S.W.3d at 676. In reaching that conclusion, however, the court relied on the fact that separate appropriations for higher education were specifically contemplated by the Kentucky Constitution—in particular, by the "Agricultural and Mechanical College" exception in Section 184—making clear that Section 189's reference to funds "for educational purposes" was intended to apply to such appropriations as well. *Id.* at 677-78. Moreover, "all of the references by constitutional convention delegates to specific sectarian or denominational schools arose in the context of the debate over higher education," strongly indicating that the drafters thought Section 189 would apply to such schools as well. *Id.* at 678.

By contrast, there is no similar reason to conclude that Section 184 was intended to foreclose the state from expending general funds on education outside the common school system. The goal of Section 184 was to ensure that the legislature could not divert funding intended for the common schools to other purposes—not to prevent the legislature from any experimentation with new forms of schooling. *See Marsee v. Hager*, 101 S.W. 882, 884 (Ky. 1907) ("No one dreamed when a new Constitution came to be framed, in 1891, that the Commonwealth had tired in her efforts to furnish the best system her resources could provide for the education of the youth of the state ...."). As long as the legislature preserves adequate funding for the existing public school system, Section 184 should not prevent it from using separate funding to provide for public charter schools as well.

If Section 184 does apply, and public charter schools are not considered common schools, then they can be funded in one of only two ways: if the funding is approved by the voters, or if the "Agricultural and Mechanical College" exception applies. The latter exception was adopted in the 1891 Constitution to preserve the existing tax "for educational purposes, and for the endowment and maintenance of the Agricultural and Mechanical College" (now the University of Kentucky). In *Agricultural & Mechanical College v. Hager*, the Kentucky Court of Appeals held that this provision applied not only to funding for that college, but also to funding for other special educational institutions that existed at the time (including schools for blind and deaf students). 87 S.W. at 1127. In addition, it held that the General Assembly is not limited to the specific tax that existed when the Constitution was adopted, but could increase or decrease aid for such institutions as it deemed appropriate. *Id.* at 1128. The court then went further in *Marsee v. Hager*, allowing the legislature to appropriate additional funds for institutions

that served "the kind of educational interests which the [constitutional] convention intended to place within the benefit of the proviso"—in that case, new "normal schools" (colleges for training teachers). 101 S.W. 882, 884 (Ky. 1907).

The public charter schools envisioned by the proposed bill do not serve the same specialized interests as the schools approved in *Agricultural & Mechanical College* and *Marsee*; they are neither institutions of higher education nor schools for students with special needs. Nevertheless, there is a reasonable argument that at least some charter schools serve educational interests beyond those provided by traditional public schools, and that could be seen as falling within the statutory exception. *See* Proposed Bill sec. 2(2)(b) (public charter schools shall provide "diverse educational opportunities"); *id.* sec. 3(5)(c) (public charter school "may be organized around a special emphasis, theme, or concept"). Accordingly, this exception may also provide a constitutional basis for some of the public charter schools contemplated by the proposed bill.

IV. Conclusion

Section 183 of the Kentucky Constitution vests the General Assembly with broad discretion to "provide for an efficient system of common schools throughout the State." Kentucky courts have recognized that this charge is "as broad as it is possible to frame an authority to the legislature to deal with the common schools in any way it should desire." *Louisville*, 195 S.W.2d at 293. The General Assembly's authorization of charter schools as part of the system of common schools to make that system more efficient falls squarely within that broad constitutional authority. The burden on those who suggest such legislation would be unconstitutional is to point to constitutional language that restricts the General Assembly's authority as clearly as Section 183 grants it. But nothing in the Kentucky Constitution restricts the General Assembly's authority to structure, as opposed to fund, the common schools. And while opponents point to dictum in *Hodgkin*, that decision involved a legislative effort to circumvent an earlier decision and to fund pre-existing special-purpose schools with common school funds. Even that inapposite holding rested on constitutional and statutory provisions that have since been repealed. Thus, nothing in the Kentucky Constitution or caselaw squarely precludes the proposed effort to improve the efficiency of the common school system by allowing charter schools to operate as common schools.