

SCHOOL CHOICE AND STATES' DUTY TO SUPPORT "PUBLIC" SCHOOLS

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Abstract: The education clauses of state constitutions require states to support schools that not only educate children adequately and equitably, but that are "public" or "common." This Article argues that state-supported school choice can be consistent with these latter requirements. Individual choices, about where to live and whether to educate children privately, have long shaped traditional "public" schooling arrangements. The more direct role choice plays in school voucher and charter programs is also consistent with the requirement that schools be "public." Such programs must ensure, however, that parents' choices among schools are "genuine and independent." This criterion, developed by the U.S. Supreme Court to test the constitutionality of school vouchers under the Federal Establishment Clause, also guarantees publicness. It does so by requiring that parents' options in the educational marketplace be determined by market demand, minimally biased by government preferences.

INTRODUCTION

Every state constitution contains an "education clause" that discusses public education.¹ Even for those who recognize an implied,

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¹ See ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, §§ 5-6; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX 2d, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(A); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. 83; N.J. CONST. art. VIII, § 4(1); N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, §§ 2-3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII,

federal constitutional right to schooling—a position without traction in the courts but surprising resilience in the academy²—these clauses provide Americans' principal guarantee of educational rights.³ A series of prominent school finance cases over the past several decades has held, moreover, that the clauses impose a duty upon states to educate all children consistently with substantive standards of quality and equity.⁴

The education clauses also instruct states to create and maintain school systems that are "public" or "common."⁵ Such terms limit the methods states may use to realize the clauses' substantive mandates. These limitations have become relevant as states, at an ever-accelerating pace, implement school choice programs as a way of addressing the quality⁶ and equity⁷ demands the education clauses impose. This Article analyzes whether vouchers⁸ and charter schools,⁹ the two most

§ 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. 2, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1; Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 (1991).

² Compare *San Antonio v. Rodriguez*, 411 U.S. 1, 41–43 (1973), with LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES 96 (2004), and Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334 (2006).

³ See Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 708, 714 (1983) (Justice of the New Jersey Supreme Court describing his court's decision favoring school-finance plaintiffs as "pick[ing] up the gauntlet" thrown down by *Rodriguez*).

⁴ For some of the numerous good accounts of the finance cases, see generally Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995); Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory*, 32 GA. L. REV. 543 (1998) [hereinafter Heise, *Equal Educational Opportunity*]; Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995) [hereinafter Heise, *State Constitutions*].

⁵ Many clauses also require that states support schools that are "free" and/or "uniform." See *infra* notes 171–191 and accompanying text.

⁶ See Christopher Pixley, *The Next Frontier in Public School Finance Reform*, 24 J. LEGIS. 21, 24 (1998).

⁷ See *infra* note 84 and accompanying text.

⁸ Notwithstanding tepid political support for voucher programs among powerful suburban constituencies, interest in vouchers appears again to be on the rise. See LANCE FUSARELLI, *THE POLITICAL DYNAMICS OF SCHOOL CHOICE* 6 (2003); Chad d'Entremont & Luis A. Huerta, *Irreconcilable Differences? Education Vouchers and the Suburban Response*, 21 EDUC. POL'Y 40, 42 (2007); James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2079–82 (2002). States have recently adopted both new voucher programs and new tax credit programs for organizations subsidizing private school tuitions. See Parent Choice in Education Act, UTAH CODE ANN. §§ 53A-1a-801 to -811 (2007) (authorizing voucher programs); R.I. GEN. LAWS §§ 44-62-1 to -7 (2006) (permitting cor-

prominent forms of state-funded school choice,¹⁰ are consistent with the requirements of publicness and commonness.¹¹

The Article proceeds in three parts. Part I argues that "school choice" reforms like vouchers and charters do not actually introduce choice into K-12 schooling.¹² Instead, they change the regulatory system applied to an existing, baseline market for schools that already permits substantial parental choice. This baseline market has two components. First, parents choose whether to exit the public system in favor of private schools. This variety of choice is a federal constitutional mandate—in 1923, in *Pierce v. Society of Sisters*, the U.S. Supreme Court affirmed the constitutionality of compulsory schooling but held that parents retain a right to educate their children privately, rather than in government-sponsored schools.¹³ Second, parents choose among local public school systems with their choice of residence. In 1974 in *Milliken v. Bradley*¹⁴ and

porate donations to fund school vouchers); Luis A. Huerta & Chad d'Entremont, *Education Tax Credits in a Post-Zelman Era*, 21 EDUC. POL'Y 73, 80, 103 n.2 (2007) (surveying and analyzing tax credit statutes); Danny Hakim, *Spitzer Budget Seeks Overhaul of Health Care*, N.Y. TIMES, Feb. 1, 2007, at A1 (explaining how newly elected New York governor includes means-tested "\$1,000-per-child tax deduction for private school tuition" in his maiden budget).

⁹ See *infra* notes 77-80 and accompanying text (discussing the charter school form). The charter school continues its exponential spread nationwide. See JOSEPH MURPHY & CATHERINE SHIFFMAN, UNDERSTANDING AND ASSESSING THE CHARTER SCHOOL MOVEMENT 11, 32-34 (2002) (documenting exploding numbers of charter schools).

¹⁰ Because home schooling is not directly supported by substantial government funds, this Article does not consider the large and burgeoning home-schooling movement. See Bruce C. Cooper & John Sureau, *The Politics of Homeschooling*, 21 EDUC. POL'Y 110, 112 (2007). Some home-schooled students do, however, use services provided by traditional public schools and charter schools. See *id.* at 120-22 (discussing traditional public schools); Luis A. Huerta et al., *Cyber and Home School Charter Schools*, 81 PEABODY J. EDUC. 103, 110 (2006) (discussing charter schools).

¹¹ Some state constitutions prohibit the use of state funds to benefit religious institutions, including schools; these so-called "baby Blaine amendments," in those states where they are present, pose a more direct obstacle to voucher programs that include religious schools than the state education clauses. See Ira Lupu & Robert Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 958-62 (2003); Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 123-24 (2000). Unlike the baby Blaines, however, state education clauses are ubiquitous among the states. See Lupu & Tuttle, *supra*, at 959-61 (explaining that ten state constitutions lack prohibitions on state aid to religious institutions, and language in many others has been construed not to constrain voucher programs). Moreover, education clauses have the potential to constrain not only traditional voucher programs, but also charter schools and voucher programs that exclude religious institutions.

¹² See *infra* notes 25-89 and accompanying text.

¹³ See 268 U.S. 510, 534-35 (1925).

¹⁴ 418 U.S. 717 (1974).

in 1973 in *San Antonio v. Rodriguez*,¹⁵ the U.S. Supreme Court ratified the nearly universal state practice of delegating much of school management and finance to small local school districts.

Because both private schools and residences are bought and sold in markets, the Federal Constitution effectively guarantees *markets* for schooling—albeit markets of unusual form. The relevant constitutional question about contemporary school choice programs is therefore not whether choice or educational markets are constitutionally permissible. They are required. Rather, the question is whether the institutional limitations of the education clauses permit states to supplant the standard regulatory approach to choice—permitting it only to those who exercise it by purchasing private schooling or by choice of residence—with charter and voucher programs that deploy market-like mechanisms to expand access to choice beyond these groups.

Part II turns to the education clauses themselves.¹⁶ It first reviews the institutional requirements of the clauses and several recent unsatisfactory cases interpreting them.¹⁷ Then, after describing how the clauses' terms resist straightforward historical or textualist interpretation, it explicates the two major competing paradigms in the literature regarding what makes a "public" or "common" school system public or common. One is a statist understanding, which emphasizes that public schooling should be directly provided by the polity and open to all its resident children. The second, pluralist approach contends that a liberal and diverse society best serves the public good by permitting individuals to choose educational options that best match their own goals and preferences. Part II argues that both views offer a legitimate perspective on what institutional values public or common schools must further.¹⁸ Therefore, state courts should accept as constitutional decisions by their political branches to support public schooling in ways consistent with either statist or pluralist understandings.

Under a statist approach, traditional institutional arrangements for public schooling are constitutional, notwithstanding localist and other features of such arrangements that fall short of publicness and commonness in some important respects. Part III argues that, under a pluralist approach to publicness, state-supported voucher and charter

¹⁵ 411 U.S. 1 (1973).

¹⁶ See *infra* notes 90–223 and accompanying text.

¹⁷ See generally *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); *Ohio ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ.*, 857 N.E.2d 1148 (Ohio 2006).

¹⁸ See *infra* notes 192–223 and accompanying text.

programs are also constitutional.¹⁹ Such programs, however, must ensure that choice is "genuine and independent," i.e., that parents' decisions are determined insofar as possible by market forces operating without being biased by government. The identification of "publicness" with the robustness of competition in a market contradicts the view, dominant in school choice debates, that broad choice undermines "publicness." In fact, Part III argues, robustness of competition and "publicness" move in parallel.²⁰

The "genuine and independent choice" criterion is taken, somewhat counterintuitively, from the 2002 case *Zelman v. Simmons-Harris*, in which the U.S. Supreme Court held voucher programs that include religious schools to be consistent with the Establishment Clause.²¹ Although *Zelman* is a federal case about a federal constitutional right, it provides two important guideposts for this Article's state-law investigation of the very different right to education. First, *Zelman* properly conceptualizes a state's adoption of school choice as a shift in its regulatory posture towards the market for K-12 schooling.²² Second, *Zelman* usefully identifies the necessity of preventing government from biasing individual choices in a pluralist, market-oriented system.²³ Analogously, I argue, the expansion of access to markets can further publicness, but only insofar as the government permits the market freely to respond to parental preferences. Unnecessary limitations on market mechanisms regarding price, entry, and exit skew choices in particular, government-approved directions, and so prevent the newly accessible market from being public, common, or free.

Part III concludes with a brief analysis of an additional requirement that choice programs must meet: they must bear a reasonable connection to the goal of improving educational quality.²⁴ By design, this criterion is fairly easy to satisfy and is certainly satisfied notwithstanding the failure of charters and vouchers demonstrably to yield many of their promised benefits. The relatively weak "reasonable connection" standard is appropriate in light of the substantial uncertainties surrounding the effects of choice and because education is a positive, rather than a negative, right.

¹⁹ See *infra* notes 224-350 and accompanying text.

²⁰ See *infra* notes 229-316 and accompanying text.

²¹ See generally 536 U.S. 639 (2002); *infra* notes 229-316 and accompanying text.

²² See *infra* notes 229-316 and accompanying text.

²³ See *infra* notes 229-316 and accompanying text.

²⁴ See *infra* notes 317-350 and accompanying text.

I. THE BASELINE MARKET FOR SCHOOLING

The U.S. Constitution mandates that all parents have the right to choose (and pay for) private schools for their children.²⁵ Some type of market for schooling, therefore, is constitutionally required.²⁶ The Constitution also guarantees the right to choose one's place of residence, which, in a system where housing is a market good and schools are locally governed, creates a geographically-based market for schooling as well. Any limitations that state constitutions' education clauses place upon choice must take these markets into account.

This Part briefly discusses these two markets, one driven by competition between public and private schools and the other by choice of residence.²⁷ It then describes the two primary education reforms referred to as "school choice"—vouchers and charters—as shifts in states' regulatory policies with respect to the first market.²⁸ States could also develop choice reforms that alter regulatory approaches to the second, interjurisdictional, market. In practice, however, they have not done so.

A. Markets Across School Types

Schooling is compulsory in all fifty states.²⁹ In 1925, in *Pierce v. Society of Sisters*, the U.S. Supreme Court acknowledged this to be a genuine restraint upon freedom and consumer sovereignty, but justified it nevertheless in light of the strong state interest in an educated populace.³⁰ But *Pierce* also established that, notwithstanding compulsory education, parents have the liberty to remove their children from state-sponsored "public" schools and educate them instead in private institutions:³¹

²⁵ See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925).

²⁶ See *id.*

²⁷ See *infra* notes 29-72.

²⁸ See *infra* notes 73-89.

²⁹ See LAWRENCE KOTIN & WILLIAM AIRMAN, LEGAL FOUNDATIONS OF COMPULSORY SCHOOL ATTENDANCE 34 (1980).

³⁰ See 268 U.S. at 534-35. This interest has been recognized across the ideological spectrum. See MILTON FRIEDMAN, CAPITALISM AND FREEDOM 86 (1962); AMY GUTMANN, DEMOCRATIC EDUCATION 42 (1987); LORRAINE PANGLE & THOMAS PANGLE, THE LEARNING OF LIBERTY: THE EDUCATIONAL IDEAS OF THE AMERICAN FOUNDERS 91-92, 107 (1993) (discussing John Locke, Samuel Harrison Smith, and Thomas Jefferson); MARK G. YUDOF, WHEN GOVERNMENT SPEAKS 52-55 (1983) (quoting JOHN DEWEY, DEMOCRACY AND EDUCATION 80 (1966); BERTRAND RUSSELL, POWER: A NEW SOCIAL ANALYSIS 368-69 (1939)).

³¹ 268 U.S. at 536. See also YUDOF, *supra* note 30, at 228-30 (documenting "widespread hostility to overruling *Pierce*," which "represents a reasonable, if imperfect accommodation of conflicting pressures" notwithstanding its dubious doctrinal and theoretical foundation). For a concise summary of objections to *Pierce*, see Barbara Woodhouse, *Speaking*

"The fundamental theory of liberty . . . excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."³²

By forbidding the prohibition of private schooling, *Pierce* requires states to tolerate a market for private schooling.³³ But schooling is not a typical consumer good; both demand and supply in the industry are highly regulated by government.³⁴ On the demand side, that schooling is compulsory means that parents cannot substitute goods that they might prefer for education. On the supply side, education is subsidized, with government ensuring that every student can attend some school without charge. Prices, entry, and exit from the market therefore cannot and do not work in standard ways.

The market for K-12 schooling is also characterized by profound information failures. American education suffers from severe normative conflict over what goals are proper for education,³⁵ especially when vague platitudes must be made specific.³⁶ Even for those goals that command widespread consensus—engendering literacy, for example—there is confusion and division regarding how effectively to teach children what we want them to know,³⁷ and widespread disagreement about how and even whether success or failure can be identified and measured.³⁸ In other words, education is beset by tech-

Truth to Power, 11 CORNELL J.L. & PUB. POL'Y 481, 481-82 (2002). For a defense, see Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 120-43 (2000).

³² *Pierce*, 268 U.S. at 535.

³³ See *id.*

³⁴ These features make the market for K-12 schooling sufficiently different from an ordinary market that many prefer the term "quasi-market." E.g., James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839, 839; Christopher Lubienski, *School Choice and Privatization in Education*, 4 J. FOR CRITICAL EDUC. POL'Y STUD. 1, 4-5 (2006), available at <http://www.jceps.com/?pageID=article&articleID=57>.

³⁵ See COMM. ON SCIENTIFIC PRINCIPLES FOR EDUC. RESEARCH, SCIENTIFIC RESEARCH IN EDUCATION 17 (Richard J. Shavelson & Lisa Towne eds., 2002); JOHN COONS & STEPHEN SUGARMAN, EDUCATION BY CHOICE 1-2 (1978); GUTMANN, *supra* note 30, at 66-70 (discussing Coons and Sugarman and reaching normative conclusions that are themselves deeply controversial); ROSEMARY SALAMONE, VISIONS OF SCHOOLING 198-200 (2000) (stating that Gutmann's claims "ignited and sustained a firestorm of reaction").

³⁶ See SALAMONE, *supra* note 35, at 197, 232-33.

³⁷ See COMM. ON SCIENTIFIC PRINCIPLES FOR EDUC. RESEARCH, *supra* note 35, at 46 (stating that "in fields like education . . . findings tend to contradict one another across studies"); Carl F. Kaestle, *The Awful Reputation of Education Research*, 22 EDUC. RESEARCHER 23, 29 (1993).

³⁸ See Sean Cavanagh, *NCTM Relaxes Stance on High-Stakes Testing*, EDUC. WK., Feb. 1, 2006, at 8; Michelle Davis, *NCLB Panel Gathers Views on Testing and Data Collection*, EDUC.

nological as well as teleological uncertainty.³⁹ Uncertainty about what to teach, how best to teach it, and how to evaluate performance has helped generate both the crisis of adequacy in the nation's many "failing" school districts, where large numbers of students are not brought even to basic levels of educational competency,⁴⁰ and the broader crisis of "mediocrity" that continues to beset many schools nationwide.⁴¹

The diversity of goals and methods for teaching create the potential for substantial product differentiation across the different categories of values, curriculum, pedagogy, and assessment. But confusion as to values and uncertainty as to both pedagogy and assessment also invite suppliers to make multiplying, conflicting, and often unverifiable claims about the quality of their products, force consumers to make decisions without any straightforward and reliable ways to evaluate those claims, and complicate regulation.

Notwithstanding the difficulty of regulation, government nevertheless closely regulates all providers of schooling. *Pierce* explicitly invites states to do so to advance the state interest in education.⁴² A state may, for example, regulate curriculum, textbooks, and teacher qualifications.⁴³ The only caveat is that the regulation may not be so close as to leave private schools effectively without genuine educational freedom of action; a state may not make a formalism of *Pierce* rights and convert its own schools into a *de facto* monopoly.⁴⁴ This leaves very substantial latitude for government regulation of private schools. States exercise this latitude pervasively,⁴⁵ although they have been reluctant, sensibly or not, to regulate what might be called schools' *point of view* even up to

Wk., May 17, 2006, at 25; Bess Keller, *States' Standards, Tests Are a Mismatch, Study Finds*, EDUC. WK., July 26, 2006, at 5.

³⁹ See, e.g., DAVID R. OLSON, *PSYCHOLOGICAL THEORY AND EDUCATIONAL REFORM* 5-6 (2003) (stating that "educational thought and research lack an organizing theory" or "organizing framework").

⁴⁰ See, e.g., James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 274-75 (1999) (documenting pathologies of distressed schools).

⁴¹ NAT'L COMM. ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 5 (1983).

⁴² *Pierce*, 268 U.S. at 534.

⁴³ *Id.*

⁴⁴ See *id.* at 535.

⁴⁵ See Eric A. DeGroff, *State Regulation of Nonpublic Schools*, 2003 BYU EDUC. & L.J. 363, 397-98 (2003) (discussing regulatory schemes). But see JAMES G. DWYER, *VOUCHERS WITHIN REASON* 175 (2002) ("The reality is that there is virtually no regulation in this country of the content of instruction or treatment of students in private schools."). Dwyer's critique focuses on religious schools. See *id.*

the constitutional limitations imposed by *Pierce*,⁴⁶ free speech guarantees, and, in the case of regulation of religious schools,⁴⁷ the right of free exercise.⁴⁸ But notwithstanding the latitude that private schools enjoy with respect to religion in particular, and point of view in general, pervasive regulation dramatically restricts the range of choices available in the market for private schooling. Schools cannot, for example, offer only three hours of schooling a day, or decline to teach mathematics, or fail to maintain attendance records, even if such schools, were they permitted to satisfy the compulsory schooling requirement, might find customers, and even though there are pedagogical and other justifications for such unusual programs.⁴⁹

The state influences private schools not only by regulating them directly but also by sponsoring its own public schools. Even as the state regulates its competition, it is also itself the market leader, controlling, depending on how one counts, approximately ninety percent of the market.⁵⁰ Direct regulation limits what private schools may do; competition with public schools for students limits what private schools choose to do. One aspect of that competition is price, and here public schools have an overwhelming advantage: private schools charge tuition, public schools do not.⁵¹ But other aspects of schooling—pedagogy, discipline,

⁴⁶ See *Asociacion de Educacion Privada de P.R., Inc. v. Garcia-Padilla*, No. 06-1146, 2007 WL 1064050, at *9 (1st Cir. Apr. 11, 2007) (objecting to state regulation of textbooks used by private schools because regulations could conflict with a school's "particular philosophy, methodology, or mission").

⁴⁷ Between eight and thirteen percent of students enrolled in K-12 schools in the United States are enrolled in religiously sponsored schools. See DeGroff, *supra* note 45, at 365 & nn.9-10 (citing and discussing various estimates).

⁴⁸ For example, although *Pierce* allows the state to require that all schools, public and private, religious and secular, inculcate civic virtue, states tread lightly in this area. See 268 U.S. at 534; R. KENNETH GODWIN & FRANK R. KEMERER, *SCHOOL CHOICE TRADEOFFS: LIBERTY, EQUALITY, AND DIVERSITY* 101-02 (2002). In part, this may be because, in balancing normative and political factors, states might arrive at a wide range of views regarding whether religious schools further or detract from their own educational goals. For example, some have suggested that sectarian schools may promote close-mindedness and intolerance. E.g., JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* 14-15, 28-30, 34-35 (1998); FRIEDMAN, *supra* note 30, at 91-92. On the other hand, states might welcome sectarian schools for their skill at conveying academic content, critical thinking, and values; and, of course, they absorb much educational expense that otherwise would fall to the state.

⁴⁹ See, e.g., WILLIAM AYERS, *ON THE SIDE OF THE CHILD* 16-18 (2003). See generally A.S. NEILL, *SUMMERHILL: A RADICAL APPROACH TO CHILD REARING* (1960).

⁵⁰ See DeGroff, *supra* note 45, at 365.

⁵¹ See GODWIN & KEMERER, *supra* note 48, at 38-39 (citing cost as a "major issue" for parents considering enrolling children in private schools).

curricular and extracurricular programs, location—matter as well, and matter to some parents enough that private schools have thrived.⁵²

In public schools, as in private schools, government regulation works to limit the range of options available to parents along these dimensions. Public schools are much more tightly regulated than private schools: the government is the public school, and virtually all features of school policy are determined through some kind of public procedure consistent with democratic and constitutional constraints. For example, although government regulation of private schools must be neutral as to religion and generally tolerates a range of points of view, public schools must be areligious and embrace a point of view established through political/bureaucratic processes.⁵³ Local school district democracy, local interest-group politics, hierarchical bureaucracy, collective bargaining by teachers and other professionals, and judicial oversight have combined to create public systems that are often incredibly specific and directive with respect to what schools may do.

Thus, the market for schooling consists of private schools, which are pervasively regulated but still permitted to vary in point of view and in other ways, that compete for parents and students with bureaucratically organized public schools. The state shapes parental choices in this market in three ways: it directly regulates private schools, it determines the nature of public schools' programs, and, by competing with private schools, it affects the mix of services that private schools offer.⁵⁴

B. *Markets Across Jurisdictions*

A second aspect of government regulation of schooling is simultaneously profoundly anticompetitive and, in a particular but long-understood way, conducive to a kind of school competition. This is states' practice of dividing their territory into school districts and empowering those districts both to fund the schools they run with local tax revenue and to provide services, usually exclusively and at least preferentially, to local residents. When the local district in which a parent

⁵² See *infra* notes 281–283 and accompanying text.

⁵³ See KENT GREENAWALT, DOES GOD BELONG IN PUBLIC SCHOOLS? 64 (2005); YUDOF, *supra* note 30, at 214–15, 233.

⁵⁴ Of course, to treat government as a monolith in this context greatly oversimplifies; there are many governments at work in education, and the one providing is not necessarily the one regulating. With a few exceptions, local school district governments both provide and regulate public education, but the states and (especially) Washington generally regulate without providing. Private schools, on the other hand, are primarily regulated by state law and rule, with federal and district governments playing a more minimal role.

lives is the only one where a parent may send a child tuition free, each local school district is a monopoly provider. Parents unwilling to pay for private schooling typically have, absent charters or magnets, only the option of the district-run school, or sometimes a menu of schools, to which their district assigns them. A parent might prefer the public school one mile to the east of her home to the school five miles to the west; but if her home sits on the western border of her school district, that parent is out of luck.

The Supreme Court has gone out of its way to legitimize this practice. When the Court held in 1974 that suburban districts surrounding an urban core could not be required to remedy the effects of the city district's racial discrimination unless the suburban districts could be shown themselves to have discriminated, it elevated educational localism to a federal quasi-constitutional norm.⁵⁵ "No single tradition in public education is more deeply rooted than local control over the operation of schools," stated the Court in *Milliken v. Bradley*; "local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to [the] quality of the educational process."⁵⁶ In 1973, in *San Antonio Independent School District v. Rodriguez*, the Court similarly reinforced localism by holding that education is not a fundamental constitutional right, writing that localized school funding does not "discriminat[e] against the 'poor'" in the sense either of operating "to the peculiar disadvantage of any class fairly definable as indigent" or "occasion[ing] an absolute deprivation" of educational benefits.⁵⁷ These cases fall short of holding that states must, as a matter of federal constitutional law, organize public education along localist lines; but the powerful federal constitutional sanction localism enjoys has been eagerly seized upon by states, whose interest-group politics make localism overwhelmingly popular.⁵⁸

Localism has long been criticized by education reformers.⁵⁹ Standard economic theory associates monopoly power with higher prices, lower quality, and economic inefficiency. In schools these effects are multiplied because customers not only have no options but are compelled by law to purchase the product. District-based schooling monopolies also reinforce educational inequity. Because housing markets

⁵⁵ See generally *Milliken v. Bradley*, 418 U.S. 717 (1974).

⁵⁶ See *id.* at 741-42.

⁵⁷ 411 U.S. 1, 22-23 (1973).

⁵⁸ See Aaron Saiger, *Legislating Accountability*, 46 WM. & MARY L. REV. 1655, 1664-65, 1670 (2005).

⁵⁹ See, e.g., Ryan, *supra* note 40, at 276-78; Ryan & Heise, *supra* note 8, at 2063-64.

are stratified by wealth, small, geographically compact school districts segregate the rich from the poor.⁶⁰ Locally based funding thus allows the rich to build excellent, well-funded schools for their children, while the poor must relegate their own children, already more difficult to educate well than children of privilege, to the mediocre-or-worse schools that they are able to afford.⁶¹

The account of school districts as anticompetitive is tempered in part by the recognition, famously associated with Charles Tiebout, that in a system of small local jurisdictions providing locally-based public goods, competition arises when people decide where to live.⁶² Consumers will elect to reside in the location that maximizes their utility across different packages of local taxes and local services like schools.⁶³ In this sense, public schools across district lines do compete with one another;⁶⁴ rather than reflecting the economic inefficiency associated with monopoly power, local monopolies competing interjurisdictionally are a source of allocative efficiency.⁶⁵

Tieboutian sorting is, to be sure, a more attenuated way than an ordinary market for the rich to pay for luxury goods and the poor to pay for cheaper ones.⁶⁶ And it is only an approximation to describe school selection as a Tieboutian market in which parents, in making their choice of residence, move to the locality that best suits the level of education for which they are willing and able to pay.⁶⁷ Nevertheless,

⁶⁰ See Ryan, *supra* note 40, at 276–78.

⁶¹ See Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY* 1, 14–17 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999) (“Many families first decide precisely where they want their children to go to school, and having done that, they find a house or apartment in the right location,” but the power to choose is unequally distributed with “income and wealth.”); Ryan & Heise, *supra* note 8, at 2064 (stating that “well-to-do parents . . . have already exercised a form of school choice” by “select[ing] where to live based on the quality of public schools”).

⁶² See Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 417 n.6, 418 (1956).

⁶³ See *id.*

⁶⁴ See Miguel Urquiola, *Does School Choice Lead to Sorting?*, 95 AM. ECON. REV. 1310, 1310 (2005) (“[I]nter-district or Tiebout choice is, and is likely to remain, the main form of school choice in the United States.”).

⁶⁵ See Caroline Hoxby, *Are Efficiency and Equity in School Finance Substitutes or Complements?*, 10 J. ECON. PERSP. 51, 57 (1996) (Tieboutian sorting does not “actually achiev[e] allocative efficiency” but “it makes a sizable dent”).

⁶⁶ See Laurie Reynolds, *Skybox Schools: Public Education as Private Luxury*, 82 WASH. U. L.Q. 755, 808–09 (2004).

⁶⁷ This is true for several straightforward reasons. Families make no direct payments to schools. All residents with property, including nonparents, pay school taxes. Renters pay differently than property owners, depending on how much of the school tax burden the rental market permits landlords to pass on to tenants; if rent is regulated or demand

the core insight of the Tieboutian model is sound: the quality of public schooling in a given district is reflected in consumers' residential decisions and affects home values and rental rates at all levels of the housing market.⁶⁸ The purchase or rental of housing, because it buys access to a particular set of schools otherwise unavailable, is effectively a roundabout method of paying tuition.⁶⁹

Nor can there be any question that by making public schooling a Tieboutian good, rather than one that can be purchased à la carte, government severely limits competition. A Tieboutian good must be purchased in a bundle that includes other public goods and also a particular residence. This makes schools less competitive than they would be if parents could select their preferred school anew at the beginning of each term.⁷⁰ Moreover, the poor are particularly hurt by making schools Tieboutian goods, because buying or renting a home, the only way to purchase a seat in a desired school district, requires substantial capital outlay. A household's willingness to pay for a bundle of local taxes and local services is, in Tiebout's theory, subject to its budget constraint.⁷¹ Poor families have less choice, therefore, in selecting a school in our current Tieboutian world of competing local monopolies than they would if, for example, schools were funded through state taxes and states permitted enrollment in any school in the state.⁷² The more economically stratified a community, moreover, the greater the limitation placed upon the choices of the less well off.

C. School Choice as Regulatory Reform

By "relax[ing] constraints on students' mobility among schools,"⁷³ charters, vouchers, and similar initiatives introduce additional compe-

highly elastic, renters may pay almost nothing. Parents of many children, or of children with special needs, do not pay more by virtue of such circumstances. People with more property pay more than people with less, even if both groups use the schools in the same way. Rich neighborhoods can contain some cheap housing, and the nonaffluent children who live in this housing get to use the rich schools on the same basis as everybody else, and vice-versa.

⁶⁸ See WILLIAM FISCHEL, *THE HOMEVOTER HYPOTHESIS* 5-6 (2001).

⁶⁹ See *Zelman v. Simmons-Harris*, 536 U.S. 639, 680 (2002) (Thomas, J., concurring) (explaining that choice is "routinely exercised" by "those with greater means"); Reynolds, *supra* note 66, at 773-74.

⁷⁰ See FRIEDMAN, *supra* note 30, at 92.

⁷¹ See Reynolds, *supra* note 66, at 773-74.

⁷² This proposal is advanced in Paul Dimond, *School Choice and the Democratic Ideal of Free Common Schools*, in *THE PUBLIC SCHOOLS* 323, 335 (Susan Fuhrman & Marvin Lazerson eds., 2005).

⁷³ CAROLINE HOXBLY, *THE ECONOMICS OF SCHOOL CHOICE* 10 (2003).

tution into the educational quasi-market.⁷⁴ Vouchers—state subsidies that parents may direct to private schools in which they enroll their children—reconfigure the school type market by reducing the barrier that cost presents to parents who would otherwise prefer private to public education. In addition, the various forms of *public* education, and the facilitation of choice among them, have proliferated. For example, often in an effort to promote both racial integration and school quality, many states and districts supplement traditional, state-managed public schools (that all children from a given area attend) with magnet schools.⁷⁵ Quality concerns also motivate districts to enter into contracts with private educational management organizations (“EMOs”), which provide not just administrative services but general management to struggling public schools.⁷⁶

The most dramatic market-based reform in the public school sector is the charter school. Chartering permits groups of educational entrepreneurs from both within and without an existing public system⁷⁷ to constitute a public school not subject to the full panoply of rules and procedures imposed by the school district in which it is located; the extent of regulatory relief varies by state.⁷⁸ Charter schools receive state money for each student who chooses to enroll, money that otherwise would go to those students’ traditionally assigned public schools.⁷⁹ The charter school sector is growing explosively.⁸⁰

⁷⁴ See Christopher Lubienski, *Public Schools in Marketized Environments: Shifting Incentives and Unintended Consequences of Competition-Based Educational Reform*, 111 AM. J. EDUC. 464, 464 (2005) (calling this process “marketization”).

⁷⁵ See SALAMONE, *supra* note 35, at 244; Douglas A. Archbald, *School Choice, Magnet Schools, and the Liberation Model*, 77 SOC. EDUC. 283, 283 (2004).

⁷⁶ See ALEX MOLNAR, *SCHOOL COMMERCIALISM: FROM DEMOCRATIC IDEAL TO MARKET COMMODITY* 124–27 (2005); KENNETH SALTMAN, *THE EDISON SCHOOLS: CORPORATE SCHOOLING AND THE ASSAULT ON PUBLIC EDUCATION* 67 (2005); Henry M. Levin, *Studying Privatization in Education*, in *PRIVATIZING EDUCATION* 3, 7 (Henry M. Levin ed., 2001); Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1389 (2003).

⁷⁷ Some states permit these groups to include EMOs. See MURPHY & SHIFFMAN, *supra* note 9, at 51–52; see also GARY MIRON & CHRISTOPHER NELSON, *WHAT’S PUBLIC ABOUT CHARTER SCHOOLS?* 170–93 (2002) (analyzing EMO participation under the Michigan charter law).

⁷⁸ See MURPHY & SHIFFMAN, *supra* note 9, at 53; Arnold F. Shober et al., *Flexibility Meets Accountability: State Charter School Laws and Their Influence on the Formation of Charter Schools in the United States*, 34 POL’Y STUD. J. 563, 567–69 & tbl.1 (2006); Sandra Vergari, *The Politics of Charter Schools*, 21 EDUC. POL’Y 15, 15 (2007).

⁷⁹ See MURPHY & SHIFFMAN, *supra* note 9, at 57–61; Vergari, *supra* note 78, at 24.

⁸⁰ See THOMAS L. GOOD & JENNIFER S. BRADEN, *THE GREAT SCHOOL DEBATE* 114 (2000); MURPHY & SHIFFMAN, *supra* note 9, at 32–34.

Traditional public schools, magnets, EMO-managed schools, charters, and voucher-accepting private schools all compete with one another for parents and students. That competition is delimited by regulations all around. For example, among public schools that charge no tuition, admission is controlled by factors other than willingness to pay.⁸¹ Magnets and charters are regulated by the state, though not in the same way as traditional public schools. EMOs are subject to public supervision and often detailed contracts. Still, in its willingness to experiment with the forms of both public and private schooling—by authorizing magnets, establishing charters, or permitting private schools to cash government-funded school vouchers—government expands the options available to consumers of schooling. Even without a price mechanism, schools can compete on nonprice dimensions as diverse as the contents of the instructional program, teaching styles, athletics, and geographical location.⁸²

Choice programs have obvious potential to mitigate the inequities of Tieboutian competition. Traditional public schools, magnets, charters, and voucher-supported private schools could all be made available to parents regardless of residence.⁸³ This would weaken the link between home purchase and school quality, and thus reduce the inefficiencies and differential burdens that sorting imposes upon the poor.⁸⁴ For reasons oriented more towards politics than policy, however, states have rarely used choice in this way. One exception is magnet schools, which, oriented towards desegregation, often seek to attract white students from suburban districts to specialized programs offered by majority-minority districts closer to the urban core. But vouchers and charters hew closely to the localist paradigm. The voucher program in Cleveland,

⁸¹ See PAUL T. HILL & ROBIN J. LAKE, CHARTER SCHOOLS AND ACCOUNTABILITY IN PUBLIC EDUCATION 4 (2002) (discussing charter admission by lottery); MIRON & NELSON, *supra* note 77, at 72 (noting charters' ability to control their student bodies through marketing and cream-skimming notwithstanding formal norms of equal access); SALAMONE, *supra* note 35, at 245 (comparing charter admission by lottery to first-come-first-served).

⁸² See Lubienski, *supra* note 74, at 467–68.

⁸³ See John Coons, *Dodging Democracy*, 111 AM. J. EDUC. 596, 606–07 (2005).

⁸⁴ See, e.g., JOHN CHUBB & TERRY MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS 210 (1990) ("The most promising choice systems now in operation are those that have moved aggressively toward the elimination of fixed jurisdictions and assignments."); GODWIN & KEMERER, *supra* note 48, at 5; RICHARD D. KAHLENBERG, ALL TOGETHER NOW 116–35 (2001); KATHRYN A. McDERMOTT, CONTROLLING PUBLIC EDUCATION: LOCALISM VERSUS EQUITY 121, 131–34 (1999); Alan Wolfe, *The Irony of School Choice*, in SCHOOL CHOICE: THE MORAL DEBATE 31, 31–32 (Alan Wolfe ed., 2003); Coons, *supra* note 83, at 605; James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287, 1311 (2005); Goodwin Liu & William L. Taylor, *School Choice To Achieve Desegregation*, 74 FORDHAM L. REV. 791, 795 (2005); Ryan, *supra* note 40, at 310–15.

for example, made interdistrict public school choice unattractive⁸⁵ and barred private schools outside of Cleveland from receiving voucher monies at all.⁸⁶ Charter schools are typically restricted to students residing in the district where they are located and indeed are often chartered by the districts themselves.⁸⁷ And enrollment in public schools outside of one's own district is made difficult if it is even allowed.⁸⁸

School choice, then, is a regulatory reform of an idiosyncratic quasi-market. The quasi-market itself is required by the Federal Constitution under *Pierce*, and reinforced by a Court-sanctioned localism. At the same time, state government regulation of educational services strongly limits competition and the ability of ordinary market mechanisms to function in that market. It does so by compelling school attendance, by directing massive funding towards tuition-free public schools whose program and policies are set through hierarchical and democratic processes, by restricting competition among public schools to Tiebout-style interjurisdictional competition, and by pervasively regulating the private school industry. Contemporary "school choice" programs selectively graft some procompetitive features onto this regulatory regime. They permit some kinds of intradistrict and interdistrict competition through magnets, private management, charters, and vouchers.⁸⁹ Still, they fall well short of undermining the overarching regulatory touchstones of public monopoly on subsidized education and Tieboutian competition.

II. CHOICE UNDER THE EDUCATION CLAUSES

Given this perspective on what "school choice" programs do, what limits should the education clauses be seen as placing upon them? To answer this question, this Part turns to the clauses themselves. The first Section reviews the education clauses and two key state cases interpreting the clauses' compatibility with choice, one overturning a voucher program in Florida⁹⁰ and the other upholding the Ohio charter school

⁸⁵ See *Zelman*, 536 U.S. at 707 & n.17 (Souter, J., dissenting).

⁸⁶ *Id.* at 645 (majority opinion).

⁸⁷ See MURPHY & SHIFFMAN, *supra* note 9, at 54.

⁸⁸ The Heritage Found., Where's School Choice?, <http://www.heritage.org/Research/Education/SchoolChoice/schoolchoice.cfm> (Apr. 19, 2005) (map showing all fourteen states which mandate interdistrict or intradistrict school choice).

⁸⁹ The Heritage Found., *supra* note 88 (graph showing states which mandate interdistrict or intradistrict school choice and have voucher programs).

⁹⁰ *Bush v. Holmes*, 919 So. 2d 392, 413 (Fla. 2006).

law against a facial challenge.⁹¹ The second Section analyzes the crucial institutional language—that states support “public” or “common” schooling—and argues that these terms resist historical and textualist interpretation.⁹² The final Section argues that although “public schooling” can be legitimately understood to require direct, statist provision of schooling, which makes choice problematic, it can equally legitimately be interpreted pluralistically, in ways compatible with charters and vouchers.⁹³ Lacking strong textual, historical, or purpose-based arguments to the contrary, state courts should acknowledge that both approaches are valid under the education clauses, and leave the choice between them to the people and their elected representatives.

Not all choice programs meet the requirement of publicness or commonness, however. A pluralist understanding of these terms imposes important constraints upon choice programs. The nature of those limitations is analyzed in Part III.⁹⁴

A. *The Constitutional Mandate*

Every state constitution has a clause that discusses primary and secondary education.⁹⁵ In Florida, to take a state discussed at greater length below, the constitution requires that “[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education.”⁹⁶ The Ohio constitution, also discussed below, requires its General Assembly to “make such provisions, by taxation, or otherwise, as . . . will secure a thorough and efficient system of common schools throughout the state.”⁹⁷ The New Jersey constitution, in a famous provision that has generated decades of litigation and mountains of scholarly analysis, mandates a “thorough and efficient system of free public” primary and secondary schools.⁹⁸ Other states’ clauses, al-

⁹¹ *Ohio ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ.*, 857 N.E.2d 1148, 1166 (Ohio 2006); *infra* notes 95–125.

⁹² *See infra* notes 126–191.

⁹³ *See infra* notes 192–223.

⁹⁴ *See infra* notes 224–350.

⁹⁵ *See* state education clauses cited *supra* note 1.

⁹⁶ FLA. CONST. art. IX, § 1(a).

⁹⁷ OHIO CONST. art. VI, § 2.

⁹⁸ *See* N.J. CONST. art. VIII, § 4(1). *See generally* *Abbott v. Burke* (Abbott V), 710 A.2d 450 (N.J. 1998); *Abbott v. Burke* (Abbott IV), 693 A.2d 417 (N.J. 1997); *Abbott v. Burke* (Abbott II), 575 A.2d 359 (N.J. 1990); Alexandra Greif, *Politics, Practicalities, and Priorities: New Jersey's Experience Implementing the Abbott V Mandate*, 22 YALE L. & POL'Y REV. 615 (2004) (cataloguing the progress of the Abbott litigation).

though they vary in scope and in specific language, generally deploy subsets of a constellation of key terms: education should be "thorough," "public," "common," "free," "general," "uniform," "efficient."⁹⁹

These requirements constrain the organization of school systems in two ways. First, school finance cases in many states have held that terms in the education clauses like "thorough," "equal," and "efficient" impose the substantive duty upon states to ensure that all children are educated adequately and/or equally.¹⁰⁰ The fiscal and remedial focus of these cases¹⁰¹ has obscured the direct applicability of the clauses to how schooling is organized and regulated.¹⁰² The institutional design underlying policymaking, budgeting, and student assignment has substantive impact upon policies, budgets, and assignments. That institutional design, therefore, must serve the substantive requirements of adequacy and/or equity.¹⁰³

At the same time, the clauses speak directly to the organization of educational institutions. Requirements that state-supported schooling be "free," "uniform," "common," and "public" can be read to require some organizational approaches and arguably to preclude others.¹⁰⁴ Even if it were to be established that school choice promoted educational adequacy and equity, state support for charter or voucher

⁹⁹ See McUsic, *supra* note 1, at 319–26.

¹⁰⁰ See generally Enrich, *supra* note 4; Heise, *Equal Educational Opportunity*, *supra* note 4; Heise, *State Constitutions*, *supra* note 4.

¹⁰¹ See Ryan, *supra* note 40, at 260 (1999); Aaron Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 894–95 (2006).

¹⁰² See Andrew Broy, Comment, *Charter Schools and Educational Reform*, 79 N.C. L. REV. 493, 535 (2001).

¹⁰³ See Michael Heise, *Equal Educational Opportunity and Constitutional Theory*, 14 J.L. & POL. 411, 432 (1998) ("Increasingly clear is that a structural approach to school reform can bear directly on the nature and quality of the education provided."); cf. Simmons-Harris v. Goff, 711 N.E.2d 203, 212 (Ohio 1999) (noting, but summarily rejecting, the argument that "implicit" in the constitutional requirement to establish "thorough and efficient system of common schools throughout the State" is "a prohibition against the establishment of a system of uncommon (or nonpublic) schools financed by the state").

¹⁰⁴ Frank Kemerer provides a preliminary assessment of the extent to which state constitutions' institutional provisions are friendly to vouchers. See Frank R. Kemerer, *The Constitutional Dimension of School Vouchers*, 3 TEX. F. ON C.L. & C.R. 137, 181–83 tbls.1 & 2 (1998). Most standard taxonomies of state education clauses, however, parse constitutional language exclusively for friendliness to finance claims and focus upon terms plausibly relevant to educational quality such as "thorough," "efficient," and "adequate." See McUsic, *supra* note 1, at 309 n.4, 319–26, 334–39; Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814–16 (1985). "Uniform" does figure in these taxonomies, but exclusively as a synonym for "equal." Of course, the variations in terminology and phrasing the taxonomists identify do not perfectly track state court interpretation. See Brian L. White, Comment, *Potential Federal and State Constitutional Barriers to the Success of School Vouchers*, 49 U. KAN. L. REV. 889, 928 (2001).

programs might still be foreclosed by requirements that such support be limited to "common," "public," "free," and/or "uniform" schools. Moreover, requirements that schooling be "thorough" or "efficient" have an independent institutional dimension. Whether "efficient" is read as a mandate for productive efficiency, in the sense of minimizing cost-per-output and avoiding waste,¹⁰⁵ or allocative efficiency, in the sense of seizing potential Pareto improvements and minimizing deadweight loss, the term on its face has more to say about how schooling is structured than about the nature of the product that it generates. "Thorough," a twin term of "efficiency," more plausibly addresses educational adequacy—to be thorough is to ignore no major area—but also plausibly bars haphazardness in administration along with demanding comprehensiveness in pedagogy and fairness in funding.

Until recently, whether choice is directly precluded by institutional language received relatively little judicial attention. In 2006, however, in *Ohio ex rel. Ohio Congress of Parents & Teachers v. State Board of Education*, the Ohio Supreme Court rejected the argument that the state's charter school legislation was facially inconsistent with the Ohio education clause's requirement of "a thorough and efficient system of common schools throughout the state."¹⁰⁶ The court emphasized that community schools (as charters are called in Ohio) incorporate "flexibility,"¹⁰⁷ "choice,"¹⁰⁸ "customiz[ation],"¹⁰⁹ and "experimen[t]"¹¹⁰ to help "ensur[e] that all children receive an adequate education that complies with the Thorough and Efficient Clause."¹¹¹ The court held that rational judgment, coupled with charters' ultimate susceptibility to public

¹⁰⁵ See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 211 (Ky. 1989) (defining "efficiency" in part as "no waste, no duplication, no mismanagement, at any level"); DIANE RAVITCH, *THE GREAT SCHOOL WARS* 191–92 (1974) (documenting historical concern over efficiency in its waste-avoiding sense); Paul Peterson, *Thorough and Efficient Private and Public Schools*, in *COURTING FAILURE* 195, 195 (Eric Hanushek ed., 2006) ("thorough and efficient" appears to ask of schools that they . . . provide the highest-quality schooling at the lowest price").

¹⁰⁶ *Ohio Cong. of Parents & Teachers*, 857 N.E.2d ¶¶ 23–26 (quoting OHIO CONST. art. VI, § 2). Plaintiffs made several other claims, also rejected, based on more idiosyncratic provisions of the Ohio constitution. See *id.* ¶¶ 41, 62. Most other lawsuits arguing that charter laws are unconstitutional have asserted particular inadequacies in program design or the drafting of the enabling statutes. See Robert Martin, *Charting the Court Challenges to Charter Schools*, 109 PENN ST. L. REV. 43, 51, 68–85 (2004).

¹⁰⁷ *Ohio Cong. of Parents & Teachers*, 857 N.E.2d ¶ 30.

¹⁰⁸ *Id.* ¶ 31.

¹⁰⁹ *Id.* ¶ 32.

¹¹⁰ *Id.* ¶ 31.

¹¹¹ *Id.* ¶ 30.

control, to be sufficient to meet the constitutional requirements of commonness, thoroughness, and efficiency.¹¹²

The Florida Supreme Court, in the 2006 case *Bush v. Holmes*,¹¹³ took the opposite approach in invalidating the state's Opportunity Scholarship Program ("OSP"),¹¹⁴ which provided school vouchers, redeemable at private, tuition-charging schools as well as public schools, to students previously enrolled in public schools that the state had categorized as "failing."¹¹⁵ The Florida court reasoned that because vouchers "diver[t]" funds from free public schools to private schools, they undermine "the system of 'high quality' schools"¹¹⁶ that the state constitution requires.¹¹⁷ Furthermore, said the court, the constitution requires state support of schools both "free" and "public," quality aside; private schools receiving vouchers are neither.¹¹⁸ Because the OSP funds schools subject to less extensive regulation than the public schools, the court found that it violates the requirement that the public

¹¹² See *Ohio Cong. of Parents & Teachers*, 857 N.E.2d ¶¶ 31, 33. For similarly deferential approaches, see *Council of Orgs. & Others for Educ. About Parochialism, Inc. v. Engler*, 566 N.W.2d 208, 217–18 (Mich. 1997) (Michigan charter law consistent with requirement that state support "public" schools); *Simmons-Harris*, 711 N.E.2d at 212 (Cleveland voucher program consistent with requirement that schools be "thorough and efficient"); *Jackson v. Benson*, 578 N.W.2d 602, 627–28 (Wis. 1998) (Milwaukee vouchers consistent with requirement that schools be "uniform"); see also *Martin*, *supra* note 106, at 51, 68–69 (collecting cases rejecting claims that choice schools are unconstitutional because they do not "fall clearly under the supervision and control of the state board of education"); *Broy*, *supra* note 102, at 535–45 (collecting and analyzing cases on constitutionality of charter schools).

¹¹³ 919 So. 2d at 400. For early summaries of the case, see Douglas N. Harris, Carolyn D. Herrington & Amy Albee, *The Future of Vouchers: Lessons From the Adoption, Design, and Court Challenges of Florida's Three Voucher Programs*, 21 EDUC. POL'Y 215, 235–36 (2007); Brad Kahn, Note, *Bush v. Holmes: School Vouchers and State Constitutions*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 833 (2006). For commentary, see generally Jamie Dycus, *Lost Opportunity*, 35 J.L. & EDUC. 415 (2006); Clark Neily, *The Florida Supreme Court vs. School Choice: A 'Uniformly' Horrid Decision*, 10 TEX. REV. L. & POL. 401 (2006) (analysis by the losing plaintiff's counsel); *Florida Supreme Court Holds Use of Public Monies to Fund Private Alternatives to Public Schools Violates the Florida Constitution*, 33 FLA. ST. U. L. REV. 1234, 1237–39 (2006).

¹¹⁴ For a political and legislative history of OSP and related Florida programs, see Harris et al., *supra* note 113, at 219–33.

¹¹⁵ See *Holmes*, 919 So. 2d at 400.

¹¹⁶ *Id.* at 409.

¹¹⁷ The relevant constitutional language reads:

It is . . . a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education

FLA. CONST. art. IX, § 1.

¹¹⁸ *Holmes*, 919 So. 2d at 410–11.

school "system be 'uniform.'"¹¹⁹ Finally, the Florida court concluded—over a vigorous dissent¹²⁰—that the Florida constitution specifies a single "manner" by which the state may discharge its duty to educate school-age children, that being a "uniform, high quality system of free public education."¹²¹ Choice is not allowed even if it meets the state's educational goals: the constitution, says the court, "does not authorize additional equivalent alternatives."¹²²

Although *Holmes* invalidated a voucher program, its reasoning clearly extends beyond vouchers to charter schools. If OSP's "diversion" of funds from public schools to private ones unconstitutionally undermines public schools, charter schools' similar diversion is unconstitutional as well.¹²³ And if a voucher program violates the "uniformity" provision because voucher schools are subject to regulations less intrusive and onerous than traditional schools, charter schools, whose *sine qua non* is regulatory relief, violate it similarly.¹²⁴ *A fortiori* if the state education clause mandates, as the Florida Supreme Court says that it does, a unique "manner" of providing public education, to the exclusion of any "additional equivalent alternatives," charters are by definition unconstitutional.¹²⁵

¹¹⁹ *Id.* at 409.

¹²⁰ *Id.* at 415–16 (Bell, J., dissenting).

¹²¹ *Id.* at 408 (majority opinion).

¹²² *Id.*

¹²³ The Ohio court explicitly rejected this argument, holding that permitting state funds to follow charter students did not unconstitutionally make traditional public schools less "thorough and efficient" by depriving them of monies that, absent charters, they would have had. *Ohio Cong. of Parents & Teachers*, 857 N.E.2d ¶¶ 38–39 (refusing to characterize charter funding mechanism as "raiding local funds that school districts are otherwise entitled to receive"). A variation on this argument, that choice in impoverished communities is unconstitutional because it diverts monies that would otherwise flow to traditional public schools that need full resources to meet the obligation of adequacy under state education clauses, is also sometimes made. The New Jersey Supreme Court noted that in theory such diversion could present a constitutional problem, but sent a case raising the question back to the trial judge for more factfinding on the question. *See In re Grant of Charter Sch. Application of Englewood on Palisades*, 753 A.2d 687, 698 (N.J. 2000); Martin, *supra* note 106, at 73–74. The New York Court of Appeals, confronting a similar argument, kept it alive by dismissing the case raising the argument on technical grounds. *See Bd. of Educ. of the Roosevelt Union Free Sch. Dist. v. Bd. of Trs. of the State Univ. of N.Y.*, 723 N.Y.S.2d 262, (N.Y. 2001); Martin, *supra* note 106, at 73–74. *But see* William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation*, 35 B.C. L. REV. 597, 615–16 (1994) (stating that a "deficiency in the public school system theoretically could become the basis for a public school voucher program . . . so that each child could reach his or her potential").

¹²⁴ *Holmes*, 919 So. 2d at 409.

¹²⁵ *Id.* at 408.

B. Interpreting the Institutional Requirements

The broad generalities and terse formulations that characterize the rights-bearing provisions of the Federal Constitution have been contrasted with state constitutions' often prolix treatment of wide ranges of quotidian concerns.¹²⁶ But although the latter variety of provisions can be relevant to educational organization,¹²⁷ the education clauses themselves use general, capacious formulations: schools must be "public," "common," "free," "uniform." Like the open-ended vocabulary of the Federal Bill of Rights—"search," "free speech," "free exercise," "establishment"—these terms are open ended, multivalent, and resistant to either exclusively historical or exclusively textualist interpretation.¹²⁸

State constitutions combine these terms in various permutations and embed them in a range of contexts.¹²⁹ Nevertheless, in every state, the primary question with respect to the permissibility of choice is how to interpret the requirement that states support "public" or "common" schools.¹³⁰ The question is difficult because "public school" denotes an

¹²⁶ See SAGER, *supra* note 2, at 51.

¹²⁷ For example, in Ohio, litigants challenging the constitutionality of vouchers won (for a time) by citing the state constitution's one-subject rule. *Simmons-Harris*, 711 N.E.2d at 214-15. The more recent Ohio challenge to the constitutionality of charter schools cited not only the state's education clause but also constitutional provisions regulating the distribution of tax revenue to districts and limitations upon state loan guarantees to private entities. *Ohio Cong. of Parents & Teachers*, 857 N.E.2d ¶¶ 48-72. See also Kemerer, *supra* note 104, at 183 tbl.2 (tabulating constitutional provisions relevant to choice).

¹²⁸ See SAGER, *supra* note 2, at 51; Aaron Saiger, *Constitutional Partnership and the States*, 73 FORDHAM L. REV. 1439, 1454 & n.84 (2005).

¹²⁹ See state education clauses cited *supra* note 1.

¹³⁰ Thirty-eight of fifty education clauses require states to support "public" schools. See state education clauses cited *supra* note 1. A thirty-ninth state constitution, Mississippi's, specifies "public" schools, but says they need be supported only "upon such conditions and limitations as the Legislature may prescribe." Miss. CONST. art. VIII, § 201. McUsic concludes that this language "requir[es] the Mississippi legislature to establish schools, although it does not mandate the type of schools." McUsic, *supra* note 1, at 311 n.5.

Seven additional states—Indiana, Iowa, Kentucky, Nebraska, Nevada, New York, and Oregon—mandate support of "common" rather than "public" schools. See state education clauses cited *supra* note 1.

The four remaining states use neither "common" nor "public": Alabama, Vermont, West Virginia, and Wisconsin. See state education clauses cited *supra* note 1. Alabama's clause, providing that "nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense," is the result of a 1956 amendment that attempted to limit racial integration after *Brown v. Board of Education*. See ALA. CONST. art. XIV, § 256; 347 U.S. 483, 495 (1954). The amendment repealed language requiring the state to "establish, organize, and maintain a liberal system of public schools throughout the state." See ALA. CONST. art. XIV, § 256 (note of code commissioner). An Alabama trial court has held the amendment invalid and the older language still in force because of the amendment's "racially discriminatory motivations." See *id.* (the Alabama

agglomeration of ambiguous features rather than a single concept.¹³¹ Some of these features are crucial to "publicness" while others are accidental. Moreover, the aspects of "publicness" correlate imperfectly. And because they are also continuous rather than binary characteristics, even were it obvious which meaning or meanings of "public school" should control, drawing necessary lines would remain far from straightforward.

The above-cited cases, *Holmes* in Florida and *Ohio Congress of Parents & Teachers* in Ohio, seem almost willfully to ignore these complexities.¹³² *Holmes* identifies the constitutional term "public schools"¹³³ with the entirety of the structural regime governing Florida's actual public schools—as it existed before marketized incentives were introduced—and bars any other "manner" of schooling.¹³⁴ It does not explain why this particular, contingent structure, including features manifestly unreflective of any important norm of publicness, deserves such deference. The effect is to strangle innovation and to constitutionalize a flawed status quo. Ohio, by contrast, defines a "public" or "common" school as any that is ultimately subject to public control.¹³⁵ Ultimate public control being a particularly undemanding standard, the dissent's claim that the court had blessed "any schooling arrangement that the General Assembly decides to support by general taxation"¹³⁶ seems a fair one.¹³⁷ The Ohio court explains neither why it elevates the single feature of public control as the absolute criterion for publicness, nor

Supreme Court's failure to uphold trial court's view leaves the status of § 256 "complex and controversial"). The Supreme Court of Vermont has held, notwithstanding the absence of the term "public" in chapter 2, section sixty-eight, of the Vermont Constitution, that under that section "[p]ublic education is a constitutional obligation of the state." *Brigham v. State*, 692 A.2d 384, 392 (Vt. 1995). The West Virginia courts have read that state's constitution's requirement of "free schools" to mean "public schools." See W. VA. CONST. art. XII, § 1; *State ex rel. Brotherton v. Blankenship*, 207 S.E.2d 421, 436 (W. Va. 1973). Wisconsin's constitution requires the "establishment of district schools." WIS. CONST. art. X, § 3.

¹³¹ See Frederick Hess, *What Is a "Public School?" Principles for a New Century*, 85 PHI DELTA KAPPAN 433, 435–48 (2004).

¹³² See generally *Holmes*, 919 So. 2d 392; *Ohio Cong. of Parents & Teachers*, 857 N.E.2d 1148.

¹³³ FLA. CONST. art. IX, § 1.

¹³⁴ *Holmes*, 919 So. 2d at 409.

¹³⁵ *Ohio Cong. of Parents & Teachers*, 857 N.E.2d ¶ 30.

¹³⁶ *Id.* ¶ 81 (Resnick, J., dissenting). But see *id.* ¶ 32 (majority opinion) (denying Justice Resnick's assertion that it was prepared to "approve of 'just any schooling arrangement'").

¹³⁷ The majority's conclusion annotates an authority with a telling parenthetical: "[A] court has nothing to do with the policy or wisdom of a statute. That is the exclusive concern of the legislature." *Id.* ¶ 73.

why it identifies one point on the spectrum of such control—the power of the state ultimately to trump private control if government wishes—instead of focusing on who controls day-to-day, or the extent of institutional resistance that private managers can exert to oppose public preferences. The Ohio court's extreme deference to legislative preference essentially reads the institutional limitations of the education clauses out of its constitution entirely.

The complexities associated with a more sophisticated take on the interpretive problem can be seen most clearly, perhaps, with the benefit of the historical perspective offered by the nine states whose education clauses require them to support "common" schools.¹³⁸ Lay and legal usage long regarded "common school" and "public school" as synonyms.¹³⁹ However, because the former term today has largely fallen out of ordinary discourse, its presence in state constitutions often generates historically-based arguments that "public school" does not. Thus, the dissent in *Ohio Congress of Parents & Teachers*, relying upon historical scholarship,¹⁴⁰ argues that charters are incompatible with "a single system of common schools"¹⁴¹ because the framers of the Ohio education clause would have understood that phrase to exclude "a proliferating variety of available schools, competition among schools for tax support, and attendance by parental selection, rather than public assignment."¹⁴²

Horace Mann and others' concept of the "common school" doubtless influenced the framing of many education clauses, including Ohio's.¹⁴³ "Common schooling," however, named a multifaceted

¹³⁸ In addition to the seven states—Indiana, Iowa, Kentucky, Nebraska, Nevada, New York, and Oregon—whose education clauses use the term "common school" instead of "public school," see state education clauses cited *supra* note 1, the California and Ohio constitutions use both "common" and "public." CAL. CONST. art. IX, § 5; OHIO CONST. art. VI, §§ 2-3.

¹³⁹ See L. S. Tellier, *What Is Common or Public School Within Contemplation of Constitutional or Statutory Provisions*, 113 A.L.R. 697, 697 (1938) (collecting cases); cf. BENJAMIN JUSTICE, *THE WAR THAT WASN'T 2* (2004).

¹⁴⁰ Molly O'Brien & Amanda Woodrum, *The Constitutional Common School*, 51 CLEV. ST. L. REV. 581, 638-40 (2004) (quoting OHIO CONST. art. VI, § 2).

¹⁴¹ OHIO CONST. art. VI, § 2.

¹⁴² O'Brien & Woodrum, *supra* note 140, at 638-39; see 857 N.E.2d ¶¶ 82-87 (Resnick, J., dissenting).

¹⁴³ See JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 238 (2006); Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 28 HARV. J. ON LEGIS. 341, 356-59 (1991) (positing "common schools" as equalizing treatment of "rich and poor"); Chris Lubienski, *Redefining 'Public' Education: Charter Schools, Common Schools, and the Rhetoric of Reform*, 103 TCHRS. C. REC. 634, 645-54 (2001); Nathaniel J. McDonald, Note, *Ohio Charter Schools and Educational Privatization*, 53 CLEV. ST. L. REV. 467, 478-80 (2005-06). See generally CHARLES LESLIE GLENN, JR., *THE MYTH OF THE COM-*

political program and described a set of complex institutions. Precisely because the term was in general use and was not a term of art,¹⁴⁴ it is difficult to know which aspects of the common school concept various framers meant to constitutionalize—beyond that all children should be eligible for an education at state expense—and which attributes are contingent.

Inarguably, common schooling operated by state assignment rather than parental choice. This policy stemmed from an explicit goal of "break[ing] down class distinctions," providing "equal opportunity," and helping to "bridge ethnic and religious divisions" among students.¹⁴⁵ But where Molly O'Brien and Amanda Woodrum conclude that a necessary feature of "common schools" is therefore that children of all classes and backgrounds be educated together,¹⁴⁶ others read the record to indicate only that a system of common schools must provide every child with access to schooling free of charge.¹⁴⁷ Paul Dimond likewise understands attendance by parental selection, rather than public assignment, to be fully compatible with a system of "common schools"; to him that public assignment characterized the early common school is merely an artifact.¹⁴⁸ Other scholars and historians, depending on their own focus and their reading of the sources, have identified as foundational commitments of common school advocates nonsectarianism,¹⁴⁹ compulsory

MON SCHOOL (1988) (analyzing history of the "common school" idea); O'Brien & Woodrum, *supra* note 140.

¹⁴⁴ O'Brien & Woodrum, *supra* note 140, at 587 (stating that the "meaning of the term 'common school' was so clear to the framers of the 1851 [Ohio] Constitution that its definition hardly merited serious discussion").

¹⁴⁵ Stephen Macedo, *Equity and School Choice*, in SCHOOL CHOICE: THE MORAL DEBATE, *supra* note 84, at 53, 57.

¹⁴⁶ O'Brien & Woodrum, *supra* note 140, at 588.

¹⁴⁷ Dimond, *supra* note 72, at 323 (stating that common schools are "tuition-free schools open to all regardless of family income"). Lloyd Joregenson concurs that access, rather than utilization, of free schooling was the common school's critical feature. LLOYD JOREGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL* 20 (1987) (explaining that common schooling included a goal to "provide schooling for all white children, partially or wholly at public expense").

¹⁴⁸ Dimond, *supra* note 72, at 324 (stating that a school is "not common" unless it is "open to all families regardless of income").

¹⁴⁹ See GLENN, *supra* note 143, at 275; see also O'Brien & Woodrum, *supra* note 140, at 640 (arguing that choice "run[s] counter to the constitutional vision" of "common schooling" because it "promote[s] separate schooling for children of discrete ethnic or religious backgrounds"). Common school reformers, of course, were aggressively Protestant and "nonsectarian" only within their Protestant context; with respect to non-Protestants, they were sectarian indeed. See Michael W. McConnell, *Education Disestablishment: Why Democratic Values Are Ill-Served by Democratic Forms of Schooling*, in NOMOS XLIII: MORAL & POLITICAL

school attendance,¹⁵⁰ local control,¹⁵¹ the centralization¹⁵² and professionalization of governance,¹⁵³ the standardization of curriculum,¹⁵⁴ and the spreading of a "pan-Protestant" form of "moral and social redemption."¹⁵⁵ Moreover, some of these ideals were honored mostly in the breach;¹⁵⁶ and, as Carl Kaestle argues, right away people conflated, sometimes purposefully, the ideology of the common school with more particular programs of school reform.¹⁵⁷ Certainly curricular standardi-

EDUCATION 106-14 (Stephen Macedo & Yael Tamir eds., 2002); *see also infra* note 155 and accompanying text.

¹⁵⁰ *See* DINAN, *supra* note 143, at 237-47; JORGENSEN, *supra* note 147, at 22.

¹⁵¹ *See* JUSTICE, *supra* note 139, at 28-29.

¹⁵² *See* CARL KAESTLE, *PILLARS OF THE REPUBLIC* 112, 147-48, 151, 221 (1983).

¹⁵³ *See id.* at 221.

¹⁵⁴ *See* DIANE RAVITCH, *LEFT BACK: A CENTURY OF FAILED SCHOOL REFORMS* 21-25 (2000); WILLIAM J. REESE, *AMERICA'S PUBLIC SCHOOLS: FROM THE COMMON SCHOOL TO "NO CHILD LEFT BEHIND"* 64 (2005). The pedagogical uniformity of the common school, its "common stock of ideas," REESE, *supra*, at 64, was later understood by both its proponents and detractors to conflict with a range of curricular reforms, including both progressive, child-centered education, and the teaching of elite academic subjects like Latin and Greek in high schools. RAVITCH, *supra*, at 163-64 (describing the opposition of progressive educators like John Franklin Bobbitt to the core curriculum of the common schools); REESE, *supra*, at 99, 107, 109, 157; DAVID TYACK, *THOMAS JAMES & AARON BENAVOT, LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954*, at 74, 110 (2003). Tyack et al. also cite and discuss the "celebrated" case of *Stuart v. School District No. 1 of Village of Kalamazoo*, which rejected arguments "that the term common or primary schools, as made use of in our legislation, has a known and definite meaning which limits it to the ordinary district schools" and prohibits them from offering "a higher grade of learning." *See* 1874 WL 6396, at *5 (Mich. 1874); TYACK ET AL., *supra*, at 74.

¹⁵⁵ JORGENSEN, *supra* note 147, at 20-23 (positing that the seeking of such redemption is the "most fundamental assumption underlying the Common School Movement"); SALAMONE, *supra* note 35, at 20-21 (associating common schooling with the anti-Catholic Blaine Amendments and quoting President Ulysses Grant's support for universal "common school education unmixed with atheistic, pagan, or sectarian teaching"). The "common core of values" was at the core of Mann's interest in common schooling. *See* GLENN, *supra* note 143, at 8; SALAMONE, *supra* note 35, at 14-15.

¹⁵⁶ For example, California's 1852 Act to Establish a System of Common Schools included among those common schools publicly funded private and religious institutions. *See* TYACK ET AL., *supra* note 154, at 90. Public funding of religious schools was repealed three years later. *See id.* at 91; *see also* SALAMONE, *supra* note 35, at 8 (defining the "myth of the common school" as being that "the values promoted through public education are indeed neutral or at the very least acceptable to Americans across the political and religious spectrum").

¹⁵⁷ *See* KAESTLE, *supra* note 152, at 95. As Carl Kaestle explained:

Although the reformers' specific proposals about centralized supervision, tax support, teacher training, and consolidated school districts met considerable resistance, the educational reform cause benefited in general from widespread consensus about the importance of common schooling The rhetorical effect was to imply that if one was against centralization, supervision, new schoolhouses, teacher training, or graded schools, one must also be

zation—and *a fortiori* "pan-Protestantism" and the corollary anti-Catholicism and nativism that contaminated the common school platform¹⁵⁸—should not be deemed constitutional requirements because of constitutional language requiring states to promote "common schools."

The difficulty of determining which of their numerous features are necessary, which are political, and which are accidental arises equally in defining what makes a "public" or "common" school in our own time. The line between "public" and "private" schools, never entirely clear-cut,¹⁵⁹ has become increasingly fuzzy as the explosion of institutional forms in education¹⁶⁰ challenges any discrete partition of the two sectors.¹⁶¹ A public school turned over to an EMO charges no tuition, and generally continues to guarantee admission to all neighborhood children, but it is run by a private firm that hires, fires, and sets educational policy.¹⁶² An EMO's choices in these areas are constrained by the terms of a contract negotiated with its public-sector client and by the more general business goal of keeping one's clients happy, but they remain private choices.¹⁶³ Is such a school *public*?¹⁶⁴ Is a magnet school, government-managed and government-funded, *public* if children must apply and are selected based upon academic achievement, racial group, or some other criterion?¹⁶⁵ Similarly, charter schools are subject to some public regulation, hold their charters at the pleasure of public authority, and generally charge no tuition. Yet, charters can rely on private as well as public funds and some are for-profit. Public regulation, moreover, is much looser than in traditional public schools, and admission can be, like magnet or theme schools, competitive.¹⁶⁶ If the charter next door to Bobby's house is returning profits to private investors and

against morality, good order, intelligent citizenship, economic prosperity, fair opportunity, and a common American culture.

Id.; see also O'Brien & Woodrum, *supra* note 140, at 602 (discussing the association of graded schools and common schools).

¹⁵⁸ See JORGENSEN, *supra* note 147, at 28; SALAMONE, *supra* note 35, at 17; McConnell, *supra* note 149, at 110.

¹⁵⁹ See TYACK ET AL., *supra* note 154, at 27–28.

¹⁶⁰ See *supra* notes 73–80 and accompanying text.

¹⁶¹ See Hess, *supra* note 131, at 433.

¹⁶² See Metzger, *supra* note 76, at 1390.

¹⁶³ See *id.*

¹⁶⁴ For critics emphatically answering this question in the negative, see MOLNAR, *supra* note 76, at 16; SALTMAN, *supra* note 76, at 10.

¹⁶⁵ See Archbald, *supra* note 75, at 284.

¹⁶⁶ See HILL & LAKE, *supra* note 81, at 4–5; Vergari, *supra* note 78, at 16–17.

need not admit Bobby, is it *public* in a way that a state-regulated private school is not?¹⁶⁷

More broadly, one might note that important aspects of "publicness," in the sense of openness to all comers, are sacrificed when traditional "public" schools sort children by geographic location¹⁶⁸ or disability.¹⁶⁹ Nor are state-regulated private schools themselves an unproblematic category. States help such schools defray various expenses, including for transportation, supplies, textbooks, the teaching of secular subjects to children at risk for failure, and special education.¹⁷⁰ How much of its budget can a regulated private school receive from the government and still be *private*?

Nor can much traction be gained in those states where education clauses include the somewhat more specific requirements that states support public or common schools that are also "free"¹⁷¹ or "uni-

¹⁶⁷ See MIRON & NELSON, *supra* note 77, at 202 tbl.11.1; Christopher Lubienski, *Instrumentalist Perspectives on the "Public" in Public Education*, 17 EDUC. POL'Y 478, 482 (2003) [hereinafter Lubienski, *Instrumentalist Perspectives*] (explaining that "charter schools explicitly blur the boundaries between public and private organizational types"); Lubienski, *supra* note 143, at 641, 656-57 (arguing that charters are less "public" than traditional public schools because they are often for-profit, do not have open records, "mirror private schools in areas such as staffing, asset management, admissions practices, and administration," and lack "democratic control"); Metzger, *supra* note 76, at 1389 (arguing that although charter schools "are officially denominated public schools [and] come into existence as a result of government authorization," they "also embody substantial private involvement").

¹⁶⁸ See *supra* notes 126-191.

¹⁶⁹ Current education law requires students with disabilities to be educated in the "least restrictive environment" possible. See 20 U.S.C. § 1412(a)(5) (2004). This approach acknowledges a necessity for some sorting by disability, even as it is to be minimized.

¹⁷⁰ See Macedo, *supra* note 145, at 52; Joseph M. O'Keefe, *Catholic Schools and Vouchers*, in SCHOOL CHOICE: THE MORAL DEBATE, *supra* note 84, at 208-09. States also pay the tuition for certain disabled students to attend private schools in order to discharge the state duty, under both federal statute and state constitution, to educate them. See generally *Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994 (2007).

¹⁷¹ Such requirements appear in education clauses in the following states: Arkansas, California, Colorado (which also requires that children in free schools be "educated gratuitously"), Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Maryland, Michigan, Mississippi (subject to the limitation "upon such conditions and limitations as the Legislature may prescribe"), Missouri, Montana, New Mexico, Nebraska, New York, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See state education clauses cited *supra* note 1. This enumeration does not include requirements that schools be "free of sectarian control." Alaska requires that schools be "open to all children of the state." ALASKA CONST. art. VII, § 1. Indiana and South Dakota require education be provided "without charge." IND. CONST. art. VIII, § 1; S.D. CONST. art. VII, § 1. Wyoming's provision is limited to "free elementary schools." WYO. CONST. art. VII, § 1.

form."¹⁷² Beyond the floor that the state must provide every child with some educational option that is free of charge,¹⁷³ these terms also resist exclusively textual interpretation.¹⁷⁴ Like "public" and "common," they identify continua, not binary relationships. Schools and school systems are neither free nor not free, uniform nor not uniform. Rather, some are more free, or less uniform, than others.

Is it obvious, for example, whether a "free" school may demand, as many contemporary public schools do, that students provide at their own expense textbooks,¹⁷⁵ necessary school supplies,¹⁷⁶ or ancillary items like required uniforms?¹⁷⁷ What about payments required only of members of cocurricular and extracurricular groups like choirs, math leagues, and football teams, which are often expected, through fees, donations, or solicitations, somehow to pay for necessary instruments, equipment, and transportation?¹⁷⁸ Can schools similarly require students to cover their own lab expenses in order to enroll in advanced placement or other courses not required for graduation?¹⁷⁹ Or consider the practices of many private and public schools of aggressively encouraging donations from parents and student-run sales campaigns hawking magazines and similar goods.¹⁸⁰ It seems a cramped interpretation indeed to regard all of these payments, which range over a spectrum from mandatory to voluntary, and from large to small, as a violation of the "freeness" requirement; but some people might reasonably object to any of these payments on that basis.

¹⁷² The states are Arizona, Florida, Idaho, Indiana, Minnesota, Nevada, New Mexico, North Carolina, Oregon, South Dakota, Wisconsin, and Wyoming. See state education clauses cited *supra* note 1.

¹⁷³ The nineteenth-century practice of running "a free 'public' school on funds from the state . . . until the cash ran out, then charg[ing] the parents tuition if they wanted their children to continue" seems straightforwardly unconstitutional. See TYACK ET AL., *supra* note 154, at 73.

¹⁷⁴ But see Holly J. Foster, *School Fees in Public Education*, 1993 BYU EDUC. & L.J. 149, 158 (noting commentators who argue that "the assertion that 'free' is textually ambiguous is against the weight of judicial authority") (internal citations and quotation marks omitted).

¹⁷⁵ Courts are divided on this question. See, e.g., *Hartzell v. Connell*, 679 P.2d 35, 38–39 (Cal. 1984) (collecting and discussing cases); *Randolph County Bd. of Educ. v. Adams*, 467 S.E.2d 150, 155 (W. Va. 1995); Foster, *supra* note 174, at 157, 159–61 (collecting and discussing cases).

¹⁷⁶ See Foster, *supra* note 174, at 157 n.62.

¹⁷⁷ See *Sneed v. Greensboro City Bd. of Educ.*, 264 S.E.2d 106, 110 (N.C. 1980).

¹⁷⁸ See *Hartzell*, 679 P.2d at 38 (forbidding charges for curricular or extracurricular activity); *supra* note 175.

¹⁷⁹ See *Granger v. Cascade County Sch. Dist.* 499 P.2d 780, 785–86 (Mont. 1972) (cited and discussed in *Hartzell*, 679 P.2d at 39 n.6).

¹⁸⁰ See Levin, *supra* note 76, at 6.

Similar questions can be raised about the requirement in a dozen states that schools be "uniform,"¹⁸¹ a requirement with both substantive and structural implications. Generally, "uniform" has similar implications, and raises similar complexities, as "equal."¹⁸² A uniform system must, in some sense, treat students alike. But this cannot mean that it must expose each child to identical curricula, experiences, and opportunities.¹⁸³ Indeed, the progressive-era pedagogy that followed the heyday of common schooling would make most educators consider doing so to be egregious educational malpractice. Extracurricular activities, elective courses, tracking students by ability and preferences, and accommodating student disabilities and giftedness all involve differentiating the school program.¹⁸⁴ Different schools offer different packages of services to meet the needs of the local labor market,¹⁸⁵ to appeal to students' diverse interests,¹⁸⁶ and to ameliorate racial,¹⁸⁷ gender,¹⁸⁸ and class discrimination.¹⁸⁹ Externally, states and systems' ability to offer a uniform program is affected by variations across communities and labor markets in population density, distribution of pupils across the age spectrum, geographic economic stratification, and teacher supply. Finally, in any school with more than one teacher, irreducible variation in teacher quality and student needs means that two students in the same program will often have very different experiences.¹⁹⁰ All of these are sources of nonuniformity; depending on one's perspective, some subset of them is benign while others are malignant.¹⁹¹

¹⁸¹ See *supra* note 172.

¹⁸² See McUsic, *supra* note 1, at 322–23; Ratner, *supra* note 104, at 814–16.

¹⁸³ See *Britt v. N.C. State Bd. of Educ.*, 357 S.E.2d 432, 436 (N.C. Ct. App. 1987) (interpreting North Carolina's "uniformity" requirement not to require "identical opportunities" for all students) (cited in McUsic, *supra* note 1, at 321).

¹⁸⁴ See THOMAS HALPER, *POSITIVE RIGHTS IN A REPUBLIC OF TALK* 165 (2003) (noting that "a heterogeneous population plus substantial local control guarantees a proliferation of disparities"); McConnell, *supra* note 149, at 131–32.

¹⁸⁵ See, e.g., Sean Cavanagh, *Vocational Education's New Job: Defend Thyself*, *EDUC. WK.*, Feb. 23, 2005, at 28.

¹⁸⁶ See Archbald, *supra* note 75, at 283 (describing magnet programs).

¹⁸⁷ See *id.*

¹⁸⁸ See ROSEMARY SALAMONE, *SAME, DIFFERENT, EQUAL* 8 (2003).

¹⁸⁹ See KAHLENBERG, *supra* note 84, at 24.

¹⁹⁰ See Robert Gordon, Thomas J. Kane & Douglas O. Staiger, *Identifying Effective Teachers Using Performance on the Job 7* (Brookings Inst., Hamilton Project Discussion Paper 2006-1, 2006), available at http://www3.brookings.edu/views/papers/200604hamilton_1.pdf (noting that "effectiveness varies substantially among certified teachers and also among uncertified teachers").

¹⁹¹ See HALPER, *supra* note 184, at 165 (noting that "it seems odd . . . that only a system pursuing uniformity would not be violative of student rights").

In short, historical and textual analyses of the education clauses leave most important questions regarding the constitutionality of choice unanswered. They do not offer convincing ways to draw lines through the multidimensional spectrum of publicness and privateness. At one end is the traditional district school whose Parent-Teacher Association does no fundraising, which is certainly a "public" school. At the other is a religious school that refuses all government money and subsists entirely upon tuition and private fundraising, which is certainly a private one. But between these extremes lie numerous other kinds of schools, including many traditional public and private schools as well as magnets, charters, and voucher-accepting private institutions.

C. What Is "Public" About Public Schools?

A state school system should be deemed to meet the requirement to support "public" or "common" schools if it fulfills the overarching goals of those requirements.¹⁹² Such a purpose-oriented approach is consistent with state education-clause jurisprudence. State courts have routinely understood "thorough," "efficient," and other substantive requirements of the education clauses in terms of their purpose—to require educational equality or adequacy¹⁹³—notwithstanding that this is not a straightforward reading of the terms' dictionary definitions.¹⁹⁴ State courts reason that terms like "thorough" and "efficient" imply, even if they do not denote, some floor of quality (or equality).¹⁹⁵ Moreover, purposive meaning can trump literal meaning: programs plausibly connected to enhancing school quality that have features not technically "efficient"¹⁹⁶ or

¹⁹² Cf. *Holmes*, 919 So. 2d at 415–16 (Bell, J., dissenting) (explaining that requirement to establish a "uniform . . . system of free public schools" is secondary to the "core value" expressed by the requirement that the state make "adequate provision for the education of all children residing in its borders").

¹⁹³ See, e.g., *Rose*, 790 S.W.2d at 212–13 (explaining that "efficient" means "equal educational opportunities" and "adequate" education); *McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516, 517 (Mass. 1993) (describing constitutional "duty . . . to cherish the interests of literature and the sciences"); see also MASS. CONST. pt. 2, ch. 5, § 2 (defining an obligation to assure equality of educational opportunity); *Abbott II*, 575 A.2d at 398 ("thorough and efficient" means adequacy as well as curricular breadth); Matt Brooker, Comment, *Riding the Third Wave of School Finance Litigation*, 75 U. MO. KAN. CITY L. REV. 183, 208 (2006) (listing similar cases).

¹⁹⁴ See Heise, *Equal Educational Opportunity*, *supra* note 4, at 572–77 (describing equity and adequacy theories).

¹⁹⁵ See *id.*

¹⁹⁶ A gold-plated budget that produces high quality at enormous expense is manifestly inefficient, but, distributional consequences aside, constitutional. This is a popular policy. See Reynolds, *supra* note 66, at 769 (stating that "wealthy school districts have long been partaking of a luxury spending spree").

"thorough"¹⁹⁷ might be ill-advised, but are generally not, and should not be, regarded as unconstitutional. Similarly, a range of charges, admissions restrictions, and policy variations can be accepted as constitutional even if there are ways in which they make schools less than literally "free," "public," or "uniform."

What is the purpose or policy behind the "public" requirement for schools? Many scholars suggest that "public" or "common" schools should advance the public or common good, i.e., that they must seek public betterment rather than purely profit-maximizing or sectarian agendas.¹⁹⁸ But what counts as *public* betterment?¹⁹⁹ Why should any given answer to that question, rather than a competing one, be identified with the *constitutional* term "public"? Is there any way to define *public* purposes without circularity or reliance on bare assertion? Moreover, as Stephen Macedo notes, "Even where the answers seem clear, public aims will be open to interpretation and implementation by organizations that do not at base represent public purposes."²⁰⁰ Furthermore, schools fulfill multiple missions: a school can simultaneously teach pluralism and advance religion, or promote literacy and seek profits. How much public purpose renders the school *public*?

¹⁹⁷ A decision to focus early elementary education nearly entirely upon the core skills of reading, writing, and mathematics, to the derogation of science, history, and the arts is a policy of dubious wisdom; but given that core competencies are gateways to all other learning, such a decision is reasonable and therefore constitutional, even though arguably not "thorough." See Kathleen Manzo, *Schools Urged to Push Beyond Math, Reading to Broader Curriculum*, EDUC. WK., Dec. 20, 2006, at 11. *Contra* Abbott II, 575 A.2d at 398 ("However desperately a child may need remediation in basic skills, he or she also needs at least a modicum of variety and a chance to excel.").

¹⁹⁸ See Richard W. Garnett, *The Right Questions About School Choice: Education, Religious Freedom, and the Common Good*, 23 CARDOZO L. REV. 1281, 1311-13 (2002) (arguing that school choice promotes the "common good" by facilitating the fulfillment of individuals, families, and groups); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1236 (2003) (noting that "public values, which themselves require public deliberation, should guide assessments of the specific benefits and limitations of competition and the quality of services delivered by for-profit or religious providers in partnership with government to meet basic human needs"); *id.* at 1266 (noting that "a public framework of accountability . . . should preserve and revitalize the conception of 'public' that puts people at the center, for it is the people whom the government is supposed to serve"); Vergari, *supra* note 78, at 1.

¹⁹⁹ See Garnett, *supra* note 198, at 1311 (citing the common good as "easy . . . too easy, perhaps. What is the 'common good'? Is it just a cliché? How is its pursuit distinguishable from the homogenizing aims of the common-school movement and the secularizing ambitions of its contemporary theoretical descendants?").

²⁰⁰ STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 273 (2000); see also Stephen Macedo, *Constituting Civil Society*, 75 CHL.-KENT L. REV. 417, 430-32 (2000).

The school choice debate has generally elicited two categories of answers to these questions. Some are *institutionalist*, focusing on how schools are organized, while others are *instrumentalist*, examining how well schools produce desired outcomes.²⁰¹ The latter approach has been strongly associated with school choice advocacy since Milton Friedman jumpstarted the choice movement with his argument that vouchers permit the efficiencies associated with competitive markets to benefit education.²⁰² For Friedman and those who followed him, the school voucher is a straightforward application of first-year college economics to ameliorating poor school quality.²⁰³ Monopolies help monopolists but hurt consumers; competitive markets, on the other hand, harness consumer sovereignty to improve products for everyone—and particularly the poor, who in most voucher programs enjoy priority in receiving rationed voucher payments.²⁰⁴ The result of vouchers would be a better and more cheaply schooled populace.²⁰⁵

Post-Friedman, the theoretical account has been strengthened, adapted, developed, and challenged in various ways. Scholars have shown that the strong assumptions of the competitive market need not hold perfectly to realize potential gains that Friedman and those who came after him associated with competition, and that choice programs can be designed to better approximate those assumptions.²⁰⁶ John Chubb and Terry Moe decisively altered the frame of the debate by making a political-economy argument that identifies an irreducible mismatch between the incentives of publicly controlled bureaucracies and educationally sound institutions.²⁰⁷ The universe of potential bene-

²⁰¹ Lubienski, *Instrumentalist Perspectives*, *supra* note 167, at 488–89.

²⁰² FRIEDMAN, *supra* note 30, at 85–98.

²⁰³ See, e.g., McConnell, *supra* note 149, at 121.

²⁰⁴ See DWYER, *supra* note 45, at 4–5. *But see* UTAH CODE ANN. §§ 53A-1a-801 to -811 (2007) (making vouchers available to all Utah public-school students, although voucher amounts are higher for the poor); Michele McNeil, *Utah's Broad Voucher Plan Would Break New Ground*, EDUC. WK., Feb. 14, 2007, at 1, 22 (stating that lack of means-testing makes Utah program unique).

²⁰⁵ FRIEDMAN, *supra* note 30, at 93–94.

²⁰⁶ See, e.g., Julian R. Betts, *The Economic Theory of School Choice*, in GETTING CHOICE RIGHT: ENSURING EQUITY AND EFFICIENCY IN EDUCATION POLICY 14, 22–36 (Julian R. Betts & Tom Loveless eds., 2005); Jack Buckley & Mark Schneider, *Shopping for Schools: How Do Marginal Consumers Gather Information About Schools?*, 31 POL'Y STUD. J. 121, 125–26 (2003) (arguing that only a small number of “marginal consumer” parents must undertake rational information-gathering and search for choice mechanisms to operate fairly well). *But see* SCOTT FRANKLIN ABERNATHY, SCHOOL CHOICE AND THE FUTURE OF AMERICAN DEMOCRACY 5–6 (2005) (arguing that the exercise of choice by informed, marginal parents harms students of inframarginal parents).

²⁰⁷ CHUBB & MOE, *supra* note 84, at 188.

fits has been expanded beyond quality: a recent collection neatly identifies the basket of benefits theoretically associated with choice when its subtitle asks, "Can the Marketplace Deliver Choice, Efficiency, Equity, and Social Cohesion?"²⁰⁸ Finally, numerous scholars have developed strong instrumentalist objections to choice programs.²⁰⁹

The education clauses, however, do not permit a completely instrumentalist justification for choice. As I argue above, requirements that schools be "public" or "common" are supplementary to substantive requirements like adequacy.²¹⁰ Choice therefore requires institutionalist justifications, in addition to instrumentalist ones.²¹¹

Just as instrumentalism is associated with prochoice views, although there are antichoice instrumentalists, the most prominent institutionalist position, what James Dwyer describes as the "liberal statist view,"²¹² is skeptical of choice. Although there is variance among statist positions with respect to how much parental choice is tolerable or desirable, they share the view that the "public good" that "public schools" promote flows from the collective, democratic provision of education by local polities. Decision making by the polity is thought of as distinct from, and superior to, decision making by individual families in a market. Statists emphasize that "public" should be understood as the opposite of "private," or of what you get when you "privatize" schools²¹³—even as they readily acknowledge that "privatize" is itself a

²⁰⁸ Levin, *supra* note 76; accord Clive Belfield & Henry Levin, *Vouchers and Public Policy*, 111 AM. J. EDUC. 548, 551–52 (2005). Particular note must be taken of the inclusion of "choice" as a potential benefit of choice programs, that is, as a good in itself, rather than as purely a means to other ends. This view arises fairly late in contemporary choice advocacy, but to economists at least makes perfect sense: consumers with multiple options are never worse off, and often better off, than those with only one of those options, all else equal.

²⁰⁹ See, e.g., Heise, *supra* note 103, at 436–39 (summarizing the debate). Those who elevate equity above other goals as the single critical feature of democratic education have been particularly chary about choice programs, fearing their impact on those "left behind" in public schools. See, e.g., Stephen Macedo, *Equity and School Choice*, in SCHOOL CHOICE: THE MORAL DEBATE, *supra* note 84, at 59. An increasingly prominent group of scholars, however, has argued recently that choice might promote equity relative to a system of educational localism. See scholars cited *supra* note 84.

²¹⁰ See *supra* notes 104–105 and accompanying text.

²¹¹ See Lubieniski, *Instrumentalist Perspectives*, *supra* note 167, at 488–89.

²¹² James G. Dwyer, *Changing the Conversation about Children's Education*, in NOMOS XLIII: MORAL & POLITICAL EDUCATION, *supra* note 149, at 314, 316.

²¹³ See ABERNATHY, *supra* note 206, at 6, 18 (objecting to choice programs that include "private sector" schools as enabling a "privatization of voice" that "chang[es] the dynamics of institutional control . . . and restrict[s] citizens' own understandings of political obligations"); Metzger, *supra* note 76, at 1392 ("Interestingly, however, parental choice also represents yet a further way in which these measures privatize public education; decisions about educational content and quality become a personal rather than collective responsi-

multivalent term.²¹⁴ Similarly, recognizing that education is both a local "public good" and a private good, the statist insist that its public-good aspect deserves priority.²¹⁵ Thus Christopher Lubienski's institutionalist account emphasizes that public goods are associated with public management for good reasons: "Marketized environments," he argues, "create disincentives for providers to shoulder costs associated with pursuing public goals such as desegregation, mainstreaming, cultural diversity, or other goals that society may expect from its schools."²¹⁶

Another view, however, understands "public" in a pluralist rather than statist fashion, while remaining thoroughly institutionalist in outlook. Judge Michael McConnell, in his classic statement of this position, notes that if "common values" were truly common they will be taught by all schools, public and private; it is only because there is no consensus about what values are "common" that statist are concerned that common schools should reflect common values.²¹⁷ McConnell concludes that a society both liberal and pluralist advances those goals better by facilitating, rather than impeding, school choice in a pluralist marketplace.²¹⁸ Such arguments, unlike the statist's, rely little upon the words "public" and "common";²¹⁹ McConnell, for example, instead stresses the concepts of liberalism, pluralism, and democracy.²²⁰ This does not mean, however, that McConnell and others of similar views are

bility, thereby creating schools that, in essence, are private communities of like-minded families."); Minow, *supra* note 198, at 1230 ("The new versions of privatization potentially jeopardize public purposes by pressing for market-style competition, by sidestepping norms that apply to public programs, and by eradicating the public identity of social efforts to meet human needs.").

²¹⁴ See Claude Chitty, *Privatisation and Marketisation*, 23 OXFORD REV. EDUC. 45, 45 (1997); Lubienski, *supra* note 34, at 3-4, 14-15 (identifying private funding and private governance as the two primary axes of privatization reforms and noting interestingly that most school choice reforms privatize primarily along the latter axis while increasing public funding of privately governed schools).

²¹⁵ See Lubienski, *Instrumentalist Perspectives*, *supra* note 167, at 499. But see Herbert Gintis, *The Political Economy of School Choice*, 96 TEHR. C. REC. 492, 494 (1995) (stating that public/private goods distinction is "specious" in educational context).

²¹⁶ See Lubienski, *Instrumentalist Perspectives*, *supra* note 167, at 497.

²¹⁷ McConnell, *supra* note 149, at 106. Others take the libertarian view that choice is an institutionalist good in itself. See David Hargreaves, *Diversity and Choice in School Education*, 22 OXFORD REV. EDUC. 131, 133 (1996).

²¹⁸ See McConnell, *supra* note 149, at 120-21.

²¹⁹ See Lubienski, *supra* note 74, at 467 (stating that "'market-based reform' . . . in essence requires a reconfiguration of the idea of 'the public'"); cf. Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1285 (2003) (stating that "privatization can be a means of 'publicization,' through which private actors increasingly commit themselves to traditionally public goals").

²²⁰ See McConnell, *supra* note 149, at 120-21.

any less concerned than the statist with what public schools are and how they help to realize the public, or common, good.

Statist and pluralist accounts offer deeply conflicting views of what constitutes the critical institutional core of "publicness." Each will be compelling to some and unpersuasive to others. There seems little justification, however, to insist that either is the only proper interpretation of historically and textually ambiguous requirements to support "public schools." Both approaches are legitimate, and state education clauses are therefore best read to permit state legislatures to adopt either.

State elected officials who take a statist approach can constitutionally maintain the classical system of bureaucratic, localist "public" schools where parents choose only where to live and whether to exit the system in favor of private school.²²¹ There are very important senses in which such a system is *not* "public," "common," or "free": most notably, all students are not eligible to attend the same schools, and eligibility is contingent on payments their families have made for particular residential locations.²²² Nevertheless, the system reflects a reasonable, statist understanding of what "public" schools ought to be—provided by the local polity, common to all of its members, and funded without parent-to-school payments.

In the balance of this Article, I argue that state elected officials can also meet the requirement to support "public" or "common" schooling by taking a pluralist approach and supporting vouchers and charters along with more traditional sorts of schools. This does not mean, however, that every voucher or charter system meets the requirement of publicness. A pluralist conception of the public good and of the public school implies limitations on the range of choice programs that are permissible. Part III describes these limitations.²²³

III. RECONCILING CHOICE AND THE CLAUSES

This Part argues that school choice should be viewed as consistent with education clauses if they meet two criteria.²²⁴ First, choice programs must be reasonably expected to result in education of adequate quality. Second, the choice programs must provide, so long as

²²¹ See *supra* notes 29–72 and accompanying text.

²²² See GLENN, *supra* note 143, at 261 (stating that the myth of common school "has persisted with undiminished force into the twentieth [century], despite all evidence that public schools are in no sense 'common'"); Dimond, *supra* note 72, at 324.

²²³ See *infra* notes 224–350 and accompanying text.

²²⁴ See *infra* notes 224–350 and accompanying text.

not inconsistent with the first criterion, parents with a *genuine and independent choice* among educational providers.

The first half of the proposed test—a reasonable connection to improving educational quality—is intended to be one that can easily be met by most choice and privatization proposals. Well-developed theoretical arguments support the view that choice and privatization have the potential to improve educational quality, although empirical demonstrations of such benefits are contested and far from robust. The rule is designed so that serious theoretical potential, absent both empirical disproof and a satisfactory status quo, suffices.

In contrast, the second part of the test—that choice, if provided, be genuine and independent—does limit the design of choice. It borrows from the U.S. Supreme Court's 2002 holding in *Zelman v. Simmons-Harris* that, under the Federal Establishment Clause, private individuals may direct state-provided voucher funds to religious and secular schools, so long as their choice to do so is "genuine and independent."²²⁵ The test proposed here similarly requires that choice programs multiply, rather than frustrate, the ability of parents to exercise choice in the educational marketplace.

The following Sections elaborate and justify both parts of this proposal. The first Section discusses the *Zelman* case and explains why its "genuine and independent choice" test, developed in the context of the Federal Establishment Clause, has useful application in the very different area of state educational rights.²²⁶ The first Section also discusses how criteria of genuineness and independence should be applied.²²⁷ A second Section then discusses the less constraining, but critical, requirement that choice be reasonably thought to advance educational quality.²²⁸

A. *Genuine and Independent Choice*

1. Choice and Markets in *Zelman*

Zelman holds that a voucher program is constitutional under the Federal Establishment Clause so long as parents exercise "true private

²²⁵ 536 U.S. 639, 649 (2002); accord *id.* at 662 (basing a judgment of constitutionality upon the conclusion that the Cleveland program offers parents "genuine choice" and "true private choice").

²²⁶ See *infra* notes 229–316 and accompanying text.

²²⁷ See *infra* notes 276–301 and accompanying text.

²²⁸ See *infra* notes 317–350 and accompanying text.

choice,"²²⁹ which it defines as a system in which "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals."²³⁰ *Zelman* notably does not extend blanket sanction to all programs of "choice"; choice must be "genuine and independent."²³¹ So, for example, the Court would presumably have rejected a voucher program that allowed parents to choose between free attendance at a public school "among the worst performing . . . in the Nation"²³² and free attendance, by means of a state-funded voucher, in a single, academically top-notch but pervasively sectarian private academy. This is no "genuine and independent" choice between religious and irreligious education: there are only two options, and only one—the religious one—offers academic quality. In drawing a line at "true," "genuine," and "independent" choice, on the other hand, the Court also avoids requiring states to provide every imaginable choice to every imaginable consumer in order to pass constitutional muster. A menu of sufficient choices, generated by the market created by parental choice, suffices.²³³

Why incorporate *Zelman*'s holding into the analysis of the education clauses? Although it is obviously desirable from the point of view of those who might establish school choice programs that two separate constitutional mandates could be satisfied by the application of a single rule, this is scarcely a sufficient reason to import the rule of *Zelman* into the education-rights area. The Establishment Clause and education clauses guarantee different rights, different kinds of rights, and appear in different varieties of constitutions.

In the school choice debate, both in the courts and the broader policy community, this chasm looms large. All but one of the Supreme Court's six *Zelman* opinions endorse, explicitly or implicitly, Justice Stevens's admonition that educational inadequacy in Cleveland "is not a matter that should affect our appraisal of [vouchers'] constitutionality."²³⁴ Policy and legal commentators across the ideological spectrum

²²⁹ 536 U.S. at 653, 662.

²³⁰ *Id.* at 649; *cf. id.* at 662 (Ohio program permits parents to exercise "genuine choice").

²³¹ See Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397, 1398 (2003) (arguing that "*Zelman* . . . does not bless all forms of public-private partnerships").

²³² *Zelman*, 536 U.S. at 644.

²³³ Regarding what is sufficient, see *supra* notes 276–301.

²³⁴ *Zelman*, 536 U.S. at 684 (Stevens, J., dissenting). The majority approves the program after finding it to be consistent with the Court's earlier cases on church/state separation. *Id.* at 653 (majority opinion). For the *Zelman* dissenters, vouchers intolerably breach the

often follow Stevens' lead: they treat choice primarily as a church-state question,²³⁵ even though they do not share the Justices' duty to confine themselves to federal questions properly before them. Others, who approach choice as a regulatory route to good schools (however defined), find this infuriating. They regard those consumed with Establishment questions as at best quixotically elevating hypothetical religious conflicts over the grim actuality of educational failure,²³⁶ and at worst as obfuscating their true political goal of (depending on which side they are on) protecting the insidious public school monopoly or preventing it from being sucked dry by self-serving privateers.²³⁷ In this camp is Justice Thomas, whose outlier opinion in *Zelman* indignantly condemns

church/state barrier and, for three of the four dissenting Justices, are a potential harbinger of Sarajevo-style "religious strife." *Id.* at 686 (Stevens, J., dissenting); *accord id.* at 717 (Breyer, J., dissenting). Justice Souter, but not Justice Ginsburg, concurred in the latter dissents.

²³⁵ See, e.g., NOAH FELDMAN, *DIVIDED BY GOD* 231–32, 244–48 (2005); Ira Lupu & Robert Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, 18 J.L. & POL. 539, 543–48 (2002) (cataloguing various possible approaches to vouchers under the Establishment Clause); Minow, *supra* note 198, at 1232–33 (framing the choice debate as a church/state question, although mentioning other issues). Other commentators analyze religion and educational quality in tandem. See, e.g., PETER SCHUCK, *DIVERSITY IN AMERICA* 297–307 (2003). See generally DWYER, *supra* note 45; McConnell, *supra* note 149.

²³⁶ See HOXB, *supra* note 73, at xi ("For a long time, I have thought that the church-state issue in school choice debates was a red herring.").

²³⁷ See DWYER, *supra* note 45, at 5 (noting that "there is every reason to suspect that the principal advocates for vouchers have an ulterior motive"); Charles Fried, *Five to Four*, 116 HARV. L. REV. 163, 172–73 (2002); Frank Macchiarola, *Why the Decision in Zelman Makes So Much Sense*, 59 N.Y.U. ANN. SURV. AM. L. 459, 462 (2003).

I take no side in this debate here. The choice-as-reform camp is right that the possibility of a hypothetical Christian school using public funds to teach young children particularistic doctrine appears to upset people like Justices Souter and Breyer more than the actual fact of Cleveland's public schools using public funds in ways that leave their students unable to read. See *Zelman*, 536 U.S. at 713 & n.24 (Souter, J., dissenting); *id.* at 724 (Breyer, J., dissenting). At the same time, voucher proponents generally have not chosen to limit vouchers to secular private schools, nor has voucher advocacy receded in the face of other approaches to school choice, such as charters, that restrict choice to secular institutions. See KEVIN B. SMITH, *THE IDEOLOGY OF EDUCATION* 98–99 (2003) (stating that private religious and public schools mostly share academic goals, but differ primarily in religious pedagogy). But see CLINT BOLICK, *VOUCHER WARS* 46–47 (2003) (claiming that inclusion of religious schools in voucher programs in Cleveland and Milwaukee "was not a matter of desiring a religious influence, but rather of providing as many alternatives as possible" so that choice would be "meaningful"). All the debates' interlocutors are aware, moreover, that schools are not only full of impressionable children, but take as their explicit mission to shape the minds of those children—and thus the civic culture of the next generation. See HARRY BRIGHOUSE, *SCHOOL CHOICE AND SOCIAL JUSTICE* 61 (2000); Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CAL. L. REV. 967, 993–96 (2003); Lupu & Tuttle, *supra* note 235, at 596.

the focus of both his concurring and dissenting colleagues.²³⁸ The students of Cleveland are suffering at the hands of its public-school monopolists, Thomas writes; how can one parse church-state questions when vouchers offer inner-city, mostly black Cleveland students a way, perhaps the only way, out of the quicksand of education dysfunction?²³⁹ He is amazed, in the face of this need, that "[o]pponents of the program" — "the cognoscenti who oppose vouchers" — are still prepared to "raise formalistic concerns about the Establishment Clause."²⁴⁰

Nevertheless, I argue, *Zelman* offers an approach to the market for schooling that usefully informs education-rights as well as Establishment analysis. This is because the Court in *Zelman* understood the Cleveland voucher program as an effort by the State of Ohio to catalyze a pluralist market for schooling, rather than as an effort to subsidize individuals' static preferences for religious education.²⁴¹

The extent of this departure has not been widely recognized. *Zelman* is generally categorized as an "aid" or "funding" case, along with such other Supreme Court cases as *Mitchell v. Helms*,²⁴² *Agostini v. Felton*,²⁴³ *Zobrest v. Catalina Foothills School District*,²⁴⁴ *Witters v. Wisconsin Department of Services for the Blind*,²⁴⁵ and *Mueller v. Allen*,²⁴⁶ because it involves government spending in aid of religious schools.²⁴⁷ *Zelman* presents its own holding as a straight line extrapolation of *Mueller*, *Witters*, and *Zobrest*.²⁴⁸ Indeed, the phrase "genuine and independent choice" is not a new coinage but taken directly from *Mitchell*²⁴⁹ and *Agostini*.²⁵⁰

²³⁸ 536 U.S. at 683 (Thomas, J., concurring).

²³⁹ *Id.*

²⁴⁰ *Id.* at 682.

²⁴¹ See generally *id.* (majority opinion).

²⁴² 530 U.S. 793 (2000).

²⁴³ 521 U.S. 203 (1997).

²⁴⁴ 509 U.S. 1 (1993).

²⁴⁵ 474 U.S. 481 (1986).

²⁴⁶ 463 U.S. 388 (1983).

²⁴⁷ See, e.g., John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 367 (2001); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1855 (2004); Gary J. Simon, *School Vouchers and the Constitution*, 11 CORNELL J.L. & PUB. POL'Y 553, 574-75 (2002); Mark Tushnet, *Vouchers After Zelman*, 2002 SUP. CT. REV. 1, 5-8.

²⁴⁸ *Zelman*, 536 U.S. at 649-52.

²⁴⁹ 530 U.S. at 810.

²⁵⁰ See 521 U.S. at 226; see also *Zobrest*, 509 U.S. at 10 (holding statute constitutional because funds arrive at religious schools only due to "private decision[s] of individual parents").

In the earlier K-12 aid cases, however, government subsidies were conceptualized as efforts to cushion the pain associated with a decision to pay tuition to private schools when public schooling could be had for free.²⁵¹ Theoretically, there can be no doubt that a tax credit like that upheld in *Mueller*,²⁵² or tuition savings like that generated by the in-kind aid upheld in *Mitchell* and *Agostini*,²⁵³ will, by changing the effective price of religious relative to public schools, result in some marginal parent-consumer changing her preference between the two. Nevertheless, until *Zelman*, the marginal case is absent from the Court's opinions. Indeed, the Court repeatedly dismisses the possibility that preferences might respond to changes in effective prices.²⁵⁴ Rather, the cases focus on the inframarginal consumers, those already

²⁵¹ The exception is *Witters*. See 474 U.S. at 483. Unlike *Mitchell* and *Agostini*, but like *Zelman*, the program challenged in *Witters*—vocational assistance for college students—seems clearly intended to catalyze college attendance for students, not just to assist those who had chosen college already. Still, *Witters*, like *Mitchell* and *Agostini*, treats the availability of vocational aid as if it does not affect the prospective choices of potential recipients. Thus, in applying the *Lemon* test, *Witters* asks whether the aid is a permissible "transfer" or "subsidy," but not whether it is a permissible incentive. See *id.* at 485, 487. Moreover, *Witters* emphasizes that there is "nothing in the record" to suggest that "any significant portion of the aid . . . will end up flowing to religious education"—precisely the opposite of the situation in *Zelman*. *Id.* at 752. This was true in part because *Witters* is a higher education case, so aid recipients were choosing not only a particular school but whether to purchase schooling at all.

²⁵² See 463 U.S. at 399 ("It is true, of course, that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children."); see also *Schuck*, *supra* note 235, at 299 (noting that tax credits are a form of voucher). In recent years there has been new interest in the tax credit approach. See *supra* note 8.

²⁵³ See *Mitchell*, 530 U.S. at 814; *Agostini*, 521 U.S. at 228. So long as the elasticity of demand for private education is nonzero, schools will pass part of value the of the in-kind subsidy they receive to parents in the form of lower tuition.

²⁵⁴ See, e.g., *Mitchell*, 530 U.S. at 814 (plurality opinion) ("[S]imply because an aid program offers . . . religious schools a benefit that they did not previously receive does not mean that the program, by reducing the cost of securing a religious education, creates . . . an 'incentive' for parents to choose such an education for their children."). By saying it, of course, Justice Thomas does not make it so, as *Mitchell* promptly acknowledges in arguing this sort of "benefit" is not of the kind that should disqualify a neutrally administered program. See *id.* ("For any aid will have some such effect."). Similarly, *Agostini* argues that because the Title I services provided to parochial schools under the challenged legislation "are by law supplemental to the regular curricula," they "do not, therefore, relieve sectarian schools of costs they otherwise would have borne in educating their students." 521 U.S. at 228. Even demurring to the Court's unlikely confidence that parochial schools, absent Title I support, would make no attempt to provide any similar services using their own resources, compare *id.* at 229 (predicting such attempts "rest[s] on speculation") with *id.* at 244 (Souter, J., dissenting) (predicting such attempts), on-site remedial education still provides parochial school parents with a more attractive package of educational services, at the same price, than they would have absent the program.

choosing religious school. Pre-*Zelman* choice matters only because private citizens make choices freely, uncoerced by government; the question is whether government, accepting the legitimacy of their choices, may help alleviate the costs private citizens have chosen to bear.²⁵⁵ Therefore, the Rehnquist Court's aid cases are full of talk about choice, but until *Zelman* no talk about markets.

The *raison d'être* of a voucher program, by contrast, is to catalyze choices *different* than those parents were previously making. Indeed, the possibility that vouchers might simply subsidize parents already using private schools, leading to no change in enrollment patterns, is often viewed as a flaw of such programs.²⁵⁶ The innovation of *Zelman*, therefore, was to recast the Court's "genuine and independent choice" rule, developed to permit government subsidies because they would *not* influence private choices, to apply to programs in which the state sought, specifically and explicitly, to influence those choices.²⁵⁷ But that influence was to be of a particular kind: the state would extend the range of choice by creating markets, including markets that embraced religious sellers, to replace government monopoly.²⁵⁸

Although this move is not implied by *Mueller*, *Agostini*, or *Zobrest*, it is a justifiable innovation.²⁵⁹ It rests on an understanding of markets as a device for aggregating and fulfilling private preferences that differs fundamentally from democratic decision making. In the latter, the aggregation of private preferences is the "public" will, and the

²⁵⁵ See *Agostini*, 521 U.S. at 232 (explaining that by providing Title I services in all schools, the program does not "give aid recipients any incentive to modify their religious beliefs or practices in order to obtain these services"); *Mueller*, 463 U.S. at 395 (stating that tuition tax credit reflects a "State's decision to defray the cost of educational expenses incurred by parents"); see also Lupu & Tuttle, *supra* note 235, at 559 (describing interlocutors in the pre-*Zelman* voucher debate as all "describ[ing] the set of relationships involved in voucher programs as a straight line running from government to recipients and then to service providers").

²⁵⁶ See BOLICK, *supra* note 237, at 74-75 (reporting conflict in the design of the Cleveland voucher program over whether students already in private school should be voucher eligible, and the decision that at least half of voucher recipients must be public school students); McNeil, *supra* note 204, at 1, 24 (noting Utah voucher program excludes current private school enrollees).

²⁵⁷ See generally 536 U.S. 639.

²⁵⁸ Accord Paul E. Salamanca, *Choice Programs and Market-Based Separationism*, 50 BUFF. L. REV. 931, 934 (2002) (arguing that *Zelman* embraces "market-based separationism," under which "the government can subsidize some or all consumers in a market, without violating the Establishment Clause, if the supply in the market is sufficiently large and variegated to make choice the operative principle in uniting consumers with producers, if the subsidy is formally neutral with regard to religious and nonreligious options, and if the product at issue can be defined in strictly secular terms").

²⁵⁹ See generally *Agostini*, 521 U.S. 203; *Zobrest*, 509 U.S. 1; *Mueller*, 463 U.S. 388.

clearest command of the Establishment Clause is that government may not, in obedience to such public will, advance religion. The point of *Zelman* is that a government that creates a market that includes religious institutions is doing something else: it is facilitating private choices, in the aggregate, *without* imposing its own will or establishing its own preferences. *Zelman* legitimates this kind of pluralist, public support for religious preference—one that not only supports all choices once made, but also actively seeks to make such choices more available to more people—because with markets, government can avoid putting its thumb on the scale regarding the content of individual choices.

That the *Zelman* Court, and particularly Justice O'Connor's swing vote,²⁶⁰ relies upon a view of educational markets as an unbiased device for fulfilling preferences is best seen in an interchange between Justice O'Connor and Justice Souter over the majority's application of its "genuine and independent choice" criterion. Souter insists that choice is truly "genuine" only if alternative schools are all of adequate quality.²⁶¹ To Souter, therefore, the choice presented by Cleveland's charter schools was illusory, because only a single charter posted test scores even "arguabl[y]" close to those of traditional public schools and the rest scored worse.²⁶² "I think," Souter writes, "that objective academic excellence should be the benchmark in comparing schools."²⁶³ O'Connor, by contrast, conceptualizes parents as *homo economicus*: the bare fact that parents are choosing those charter schools indicates that the charter schools are better *for them*.²⁶⁴ Souter is wrong, she argues, to "assum[e] that the only relevant measure of school quality is academic performance. It is reasonable to suppose . . . that parents in the inner city also choose schools that provide discipline and a safe environment for their children."²⁶⁵

Justice Souter must admit, I think, that it is reasonable: academic quality and religious approach are but two of the many legitimate criteria parents might use to choose among schools.²⁶⁶ Souter surely

²⁶⁰ Professors Lupu and Tuttle conclude, based on a convincing analysis of the separate opinions in *Zelman*, that Justice O'Connor, now departed from the Court, "is the only member of the Court who thinks that 'genuine and independent choice' has determinative constitutional significance." Lupu & Tuttle, *supra* note 11, at 943-44.

²⁶¹ *Zelman*, 536 U.S. at 702 n.10 (Souter, J., dissenting).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ See *id.* at 675 (O'Connor, J., concurring).

²⁶⁵ *Id.*

²⁶⁶ See *infra* notes 280-283 and accompanying text.

cannot mean that every package of relevant factors available in any religious school must be matched by an identical package in a secular school. Souter's rejoinder, therefore, is that O'Connor's position is vacuous: it treats any choice once made as "genuine and independent" merely because it has been made, because one option has been selected over another.²⁶⁷ But O'Connor clearly does not think that, or she would have felt no need to dwell on Cleveland parents' access to community schools.²⁶⁸ Instead, she thinks that the choices that do exist must be broad and numerous *enough* to satisfy the "genuine and independent" criterion.

What is enough? O'Connor's insistence that any number of legitimate preferences might lead parents to prefer one school over another offers a clue to a workable answer—one that relies upon an ordinary understanding of choice in consumer markets. On that view, consumers have "choice" even when limited by the range of goods available on the market and, especially, by their own resources. First-time homebuyers exercise "genuine and independent" choice regarding which house they will buy, even though a few iconoclastic aesthetes among them cannot find homes to their tastes in the neighborhoods where they want to live, even though some people must rent because they are too poor to buy at all, and even though most everyone who can afford a house cannot buy the kind of house that they wish they could afford. Nevertheless, at some point housing market failures could become severe enough that homebuyers would not be viewed as exercising "genuine and independent" choice.²⁶⁹

But schooling, as Part I explains, is not an ordinary consumer good, nor is it bought and sold in an ordinary consumer market. Compulsory schooling prevents substitution among goods, and prices cannot function normally.²⁷⁰ Choice programs complicate market regulation further; for example, the Ohio statute upheld in *Zelman*

²⁶⁷ *Zelman*, 536 U.S. at 703 (Souter, J., dissenting).

²⁶⁸ *Id.* at 672–75 (O'Connor, J., concurring); see also *id.* at 663 (arguing that it is necessary to "elaborate on the Court's conclusion that [its] inquiry should consider all reasonable educational alternatives that are available to parents," i.e., the choices that parents actually have, because "[t]o do otherwise is to ignore how the educational system in Cleveland actually functions").

²⁶⁹ Some poor people, absent adequate government subsidy, lack any real choice in the housing market. See Michael E. Stone, *Housing Affordability*, in *A RIGHT TO HOUSING* 38, 47–49 (Rachel G. Bratt et al. eds., 2006); cf. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232, 241 (1984) (stating that domination of Hawaii housing market by fewer than two dozen landowners is a "market failure").

²⁷⁰ See *supra* notes 33–34.

provided vouchers preferentially to poor families, required a parental copayment of ten percent, and capped total tuition, from all sources, at \$2500.²⁷¹ With both consumer sovereignty and the price mechanism so severely curtailed, what does it mean to have "genuine and independent choice" like that one would see in an ordinary market?

It means, as I think O'Connor's approach to the academic-quality question suggests, that educational choice should be designed to mimic a free market to the extent possible, given the other constitutional rules that constrain it. Therefore, as in any consumer market, the options that parents face may be limited, even severely so. The rich can enjoy more and better choices than the poor, and high achievers more and better choices than low achievers.²⁷² The state need not guarantee all consumers access to the highest quality goods at artificially low prices. But the menu of options must be substantial, not illusory.²⁷³ More importantly, unnecessary, governmentally-imposed obstacles to market entry and matching of parents with schools must be avoided, because it is only by avoiding these mechanisms that the menu of available options can be relied upon to reflect the preferences of consumers rather than governmental fiat.²⁷⁴

Zelman ratifies the virtues of market mechanisms precisely because markets satisfy individually determined, not democratically aggregated, preferences. But that government can expand choice without biasing it does not mean that government will. *Zelman* therefore imposes the principle that choice must be "genuine and independent" so that government cannot use its regulatory powers to impose its own point of view and in that way bias choices that would otherwise be freely made.²⁷⁵ If government jiggers an ostensibly pluralist market so that it

²⁷¹ 536 U.S. at 646.

²⁷² See Ruth Curran Neild, *Parent Management of School Choice in a Large Urban District*, 40 URB. EDUC. 270, 294 (2005) (stating that "schools that select based on students' previous academic performance do some choosing of their own," so that school choice does not allow "parents . . . to choose schools much the way one chooses a long-distance telephone company").

²⁷³ See Gintis, *supra* note 215, at 497.

²⁷⁴ See Joseph L. Bast & Herbert J. Walberg, *Can Parents Choose the Best Schools for Their Children?*, 34 ECON. EDUC. REV. 431, 433 (2004) ("If schooling were provided in a competitive market, we would expect to see greater diversity . . . as entrepreneurs tailor the traditional school and classroom to meet the interests and needs of parents and students."); Bryan Hassel, *The Future of Charter Schools*, in *THE FUTURE OF SCHOOL CHOICE* 187, 188–89 (Paul E. Peterson ed., 2003) (noting that both voucher and charter schools arise "in response to the availability" of choice).

²⁷⁵ See Lupu & Tuttle, *supra* note 235, at 558 ("[T]he question of forbidden effects in voucher cases [under the Establishment Clause] is about the state's role in creating pressures and incentives towards religious experience in ways that make it more likely to be

in fact favors particular schools or types of schools, private choice ceases to drive the system and the risk of establishment becomes serious.

2. Some Applications

In their separate *Zelman* opinions, Justices O'Connor and Souter disagree whether particular features of the school choice program adopted for Cleveland render choice under that program not "genuine and independent."²⁷⁶ I argue above that the test's critical requirement is that government-subsidized school choice not bias the choices parents make in the educational quasi-market. On that basis, both Justice O'Connor and Justice Souter are right about some aspects of the program.

O'Connor justifiably insists that the genuineness and independence of choice cannot be disproved either by the mix of schools that the quasi-market provides or the schools that parents choose, absent other evidence.²⁷⁷ Moreover, in determining how closely a choice pro-

undertaken than would have been the case in the absence of the voucher program."); *id.* at 576 (stating that "the government . . . must not intentionally skew the mix toward religious providers").

²⁷⁶ See 536 U.S. at 695-96 (Souter, J., dissenting). Elsewhere Justice Souter argues that the test itself is improper. *Id.* at 688-95.

²⁷⁷ Compare *id.* at 672 (O'Connor, J., concurring) (noting that "no voucher student has been known to be turned away from a nonreligious private school participating in the voucher program," which is "impressive given evidence" that parents have "reasonable nonreligious options"), with *id.* at 699, 701 (Souter, J., dissenting) (noting that "genuine" choice between religious and secular options requires there to be "enough secular private school desks in relation to the number of religious ones"). Souter refuses to acknowledge, moreover, that although parents whose own particular religious commitments lead them to desire religiously-based instruction are the core constituents of their own faiths' private schools, religious schools also attract parents open to secular as well as religious, and publicly-funded as well as tuition-based, schooling options. Religious schools compete for these parents with nonreligious schools, public and private both, on a range of attributes, including pedagogical approach, discipline, values, quality of instruction, and price. Parents purchasing such schooling for their children will sometimes regard the direct religious instruction they provide as a benefit, and sometimes as a cost for which other features of the school compensate. See Hoxby, *supra* note 73, at 9-11; Sarah Garland, *Church Schools Face Challenge from Charters*, N.Y. SUN, Feb. 27, 2007, at 1 (Catholic school principal predicting that greater charter access will decrease her enrollments, noting, "If you had an opportunity to get your child into a school modeled on Catholic education, and it's free, of course you're going to do it"). Some religious schools may view serving this population, in addition to its core constituency of the faithful, as part of their religious and educational mission. See Brief Amicus Curiae for the Catholic League for Religious and Civil Rights Supporting Petitioners, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779), at 11-12 [hereinafter Amicus Brief] (explaining that Catholic schools do not seek to indoctrinate students with Catholic doctrine but to "nurtur[e] the intellectual faculties").

gram approximates market choice, O'Connor and the Court are clearly right, and Souter clearly wrong, that the local availability of charter schools, as well as the state of traditional public schools, is relevant.²⁷⁸ Voucher use is optional, and the quasi-market in which parents decide whether to exercise that option requires them to consider whether private school with voucher, private school without voucher, charter, or traditional school best meets their needs. Because that is the choice they face, that is the choice which must be "genuine and independent."²⁷⁹

Similarly, a market-based understanding of the test rejects Souter's claim that schools with poor test scores are not realistic "choices" in favor of O'Connor's view that parents can have legitimate preferences over a wide range of school characteristics.²⁸⁰ Distance from home, for example, has proven an important determinant of parental preferences.²⁸¹ Other preferences ought not be disregarded either.²⁸² One

²⁷⁸ Compare *Zelman*, 536 U.S. at 660 n.6 (all options relevant), and *id.* at 673–74 (O'Connor, J., concurring) (same), with *id.* at 701 (Souter, J., dissenting) (arguing that if charter and traditional public schools count as "relevant choices," then the "genuine and independent choice" criterion cannot function as a "limiting principle"). Conversely, it is wrong to assert, as Professor Foley does, that one can demonstrate that choice is "genuine and independent" merely because parents exercising choice experience their decisions as freely made. See Edward Foley, *Judging Voucher Programs One at a Time*, 27 U. DAYTON L. REV. 1, 6–7 (2001). Such perceptions are consistent with a government-manipulated market.

²⁷⁹ *Accord* Lupu & Tuttle, *supra* note 235, at 594–95.

²⁸⁰ See *supra* notes 260–268 and accompanying text.

²⁸¹ Academic quality is the dominant influence upon parents choosing among schools—certainly if self-reporting is reliable, and likely even if not. See Bast & Walberg, *supra* note 274, at 435–36 (reviewing literature); Kurt L. Tedin & Gregory R. Weiher, *Racial/Ethnic Diversity and Academic Quality as Components of School Choice*, 66 J. POL. 1109, 1111, 1130 (2004) (same). But distance from home trumps quality for some families. See, e.g., Justine S. Hastings et al., *Parental Preferences and School Competition: Evidence from a Public School Choice Program 4* (Nat'l Bureau of Econ. Research Working Paper No. 11805, 2005) (finding a strong parental preference for schools close to home, controlling for the possibility of families' locating near preferred schools, while finding parental preferences for high test scores that vary with income and the child's academic ability).

²⁸² See MARK SCHNEIDER ET AL., CHOOSING SCHOOLS 86–95 & fig.4.1 (reviewing literature in support of claim that schooling is a "multidimensional good," and listing eleven factors parents "find important" in schools); Bast & Walberg, *supra* note 274, at 433 (stating that different schools are "best" for different children); Eric A. Hanushek, *Throwing Money at Schools*, 1 J. POL'Y ANALYSIS & MGMT. 19, 34 (1981) (asserting rationality of choosing schools for "pleasant surroundings, athletic facilities, [or] cultural advantages"); see also, e.g., Eddie Denessen et al., *Segregation by Choice? A Study of Group-Specific Reasons for School Choice*, 20 J. EDUC. POL'Y 347, 350, 362–64 (2005) (concluding that academic quality is a major determinant of parental school choices in the Netherlands, but that geographic proximity, "order and discipline," and class and religious backgrounds also shape preferences); William G. Howell, *Dynamic Selection Effects in Means-Tested, Urban School Voucher Programs*, 23 J. POL'Y ANALYSIS & MGMT. 225, 242 (2004) (concluding that families' reli-

need have no illusions about markets and the extent to which parents are well informed about their options²⁸³ to think that charter and private schools, which are founded entrepreneurially and survive only if they can attract children, offer parents a choice at least as "genuine and independent" as a menu of schools developed entirely by bureaucrats working in hierarchical systems.

In other particulars, however, Souter's arguments are better than O'Connor's.²⁸⁴ Take Souter's suggestion that the low voucher amount, along with the requirement that the voucher pay ninety percent of total school charges, biases the range of schools willing to make themselves available to voucher-holding parents.²⁸⁵ In the Establishment Clause context, the problem with this is that the bias favors religious schools that enjoy external sources of funding and/or can employ staff at below-market wages.²⁸⁶ In the education clause context, the problem is more systematic. If any new school wishing to accept a voucher must agree to hold its total per-student charges (voucher plus tuition) below the amount that even the most cost-conscious school requires to balance its budget, then the market-entry mechanism is undermined. Although schools will still close in response to the market—schools cannot sustain themselves without attracting enough students—few new schools will enter when entry is by definition a losing proposition.²⁸⁷ Those that do enter will not shape their program to satisfy the preferences among consumers but in line with whatever

gious beliefs affect their use of vouchers); Bretten Kleitz et al., *Choice, Charter Schools, and Household Preferences*, 81 Soc. Sci. Q. 846, 847 (2000) (reviewing prior literature raising "serious questions . . . about the validity" of the claim that "all households seek the same thing from schools—quality education"); Tedin & Weiher, *supra* note 281, at 1130–31 (2004) (analyzing relationship between preferences for school quality and diversity, and noting also preferences for "teaching moral values").

²⁸³ See GODWIN & KEMERER, *supra* note 48, at 37–40; EMILY VAN DUNK & ANNELIESE M. DICKMAN, *SCHOOL CHOICE AND THE QUESTION OF ACCOUNTABILITY* 74–95 (2003); Gintis, *supra* note 215, at 498–500; Neild, *supra* note 272.

²⁸⁴ See *Zelman*, 536 U.S. at 705 (Souter, J., dissenting).

²⁸⁵ See *id.*

²⁸⁶ See FRIEDMAN, *supra* note 30, at 91 (parochial schools, absent public subsidy, enjoy "the compensating advantage of being run by institutions that are willing to subsidize them and can raise funds to do so"); GODWIN & KEMERER, *supra* note 48, at 16 (parochial schools "often receive subsidies from their religious organizations [and] do not pay the market value for teachers who are members of religious orders"); Lupu & Tuttle, *supra* note 235, at 569; see also Amicus Brief, *supra* note 277, at 27 (Catholic schools accept vouchers at a loss).

²⁸⁷ See Coons, *supra* note 83, at 602 (workable choice programs must offer a subsidy "big enough to start new schools," one that "ought at least to exceed 80–90 percent of the total average of what is currently being spent in state schools on the particular category of child").

noneconomic preferences have already made them willing to take a loss. By severing the connection between what parents want and what they are offered that ordinary market competition provides, a too-low government-imposed cap on school charges renders parents' choices not "genuine and independent."

This is not to say that the government may not cap school charges or charter allocations at all, or must cap them at levels that exceed the tuition of all but the most gold-plated of schools. Free markets need not guarantee Cadillac-level service to all. Perhaps more importantly, a cap on total charges restricts private schools' capacity to capture subsidies for themselves by raising tuition when demand is inelastic. Still, the cap must be sufficiently high that it will allow schools to enter the market whose incentives will be to respond to market demand. In 1998–99, when the *Zelman* record was established, nobody could have thought that a private school could operate in the black on \$2500 per student per year.²⁸⁸ The Milwaukee voucher program, on the other hand, capped total school charges at nearly twice that amount,²⁸⁹ and since *Zelman* was decided, the cap has been raised in Cleveland from \$2500 to \$5000.²⁹⁰ These caps, although they surely require careful attention to expenses and are well below per-student spending in the traditional public schools, are plausibly sufficient to allow new entrants to survive in the education market.²⁹¹ For this reason, they are consistent with the "genuine and independent" choice rule, while the lower \$2500 cap is not. Similar arguments can be made regarding the state funding that follows students to charter schools, which is typically significantly lower than the per-student average funding in traditional public schools,²⁹² but, I argue, cannot be too much lower.

²⁸⁸ See 536 U.S. at 705 (Souter, J., dissenting).

²⁸⁹ Milwaukee's voucher was for \$5553 in 2001–02. Wis. Dept. of Pub. Instruction, Milwaukee Parental Choice Program, MPCP Facts and Figures for 2001–02 2 (Feb. 2002), <http://dpi.wi.gov/sms/doc/mpc01fnf.doc>.

²⁹⁰ See Christina Samuels & Karla Scon Reid, *Ohio OKs Vouchers for Pupils in Low-Rated Schools*, EDUC. WK., July 13, 2005, at 23.

²⁹¹ See David Salisbury, *What Does a Voucher Buy?*, POL'Y ANALYSIS, Aug. 28, 2003, at 2, 7 ("[A] voucher amount of \$5,000 or more would give students access to most private schools.").

²⁹² See *Ohio ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ.*, 857 N.E.2d 1148 ¶¶ 36, 38 (Ohio 2006) (charter schools in Ohio receive per-pupil state funding, but not per-pupil local funding, that otherwise would have been provided to charter students' traditional public schools); Vergari, *supra* note 78, at 24–25 (describing charter school funding); Julian R. Betts, *School Choice as a Remedy for America's Public Schools: Promising Theories Sail into the Empirical Fog* 1, 8 (Oct. 2006) (paper presented at October 2006 conference, "Values and Evidence in Educational Reform") (manuscript on file with author) (arguing that "the financial playing field" is tilted "against charters and in favor of

At the same time, "genuine and independent choice" does not require that all schools be funded equally or that all parents have equal purchasing power. So long as the voucher amount permits new entry, choice programs could constitutionally permit schools to charge additional tuition up to any amount (as Ohio did not), and to use their own nontuition resources as they like (as Ohio did).²⁹³ Similarly, notwithstanding that traditional public schools will be dominant in most educational markets, the state should be permitted to subsidize its own government-provided public schools at a higher per-student rate than it subsidizes charters or provides vouchers.²⁹⁴ States might implement such preferential subsidies, notwithstanding the manifest unfairness to the competitors of government-operated schools, to promote diversity, compensate for private schools' relatively better access to outside funds, or placate politically influential interest groups. The constitutional requirement is not fairness across institutions, but whether parental choice is genuine and independent.

Similar to tuition caps are the geographic restrictions that the Ohio voucher program placed upon which schools would accept vouchers. Distance from home, as already noted, is an eminently reasonable factor in familial choice among schools. Long distances and complicated commutes tire students, reduce family time, and divorce the social world of school from that of neighborhood. It is equally true, however, that parents will often accept longer commutes in order to obtain what they view as the more-than-offsetting benefits associated with a distant school. In Cleveland, two regulations arbitrarily fore-

regular public schools" because the former face several kinds of costs that the latter do not); Posting of Shavar Jeffries to blackprof.com, *A New Paradigm of Education Reform Litigation*, <http://www.blackprof.com/archives/2006/12> (Dec. 30, 2006, 04:44 AM) (blog post describing class action challenging the funding of charter schools at forty percent of the level provided traditional public schools).

²⁹³ This argument demurs to Gintis's objection that permitting additional charges corrupts the market by making it "likely that political pressures would lead to a lowering of the size of the public tuition contribution to the point where severe resource inequality reemerges." Gintis, *supra* note 215, at 504. (Gintis does not explain why this argument should not extend to schools' use of resources other than student fees.) My position that such an "inegalitarian dynamic" in school-funding politics is constitutionally tolerable so long as public subsidies are sufficient to permit adequate schools to enter the market parallels the shift from equity to adequacy in the finance cases. See *supra* note 4 and accompanying text.

²⁹⁴ Perfect competition would require equal subsidy for all purchasers. See FRIEDMAN, *supra* note 30, at 93 (describing a system where "[p]arents who choose to send their children to private schools would be paid a sum equal to the estimated cost of educating a child in a public school"); Joseph Viteritti, *Reading Zelman*, 76 S. CAL. L. REV. 1105, 1181 (2003) (advocating "financial equity" between public and voucher schools).

closed these options for parents desiring them: public schools outside of the Cleveland school district, regardless of space constraints, were permitted to elect whether to accept vouchers, and private schools outside of Cleveland were foreclosed from doing so.²⁹⁵ Both these choice-limiting policies²⁹⁶ were driven entirely by politics, and neither is justifiable as a matter of pedagogy or choice.²⁹⁷ The former, in particular, seems designed purely to ratify the Tieboutian separation of rich children from poor in the face of the challenge to such separation that the choice idea poses. Without educational or market justification, unnecessary limitations of supply in this way should be held to contravene the "genuine and independent choice" requirement.

Another example of such a limitation, this one from the charter school context, would be a low cap on the number of charter schools that may enter a market. A preeminent example is the limitation in New York State of the total number of charter schools statewide to one hundred, which now binds the market. Because the state is creating a market *ex nihilo*, it may legitimately restrict the number of charters initially issued so as to ensure that the market is not initially flooded with more new entrants than it can absorb, leading to widespread failures for want of enrollment. But if the goal of such a limitation is to hold the quantity of charter desks supplied well below demand in the medium term, as it appears to be in New York, it should be viewed as a requirement that impinges upon parents' "genuine and independent choice."²⁹⁸ Perhaps unlike the Justices in *Zelman*, the test proposed here would reject any such a cap even if it provided parents in a given area with more than a handful of "choices," be-

²⁹⁵ *Zelman*, 536 U.S. at 645 (citing OHIO REV. CODE ANN. §§ 3313.976(A)(3), 3313.976(A)(6) (1999 & Supp. 2000)).

²⁹⁶ I do not list a third demand-side choice limiting policy, i.e., providing choice to Cleveland residents but not to other poor residents of the metropolitan area. Although a cap on the number of vouchers available clearly limits the extent of choice, such a cap has obvious budgetary justification, and in light of the need for a cap the desire to concentrate voucher-holding parents geographically (as well as in terms of income) is arguably choice-maximizing. For the same reason, Florida's policy in connection with its overturned voucher program, by which it limited vouchers to students previously enrolled in "failing" schools, is consistent with "genuine and independent choice." See *supra* notes 113–115 and accompanying text.

²⁹⁷ Nor are they justifiable with reference to local sovereignty. Vouchers are state funded, not locally funded, and the admissions policies of suburban school districts surrounding Cleveland are subject to state control and need not be devolved to local preferences.

²⁹⁸ Government can also restrict the supply of charters to the market more subtly, by defining the regulatory burden charters face. See Shober et al., *supra* note 78, at 579–80.

cause it blocks the market entry mechanism and therefore the ability of new schools to respond to parent demands.

All regulations affecting schools of course affect the market. Direct regulation of schools of choice restricts their ability to respond to parental preferences and their willingness to enter or remain in business. Even regulation confined to traditional public schools affects demand for alternatives. Still, such regulations are justified by the state's obvious legitimate interest in regulating both schools and market in order to promote goals of quality, safety, and civic-mindedness.²⁹⁹ The only sensible rule is that the state may not regulate schools of choice *too much*, an assessment that will inevitably often be ad hoc, and that, in addition, the state may not regulate in order to bias parental choice in the marketplace.

By identifying "genuine and independent choice" as the kind of choice enjoyed in an ordinary consumer market, I accept *Zelman*'s broad insight that choice should be considered genuine even when options are limited and quality is mixed.³⁰⁰ The test proposed here, however, is less tolerant than was the *Zelman* majority of anticompetitive features of school choice programs.³⁰¹

3. A Pluralist Public Market

Even under a pluralist understanding of the education clauses, some choice programs clearly disregard most norms of publicness.³⁰² This section argues that the "genuine and independent" criterion of *Zelman*, applied in the ways I describe, identifies those choice programs that reflect requirements that schools be "public," "free," and "uniform."

Although the scope of choice programs is often thought to vary inversely with their publicness,³⁰³ the converse seems more accurate. It is true that robust choice decreases enrollment in traditional "public" schools, diverts funds that otherwise would have flowed to those schools,³⁰⁴ and mitigates the direct influence of "public" regulation. But

²⁹⁹ For one example of the inclusion of quality on this list, see DWYER, *supra* note 45, at 197 (arguing that state regulation of quality is necessary to voucher programs).

³⁰⁰ See generally 536 U.S. 639.

³⁰¹ See generally *id.* Indeed, the *Zelman* Court would have been well served to apply this more demanding understanding of "genuine and independent" in the Establishment context as well. A full argument to this effect is beyond the scope of this Article.

³⁰² See, e.g., *Ohio Cong. of Parents & Teachers* 857 N.E.2d ¶¶ 32-34.

³⁰³ See, e.g., Metzger, *supra* note 76, at 1392.

³⁰⁴ *Ohio Cong. of Parents & Teachers*, 857 N.E.2d ¶ 37.

these observations, although sound, reflect a statist critique of choice.³⁰⁵ Once the decision is made to permit pluralist choice, the norms of access, fairness, quality promotion, and a disconnect between opportunities and ability to pay can and ought to govern the design of choice programs. "Genuine and independent choice" offers a promising operationalization of those norms that is both institutionalist and instrumentalist. When options under a choice program are varied and arise in response to market demand, there is public input into their design—to be sure, input mediated through a market instead of through political and bureaucratic institutions, but public nonetheless. When the number of options is not artificially constrained, more people have access to schools of choice and those schools are in that sense more public. The same is true when no point of view is *a priori* preferred in designing school options. And when profound underfunding of choice schools is barred as anticompetitive, the schools are more "free." Moreover, because robust choice is Pareto superior to nonrobust choice with respect to parents, it, in an important sense, contributes to the requirement that schools be "efficient."

At the same time, "genuine and independent" choice as I define it does not set the constitutional bar so high that choice programs become unrealistic or unworkable. The test permits states to cap their expenses at acceptable levels. It allows market choice to be limited. It preserves both the right to have "free" schools and the right to pay for schools. And perhaps most important, it creates diverse schools to serve a diverse population of learners—an approach which, although the antithesis of uniformity in the institutional-design sense, promotes equality of educational opportunity in a world where all children are different.

Programs based upon "genuine and independent" choice also offer a different compromise than traditional statist schools with respect to states' *Pierce* obligation to tolerate an educational market and to localism.³⁰⁶ As Part I describes, states have long circumscribed markets for schooling by offering parents only the option either to send their children, without charge, to a public school in the district in which they live, or to pay to educate them privately. This is one approach to regulating the educational marketplace; it is most emphatically not a policy that disappears the market or renders it nugatory. The recognition that markets, even imperfect ones, can enhance the

³⁰⁵ See *supra* notes 212–216 and accompanying text.

³⁰⁶ See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

scope of private choice and simultaneously fulfill public values suggests that this single, grudging, and biased variety of market regulation—grudging in its limitation of options and biased in its preference for those who can afford private education, those who live in districts with good schools, and those whose preferences regarding schooling are similar to their neighbors³⁰⁷—is not the only policy that might be characterized as making a school system “free,” “public,” “uniform,” or “common.”³⁰⁸ Statist dimensions of publicness like democratic deliberation and state provision, along with within-school diversity may suffer under choice; but replacing district-based, stratified, and low-quality educational monopolies with market institutions is in other ways more responsive to the public will, more free, and more uniform than the dichotomous pay-or-play choice today imposed upon rich and poor alike.

The “genuine and independent” criterion thus moves the law away from the selective blindness through which it has long regarded those aspects of traditional institutional arrangements that are antipublic, antiuniform, and antifree. Here the Florida Supreme Court’s 2006 rejection of a voucher benefit for students in failing schools³⁰⁹ in *Bush v. Holmes* is paradigmatic.³¹⁰ Indeed, had Florida’s public schools been “uniform” and “high quality,” OSP would have been a dead letter: there would have been no failing schools to trigger the scholarships.³¹¹ Not a word in *Holmes* recognizes that the situation that the Florida OSP was designed to ameliorate—some of the state’s schools were good, and others were abysmal—itself violates constitutional norms.³¹²

Indeed, were Florida’s system of public schools to be assessed from scratch, it is easy to see how a reasonable person—even one with a statist orientation—might conclude that it was neither constitutionally “free” nor “public.” Florida takes the Tieboutian, modal American ap-

³⁰⁷ See MARK GRADSTEIN, MOSHE JUSTMAN & VOLKER MEIER, *THE POLITICAL ECONOMY OF EDUCATION* 95–102, 104–07 (2005).

³⁰⁸ Strong statists offer a different resolution to this problem: that private and home schooling should be abolished and all students required to attend public schools organized into large, metropolitan districts. See Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1472–73 (2003) (arguing as well that the concomitant abrogation of *Pierce* rights can survive strict scrutiny because of a compelling interest in equality of educational opportunity).

³⁰⁹ See Harris et al., *supra* note 113, at 220.

³¹⁰ See generally *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

³¹¹ See *id.* (ten thousand Florida students were eligible for OSP scholarships in 2004–05).

³¹² See generally 919 So. 2d 392.

proach to school governance. The rich suburbs of Florida run, and levy taxes to pay for, "public" schools, but the only students entitled to enroll in these successful schools are the children of residents—mostly the same affluent suburbanites who pay the bills.³¹³ The "public" schools whose failures would have triggered OSP voucher availability, by contrast, generally enrolled the children of poorer families, demonstrably more difficult to teach and less likely to succeed; these poorer children were not invited to attend the "public" schools of the rich. It is reasonable to ask, as we asked about a tuition-free but competitive-enrollment charter school, whether a traditional public school in a small rich district adjacent to a large poor district, where attendance is conditioned on the (expensive) home purchase or rental in the small district, is better conceptualized as a *public* or *private* school.³¹⁴ The answer, as with previous answers, depends on the relative weights one assigns to norms of publicness associated with the values of control, access, and funding. But, as a matter of constitutional interpretation, it is surely reasonable to define "public" in a fashion that also permits the satisfaction of the constitutional command to guarantee "high quality education."³¹⁵ This *Holmes* refuses to do.³¹⁶ OSP, by contrast, might plausibly have moved the state in that direction.

The "genuine and independent" criterion for choice would not, and does not purport to, uproot the localist, Tieboutian foundations of school governance and finance. Statist views of publicness are legitimate, and traditional arrangements serve important public values even as they require compromise and carry costs. But this does not change the fact that in many ways schools called "public" undermine norms like "free," "public," and "common." These values are served when states expand the educational marketplace beyond its private-school and Tieboutian foundations, by insisting that artificial, state-imposed barriers of district lines and local tax authority should give way absent solid reasons to retain them.

B. Reasonable Connection to Educational Quality

As noted above, the substantive requirements of the education clauses, as well as their institutional requirements, limit the structure

³¹³ See Reynolds, *supra* note 66, at 758.

³¹⁴ See Coons, *supra* note 83, at 597 (suggesting that readers mentally replace the term "private" schooling with "suburban" schooling in evaluating antichoice arguments).

³¹⁵ FLA. CONST. art IX, § 1(a).

³¹⁶ See generally Holmes, 919 So. 2d 392.

of education.³¹⁷ If charters or voucher programs prevent the realization of constitutionally required educational adequacy or equity, they are impermissible even if they are "public."

Notwithstanding the strong theoretical case that choice advances school quality,³¹⁸ empirical research on choice to date has failed to demonstrate the realization of its theoretical potential. A recent review essay notes that evidence for the anticipated benefits of choice is "quite mixed," and describes the "promising theories" of choice as "sail[ing] into the empirical fog."³¹⁹ Students attending schools their families choose under market-like mechanisms have not been reliably demonstrated to learn more than similar students assigned to traditional public schools;³²⁰ nor is there reliable, consistent evidence that public schools improve when subject to market-like competition.³²¹ Concerns that poor families armed with vouchers can easily be misled into schools worse than the ones they left,³²² or that they might make bad choices,³²³ have also found mixed empirical support.³²⁴

A failure of choice to yield any of its predicted benefits should, I think, render it inconsistent with the education clauses. But empirical research to date documents no such failure. Although the research strongly suggests that choice does not produce strong, consistent educational benefits across the board, in the current "fog" many questions remain genuinely open.³²⁵ Some researchers have found benefits

³¹⁷ See *supra* notes 100–103 and accompanying text.

³¹⁸ See *supra* notes 202–209 and accompanying text.

³¹⁹ Betts, *supra* note 292, at 1.

³²⁰ See generally Dan Goldhaber, *School Choice: An Examination of the Empirical Evidence on Achievement, Parental Decision Making, and Equity*, 28 EDUC. RESEARCHER 16 (1999); Patrick McEwan, *The Potential Impact of Vouchers*, 79 PEABODY J. EDUC. 57 (2004).

³²¹ See generally Eric Bettinger, *The Effect of Charter Schools on Charter Students and Public Schools*, 24 ECON. EDUC. REV. 133 (2004).

³²² See Joseph P. Viteritti, *Defining Equity*, in SCHOOL CHOICE: THE MORAL DEBATE, *supra* note 84, at 13, 18.

³²³ See LOIS ANDRÉ-BECHTEL, *COULD IT BE OTHERWISE?* 78–79 (2005); Minow, *supra* note 198, at 1249–52.

³²⁴ See *supra* notes 281–283 and accompanying text.

³²⁵ Accord O'Keefe, *supra* note 170, at 195, 198. Empirical work can never be perfectly definitive on this sort of question. The failure to find statistical significance is different from demonstrating the absence of a relationship. Moreover, the presence of multitudinous confounding factors and relationships often obscures the effect of any one educational practice upon choice, efficiency, equity, and social cohesion. See STEPHEN GONARD, CHRIS TAYLOR & JOHN FITZ, *SCHOOLS, MARKETS, AND CHOICE POLICIES* 183 (2003) (explaining that "key factors" relevant to some educational outcomes relevant to choice are "outside the education arena"); William A. Firestone, *Education Policy as an Ecology of Games*, 18 EDUC. POL'Y RESEARCHER 18, 18 (1989).

to choice,³²⁶ though generally those findings are not robust;³²⁷ methodological questions remain open;³²⁸ important variations on choice programs, suggested by theory, have been neither tried nor tested;³²⁹ and, most important, empirical evidence to date remains "very limited."³³⁰ In the future, empirical knowledge might advance sufficiently to permit a determination that the requirement that choice be reasonably connected to educational quality is not met.³³¹ In the current environment, however, what we do not know so overwhelms what we do know that state officials are well within their prerogatives to rely upon very strong theoretical arguments favoring choice experiments.

This approach is consistent with what Professor Cass Sunstein has called an "administrative model" of judicial review for positive rights,³³² which the right to education is manifestly is.³³³ This is a feature sorely lacking in the school finance cases, which have been the focus of education-clause jurisprudence to date.³³⁴ The cases signally fail to recognize that education is a positive right, although the school-finance dilemma makes it vivid. Schooling is expensive,³³⁵ and its costs rise with its

³²⁶ See Betts, *supra* note 292, at 27–28.

³²⁷ See *id.* at 34.

³²⁸ See Katrina Bulkley & Jennifer Fiesler, *A Decade of Charter Schools*, 17 EDUC. POL'Y 317, 333–34 (2003); Betts, *supra* note 292, at 17–18, 26–27, 31.

³²⁹ See, e.g., JOHN MERRIFIELD, *THE SCHOOL CHOICE WARS* 12–18, 21 (2001) (arguing that the only effective school choice program is one characterized by no price controls, minimal regulation, and free entry and exit of schools); Dan Goldhaber et al., *How School Choice Affects Students Who Do Not Choose*, in GETTING CHOICE RIGHT, *supra* note 206, at 101, 120–124 (discussing policy design options for assuring a "rich set of alternatives to the existing public schools").

³³⁰ Betts, *supra* note 292, at 33.

³³¹ Similarly, a robust and entirely convincing empirical demonstration that choice was the only organizational system that could sustain "thorough and efficient" schools, as Chubb and Moe purported to find, might require the state to adopt an education organized under market rather than traditional bureaucratic principles. See CHUBB & MOE, *supra* note 84, at 190. At the least, the state would have to determine openly that traditional organizations have normative benefits that compensate for the loss of quality they impose. At this writing, this seems an unlikely problem, as the literature struggles to measure any systematic gains from choice.

³³² CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 234 (2001) [hereinafter SUNSTEIN, *DESIGNING DEMOCRACY*]. See generally Cass Sunstein, *Social and Economic Rights—Lessons from South Africa*, 12 CONST. FORUM 123 (2001) [hereinafter Sunstein, *Social and Economic Rights*].

³³³ See HALPER, *supra* note 184, at 163. Surprisingly, it is not always categorized as such. See, e.g., DINAN, *supra* note 143, at 237–47.

³³⁴ See generally Enrich, *supra* note 4; Heise, *Equal Educational Opportunity*, *supra* note 4; Heise, *State Constitutions*, *supra* note 4.

³³⁵ In 2001, the nation spent approximately \$390 billion on education, "more than defense and not too much less than Social Security." JENNIFER HOCHSCHILD & NATHAN SCOVRONICK, *THE AMERICAN DREAM AND THE PUBLIC SCHOOLS* 20 (2003).

ambitions. A legislature that seeks to provide children with sophisticated rather than rudimentary knowledge and skills must undertake the corresponding expenditure. It must pay even more if it aims to provide that high-quality education to all children, no matter their circumstances or challenges.³³⁶

State courts have reacted to the obvious question—how much money is enough?—in extreme ways. Some take the view that there is no ceiling on legislatures' duty to authorize whatever educational spending is necessary to achieve the substantive results that constitutions require, technological uncertainty be damned.³³⁷ But to require state legislatures to prioritize education above all else and to ratchet spending upwards indefinitely is to indulge a jurisprudence of fantasy rather than seek workable solutions.³³⁸ Other courts have argued that finance questions are nonjusticiable matters of pure politics or of legislative spending.³³⁹ This approach effectively reads the education clauses out of their constitutions.

Professor Helen Hershkoff persuasively argues that positive constitutional rights are a "nondiscretionary feature of the legal order" that "may not simply be remitted to politics."³⁴⁰ Her argument for judicial review more demanding than rational basis review, however, overestimates courts' institutional competence to "develop baselines" in the educational arena.³⁴¹ Judicial management is unattractive because normative judgments about educational baselines are deeply

³³⁶ See Reynolds, *supra* note 66, at 764 (explaining that the cost of equalizing all spending to the level of the highest spending districts "would be astronomical").

³³⁷ See *Montoy v. Kansas*, No. 99-C-1738, 2004 WL 1094555, at *13 (Kan. Dist. Ct. May 11, 2004) (holding that state is constitutionally obligated to "provide resources necessary to close the 'achievement gap'"); *Abbott v. Burke* (Abbott II), 575 A.2d 359, 403 (N.J. 1990) (holding that additional funding is a constitutional requirement notwithstanding "that no amount of money may be able to . . . make the difference" for students in poor districts); *Campbell County Sch. Dist. v. Wyoming*, 907 P.2d 1238, 1279 (Wyo. 1995) (explaining that state constitution requires legislature to define "the best" education that can be achieved and provide funds accordingly).

³³⁸ See Alfred A. Lindseth, *The Legal Backdrop to Adequacy*, in *COURTING FAILURE*, *supra* note 105, at 33, 53, 56 (explaining that cases like *Campbell* and *Montoy* require states to meet "unrealistic[c]" benchmarks).

³³⁹ See Brooker, *supra* note 193, at 201–04 (collecting cases).

³⁴⁰ See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1156 (1999).

³⁴¹ See *id.* at 1189–90 (reading some finance decisions to develop "a normative baseline against which to assess educational sufficiency" and use "innovative . . . procedural devices" without exceeding "the limits of [judges'] institutional competence").

contested, and implementation is inevitably bedeviled by hard technological and measurement questions.³⁴²

Instead, for many of the same reasons that Sunstein proposes an "administrative model" of judicial review for substantive rights,³⁴³ the rule here looks at whether choice might reasonably be thought to help rather than whether it actually helps.³⁴⁴ For positive rights, it is more appropriate to demand reasonable legislative decision making, coherence across related policy approaches, and the "progressive realization of rights"³⁴⁵ than actual success of policy on the ground.³⁴⁶ This is far from a posture of complete deference to political decision making, but still recognizes fiscal limitations, a role for administrative expertise, and a broad (but not infinite) scope of legitimate political judgment in a context of technological uncertainty.³⁴⁷

Two ways in which this proposal departs from Sunstein's model are worth noting. First, relative to a right to housing (to take Sunstein's example), the normative content of the right to education is disputed. In the housing context, the only real normative dispute is about priorities: whether to give most resources to the desperately underhoused, or fewer resources per capita to more people at varying

³⁴² See *supra* notes 35–39 and accompanying text.

³⁴³ SUNSTEIN, *DESIGNING DEMOCRACY*, *supra* note 332, at 234.

³⁴⁴ Recognizing a similar problem regarding the Establishment Clause, Lupu and Tuttle suggest that "[i]n a setting of mixed legal and factual compulsion, and gradual transformation over time, the state's performance—at least initially—should be measured more by its effort than by its results." Lupu & Tuttle, *supra* note 235, at 597. Lupu and Tuttle rely more on evidence of "the state's good faith efforts" than on the reasonableness of their policy. See *id.* Similarly, Professor Liu, who understands Congress to have a federal constitutional duty to guarantee a substantive floor of educational adequacy nationwide, asserts that Congress must undertake "deliberate inquiry . . . and . . . take steps reasonably calculated to ameliorate conditions that deny children adequate opportunity to achieve." Liu, *supra* note 2, at 400.

³⁴⁵ This phrase is from S. AFR. CONST. 1996 § 26 (articulating a right to housing, and requiring that "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right"). Housing, like education, is an expensive, market-based, positive right. The leading case on Section 26 is *South Africa v. Grootboom*, 2001 (1) SA 46 (CC) ¶¶ 41–46 (S. Afr.), which itself offered the occasion for recent important theorizing about the enforcement of substantive rights. See generally, e.g., SUNSTEIN, *supra* note 332; Sunstein, *Social and Economic Rights*, *supra* note 332; Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895 (2004).

³⁴⁶ Note that the "genuine and independent" criterion can be applied to policies as implemented as well as policies as articulated. See *Grootboom*, (1) SA ¶¶ 41–46 (stating that "policies and programmes must be reasonable both in their conception and their implementation").

³⁴⁷ Sunstein calls this last feature *Grootboom*'s "distinctive virtue." Sunstein, *Social and Economic Rights*, *supra* note 332, at 123.

levels of housing distress, and whether both of these approaches or only one should be viewed as constituting "progressive realization" of the right.³⁴⁸ For educational rights, by contrast, normative disputes are much more pervasive. The rule proposed here therefore gives state officials more latitude to define quality education for themselves than the administrative model might provide in other contexts.

Correspondingly, the rule here governs not just "judicial review"³⁴⁹ but is meant to guide political officials in determining for themselves what constraints the constitution places upon their behavior. For courts, the administrative model involves deference; and courts operating under the rule proposed here would very often have to defer to sensible-sounding proposals generated by the political branches. But, as Sunstein has argued more generally, political actors bear their own constitutional duty, "outside the courts," to develop school policies consistent with their state's education clause.³⁵⁰ These political actors, omniscient with respect to their own motives and analyses, may choose choice only if they think it will help discharge the duty the constitution imposes.

CONCLUSION

In 2002, in *Zelman v. Simmons-Harris*, a majority of the U.S. Supreme Court deemed Ohio's voucher program for Cleveland constitutional because the state used a quasi-market to aggregate parents' genuine and independent choices, in a fashion unbiased by the state's own preferences. A market, rather than public deliberation, determined both whether and which religious institutions benefited from state funds.

The central roles that *Zelman* accords to the genuineness and independence of parental choice and to the market mechanism express a view of religious establishment that, however ascendant on the sitting Court, is and will surely long remain deeply contested. Many will undoubtedly continue to insist that vouchers establish religion even if distributed under conditions of total government neutrality as to any possible religious use. And because it is undeniable that government

³⁴⁸ See Rob Rosenthal & Maria Foscarinis, *Responses to Homelessness, in A RIGHT TO HOUSING*, *supra* note 269, at 316, 326 (stating that strategies to address homelessness must "first protec[t] existing housing and the tenancy of those already in place").

³⁴⁹ SUNSTEIN, *DESIGNING DEMOCRACY*, *supra* note 332, at 234; Sunstein, *Social and Economic Rights*, *supra* note 332, at 123.

³⁵⁰ See generally CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993).

subsidies alter the preferences of at least some people, the *Zelman* Court's conviction that a "genuine" quasi-market guarantees neutrality, government subsidy and regulation notwithstanding, will seem fanciful to some even as it seems obvious to others.

The use of genuine and independent choice as a standard to determine whether a state has established and supported a system of "public" or "common" schools, by contrast, should be less controversial. In the context of schools, unlike that of religious establishment, government neutrality is not an option: one way or another, the state will subsidize, provide, and regulate schools that have some point of view, and indeed that embrace a mission of shaping the points of view of their pupils. The effects of these subsidies, moreover, are necessarily mediated through parental choice and the operation of a market for schooling. Traditionally, parents make purchasing decisions in that market by spending (or choosing not to spend) often substantial sums in order to exercise two constitutional rights: to select a district in which to live, and to exit the public system and educate their children privately.

There are no good historical, textual, or other reasons to understand the command of state education clauses that schooling be "public" or "common" to permit these, but not other forms, of choice and markets. Indeed, state systems are considered fully public although nearly all states greatly inflate the influence of residential choice by establishing numerous, competing school districts with local monopolies, a policy that vastly exacerbates the advantages that the wealthy enjoy in the market for schooling. There is every reason also to consider as public systems of vouchers or charters that subsidize individual parental preferences about schools while impartially aggregating them using a market mechanism. So long as that aggregation is based upon genuine and independent parental choices, unbiased insofar as possible by state regulation, such a pluralist, market-based approach is no less "public"—and indeed is more fair, open, and participatory—than traditional arrangements. Such systems might also help to realize the substantive guarantees of the education clauses, too often neglected by traditional forms, that all children be schooled not only publicly, but well.