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## Voice, Not Choice

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# Book Review

## Voice, Not Choice

*Politics, Markets, and America's Schools.* By John E. Chubb\* and Terry M. Moe.\*\* Washington: The Brookings Institution, 1990. Pp.xvii, 311. \$28.95 (cloth), \$10.95 (paper).

James S. Liebman†

*You can actively flee, then, and you can actively stay put.*<sup>1</sup>

In John Chubb and Terry Moe's book,<sup>2</sup> choice is hot; voice is not.<sup>3</sup> As influential as their book has become in current policy debates,<sup>4</sup> however, its

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1. ERIK H. ERIKSON, *INSIGHT AND RESPONSIBILITY* 86 (1964).

2. JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990) [hereinafter by page only].

3. By "choice" I mean reliance on consumers' purchase or rejection of services to determine the services' future traits and distribution. By "voice" I mean reliance on constituents' expressions about the value of particular services to make the same determination. "Choice" typically uses market mechanisms to coordinate individual actions. See *infra* notes 163-72 and accompanying text. "Voice" often uses democratic procedures to shape collective action. See *infra* notes 255-68 and accompanying text.

4. The extensive press coverage given to the book includes Susan Chira, *The Rules of the Marketplace Are Applied to the Classroom*, N.Y. TIMES, June 12, 1991, at A1 (crediting Chubb and Moe with having "ignited the choice debate"); John E. Chubb & Terry M. Moe, *The Private vs. Public School Debate*, WALL ST. J., July 26, 1991, at A8; John E. Chubb & Terry M. Moe, *Reform Can't Be Left to the Education*

data and reasoning may support policies the reverse of those that the authors and their "New Paradigm" disciples propose.<sup>5</sup> In this review, voice is hot; choice is not.

Chubb and Moe conclude that dropping SAT scores and American students' poor performance on internationally standardized math and science exams demonstrate that America's public schools are in crisis.<sup>6</sup> Based on an empirical study of a large sample of students attending American public and private high schools in the early 1980's,<sup>7</sup> the authors give the following account of the causes of educational failure and success: The "inputs" on which educational policy debates typically have focused—per capita spending, class size, teacher experience, and the like—have almost no effect on educational quality (measured by achievement test scores) at the high school level.<sup>8</sup> Putting aside student ability and family resources, which exert the largest impact on performance but are more or less immutable,<sup>9</sup> the only policy-sensitive input that is associated with strong academic performance is a school's "effective organization"—its "clear goals, . . . ambitious academic program, strong educational leadership, and high levels of teacher professionalism."<sup>10</sup> Schools permitting a lot of professional "autonomy," that is, ones with minimal "bureaucratic influence," are more likely to be effectively organized than schools that do not

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*Establishment*, N.Y. TIMES, Aug. 26, 1990, at E19; Peter M. Flanigan, *A School System That Works*, WALL ST. J., Feb. 12, 1991, at A11; Sam Ginn, *Education Consumers Should Have a Choice; Still Far to Go*, N.Y. TIMES, July 17, 1990, at A20; Nicholas Lemann, *A False Panacea*, ATLANTIC, Jan. 1991, at 101; Barbara Reynolds, *School Choice: All Kids Deserve a Good Education*, USA TODAY, Nov. 6, 1990, at 11A; *Schoolyard Perestroika*, ECONOMIST, June 16, 1990, at 23; Walter Shapiro, *Pick a School, Any School*, TIME, Sept. 3, 1990, at 70; Thomas A. Stewart et al., *The Most Fascinating Ideas for 1991*, FORTUNE, Jan. 14, 1991, at 30; Abigail Thernstrom, *Is Choice a Necessity?*, PUB. INTEREST, Fall 1990, at 124 (crediting Chubb and Moe with having led "startling comeback" of long "taboo" subject of educational vouchers); James Q. Wilson, *Politics, Markets, and America's Schools by John E. Chubb and Terry M. Moe*, NEW REPUBLIC, Oct. 8, 1990, at 39.

5. Turning the nation to choice is the principal objective of a group of "positive" conservatives in the Bush Administration marching under the banner of "the New Paradigm." Maureen Dowd, *Fate of Domestic Police Lies in a Battle of Aides*, N.Y. TIMES, Nov. 24, 1990, at A8; see Jason DeParle, *Bush Blurs Home Goals*, N.Y. TIMES, Feb. 3, 1991, at A29. The group gained ground recently when President Bush, his Council of Economic Advisors, and his new Secretary of Education endorsed educational choice proposals, including a \$230 million "bribe" to induce districts and states to pay the tuition of public school students switching to private schools. Mark Pitsch, *Bush Seeks to Reward District Plans that Include Private-School Choice*, EDUC. WK., Feb. 13, 1991, at 1, 29; see Susan Chira, *Bush School Plan Would Encourage Choice by Parents*, N.Y. TIMES, Apr. 19, 1991, at A1; Karen De Witt, *New Education Chief Stresses Commitment*, N.Y. TIMES, Mar. 19, 1991, at A21; *Morning Edition 7-8* (National Public Radio broadcast, Feb. 14, 1991) (transcript on file with author).

6. Pp. ix, 1, 6-8. See John E. Chubb & Eric A. Hanushek, *Reforming Educational Reform*, in SETTING NATIONAL PRIORITIES: POLICY FOR THE NINETIES 213, 213-17 (Henry J. Aaron ed., 1990).

7. Pp. 72-75, 230-31.

8. Pp. 87-88, 101, 105-06 tbl. 4-2, 143-44.

9. Pp. 101, 105-11 & tbls. 4-3 to 4-6, 145-46, 160-65 & tbls. 5-7 to 5-8, 169-70 & tbl. 5-9, 172 & tbl. 5-10, 294-95 nn.1-3.

10. P. 23.

permit such autonomy.<sup>11</sup> Private and parochial schools exhibit a lot of autonomy; public schools do not.<sup>12</sup>

Translating correlation into cause, the authors restate their thesis in reverse: Private schools give teachers and principals a lot of autonomy, which in turn facilitates good school organization, which in turn causes high achievement. Conversely, bureaucratically administered public schools discourage autonomy, which leads to poor organization, and low achievement.<sup>13</sup>

The authors conclude that politicians can solve the crisis in education by causing all schools to emulate private schools—that is, by substituting “market” control for “democratic” (by which the authors mean “interest group” and “bureaucratic”) control of the schools.<sup>14</sup> Because market-driven excellence would come at too high a cost if it entirely sacrificed a public system’s welfare and equity features, the authors would locate a set of new or overhauled schools in the public sector, subject to loose public regulation.<sup>15</sup> Within the public sector, the authors would replace existing systems of funding and student assignment with a system in which:

- The state (alone) provides funds for participating schools by giving them “scholarships,” in amounts fixed by law, for each child who enrolls in each school.
- Parental and school choice determines the assignment of children to schools: Parents may apply to any school in the state, and schools may select applicants and retain or expel matriculated students on the basis of any criteria the schools choose, exclusive of race but not, for example, of intelligence, achievement, motivation, disciplinary record, and, possibly, religion.<sup>16</sup>

In Part I, I argue that Chubb and Moe exaggerate the impact of school structure on student achievement. They do so by underestimating the impact of parent and student educational “tastes,” mislabeling evidence of personal tastes as elements of school structure, and treating mundane structural *effects* of good or bad achievement as important policy-driven *causes* of that achievement. As a result, the authors fail to rule out a plausible alternative explanation of their data: that the educationally oriented parents and children (call them “educational connoisseurs”<sup>17</sup>) who congregate in private schools demand and receive higher quality educational services than do consumers with less exacting educational tastes.

11. Pp. 147-55.

12. Pp. 175-83.

13. Pp. 23-24, 37, 48-51, 56-57, 141, 174, 180-81.

14. Pp. 2, 17, 29-33, 167, 180-81, 206-15; *see infra* note 265.

15. Pp. 206, 217-19, 225.

16. Pp. 219-23. The authors’ “preference would be to include religious schools . . . , as long as their sectarian functions can be kept clearly separate from their educational functions.” P. 219.

17. *See* ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 49 (1970).

Part II concludes that enhancement of choice along the lines the authors propose would put even more children at educational risk than the existing system and thus would make an educationally (and equitably) bad situation worse.

Drawing on theories that Albert O. Hirschman developed twenty years ago,<sup>18</sup> Part III explains how an *excess* of the market mechanism of “choice” caused the crisis in public education and how enhancement of the democratic mechanism of “voice”—the conceptual opposite of choice—might make public schools better. Rejecting the authors’ curious elision of “bureaucracy” and “democracy,” and their juxtaposition of both to markets, Part III argues that bureaucracy actually stands between markets and democracy as a third form of organizational control, and that bureaucracy only came to dominate urban public schools in response to increasing parental exit from, and declining parental voice in the administration of, those schools. Accepting the authors’ critique of bureaucratic control, and doubting the wisdom of market control, Part III sketches a proposal for enhanced parental voice in, and democratic control of, the public schools.

## I. WHY CAN’T JANE AND JOHNNY READ?

### A. *The Authors’ Statistical Story Stated*

Chubb and Moe ask a question that has occupied researchers for years: Why do some children learn more in school than others? The authors’ answer is new and sophisticated: Market forces favor school autonomy; school autonomy fosters effective organization; effective organization promotes achievement.<sup>19</sup> Or, even more simply, market forces promote achievement.<sup>20</sup> This section describes each step in the authors’ argument in order to begin examining whether the argument’s sophistication illuminates or obscures.<sup>21</sup>

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18. *Id.*

19. See p. 37 (“In a market setting . . . , there are strong forces at work—arising from the technical, administrative, and consumer-satisfaction requirements of organizational success—that promote school autonomy.”); p. 23 (“[T]he most important prerequisite for the emergence of effective school characteristics is school autonomy, especially from external bureaucratic influence . . . .”); p. 174 (“School organization is crucial for achievement above and beyond the influence of students and parents. Autonomy from bureaucracy is crucial for school organization above and beyond the kinds of students and parents being served by the organization.”); pp. 125-33 & tbls. 4-8 to 4-10, 160-62 & tbls. 5-7 to 5-8, 176 tbl. 5-11.

20. Pp. 141, 180-81.

21. “Chubb and Moe claim uniqueness for their argument[] about reform . . . [because] their argument grows out of the quantitative analysis of empirical data.” Gene V. Glass & Dewayne A. Matthews, *Are Data Enough?*, EDUC. RESEARCHER, Apr. 1991, at 24, 25. Deciding whether Chubb and Moe in fact provide “the research legitimation that the school choice movement has been waiting for” or, instead, “a polemic wrapped in numbers” is accordingly central to the task of evaluating their work. *Id.* at 26.

*Step 1:* Researchers have long known that parental resources and student ability strongly affect successful learning.<sup>22</sup> The authors' significant discovery is a third factor associated with learning—effective school organization, which accounts for a quarter of the variance in achievement that the authors' regression model explains.<sup>23</sup> The discovery is significant because organization may be more sensitive to public policy than are wealth and ability.

The authors' measure of "effective school organization" is not an established metric in educational research, however, but rather their own invention.<sup>24</sup> Actually, the authors use two measures of effective organization. The first is a composite of: (1) students' satisfaction with the fairness and effectiveness of their school's disciplinary mechanisms; (2) teachers' feelings of "efficaciousness" vis-à-vis their students, "collegiality" and "cooperativeness" vis-à-vis each other, "clarity" vis-à-vis their principals' "vision" and goals, and "influence" vis-à-vis school policy; and (3) principals' confidence in the excellence of their teachers, commitment to academic excellence as opposed to assuring literacy, and dedication to running their schools as opposed to advancing their careers.<sup>25</sup>

The authors' second measure of effective organization adds one additional factor—"academic program," i.e., the proportion of students in a school who are enrolled in an academic as opposed to a "general" or a vocational course of study.<sup>26</sup> Although it is not surprising that students in academic programs score higher on academic tests than students in nonacademic programs, the authors are interested in *why* students enroll in one or the other program. In their first regression analysis—of the factors associated with student achieve-

22. Using the authors' preferred analysis, student ability as well as family and school socioeconomic status (essentially, parents' income and educational attainment) together account for three-fourths of the variance in achievement explained by their regression analysis. Pp. 125-29 & tbl. 4-8, 139; *see also* pp. 126-28 (describing authors' method, followed herein, of figuring proportion of variance explained by independent variables). *But cf.* RICHARD J. MURNANE, *THE IMPACT OF SCHOOL RESOURCES ON THE LEARNING OF INNER CITY CHILDREN* 5-30 (1975) (criticizing this methodology).

23. P. 126 & tbl. 4-8. A possibly embarrassing feature of the authors' regression analysis of achievement is that it explains so *little*—only 5% of the variance in student achievement. *See* pp. 126 tbl. 4-8, 132-33 tbl. 4-10, 298 n.33. In response to criticism on this score, *see* Glass & Matthews, *supra* note 21, at 26; John F. Witte, *Understanding High School Achievement: After a Decade of Research, Do We Have Any Confident Policy Recommendations?* 16, 20 (paper delivered at the Annual Meeting of the American Political Science Association, Aug. 30, 1990) (on file with author), the authors pose a challenge: "If our analysis omits any variable that is likely to account for the variation in achievement-gain scores, we are not aware of it, and none of our critics have [sic] suggested what it might be." John E. Chubb & Terry M. Moe, *A Response to Our Critics*, *EDUC. WK.*, Feb. 20, 1991, at 26. *But see infra* notes 38-75 and accompanying text (discussing variables omitted by Chubb and Moe).

24. "Effective schools" is a term of art in modern educational theory, *see* Stewart C. Purkey & Marshall S. Smith, *Effective Schools: A Review*, 83 *ELEMENTARY SCHS. J.* 427 (1983), but Chubb and Moe's *measure* of "effective school organization" is their own invention.

25. In addition to the factors mentioned in the text, the authors' measure of "school effectiveness" is a composite of reports about the amount of homework assigned daily, graduation requirements, principals' relative preference for the pedagogical as opposed to the managerial aspects of their jobs, and teachers' freedom from administrative "routines and paperwork." Pp. 78-99 & tbls. 3-3 to 3-10, 120-24 & tbl. 4-7, 139, 143.

26. Pp. 120-24, 130-40 & tbl. 4-10.

ment—the authors find that academic program has explanatory power even after *parental* resources and *student* ability are controlled. Based on this finding, the authors hypothesize that *school* traits also influence academic program, and they sometimes include academic program in their measure of “school organization.”<sup>27</sup>

*Step 2:* The authors conduct a second regression analysis to determine whether school policy or other factors explain why schools are well organized according to the authors’ first definition of organization—to determine, that is, why students say they respect the educational enterprise, why teachers say they are happy with it, and why principals say they are dedicated to it. The authors again find that certain parent traits (resources and frequency of contact with schools) and student traits (ability and comportment) account for close to three-fourths of the variance in the condition under examination (effective organization).<sup>28</sup> Likewise, the authors again discover a policy-sensitive factor—“absence of bureaucratic influence” or “autonomy”—that accounts for a quarter of the explained variance in the condition being studied.<sup>29</sup> By “autonomy” the authors mean the propensity of principals to credit or blame themselves, rather than unions and central office staff, for their schools’ program and personnel.<sup>30</sup>

Interestingly, at this second stage of their analysis, the authors introduce two new parent-student factors—parent contact with schools and student comportment—that were not studied at the first stage of their analysis and that seem to reflect the importance that parents and students attach to schooling. The belated introduction of this new causal factor—“taste” for education—in the second regression raises the question whether educational taste also might have proven causal had it been introduced, in some form, in the initial regression of achievement.

*Step 3:* The authors conduct a third regression analysis to see whether manipulable policy, rather than some other factor, determines how much responsibility principals attribute to themselves as opposed to outsiders. In this study, parent traits (contact with schools) and student traits (ability, comportment, and achievement gain) explain only 20-30% of the fluctuation in the dependent variable (autonomy).<sup>31</sup> Notably, the authors again introduce a new student-related causal factor at this stage—achievement gain—again begging the question whether the factor might have proved causal had it been introduced

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27. Pp. 134-40.

28. Pp. 160 tbl. 5-7, 162 tbl. 5-8.

29. *Id.* School size also modestly affects organization. *Id.*

30. Pp. 150-57 & tbls. 5-4 to 5-6 (“bureaucratic influence” is a composite of principals’ answers to questions about the influence exercised by central office staff, unions, and seniority policies, relative to principals’ own influence, over curriculum, instructional methods, personnel, and discipline).

31. P. 176 tbl. 5-11.

in the previous regression. Might student success cause effective organization (e.g., student and teacher happiness), rather than the reverse?<sup>32</sup>

By attributing only a modest amount of the variance in school autonomy (20-30%) to parent-student factors, and a similar amount (20-25%) to nonurban school location,<sup>33</sup> the third regression leads the authors to the pot of gold at the end of their sophisticated rainbow. The authors discover that school sector—private as opposed to public control—is highly correlated with school autonomy, accounting for 45-60% of the variance in autonomy that the authors' model explains.<sup>34</sup>

As interesting as it is, the authors' discovery means only that, at best, private control accounts for three-fifths of one-fourth of one-seventh of the posited causes of the outcome (achievement) the authors hope to foster. Moreover, given the authors' measure of autonomy, the finding might boil down to the not-so-surprising discovery that, compared to public schools, private schools are less unionized, have fewer district-level administrators, and have principals who, for these and other reasons, take more responsibility for conditions at their schools and assign less responsibility to outsiders than do their public school counterparts.

Finally, as highly correlated as private sector is with autonomy and effective organization, the authors fail to report *any* correlation between private control and student achievement.<sup>35</sup> The reason for the authors' unexplained omission is easy to guess: As other researchers using the same data have discovered, once other factors are controlled, there is no correlation, or only a very small one, between private control and achievement.<sup>36</sup>

32. See p. 167 (surmising that successful students are easier to manage).

33. P. 176 tbl. 5-11.

34. See *id.*

35. Pp. 181-82 & tbl. 5-13; see Witte, *supra* note 23, at 21-22 (calling Chubb and Moe's substitution of transitive logic for statistical demonstration of link between sector and achievement "a sleight-of-hand"). In response to criticism, the authors recently have downplayed the importance of their regression of the factors affecting achievement gain and of achievement gain generally. Chubb & Moe, *supra* note 23, at 24, 26. Their book, however, consistently relies on the achievement effects the authors claim to have established as the principal reason to adopt their policy proposals. See, e.g., pp. 180-81 (market control is solution because, "[b]y itself," market control fosters autonomy and effective organization, each of which "alone is capable of shifting student achievement gains by more than one full year during four years of high school"); see also pp. 23, 35-36, 51-53, 166, 174.

36. See, e.g., Karl L. Alexander & Aaron M. Pallas, *School Sector and Cognitive Performance: When Is a Little a Little*, 58 SOC. EDUC. 115, 126 (1985) (almost no difference between Catholic and public schools); Christopher Jencks, *How Much Do High School Students Learn?*, 58 SOC. EDUC. 128, 134 (1985) (small sector effect without controlling for academic track); Valerie E. Lee & Anthony S. Bryk, *A Multilevel Model of the Social Distribution of High School Achievement*, 62 SOC. EDUC. 172 (1988) (no sector effect after controlling for academic track); Henry M. Levin, *The Theory of Choice Applied to Education*, in 1 CHOICE AND CONTROL IN AMERICAN EDUCATION 247, 275-76 (William H. Clune & John F. Witte eds., 1990) [hereinafter CHOICE AND CONTROL] (minuscule or no effects); Witte, *supra* note 23, at 22 ("Sector effects for achievement . . . are negligible when controls for prior achievement, student background, tracking and coursetaking are included."); *id.* at 10, 12-13, 28; cf. Robert Rothman, *Debate on Merits of Public, Private Schools Reignites*, EDUC. WK., Sept. 18, 1991, at 1 (listing recent national test data suggesting that private and parochial students do no better—and at times do *worse*—on national tests than socioeconomically comparable public school students).



*Step 4:* The final step in the authors' argument—attributing autonomy to market forces, as opposed to other private school characteristics—is not supported by statistical data. Instead, it flows from a theoretical argument: Private organizations are more autonomous than public ones because the former are free of the latter's interest group politics. As a result, private schools avoid the bureaucratic rules that today's winners in the interest group game use to impose their interests on uncooperative employees and to make it difficult for tomorrow's winners, if they unseat today's, to stop serving the interests of previous winners.<sup>37</sup> Having escaped the influence of an electorate full of greedy interests, the only demands private schools need serve are the more "homogeneous" desires of their schools-focused clientele. This simpler task permits a good bit of administrative flexibility and reliance on the unconstrained judgment of the professionals the schools employ.

### B. *The Statistical Story Studied*

Researchers frequently advance the hypotheses that three factors—*parental resources, student ability, and parent and student tastes for education*—largely determine educational achievement,<sup>38</sup> and that studies identifying other, policy-driven causes of achievement simply mislabel measures of the elusive third factor (tastes) as indicia of the favored policy.<sup>39</sup>

In this section, I argue that Chubb and Moe may have succumbed to the same mislabeling error, and may have exacerbated the error by treating attitudinal *effects* of successful achievement as additional policy-driven *causes* of that achievement. As a result, the authors may inaccurately deflate the importance of personal causes of achievement and inflate the importance of programmatic causes, thus overstating the value of their own market-driven program.

#### 1. *Step 1: Is Academic Program a Cause of Achievement or a Proxy for Motivation; Is Organization a Cause of Achievement, or Its Effect?*

The authors confirm that achievement is strongly correlated with parental resources and student ability, and acknowledge that taste for education may

37. Pp. 29-35.

38. See Witte, *supra* note 23, at 3-6, 10, 12-16, 22 & tbl. 1, fig. 1 (reviewing literature supporting this hypothesis).

39. See Anthony S. Bryk et al., *High School Organization and Its Effects on Teachers and Students: An Interpretive Summary of the Research*, in 1 CHOICE AND CONTROL, *supra* note 36, at 135, 160-61; Arthur S. Goldberger & Glen G. Cain, *The Causal Analysis of Cognitive Outcomes in the Coleman, Hoffer and Kilgore Report*, 55 SOC. EDUC. 103 (1982); Levin, *supra* note 36, at 247, 275; Witte, *supra* note 23, at 4, 28-29. On the elusiveness of educational tastes, see pp. 111-12, 122-23, 248, 260; Richard J. Murnane, *Evidence, Analysis, and Unanswered Questions*, 51 HARV. EDUC. REV. 483, 485-87 (1981) ("Many researchers have pointed out that the effects of self-selection cannot be controlled even by including a large number of observed family background characteristics." (citation omitted)); Wilson, *supra* note 4, at 40, 42.

have independent causal effect.<sup>40</sup> We can further discern the importance of educational motivations by noting that college admissions officers rate students on the basis not only of aptitude (SAT scores) and of wealth (tuition and scholarship policies) but also of grade point average—presumably on the theory that knowing whether a student is willing to apply herself is important even after we know that she is intellectually and financially able to do so. Moreover, it has long been understood that, apart from other socioeconomic characteristics, parental expectations play an important role in learning.<sup>41</sup> Indeed, a well-developed literature establishes that achievement levels depend not only on one's own and one's parents' educational expectations, but also on the expectations of one's schoolmates and their parents.<sup>42</sup>

The authors try to factor out taste for education by using seniors' test scores as sophomores to measure the seniors' "ability."<sup>43</sup> The authors theorize that sophomore scores reflect most of the performance boost or drag attributable to motivations, so that factoring out those scores also factors out most of the impact of educational tastes.<sup>44</sup> There are four reasons to question this conclusion.

First, students' and parents' tastes for education do not drop out of the picture at the end of the tenth grade. They continue affecting performance during the junior and senior years when the "achievement gains" the authors study occur.<sup>45</sup> Indeed, high school is a time of changing and intensifying educational motivations: Students with a hankering for college (and parents hoping to instill one) are busy creating the grade point average on which

40. Pp. 111-12, 122-23, 127-28, 248, 260; see HIRSCHMAN, *supra* note 17, at 45 n.2 ("[Parent's] willingness to make a financial sacrifice for the sake of improving the children's education differs widely within a given income class, especially at intermediate levels of income."); Murnane, *supra* note 39, at 485.

41. See Bryk et al., *supra* note 39, at 135, 155; Witte, *supra* note 23, at 3-6, 12-13, 22 & tbl. 1, fig. 1.

42. Pp. 109, 118; Bryk et al., *supra* note 39, at 135, 150-51; James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1624-25 & n.675 (1990); Murnane, *supra* note 39, at 486 ("[O]ne of the most effective ways to improve children's cognitive skills is to put them in an environment with other children who want to acquire cognitive skills and whose families support such learning.").

43. Pp. 112-18.

44. Pp. 112, 115-18, 248-51, 260-73. The authors support their claim to have winnowed out the effect of motivation by asserting that they replicated their analysis of student achievement in a separate regression using only public schools—thus "dropping . . . those students most likely to have [strong educational motivations]." P. 112; see also p. 248. Because families can exhibit high educational motivation by moving to the suburbs or opting for academic, rather than general or vocational, public school programs, a study that excludes private schools hardly washes out the effect of motivation. See p. 33; *infra* notes 49-52, 74 and accompanying text. In any event, the authors' public-schools-only regression does not unambiguously replicate their all-schools regression. Compare p. 126 tbl. 4-8 (in authors' most general *all-schools* regression, effective organization accounts for 25% of variance in achievement) with p. 261 tbl. D-1 (in corresponding *public-schools-only* regression, effective organization accounts for only 16% of variance in achievement).

45. Pp. 115-16; see Bryk et al., *supra* note 39, at 135, 155. The authors measure achievement using "gain scores"—the additional number of right answers achieved by seniors on a test they also took as sophomores. Cf. Witte, *supra* note 23, at 24-26 (Chubb and Moe's transformation of their data into gain scores renders results useless because transformation creates "frightening" amount of measurement error, accounting for as much as 70% of demonstrated variance in achievement gains).

college admissions officers will rely. Students with little hankering for school are experiencing steeply rising boredom curves and are taking advantage of the many nonacademic opportunities that suddenly are available, ranging from vocational and fine arts curricula, to athletics and other extracurricular activities, to part-time jobs, to expanded social lives, to marriage and childbirth, to hanging out on the streets, to alcohol and drug use, and so on. Parents' lives and motivations also can change dramatically when their children become old enough to care for themselves. For these and other reasons, the pre-tenth grade motivations that sophomore test scores measure can only incompletely reflect the educational tastes that affect academic performance in the succeeding two years.

Second, as noted, not only the student's and her parents' educational motivations, but also those of her classmates and their parents affect academic performance.<sup>46</sup> Because the onset of high school often is a time when students move from one school to another, it also is a time when students move from one circle of peers with a particular set of educational tastes to a different circle with different tastes. However successfully sophomore test scores measure the educational motivations of the student's family, those scores are unlikely to measure tastes emanating from the school setting in which sophomores only recently arrived. Yet those unmeasured tastes are likely to be intensively experienced by juniors and seniors while the achievement gains the authors measure are occurring.

Third, even when potential measures of educational tastes are at hand, the authors do not use them. For example, although the authors notice that students in high performance schools more frequently report that their parents expect them to attend college than students in low performance schools, they exclude parental expectations from their analysis of achievement gains.<sup>47</sup> The authors thus jettison the only direct, albeit crude, measure of parental motivations that their data set contains.<sup>48</sup>

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46. See *supra* note 42 and accompanying text.

47. Pp. 108 tbl. 4-5, 296-97 n.17. The 17% difference between low- and high-performing schools on this measure is comparable in size to differences that elsewhere prompt the authors to include factors in their regression models. See, e.g., pp. 82 tbl. 3-5, 85-86 tbl. 3-6, 122 ("goal clarity" and "principal's vision" included based on 16% and 10% differences).

48. See Witte, *supra* note 23, at 4 tbl. 1 (using same data set as Chubb and Moe to show that a mother's expectations in regard to her child's future college attendance has substantially more impact on past achievement than family income, parents' education, number of books in home, and all other factors measured, except ethnicity). Chubb and Moe also might have gauged motivations using measures of parental contact with schools and student comportment—factors that the authors concede reflect students' and parents' attitudes towards education and that the authors rely upon in their second, but not in this first, regression analysis. Pp. 96-98 tbl. 3-10, 160 tbl. 5-7, 164, 298 n.28. Additional measures of parent and student motivation that researchers besides Chubb and Moe have extracted from the data set include frequency of parent-child discussions about the latter's experiences (which has as much impact on achievement as mother's education and more impact than family income) and students' college aspirations in grades 6-11 (which correlate with achievement and private school attendance). See Anthony S. Bryk, *Disciplined Inquiry or Policy Argument*, 51 HARV. EDUC. REV. 497, 501-03 (1981); Witte, *supra* note 23, at 4 tbl. 1, 15-16, 34 n.18.

Finally, the authors label what look like pretty good proxies for parent and student motivations as measures of other things. The best example is the authors' treatment of "academic program," i.e., the proportion of students enrolled in academic as opposed to general or vocational courses. The authors sometimes include academic program in their measure of "effective organization," rather than attributing program to student and parent influences, thus *doubling* the impact of organization on achievement.<sup>49</sup>

Although school policies surely have *something* to do with the programs in which students enroll, it is hard to imagine those policies having as *much* impact on program choices as the students' and their parents' own tastes for, or aversion to, academics.<sup>50</sup> Moreover, the motivations of a student's and her parents' peers within the school setting may well surpass school policy as the second most important factor. The authors thus attribute the effect on achievement of students' program choices to a school policy that they themselves acknowledge (in an appendix) is only a secondary or tertiary determinant of program choices, ranking well behind student ability and parental motivations.<sup>51</sup> When academic track is removed from the organization measure and included among the parent-student factors, the latter factors account for 86% of the variance in achievement that the authors' model explains, leaving only 14% of the variance to be explained by what the authors conceive of as school-related, hence, policy-sensitive factors.<sup>52</sup>

Turning, then, to that remaining 14% of the variance, recall that, apart from academic program, what the authors label as "effective school organization" actually has less to do with policy than with the satisfaction levels of students, teachers, and principals. According to Chubb and Moe, a school is well organized: (1) if its students report that the school has fair disciplinary procedures; (2) if its teachers report that they feel responsible for the success or failure of their students, that they wield a lot of influence over school policy, that they

49. Pp. 93-95, 131-40. The well-established impact of academic program on academic achievement has led some researchers to suggest that requiring students to take academic courses would substantially improve performance. See Valerie E. Lee & Anthony S. Bryk, *Curriculum Tracking as Mediating the Social Distribution of High School Achievement*, 61 *Soc. EDUC.* 78 (1988); Witte, *supra* note 23, at 10, 12-16, 22, 26. Both Chubb and Moe's theory that academic program is a function of effective organization and my own view that academic program is a function of motivations suggest that this simple reform would not work.

50. See Witte, *supra* note 23, at 15-16, 26-27, 34 n.18.

51. P. 254 tbl. C-3; *see id.* (student ability, parental expectations in regard to children's college attendance, and family socioeconomic status have 3½ times more impact on program choices than effective organization has). By the authors' own estimate, the combined impact of effective organization on academic program and of academic program on achievement is so small that even the hopelessly ambitious policy feat of elevating children from the 13th to the 88th percentile of well-organized schools would only improve their achievement by 7/100ths of a grade equivalent each year. P. 256 tbl. C-4. Moreover, the authors may inflate even the modest impact on program choices that their regression analysis attributes to effective organization by giving organization credit for what may be the impact of student educational tastes. *Compare* p. 254 tbl. C-3 (including effective organization but omitting any direct measure of student motivations in regression of factors associated with student program choices) *with* p. 160 tbl. 5-7 (student comportment—a rough proxy for student motivations—accounts for close to one-quarter of variance in effective organization).

52. Pp. 130-33 & tbl. 4-10.

get along and cooperate well with each other, that administrative “routines and paperwork” only rarely intrude on their work, and that their principal knows what kind of school she wants, values innovation and new ideas, and keeps the school apprised of where it is going; and (3) if the school’s principal reports that she focuses more attention on achieving academic excellence among students than upon achieving basic literacy skills, attaches more importance to gaining control of the school than to advancing her career, values the pedagogical more than the managerial aspects of her job, and employs excellent teachers.<sup>53</sup>

As with “academic program,” these other indicators of school organization seem only partially, and perhaps secondarily, related to school policy. It is no doubt true that actual disciplinary procedures determine students’ views on the subject, actual allocations of authority determine how much power teachers wield, and actual personnel and pedagogical policies determine whether teachers are “excellent” and “efficacious.” But it seems equally true that other factors—most particularly student achievement itself—play an important role in determining students’, teachers’, and principals’ *reports* in these regards.

Is it not likely, for example, that students who are learning well in school will express confidence in the school’s procedures? That teachers of successful students will feel (or want to feel) responsible for their students’ progress, influential in setting the schools’ apparently effective policies, and respectful of their colleagues, and will believe that their professional endeavors are too important to be called “routines and paperwork?” And that principals who run schools full of successful students will report that their teachers perform well and that pedagogical success is important to their sense of self, and will convey a strong sense of mission in regard to the successes that their students achieve? Conversely, is it not likely that students who do poorly in school will have little respect for school policies, that their teachers will be ill-disposed to take responsibility for the students’ disappointing outcomes and otherwise to feel good about their jobs and colleagues, and that principals directing schools with high concentrations of poor performers will, for that reason alone, rate their teachers less effective, invest less of their self-image in their students’ academic success, and have difficulty conveying a sense of mission?

Psychological theories aside, different levels of student success dictate different educational policies. Principals directing schools full of students from poor families with modest educational aspirations might well be charged with malpractice—or at least with confusing carts and horses—if they placed academic excellence too far ahead of literacy on their list of priorities.<sup>54</sup> Likewise, the managerial tasks required of principals in schools full of under-achievers may be greater than those needed in schools full of overachievers,

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53. Pp. 78-99 & tbls. 3-3 to 3-10, 120-24 & tbl. 4-7; *see supra* note 25 and accompanying text.

54. *See* p. 82 (“Naturally, schools with bright students may find it easier than schools without such students to focus on academic excellence.”).

thus explaining selection techniques that place managerially oriented principals in the former but not in the latter schools. Finally, all else being equal, excellent teachers, who presumably have the most control over where they teach, can be expected to gravitate to schools with higher achieving children, hence lower psychic costs.

Put most simply, there is reason to wonder whether the authors' *Step 1* discovery boils down to two not very interesting propositions: that parent and student motivations affect learning, and that schools full of strong performers—i.e., schools full of relatively wealthy, talented, and highly motivated students—have happier clients and professionals than schools full of weak performers. If this description is accurate, then the authors have done policy-makers no great favor by dressing up motivations and satisfaction levels in the guise of “school organization,” and by misidentifying a *personal cause* and an *attitudinal effect* of achievement as instead a single *programmatic cause* of that outcome.

2. *Step 2: Is Autonomy a Cause of School Organization or Another Proxy for Motivation?*

If the hypotheses posed above were correct—if achievement were in part a consequence of educational tastes and if client-professional satisfaction were a consequence, not a cause, of student achievement—then motivations might, and achievement should, show up in Chubb and Moe's *Step 2* regression of the causes of effective organization (minus academic program). The authors, however, continue using incomplete measures of motivation and entirely fail to analyze the impact of achievement (which they consider an effect, not a cause, of organization). Nonetheless, the authors' *Step 2* findings strengthen the suspicion that their analysis undervalues educational tastes and reverses cause and effect.

In the authors' second regression analysis (of factors related to school organization), family resources and student ability account for about a third of the variance that the model explains.<sup>55</sup> Another third of the variance is explained by two measures of parent and student motivations that the authors introduce in their analysis for the first time.<sup>56</sup> Although welcome, these measures almost certainly underrate the importance of motivations. While acknowledging that the educational attitudes that parents express to teachers and principals at *school* probably have a much smaller impact on educational outcomes than the attitudes parents display to students at *home*,<sup>57</sup> the authors limit their measure of parental motivations to an index of parent-school contact. The authors' measure of student motivations—infrequency of disciplinary

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55. P. 160 tbl. 5-7.

56. *Id.*

57. P. 164; see Bryk et al., *supra* note 39, at 135, 155-56.

problems—is similarly incomplete. Although misbehavior is one way in which students show that they do not care much for academics, it is too extreme a manifestation to pick up most gradations of educational taste.

The authors focus most of their *Step 2* attention on “autonomy” or “bureaucracy” levels, to which they attribute about a quarter of the variance in school organization.<sup>58</sup> The authors define autonomy as the extent to which principals take responsibility for school policy rather than attributing it to outside actors.<sup>59</sup> Because schools with “effective organization” tend to have high-achieving students, and schools with “ineffective organization” tend to have low-achieving students,<sup>60</sup> the authors’ discovery may translate into a finding that principals in schools with successful students tend to take credit for the schools’ and the students’ accomplishments, while principals in schools with unsuccessful students tend to attribute part of the blame to central office staff and unions.

Just as “school organization” may reflect satisfaction levels rather than pedagogical policy, “school autonomy” may reflect something other than governance policy, namely, student educational tastes and success rates. Like the rest of us, administrators are probably more willing to take credit for good things than to accept blame for bad things. This tendency is particularly strong where, as here, no one understands very well how desirable outcomes are achieved and, accordingly, where no transparent standards are available for assessing credit and blame.<sup>61</sup> The same point can be made programmatically: Students with low educational motivation bring many problems to school that students with strong educational tastes do not bring; and schools with more problems require more management and outside assistance (in the form, for example, of compensatory education programs, vocational and special education assistance, dropout prevention activities, and birth control and AIDS counseling) than do schools with few problems.<sup>62</sup>

Instead of ruling out the possibility that the authors’ *Step 1* analysis mislabeled an attitudinal effect of achievement (client-professional satisfaction) as a programmatic cause (“effective school organization”), the authors’ *Step 2* analysis of effective organization appears to mischaracterize another attitudinal effect of successful students (principals’ responsibility-taking) as another programmatic cause (“school autonomy”).

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58. Pp. 160 tbl. 5-7, 162 tbl. 5-8.

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

60. Pp. 126, 130-33 & tbl. 4-10.

61. See James S. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 390-91 & n.138 (1990) (courts have refused to recognize “educational malpractice” cause of action because facilitating learning in classroom is “skill” for which no objective standards exist).

62. See pp. 62-64, 168-70.

### 3. *Step 3: Is Private Control a Cause of Autonomy or Another Proxy for Motivation?*

In setting out to determine what makes schools autonomous or bureaucratic, Chubb and Moe acknowledge a possibility that their *Step 2* analysis ignores—that student achievement is a cause, not an effect, of the school traits on which they focus their attention. In one of the authors' regression analyses of autonomy, moreover, achievement gains do account for some of the variance that their model explains.<sup>63</sup> From the authors' standpoint, however, the important *Step 3* finding is not how powerfully, but how weakly, parent and student characteristics (parental resources and contact with schools; student ability, achievement gains, and comporment) correlate with autonomy levels—accounting for only 20-30% of the variance. The remainder of the impact on autonomy is split between two factors: “private control” and “[non]urban location,” which account, respectively, for 45-60% and 20-25% of the explained variance.<sup>64</sup> Put bluntly, private school principals and, to a lesser extent, suburban principals give themselves the credit for school policy; urban principals blame central office and the union.

Again, one can give psychological and programmatic explanations for this phenomenon. Urban schools have a lot of problems; private and suburban schools do not. Urban principals may be happy to share the blame for their problems; private and suburban principals may want the credit for their schools' successes. Solving urban schools' problems may require lavish management and administration; keeping private and suburban schools running may require less.

But passing these explanations, let me pose a question the authors do not adequately answer: What, besides autonomy, do private and suburban schools have in common? A tempting response is “market discipline” or the threat of “exit”—imposed by mobile customers in the private school case and mobile residents in the suburban case. The authors convincingly reject this claim, however, noting that residential mobility does not approach the product-wise mobility needed to make markets work.<sup>65</sup> Notwithstanding their affinity for

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63. P. 176 tbl. 5-11. The authors thus find that *student achievement* is about 10% of the posited cause of school autonomy, which is 25% of the posited cause of school organization (minus academic program), which is 14% of the posited cause of *student achievement*. What use policymakers can make of such findings is unclear.

64. Pp. 171, 176 tbl. 5-11.

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[R]esidential mobility . . . tend[s] to promote the kind of matching that occurs in markets; but it is a very rough and inadequate approximation to the real thing, even for those citizens affluent enough to move where they want when they want. In general, residential decisions involve many factors in addition to education . . . and, once they are made, the financial costs and personal adjustments entailed by moving are quite high. Low or declining educational quality need not keep parents from moving into an area, and it is even less likely to prompt existing residents to pick up and leave.



market-based explanations of success, therefore, the authors acknowledge the need for a non-exit-based explanation for suburban school autonomy, and they give the one sketched above: Relatively speaking, suburban schools have “‘nice’” environments and student bodies and thus are relatively trouble free.<sup>66</sup> What the authors ignore is that the same reasoning explains the autonomous conditions that *private* school principals report. Indeed, because the vast majority of private and parochial schools are in the suburbs,<sup>67</sup> those schools *begin* with the “‘nice’” edge that assertedly is sufficient to make public suburban schools autonomous—leaving the private schools’ acknowledged ability, *in addition*, to attract especially motivated students<sup>68</sup> to ice the “‘niceness’” cake.

Private and suburban schools share another trait, however: Literally or figuratively, their patrons fled the city schools. And they did so at substantial educationally targeted cost to themselves. Private school customers gave up a large public subsidy in favor of often steep private tuitions; suburban school patrons moved to districts with (by comparison to industrialized cities) small property tax bases requiring stout levy rates to support their “‘nice’” public schools.<sup>69</sup> What, then, do private and suburban schools have in common? The answer seems to be that both sets of schools are populated by parents and students who, in the clearest possible way—cash on the barrel head, and a lot of it—have manifested well-developed tastes for education. By definition, therefore, private and suburban school patrons are veritable “‘educational connoisseurs.’”

That private control has a *stronger* effect than nonurban location supports an educational-tastes hypothesis. Private schools act as a sponge for educational motivations in two ways, the first of which applies more strongly to private schools, and the second of which applies *only* to private schools. First, by entirely forsaking the public subsidy and paying tuition, private school parents evidence a stronger preference for education than suburban parents, who derive some subsidy from the taxes nonparent patrons pay. Second, unlike nearly all public schools, private schools *themselves* sort prospective students on the basis of educational tastes.<sup>70</sup> Private school admissions personnel can be expected to prefer—even over highly talented applicants—applicants who themselves, and whose parents, display a commitment to the educational enterprise. Not

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P. 33; *see infra* notes 170-72 and accompanying text.

66. Pp. 24, 62-66, 183-84, 190-91.

67. *See* Witte, *supra* note 23, at 28 & tbl. 10.

68. P. 112.

69. *See, e.g.*, Declaration of James E. Coleman, Executive Director of Financial Services for the School District of Kansas City, Missouri at 3, *Jenkins v. Missouri*, 731 F. Supp. 1473 (W.D. Mo. 1990) (No. 77-0420-CV-W-4) (on average, tax levy rates in suburban Kansas City school districts are 22% higher than in urban Kansas City district; in some suburban districts, levy rates are 30-70% higher than in urban district).

70. *See* Murnane, *supra* note 39, at 486 (“[S]electing the right mix of students is a powerful way to improve the effectiveness of an educational program,” and private schools do just that by “provid[ing] primarily college preparatory instruction to children they select and whose parents select them.”); Witte, *supra* note 23, at 28-29 tbl. 11.

only, therefore, do well-developed educational tastes “cause” private schools, by propelling educational connoisseurs to pool their educationally directed resources there. In addition, private schools “cause” high educational tastes by selecting clients who evidence especially high levels of connoisseurship.<sup>71</sup>

If any traits can be expected to act as proxies for educational tastes, those traits are private school attendance and suburban school location. Suggestively, those two factors account for more of the variance (70-80%) than any other factor examined in the authors’ three regression analyses.

If anything, therefore, each step in Chubb and Moe’s odyssey of statistical analysis brings them closer to the conclusion that educational tastes play an important role in all manner of educational outcomes. Aggregating the proxies for educational tastes that can be extracted from the authors’ analysis permits the conclusion that: (1) educational motivations measured by a composite of private sector, nonurban location, parent contact with schools, and student comportment account for 90% of the variance in autonomy that the authors’ study explains; (2) educational motivations measured by a composite of school autonomy, parent-school contact, and student comportment account for nearly 60% of the explained variance in school organization; and (3) educational motivations measured by a composite of academic program and client-professional satisfaction account for as much as 25% of the explained variance in achievement.

One troubling question remains—a question that presents as serious a problem for a tastes-focused interpretation of the authors’ data as it does for their own markets-focused interpretation. If private control is such a good proxy for educational tastes—or, we might ask Chubb and Moe, if private control is so strongly related to the prerequisites for achievement—why is there such a weak correlation (if any) between private control and achievement?<sup>72</sup>

The authors offer no answer to this question, but one can be imagined: It is not private control, but rather effective organization, that promotes achievement; private control is simply the best way to foster effective organization. This answer explains why private control has no impact on achievement in studies that take effective organization into account, but it does not satisfactorily explain why private control has so little impact on achievement in studies that leave effective organization out of account.<sup>73</sup>

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71. Thus, the level of success private schools achieve with the students they now select could not possibly accompany a plan, such as the authors’, in which most private school students would mainly be children whom private schools now reject. Predicting otherwise is analogous to predicting that if members of Yale’s football team somehow gained admission to the training program of the American Ballet Theater they would have a good chance of becoming professional ballet dancers.

72. See *supra* notes 35-36 and accompanying text.

73. See *supra* note 36. The modesty of the contribution that private control makes to effective organization, and that effective organization makes to achievement, may explain the minimal impact of private control on achievement in studies that do not account for effective organization. This explanation, however, hardly commends private control to policymakers seeking ways to improve achievement.

There is an alternative answer. It is not private control, but rather parent and student motivations, that promote achievement. And, while enrollment in private schools is a good proxy for those motivations, the proportion of students enrolled in academic programs is a more encompassing proxy, which *does* correlate with achievement and could easily wash out the explanatory power of private schools in a regression that controls for both.<sup>74</sup> This answer explains why private control has no impact on achievement in studies that take academic program into account, and may also explain why private control has some, albeit slight, impact on achievement in studies that do not account for academic program but use other fairly encompassing controls (among them, controls not used by Chubb and Moe) for parent and student motivations.<sup>75</sup>

#### 4. *Step 4: Is Choice the Motive Force?*

The authors' statistical analysis ends with *Step 3*, but their interpretive momentum carries them a step further. They conclude that market discipline resulting from the threat of parental exit, rather than some other attribute of private schools, accounts for those schools' success.<sup>76</sup> Here again, the authors' analysis does not rule out an alternative hypothesis—that educational success coincides with the absence, and not with a surfeit, of market constraint. To begin with, suburban schools do relatively well pedagogically, even though the high cost of residential relocation substantially shields those schools from the threat of exit.<sup>77</sup>

Second, private school patrons have less choice—and their schools need worry about less exit—than the authors suggest. Theoretically, exit can take one of two forms. Parents can move from one school to another, or they can move from one *sector* (say, private) to another (say, public). In fact, intersectoral exit is *not* realistically available to private school patrons. The bane of all connoisseurs is that their low regard for cost and their high regard for quality leaves them with few options among competing products.<sup>78</sup> In the educational area, this bane takes the form of a preference-driven disability in regard to intersectoral moves: the bulk of educational alternatives (i.e., public schools) simply are not *meaningful* options for most private school patrons.<sup>79</sup>

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74. See *supra* notes 49-52 and accompanying text. Thus, enrolling in a private school is simply one way of enrolling in an academic program. One can test this hypothesis by seeing whether academic program makes the same contribution to achievement in studies that include private schools and those that do not. The authors confirm that academic program has the same impact on achievement in regression analyses of all schools and of public schools only. Compare pp. 132-33 tbl. 4-10 with pp. 264-65 tbl. D-2.

75. The relevant studies are cited *supra* note 36. The factors those studies use to control for parent and student motivations are discussed *supra* note 48 and accompanying text.

76. Pp. 180-82.

77. See *supra* notes 64-65 and accompanying text.

78. See HIRSCHMAN, *supra* note 17, at 50-51; *infra* notes 165-66 and accompanying text.

79. See also Jack Tweedie et al., *Should Market Forces Control Educational Decision Making?*, 84 AM. POL. SCI. REV. 549, 556-57 (1990) (arguing that private school patrons have few *intrasectoral* options).

Third, the segment of the education market in which exit is most common and least constrained—the urban public schools—is also the segment in which performance is worst. Urban public schools know from long experience that they are constantly at risk of losing their educational-connoisseur patrons, that they alone face flight-encouraging urban blight and school desegregation, that they alone compete with *all* sectors of the educational market (particularly now that urban open-enrollment programs invite intrasectoral competition), and that, until recently, they faced the persistent threat of FHA-subsidized outmigration to the suburbs by disgruntled patrons (a subsidy explicitly denied *intraurban* migrants).<sup>80</sup> Yet, as Chubb and Moe document, the result of this surfeit of disciplining choice on the part of patrons of public schools—discipline largely denied the public schools' private and suburban competitors—has been educational decline and even disaster.<sup>81</sup>

The threat of exit and the stimulus to achievement do not necessarily coincide. They may even repel. The authors' analysis thus provides no credible basis either for adopting their exciting answer to the question of what causes achievement—that market-driven policies make a difference—or for ruling out the more traditional and depressing answer—that policy-resistant nurture and nature control. The next part of this Review argues that seeking a more credible basis for the authors' program is probably futile because even if market forces could promote autonomy, effective organization, and achievement, those forces could not be harnessed to elementary and secondary education at an affordable social cost. Part III then explains why the policy implications of the traditional, motivations-focused answer to the question of what causes learning may not be so depressing after all.

## II. WHAT PRICE CHOICE?

Choice proposals for educating children have been around for centuries.<sup>82</sup> During the last thirty-five years, Milton Friedman and John Coons have proposed voucher plans,<sup>83</sup> and James Coleman has promoted tuition tax credits.<sup>84</sup>

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80. See Liebman, *supra* note 42, at 1515-16 n.258; Paul E. Peterson, *Monopoly and Competition in American Education*, in 1 CHOICE AND CONTROL, *supra* note 36, at 66-68; *infra* note 146 and accompanying text.

81. Pp. 7-8.

82. See, e.g., Thomas Aquinas, *Summa of Theology*, in ON LAW, MORALITY AND ETHICS 63 (William P. Baumgarth & Richard J. Regan eds., 1988); AMY GUTMANN, DEMOCRATIC EDUCATION 31-32 (1987) (John Locke's views); John Stuart Mill, *On Liberty*, in JOHN STUART MILL: THREE ESSAYS 128-31 (Richard Wollheim ed., 1985); Thomas Paine, *Rights of Man*, in 2 THE WRITINGS OF T. PAINE 258, 485-93 (Moncure D. Conway ed., 1967); ADAM SMITH, THE WEALTH OF NATIONS 737 (Edwin Cannan ed., 1937); George H. Smith, *Nineteenth-Century Opponents of State Education: Prophets of Modern Revisionism*, in THE PUBLIC SCHOOL MONOPOLY: A CRITICAL ANALYSIS OF EDUCATION AND THE STATE IN AMERICAN SOCIETY 109 (Robert B. Everhart ed., 1982).

83. JOHN E. COONS & STEPHEN D. SUGARMAN, EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL (1978); Milton Friedman, *The Role of Government in Education*, in ECONOMICS AND THE PUBLIC INTEREST 123 (Robert A. Solo ed., 1955).

What Chubb and Moe add to the policymaking landscape is a plan for privatization *within* the public context—a plan to preserve a modicum of public control in order to deflect the social stratification charges made against prior plans.<sup>85</sup>

Like the authors' statistical arguments, their policy specifications are sophisticated and finely tuned. On the one hand, the authors advocate a degree of public control. On the other hand, they insist that the market be relatively free on both the demand and supply sides: Parents and children must be free to choose schools, and schools must be free to select and expel students. The tricky question, then, is just *how* free a market is free enough without being too, inequitably, free. In answer to that question, this part concludes that the "public good" nature of an educated public makes a fully free market unthinkable, and that constitutional, educational, and equity problems make the authors' plan and other proposals for partially free markets unworkable and undesirable.

#### A. *Just So Free, and No More: The Limited Market for a Partially Public Good*

The first thing to acknowledge is how little we know about how educational markets could and should work. Whether or not one accepts Chubb and Moe's interpretation of their study, it tells us next to nothing about how schools might function in a free (or freer) market. Indeed, the most salient trait of the current educational market is how *unfree* it is.

To begin with, unlike the typical consumer in a free market who can spend money or save it and stay home, the educational consumer has no legal choice but to spend opportunity capital (if not money) on thirteen years of schooling.<sup>86</sup> Lacking experience in deciding *whether* to spend capital on schooling,

84. JAMES S. COLEMAN ET AL., *HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED* (1982). In the past year, a number of similar plans have been proposed. Former Governor Pete du Pont proposed an uncapped voucher plan to the Delaware legislature, see Amy S. Wells, *A Bold Plan for Choice in Delaware's Schools*, N.Y. TIMES, Feb. 27, 1991, at B11; the Wisconsin legislature adopted (and a court promptly struck down) a plan paying for 1% of Milwaukee's low-income children to attend private nonsectarian schools, see William Celis, *State Plan for Choice of Schools Is Voided*, N.Y. TIMES, Nov. 14, 1990, at B8; a California businessman initiated a well-financed ballot initiative campaign to enshrine a knock-off of Chubb and Moe's choice proposal in the California Constitution, see Lynn Olson, *California Businessman's Drive for Choice Sparking Battle*, EDUC. WK., Sept. 18, 1991, at 1; and President Bush prodded states to pay for students to attend private schools and proposed a partial voucher plan allowing federal assistance to follow children to private and parochial schools, see *supra* note 5. *But cf.* Susan Chira, *A Sea of Doubt Swells Around Bush's Education Plan*, N.Y. TIMES, July 22, 1991, at A12. On the other hand, Oregon voters overwhelmingly rejected a well-funded ballot initiative to adopt a choice plan modeled after Chubb and Moe's. See William R. Kincaid & Jonathan E. Meyer, Note, *Pushing Constitutional and Political Limits: The Oregon Educational Choice Initiative*, 7 J.L. & POL. (forthcoming October 1991). See generally Lynn Olson, *Proposals for Private School Choice Reviving at All Levels of Government*, EDUC. WK., Feb. 20, 1991, at 1.

85. See pp. 217-19; *supra* note 16 and accompanying text. President Bush's proposal to create hundreds of new public schools follows Chubb and Moe's model. See Abigail Thernstrom, *Out-classed*, NEW REPUBLIC, May 13, 1991, at 12.

86. See Liebman, *supra* note 42, at 1637-40, 1649-50.

the typical educational consumer also knows next to nothing about *how* to do so. The combination of the 100% subsidy that 90% of all educational customers currently use and the public schools' traditional mandatory assignment policy means that price and quality shopping by consumers, as well as advertising by providers, are rare events save at the high end of the market.<sup>87</sup>

Compulsory attendance and public subsidization distinguish the existing educational market from a free market in another way: In addition to giving many young citizens an education they do not want and (given the choice) would refuse to pay for, and giving other citizens an education they want but cannot pay for, the existing system forces still other citizens to pay for an education they do not want, do not receive, and have no interest in providing to others. Throw in the fact that education is virtually the only good or service that any (and, in fact, nearly all) of the country's fifty-one constitutions affirmatively makes the state provide,<sup>88</sup> and it becomes clear that education is different from all other objects of consumption in this country. What sense does it make, finally, to think in free-market terms about a good that the state forces unwilling purchasers to purchase and unwilling consumers to consume?

The second thing to realize is that no responsible policymaker *wants* the free educational market we currently don't have. No credible policymaker would be willing to consign educational consumption and expenditures to whatever, and only so much as, the market will bear. Whether to prepare young adults for self-government,<sup>89</sup> to inaugurate them into a pluralistic society,<sup>90</sup> to empower them to make the kinds of moral choices that Chubb and Moe think should drive the educational system,<sup>91</sup> to assure the existence of a minimally productive work force,<sup>92</sup> to promote social reproduction in some other way, or just to keep kids off the street part of the time, the state is going to make children attend school. And because the state makes them do so against their wills (and for the social reproduction reasons just discussed), the state is going to define the content of that education and provide it *for free*, courtesy of you and me.<sup>93</sup>

In a world in which minimum levels of consumption (by some) and purchase (by others) are compelled—a world in which an educated public, if not education itself, is treated as a “public good”<sup>94</sup>—only three market free-

87. See *id.* at 1650 & n.803; Peterson, *supra* note 80, at 53 tbl. 2.2 (just under 10% of American high school students attend private schools).

88. See Liebman, *supra* note 42, at 1494-95 & n.156.

89. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

90. See, e.g., *Ambach v. Norwick*, 441 U.S. 68, 77-78 (1979).

91. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 240 (1972) (White, J., concurring).

92. See, e.g., *id.* at 221 (majority opinion).

93. See GUTMANN, *supra* note 82 (discussing social reproduction function that education serves in all societies and refuting view that education could and should be limited to cognitive development free of social aims).

94.

*Public goods* are . . . goods which are consumed by all those who are members of a given community . . . in such a manner that consumption or use by one member does not detract from

doms potentially remain: the consumer's freedom to decide how much (but not how little) to spend on education; the consumer's freedom to decide *where* to attend school; and the provider's freedom (subject to constitutional antidiscrimination restrictions<sup>95</sup>) to decide which students to enroll. The next three sections explain why it is not possible, using only these three market freedoms, to construct anything resembling a choice-driven educational market at a tolerable social cost.

B. *Just So Free and No Less: Uncapped Vouchers, Tax Credits, and Class Segregation*

Choice proponents seeking to preserve all three market freedoms advocate either uncapped vouchers or tuition tax credits—mechanisms that lack a ceiling on the amount parents can spend on their children's education. Although Chubb and Moe reject such plans on equity grounds, brief consideration of them will facilitate discussion of the authors' proposal.

The first problem with uncapped choice mechanisms is a legal one, although understanding its implications necessitates a return to Chubb and Moe's statistical study. A majority of the private schools the authors studied are Catholic schools.<sup>96</sup> Most researchers using the same data have concluded that the data allow no useful generalizations about private schools *other* than Catholic schools because of the small number of non-Catholic private schools surveyed and the disproportionate number of those schools that serve elite and specialized populations whose patterns of achievement may not generalize to other children.<sup>97</sup> Any publicly funded choice plan that excludes Catholic schools accordingly threatens to deny children access to an important—some would say the *only*—segment of the private sector with even a partially demonstrated capacity to improve existing educational services. The difficulty, of course, is that the Constitution may exclude parochial schools from publicly funded choice plans.

Determining what publicly funded educational arrangements the Establishment Clause prohibits is difficult at present, because the Supreme Court's

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consumption or use by another. Standard examples have been crime prevention and national defense as well as . . . advanced standards of literacy . . . . The distinguishing characteristic of these goods is not only that they *can* be consumed by everyone, but that there is *no escape* from consuming them . . . .

HIRSCHMAN, *supra* note 17, at 101; see Levin, *supra* note 36, at 251; David B. Tyack, *The Public Schools: A Monopoly or a Contested Public Domain?*, in 1 CHOICE AND CONTROL, *supra* note 36, at 86, 89 (noting "long American tradition of regarding education as a common good").

95. See, e.g., *Norwood v. Harrison*, 413 U.S. 455 (1973).

96. See p. 27.

97. See COLEMAN ET AL., *supra* note 84, at 13; Bryk et al., *supra* note 39, at 190-91, 197-98 n.72 ("Many of the positive effects associated with Catholic schools are not characteristic of non-Catholic private schools," including the "unusual effectiveness of Catholic high schools for at-risk youth."); Goldberger & Cain, *supra* note 39; Witte, *supra* note 23, at 6-7, 18-19, 36 n.27.

jurisprudence is in flux.<sup>98</sup> It may be worthwhile, however, to consider whether plans will invite sufficiently serious constitutional challenge under existing doctrine to frustrate implementation while the Supreme Court sorts out the matter.

Voucher plans are attractive in theory because giving each child a coupon worth the price of a “minimally adequate” education is an administratively easy way to make private schools accessible to all children—including the poor and working class children who are most systematically neglected by the status quo.<sup>99</sup> Unfortunately, the full-funding and administrative virtues of voucher plans from social and educational standpoints are vices from a constitutional standpoint. At the point the parochial school redeems its vouchers (no pun intended), the plan calls for the state unconstitutionally to provide *large amounts and proportions* of funding *directly* to a religious school.<sup>100</sup> Even if states attempt to disguise the redemption process by retroactively reimbursing parents for amounts spent on religious schools, prospectively giving parents grants for the same purpose, or otherwise seeking to pass the subsidy through the parent, the Court’s precedents pose obstacles.<sup>101</sup> Nor can churches—at

98. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). Compare *Can Vouchers Hurdle Church-State Wall?*, N.Y. TIMES, June 12, 1991, at B5 (quoting constitutional law scholar Laurence Tribe: “One would have to be awfully clumsy to write [educational] voucher legislation that could not pass constitutional scrutiny.”) with Charles Fried, *The Once and Future Court*, N.Y. TIMES, July 7, 1991, at E11 (“Voucher plans that would allow parents to use tax dollars to choose . . . church-affiliated schools” are “likely to divide even the Reagan and Bush appointees to the Court,” and “there is no predicting the outcome[.]”). For the time being, the prevailing Establishment Clause proscription is against state action that “convey[s] or attempts to convey a message that religion or a particular religious belief is preferred.” *Westside Community Schs. v. Mergens*, 110 S. Ct. 2356, 2370-71 (1990) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985)). This test requires an inquiry into whether the law or practice has the purpose or primary effect of advancing religion and, possibly, whether it entangles the state in the affairs of religious organizations. See *id.* at 2370-71 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)); cf. *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S. Ct. 688, 698 (1990) (dicta questioning “entanglements” test). Some state constitutional provisions pose even higher barriers to parochial school participation in publicly funded choice plans than does the First Amendment. Compare *Witters v. State Comm’n for the Blind*, 771 P.2d 1119, 1121 (Wash. 1989) (state constitutional proscription against public money being “‘applied to any religious . . . instruction’” forbids state to reimburse blind student for Bible college tuition under program helping handicapped individuals obtain job skills (quoting WASH. CONST. art. I, § 11; emphasis added by court)) with *Witters v. Washington Dep’t of Servs. for the Blind*, 474 U.S. 481 (1986) (upholding state aid to same student under First Amendment).

99. See Chubb & Hanushek, *supra* note 6, at 239-40.

100. See, e.g., *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 392-93 (1985) (“[O]ur . . . cases have struck down attempts by States to make payments out of public tax dollars directly to primary or secondary religious educational institutions . . .”); *Mueller v. Allen*, 463 U.S. 388, 399 (1983) (“[T]he means by which state assistance flows to private schools is of some importance . . .”); *id.* at 403-04 n.11 (“[D]irect financial subsidies are forbidden . . .”); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973) (“[D]irect aid in whatever form is invalid . . .”); *Lemon*, 403 U.S. at 611-13; *Walz v. Tax Comm’n*, 397 U.S. 664, 675 (1970) (“direct money subsid[ies]” to parochial schools are “pregnant with” potentially unconstitutional involvement in religious affairs); *infra* note 194 and accompanying text. *But cf.* *Committee of Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980) (upholding state program reimbursing parochial schools for costs of state-mandated tests).

101. See, e.g., *Witters v. Washington Dep’t of Servs. for the Blind*, 474 U.S. 481, 487 n.4, 488 (1986); *Grand Rapids*, 473 U.S. at 393-94, 396; *Sloan v. Lemon*, 413 U.S. 825, 827, 832 (1973); *Nyquist*, 413 U.S. at 785-86. *But cf.* *Wolman v. Walter*, 433 U.S. 229, 255 (1977) (states may loan instructional materials to parochial students); *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947) (states may reimburse parents



least without giving up the power to select their own teachers—avoid the problem by subsidizing their schools' religious endeavors and using voucher funding for secular instruction only.<sup>102</sup>

Regardless of its constitutionality, the possibility of publicly mandated, hence bureaucratically enforced, segregation of secular and nonsecular funding, instruction, and other activities—and especially the possibility of publicly controlled hiring and firing—presents a major educational problem. Recall that, by hypothesis, the reason private schools educate so successfully is that private control avoids bureaucracy (defined as outside regulation of instruction, hiring, and firing), which facilitates effective organization (defined as the absence of administrative “routines and paperwork”), which facilitates learning.<sup>103</sup> Whatever the Supreme Court thinks about the church-state entanglements needed to keep public money from flowing to secular activities,<sup>104</sup> Chubb, Moe, and other choice proponents think those entanglements are educational anathema.

for cost of transporting parochial children to school).

In *Witters*, the Court upheld the payment of a state vocational-training grant for the handicapped to a blind man attending Bible college. *Witters*, 474 U.S. at 489. Five concurring Justices emphasized the constitutionality of state programs: (1) “that are wholly neutral in offering educational assistance to a class defined without reference to religion”; (2) that do not “single[] out a [religiously identified] class of citizens for a special economic benefit”; and (3) under which “any aid to religion results from the private choices of individual beneficiaries.” *Id.* at 490-91 (Powell, J., concurring) (quoting *Sloan*, 413 U.S. at 832); *see also id.* at 490 (White, J., concurring); *id.* at 493 (O'Connor, J., concurring in the judgment). *Witters*' bearing on elementary and secondary school vouchers is uncertain. First, any widely available choice plan that, like the program in *Witters*, paid money “directly to” parents for transmission to “educational institutions of choice,” *id.* at 487 (majority opinion), would be an administrative nightmare, rife with opportunities for fraud. Second, the Court has traditionally subjected public funding of higher education to considerably less Establishment Clause scrutiny than public funding of elementary and secondary education. *See, e.g., Tilton v. Richardson*, 403 U.S. 672, 680-81 (1971). Third, the compulsory nature of elementary and secondary education subverts the *Witters* requirement that “any” money citizens pay religious schools be entirely a matter of “private decisions.” *Witters*, 474 U.S. at 491 (Powell, J., concurring). Fourth, by relieving only parents of private and parochial school children of the traditional lost-subsidy penalty for abandoning the public schools, elementary and secondary school vouchers arguably “single out a [religiously identified] class of citizens for a special economic benefit.” *Id.* at 491 n.2 (quoting *Sloan*, 413 U.S. at 832). Finally, the weak “inference” of state religious endorsement when the state gives vocational-training grants to a small number of eligible handicapped adults attending religious colleges, *id.* at 493 (O'Connor, J., concurring), strengthens considerably when millions of children compelled to attend school divert billions of tax dollars to parochial schools whose principal mission “is ‘to assure future adherents to a particular faith.’” *Tilton*, 403 U.S. at 685-86 (quoting *Waltz*, 397 U.S. at 671). At that point, the program approaches the situation the *Witters* Court distinguished: where no meaningful distinction can be made between aid to the student and aid to the school. *See Witters*, 474 U.S. at 487 n.4.

102. *See Aguilar v. Felton*, 473 U.S. 402, 409 (1985); *Grand Rapids*, 473 U.S. at 375-78, 382-86; *id.* at 398-99 (Burger, C.J. & O'Connor, J., concurring in judgment in part and dissenting in part); *Sloan*, 413 U.S. at 827, 832; *Nyquist*, 413 U.S. at 785-86, 789-90; *Lemon*, 403 U.S. at 611-13. In the cited passages: *Lemon* forbids direct state subsidization of core parts of parochial school instruction; *Nyquist* and *Sloan* forbid accomplishment of the same goal through mechanisms that pass the subsidy to the school via the parent; and *Lemon*, *Grand Rapids*, and *Aguilar* reject attempts to sanitize subsidies by targeting them for secular programs, particularly when the teachers conducting the programs are hired by the parochial school. Thus, little room is left for even secularly targeted subsidies that nominally pass through the parent. *See Grand Rapids*, 473 U.S. at 395 (“[D]irect aid to the educational function of the religious school is indistinguishable from the provision of a direct cash subsidy to the religious school that is . . . prohibited under the Establishment Clause.”).

103. Pp. 150-55, 223-25.

104. *See supra* note 98 and accompanying text.

In addition to trading off against each other, educational excellence and constitutionality trade off against equity, as tax credits reveal. In the past, the Court has upheld tax *deductions* for modest portions of private school expenditures<sup>105</sup> but struck down a form of tax *credit*.<sup>106</sup> Although this distinction may be at risk in the Court's current restructuring of Establishment Clause jurisprudence, any adjustment in the law is unlikely, for equity reasons, to permit a tax credit plan that Chubb, Moe, and like-minded choice advocates would find attractive.

The problem with the tax credit/negative income tax scheme that the Court actually struck down is that it was a voucher plan in disguise: It allowed a particular class of taxpayers to receive a uniform benefit for each child the taxpayer had enrolled in a parochial school, regardless of the taxpayer's income and regardless of how much she actually spent on her children's education.<sup>107</sup> One can imagine the Court upholding tax deductions for parochial tuition that are more substantial (even 100%) than the Court yet has upheld, and even approving tax credits that depend on parents' actual income and expenditures on parochial schools.<sup>108</sup> But any such deduction or credit plan is likely to have three unattractive characteristics. First, it probably cannot enable poor and working class children to purchase a parochial education because the income- and spending-insensitive features necessary to accomplish that goal would replicate the direct-aid and quasi-voucher attributes that the Court's precedents forbid.<sup>109</sup> Second, the plan would exacerbate existing educational inequities by subsidizing families in proportion to how *little* they need an educational boost, i.e., based on whether families have enough income or tax liability to offset with a tax break. Finally, by increasing the proportion of educational connoisseurs who can afford to give up the public subsidy by transferring to private schools, the plan would plunder the public schools (from which the poor could not escape) in a number of ways discussed below.<sup>110</sup> Trading off equity to achieve constitutionality, tax credit plans are likely to help the rich get richer, while the poor stay poor.

Without contemplating drastic changes in Establishment Clause doctrine, it is hard to imagine educationally attractive voucher programs or socially attractive tax credit plans that include Catholic schools. Yet, on the basis of

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105. See *Mueller v. Allen*, 463 U.S. 388, 391 (1983).

106. See *Nyquist*, 413 U.S. at 780.

107. See *Mueller*, 463 U.S. at 393, 396-97 & n.6 (credits are unconstitutional if they are not "part[] of a genuine system of tax laws," and provide a benefit that "is unrelated to the amount of money actually expended by any parent on tuition, but is calculated on the basis of a formula . . . to assure that each family would receive a carefully estimated net benefit" (quoting *Nyquist*, 413 U.S. at 790)); *Nyquist*, 413 U.S. at 785-86, 789-90.

108. See *Mueller*, 463 U.S. at 400 (dicta). *Mueller* suggests, however, that, to be constitutional, tax breaks tied to educational expenditures must be available to all parents and not simply to parents of children attending private and parochial schools. See *id.* at 388, 397.

109. See *supra* notes 100-02 and accompanying text.

110. See *infra* notes 165-74 and accompanying text.

existing data, it is hard to imagine a social scientifically supportable plan for educational improvement that *excludes* those schools.

Even if nonsectarian tax credit and uncapped voucher plans enhance educational excellence, they do so intolerably by trading off equity. A key desideratum of such plans is to preserve the supplier's market freedom to decide how much to charge for a particular service and the consumer's market freedom to decide how much to spend on it. Thus, although educationally and politically viable plans probably would have to provide *all* students with a benefit sufficient to purchase a minimally adequate education,<sup>111</sup> such plans, by assumption, would *not* restrict private school tuitions to that benefit or to any other amount.

The consequence of such plans would be the segregation of schools, like other consumer markets, on the basis of class. If we assume only that the market works—educational consumers get what they pay for—and that wealthy families can and will pay for more on average than less wealthy families, we can be sure that uncapped plans will distribute learning, beyond some “minimally adequate” amount, on the basis of wealth. At that point, liberal democracy's basic premise of equal educational opportunity is threatened.<sup>112</sup> Similarly, the four-decade-old premise of racial equality and integration is threatened, given (as the authors demonstrate) that racial stratification follows class stratification.<sup>113</sup>

In response to class segregation worries, choice advocates often claim that parents will choose on the basis of tastes, not cost.<sup>114</sup> Just as wealthy diners-out, who can afford to sup at Le Cirque, may prefer the nice little bistro around the corner, so, too, wealthy parents may choose a school because they prefer “open education” to a more regimented approach or courses in science to ones in fine arts. Choice advocates also point out that, given private and suburban options, schools already are stratified by class.<sup>115</sup>

There is reason to fear, however, that uncapped voucher and tax credit plans will make today's socially stratified situation worse. To begin with, even accounting for taste, the range of restaurants accessible to wealthy customers is far broader than that available to the working class and the working and unemployed poor—even were the latter granted restaurant-redeemable food stamps. Moreover, everything else being equal, the more a restaurant's patrons are expected to pay for their dinner, the better they can expect it to be.

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111. To enable poor and working class children to escape the public schools, plans would have to provide those children with the entire “minimally adequate” amount. To make the cost of doing so palatable to a majority of voters, the same benefit almost certainly would have to extend to middle class children as well.

112. See Liebman, *supra* note 61, at 367-70.

113. Pp. 119, 127.

114. See pp. 32-33, 55; James S. Coleman, *Choice, Community and Future Schools*, in 1 CHOICE AND CONTROL, *supra* note 36, at xix, xviii.

115. See John E. Coons, *As Arrows in the Hand*, in 1 CHOICE AND CONTROL, *supra* note 36, at 319, 320-21.

Second, although well-off patrons may select restaurants on the basis of the patrons' short and long term wealth, restaurants need not select customers on any basis other than the customers' momentarily available (and perhaps visible) wealth. The same is not true of private schools, which have a strong incentive to select students on the basis of their long-term as well as their momentary wealth.<sup>116</sup> A school's competitive position depends on its educational performance; its educational performance depends on its students' academic success; its students' academic success depends principally on their parents' and their peers' parents' socioeconomic status; and socioeconomic status depends not only on momentary circumstances (family income) but on long-term traits as well (parents' prior educational attainments).<sup>117</sup> Market-wise private school operators are accordingly well advised (using available proxies, such as intelligence and achievement tests, alumni preferences, tuition scales, location, residential restrictions, and the like) to allocate seats on the basis of long-term and existing net worth.

Finally, uncapped plans dispense with the stiff penalty currently imposed on parents who segregate their children socially. Assume that the average public school system annually spends \$4,000 on the education of each child.<sup>118</sup> Assume further that, despite bureaucratic inefficiency, half that amount, \$2,000, finds its way to the child. Under the current system, the rational parent choosing between public schools and even perfectly efficient private schools faces the following situation: Whether she has nothing, \$500, \$1,000 or \$1,900 to spend on each child's education, she (rationally) must send her children to public school—along with all other children whose parents have less than \$2,000 to spend, *and*, we can predict, along with a number of children whose parents have even more than \$2,000 to spend. True, a parent with \$2,500 to spend on education has the *option* of sending her child to a private school. But in doing so, she will purchase only \$500 more in education at a cost of \$2,500—giving her a return of 20 cents on the dollar. Assuming that she can get up to 100 cents on the dollar for other uses of her money, she will think long and hard before spending the money on education. Accordingly, one can expect parents with less than lavish tastes for education to send their children to (even urban) public schools, although they have \$2,500, or \$5,000 (returning 60 cents on the dollar), or even \$8,000 dollars (returning 75 cents on the dollar) to spend on each child's education.<sup>119</sup>

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116. See *supra* notes 70-71 and accompanying text (private schools have incentive to select students on basis of parents' and students' educational tastes); *supra* note 40 and accompanying text (educational tastes are partially tied to wealth).

117. Pp. 110-11; see *supra* note 22.

118. The figure actually is a little more than \$5,600. See *K-12 Spending Rises by 7.2 Percent to Record \$231 Billion for 1990-91*, EDUC. WK., Sept. 5, 1990, at 2.

119. Although the lost-subsidy penalty for moving to the suburbs is smaller than that for enrolling in private school, a penalty still exists, hence a similar analysis applies to suburbanward moves. See *supra* notes 69-71 and accompanying text.

The situation is quite different under an uncapped voucher or tax credit plan. Once the state closes the public schools and turns over \$2,000 to each child's parent, then the children of parents with nothing to spend on education can be expected to attend school—call it Soup Kitchen High—with each other and *no one else*. Children whose parents have \$500 to spend will congregate in a slightly better school—call it McDonald's High.<sup>120</sup> And children whose parents have each additional increment to spend will congregate, by class, in a smorgasbord of schools ranging from Hardee's and Howard Johnson's High to Sardi's and Smith and Wollensky High.<sup>121</sup>

By my lights, the equity cost just described is too much to pay, even for modest across-the-board gains in educational excellence. By other lights, the cost is worth incurring on the assumption that showering the rich is a good idea as long as everybody else gets more in the way of runoff than any of them was getting before.<sup>122</sup> The kicker is that the result of an uncapped voucher or credit plan might not be across-the-board educational improvement but, instead, drastic below-the-median decline.

Recall that educational tastes have a large impact on educational achievement. Recall also that the tastes that count are not simply those of one's parents but also those of one's classmates and *their* parents. Consider, finally, that educational tastes are strongly, although by no means perfectly, correlated to wealth.<sup>123</sup> By trading in existing schools, which mix children of all socioeconomic and motivational statuses except those that prompt parents to spend a dollar to purchase a lot less than 100 cents worth of education, for schools that mix only children of nearly identical socioeconomic statuses, uncapped plans assure that *all* poor children will be victimized not only by their parents' own educationally disadvantaged situations, but also by the unfortunate circumstances of literally every one of their peers.<sup>124</sup>

An illustration is close at hand. Consider the existing market for *post*-secondary education—bracketing tuition-capped public universities, and keeping in mind both the Pell grants that give most high school graduates access to

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120. See Mark Walsh, *Entrepreneur Whittle Unveils Plans to Create Chain of For-Profit Schools*, EDUC. WK., May 22, 1991, at 1.

121. As long as it remains uncapped, any politically and fiscally viable plan can only superficially moderate stratification by giving higher benefits to the poor. See *supra* note 111.

122. Cf. JOHN RAWLS, A THEORY OF JUSTICE 75-78 (1971) ("difference principle" permits less equitable distributions of wealth that improve position of all citizens). This argument against consumer stratification does not extend to markets for goods and services that do not serve the social reproduction goals discussed earlier. See Liebman, *supra* note 42, at 1635-45; *supra* notes 89-94 and accompanying text. In my view, the limited social reproduction function of *higher* education places it in a middle position, in which stratification is allowable but ought to be tempered by liberal public subsidies and race- and class-specific affirmative action and scholarship policies. See *infra* note 125 and accompanying text.

123. See sources cited *supra* notes 38-40.

124. The stratification process reaches its regrettable zenith when, having first divided children along race and class lines, it then divides the resulting groups along political, motivational, and gender lines. See NOW Legal Defense and Educational Fund, Public Education Programs for African American Males: A Women's Educational Equity Policy Perspective (1991) (on file with author).

some kind of post-high school education and the other partial public subsidies available to most American post-secondary institutions. Even given the breadth of public subsidization and the prevalence of affirmative action programs, consider whose children, by and large, take advantage of the public subsidies given to Stanford, Smith, and Swarthmore, and whose children, by and large, spend their Pell vouchers on the proprietary beautician, bank teller, and “business” schools that advertise in the subway—and consider, most particularly, how tragically little the latter students get for their, your, and my money.<sup>125</sup>

### C. *Just So Free and a Little Less: Capped Vouchers and Ability Segregation*

The authors seek to avoid the concededly unacceptable costs of uncapped plans by sacrificing one of the three market freedoms outlined earlier.<sup>126</sup> Under the authors’ plan, states would entice entrants into a “new system of public education” by offering them access to a large pool of legally compelled, publicly subsidized, and choice-invested consumers.<sup>127</sup> The price of admission to the market—or perhaps a further inducement to enter—would be a near prohibition on price competition among participating schools.<sup>128</sup> Thus, although parents would retain the freedom to choose schools (with state funding triggered by those choices) and schools would retain the freedom to decide which customers to serve, parents would lose the market freedom to pay (and schools generally would give up the market freedom to charge) what they please for an education.

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125. See Jason DeParle, *In Ruling, Hope for Students Deceived by Schools*, N.Y. TIMES, July 15, 1991, at A11; Karen De Witt, *U.S. Threatening to End Aid at 225 Schools*, N.Y. TIMES, July 18, 1991, at A18; New York Interface Development Project Inc., *Unfair at Any Price: Welfare Recipients at New York Proprietary Schools* (1989) (on file with author); U.S. Federal Trade Comm’n Bureau of Consumer Protection, *Proprietary Vocational and Home Study Schools* (1976). Equally cautionary are the nation’s experiences with market-driven mechanisms for delivering: (1) health care to the poor under the Medicaid program—to which much inefficiency, professional stagnation, and underservicing of needs has been attributed, see Paul Starr, *Health Care for the Poor: The Past Twenty Years*, in FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN’T 106, 106-32 (Sheldon H. Danziger & Daniel H. Weinberg eds., 1986); (2) housing to the poor under HUD’s section 8 housing voucher program—to which endemic, publicly subsidized racial segregation has been attributed, see James W. Fossett & Gary Orfield, *Market Failure and Federal Policy: Low-Income Housing in Chicago 1970-83*, in DIVIDED NEIGHBORHOODS: CHANGING PATTERNS OF RACIAL SEGREGATION 158, 158-80 (Gary A. Tobin ed., 1987) (Urban Affairs Ann. Rev., Vol. 32); and (3) workers compensation benefits to injured industrial employees—to which abandonment of public welfare policies in favor of rigid enforcement of narrow private rights has been attributed, see PHILIPPE NONET, *ADMINISTRATIVE JUSTICE: ADVOCACY AND CHANGE IN A GOVERNMENT AGENCY* 167-74, 260-65 (1969).

126. Pp. 206, 217-18, 220; see Chubb & Hanushek, *supra* note 6, at 238-39; *supra* text accompanying notes 94-95.

127. Pp. 186, 206, 217-18. See *supra* note 16 and accompanying text.

128. Pp. 219-21. The authors’ plan achieves this outcome by forbidding parents to pay more than the state-determined voucher amount and by giving schools and parents no incentive to charge and pay less than that amount. Although public school districts could use local tax receipts to supplement the state scholarship, p. 220, the ability of children to spend these “collective add-ons” in other districts will discourage local taxpayers from approving them.

This move costs the authors dearly in exit-driven, autonomy-promoting, organization-improving discipline. For the authors' plan assures educational suppliers not only that no alternative good, service, or opportunity (including staying at home) can entice their customers to exit, but also that no competing supplier of the same service will entice away clients by lowering its price for the same service or by raising its price and providing a better service. All suppliers need fear is that a competitor will find a way to provide a *better* product at the *same* price. If this does not sound like a bad idea, consider that it presents a *less* competitive situation than that bugaboo of the Chicago set—the pre-deregulation airline industry—which at least always faced competition from the train, bus, car, and stay-at-home industries, even though member firms did not price compete with each other.

Having relieved parents of their right to price shop, the authors then relieve suppliers of their constitutional right to privacy. By becoming state actors, schools subject themselves to the Bill of Rights, the Fourteenth Amendment, and the various statutory burdens of actors on the left side of the public-private divide.<sup>129</sup> Most importantly, participating schools trade in their First Amendment right to religious free exercise for a First Amendment responsibility of religious disestablishment. Hope as the authors do for parochial school participation,<sup>130</sup> they offer no reason to think that even a future Supreme Court would let the Catholic Church run public schools. As was true of uncapped plans, therefore, the authors' capped plan inevitably must exclude the only segment of private schools that even choice-oriented social scientists can agree provides better-than-ordinary schooling.<sup>131</sup>

With the schools' privacy goes most of their independence—what the authors call “autonomy” and loath giving up.<sup>132</sup> For example, policing the antidiscrimination norms that the authors favor and the Constitution imposes will necessitate administrative and judicial scrutiny—what the authors call “bureaucracy” and loath giving in to.<sup>133</sup> Additional bureaucracy will accompany enforcement of the due process and free speech restrictions that schools' inclusion in a public system dictates.<sup>134</sup> More also will accompany the auditing procedures that taxpayers presumably will demand in return for the billions they are assessed.<sup>135</sup>

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129. See Liebman, *supra* note 42, at 1550-52 & nn.390, 392 & 394.

130. See *supra* note 16 and accompanying text.

131. See *supra* note 97 and accompanying text. The point stands even if the “public” appellation is withheld. However denominated, a Catholic school for which the state is the only source of funding almost assuredly violates the Establishment Clause. See *supra* notes 98-102 and accompanying text.

132. See *supra* notes 11-13, 19-21 and accompanying text.

133. P. 221; see *Norwood v. Harrison*, 413 U.S. 455 (1973); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *supra* notes 11-13, 19-21 and accompanying text.

134. Cf. p. 54 (listing due process protections among bureaucratic defalcations most assiduously to be avoided).

135. Cf. pp. 28-30 (criticizing public control for making parents share power with taxpayers). Taxpayers and voters may demand more than auditing procedures. See Kinkaid & Meyer, *supra* note 84 (proposed ceiling on state regulation of private schools recently led Oregon voters to defeat school-choice initiative

The list goes on. The authors' plan would require state officials to: "set[] criteria that define what constitutes a 'public school' under the new system [including] . . . graduation . . . , health and safety . . . , and teacher certification requirements"; develop a schedule of voucher (i.e., price control) levels based on "special educational needs . . . arising from economic deprivation, physical handicaps, language difficulties, emotional problems, and other disadvantages"; adjudicate claims that students received the wrong voucher amount; create "a Choice Office in each district which, among other things, will maintain a record of all school-age children and the level of funding . . . associated with each child"; provide a "Parent Information Center" in each district charged with collecting and making available to the public information on the schools' "mission, their staff and course offerings, parent and student satisfaction, staff opinions, standardized test scores . . . , and anything else that would promote informed choice among parents and students"; distribute, help parents fill out, and collect applications to individual schools; design a "safety-net procedure . . . to ensure that [a child] is assigned to a . . . school" when no school voluntarily accepts her; adjudicate claims that suspensions are "'arbitrary and capricious'"; police claims that parents are overtly or covertly paying more than the voucher amount; "operate a system of buses for getting students to drop-off points . . . where schools . . . would then pick them up," "reimburs[e] schools on a per child basis" for transporting students, and license and regulate the bus companies providing the complex transportation services that the authors' open-enrollment feature would entail; approve "applications for new schools"; "monitor schools for adherence to law"; and negotiate with the unions to which public systems are "conducive."<sup>136</sup> In the face of the complex regulatory structure required by Chubb and Moe's proposal, the authors exhibit a certain amount of imagination when they describe the schools they advocate as "controlled only by the market . . . [and] free to organize any way the [schools] want."<sup>137</sup>

By giving up price competition, jettisoning Catholic schools, and subjecting new entrants to several shelf-feet of regulations, the authors leave few of their market and achievement-promoting principles intact. Most disturbing, they achieve little equity for their trouble. As the airline example illustrates, dispensing with price competition exaggerates quality competition. Yet, when com-

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similar to Chubb and Moe's plan; in response, drafters of new initiative added controls on private school admissions, tuition, curriculum, testing, and even religious practices).

136. Pp. 188, 219-26, 309 n.53; cf. pp. 194-96, 287 n.21 (ruing bureaucratic control over graduation requirements, teacher certification, and bus driver training); pp. 53-55 (attacking bureaucratic regulations associated with "socialization of immigrants," "mainstreaming of the handicapped," and "bilingual education"); pp. 39, 309 n.51 (opposing states' "control [of] schools from above"); Chubb & Hanushek, *supra* note 6, at 240 ("Obviously, the more government regulation, the further the plan deviates from the concept of an educational market.").

137. P. 190.



bined with the schools' surviving freedom to set their own admissions criteria,<sup>138</sup> quality competition is sure to stratify schools on the basis of student ability, if not family wealth.

Absent price competition, schools will compete on the basis of the quality of their results. Average SAT scores will replace price as the lingua franca of value. As the authors document, the best way to increase test scores when price controls hamper selectivity on the basis of wealth is *not* to give principals a lot of autonomy *or* to improve the effectiveness of the school's organization but to admit smarter students.<sup>139</sup> Accordingly, as long as participating schools retain the second market freedom—to use I.Q. or achievement tests to control admissions—we can expect capped voucher plans to generate the same McDonald's High to Le Cirque High stratification as that generated by uncapped voucher plans.<sup>140</sup> The only difference, as the airline example again reminds us, is that stratifying customers using quality and ability may cost more than tried-and-true stratification on the basis of price and wealth. In any event, as detailed above, with stratification comes not only the death of equity but also a dearth of excellence, at least for the children at Soup Kitchen, McDonald's, and Hardee's High.<sup>141</sup>

Having attempted to exchange a decrement in market freedom, and thus (by hypothesis) of excellence, for an increment of equity, the authors' plan in fact achieves neither equity, market freedom, nor excellence.

#### D. *Just So Free and a Lot Less: Open Enrollment, Controlled Choice, and Racial Segregation*

What's left in the way of choice? The answer given by the Minnesota and Nebraska Legislatures, many urban public high school systems, and several school districts in Massachusetts is open-enrollment or, in Massachusetts parlance, "controlled choice."<sup>142</sup> Under this approach, a good bit more equity arises, as the second to last market freedom falls. Within some geographic boundary—a school district's, a metropolitan area's, or a state's—parents retain

138. Pp. 221-22 ("[It] is absolutely crucial" that schools "be free to admit as many or as few students as they want, based on whatever criteria they think relevant—intelligence, interest, motivation, behavior, special needs . . .").

139. See *supra* note 22 and accompanying text.

140. The authors thus would implement a comprehensive scheme of school-by-school ability-grouping to replace the intermittent classroom-by-classroom tracking that goes on today. On the damage that tracking does to poor and minority students (with little gain to wealthier and white students), see JEANNIE OAKES, *KEEPING TRACK* (1985).

141. See *supra* notes 111-25 and accompanying text.

142. Pp. 210-11, 307 n.39; see Dennis Baack & Keith Geiger, *Should Students Be Allowed to Choose Their School?*, STATE GOV'T NEWS, Feb. 1991, at 10-11; William Snider, 'Choice' Proposals Make Headway in Statehouses in 1990, EDUC. WK., Sept. 5, 1990, at 26; Michael Marriott, *States That Allow a Choice of Schools*, N.Y. TIMES, Dec. 19, 1990, at B7.

the freedom to choose public schools, but schools give up the freedom to choose students.<sup>143</sup>

The authors criticize open-enrollment plans on excellence grounds, arguing that such plans retain too much bureaucracy and too little market freedom.<sup>144</sup> The open-enrollment experience of New York City's high schools adds an equity objection—stratification on the basis of consumer sophistication.<sup>145</sup> Confirming the results of investigations conducted elsewhere, a recent study concludes that poor and minority families in New York City have continued sending their children to the nearest school at hand, often unaware that alternatives are available. Meanwhile, middle class and white families have used the open-enrollment program to aggregate their children in superior programs both inside and outside their own neighborhoods.<sup>146</sup> Freedom-of-choice plans also can facilitate racial segregation.<sup>147</sup>

The Massachusetts "controlled choice" plans are an important exception to the stratification history of open-enrollment programs. Devised to sell racial desegregation to patrons of districts in which real integration remains possible, these plans have achieved considerable equity *and* academic success by significantly constraining the last remaining market freedom—that of parents to choose schools.<sup>148</sup> The success of these plans thus has depended on top-down edicts from a state-level agency requiring districts to make racial desegregation

143. The Minnesota and Nebraska plans allow any child to attend any school with space in the State. Public funds follow the student. P. 210. A limitation on the Minnesota plan is the lack of transportation aid for poor families. See Joseph Nathan, *More Public Choice Can Mean More Learning*, EDUC. LEADERSHIP, Oct. 1989, at 51-55; William Snider, *Minnesota Backs Nation's First Choice System*, EDUC. WK., May 4, 1988, at 1. Less than one-half of 1% of the eligible children (most of them rural children) have participated. See Kenneth J. Cooper, *Minnesota's Choice Option Inspires Few Students to Transfer*, WASH. POST, Feb. 24, 1991, at A12.

144. Pp. 210, 212.

145. See generally Chubb & Hanushek, *supra* note 6, at 232 ("Parents who are well educated or deeply committed to education are likely to make better choices than other families do."); Janet A. Weiss, *Control in School Organizations: Theoretical Perspectives*, in 1 CHOICE AND CONTROL, *supra* note 36, at 91, 114-15.

146. Columbia Law School Education Law Project, *Promoting Integration in the New York City High Schools 20-23* (1987) (on file with author); see Richard F. Elmore, *Choice as an Instrument of Public Policy: Evidence from Education and Health Care*, in 1 CHOICE AND CONTROL, *supra* note 36, at 285, 301, 313 (same conclusion based on studies of pilot educational-choice program that Nixon Administration conducted in San Jose); Donald R. Moore, *Voice and Choice in Chicago*, in 2 CHOICE AND CONTROL, *supra* note 36, at 153, 178-91, 194-95 (discussing DONALD R. MOORE & SUZANNE DAVENPORT, *THE NEW IMPROVED SORTING MACHINE, FINAL REPORT TO THE NATIONAL CENTER ON EFFECTIVE SECONDARY SCHOOLS, MADISON, WISCONSIN* (1988)) (same conclusion based on study of high school open-enrollment plans in Boston, Chicago, New York, and Philadelphia). The absence of price competition and objective measures of instructional quality exacerbates informational difficulties. See HIRSCHMAN, *supra* note 17, at 26-28; *supra* note 61 and accompanying text. Although disempowered groups can overcome informational and bargaining disadvantages by organizing and then delegating enforcement of their rights to experts employed by the collective, making them do so promotes bureaucratization and interest-group conflict of the sort the authors abhor. See NONET, *supra* note 125, at 51-57, 70-120.

147. See Baack & Geiger, *supra* note 142, at 11 (evidence that white students have used Minnesota's plan to transfer from integrated urban to all-white suburban schools). See generally *Green v. County Sch. Bd.*, 391 U.S. 430 (1968) (freedom-of-choice desegregation plans unconstitutionally preserve segregated conditions).

148. See pp. 210-11; Michael J. Alves & Charles V. Willie, *Choice, Decentralization, and Desegregation: The Boston 'Controlled Choice' Plan*, in 2 CHOICE AND CONTROL, *supra* note 36, at 17-76.

a prerequisite for permissible parental choice and mandating close monitoring and supervision to ensure that parents make informed decisions.<sup>149</sup> As discussed later, the Massachusetts success story suggests that half a market freedom is better than three, and that “controlled” uses of exit help, not as infusions of choice but as catalysts of voice.<sup>150</sup>

#### E. Summary

Education is a public good that cannot be allocated on a free market basis. Every market-based aspect of every educational arrangement we have examined supports this conclusion and begs a stronger one: *Market mechanisms interfere with the capacity of society to reproduce itself through elementary and secondary schools.* Thus, if consumers are allowed to choose whether to purchase an education, many will refuse, and social competence and cohesion will decline. If consumers instead are *compelled* to purchase an education but are left to their own economic devices to do so, many will be unable to comply, and decline still will occur. If consumers instead are compelled to purchase an education and are given the minimum resources needed to do so, but are not limited in their expenditures, they will arrange themselves on the basis of wealth, with children in the bottom tier of schools receiving a counterfeit education that is worse even than the one they receive today, and decline will persist. If consumers instead are compelled to purchase an education, are given the minimum resources needed to do so, and are held to a maximum expenditure, schools free to select students will arrange children on the basis of ability, and the same bottom tier will offer the same counterfeit education with the same negative results. If consumers instead are compelled to purchase an education, are given the minimum resources needed to do so, are held to a maximum expenditure, and (space permitting) are assured entry into whatever school they choose, then we no longer have a market. Yet schools *still* will stratify on the basis of race and consumer sophistication (i.e., class), and social reproduction still will be at more risk than it is today. Indeed, even if only educational connoisseurs are free, as is now true, to purchase the suburban or private education of their choice, the effect on urban districts is the disaster the authors describe.

Have we not, then, dismissed *all* the options running from a truly free and decentralized market for education to the existing interest-group and bureaucracy ridden system? Have we not, then, come to the point of capitulation to a

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149. See Charles L. Glenn, *Parent Choice: A State Perspective*, in 1 CHOICE AND CONTROL, *supra* note 36, at 327, 329 (“We know how to deal effectively with the equity issues, though at a considerable cost to anyone’s theories of pure market mechanisms” and via substantial “state regulation and state incentives.”); Thernstrom, *supra* note 4, at 130 (noting “coercive nature of the assignment process under controlled choice” in Massachusetts).

150. See *infra* notes 189-90 and accompanying text.

situation that all consider corrupt? Answering these questions requires us to return to where the authors' study left us earlier.

### III. WHY DON'T JANE'S AND JOHNNY'S PARENTS SPEAK UP; WHY AREN'T THEY HEARD?

#### A. *Statistical Speculations*

Why don't Johnny and Jane learn? The clearest answer to this question is that Johnny's and Jane's parents do not have enough income and education.<sup>151</sup> If the state increased those resources, Jane's and Johnny's academic accomplishments also would increase. As clear as this message of Chubb and Moe's book is, it is not a message the authors' New Paradigm disciples can hear.<sup>152</sup> Before giving up on pie in the sky, however, consider this: a fourth to a third of the effect of socioeconomic status comes not from the wealth and educational attainments of Jane's and Johnny's *own* parents but from the wealth and attainments of their *classmates'* parents. Even if it is hopeless pie in the sky to make Johnny and Jane richer, is it quite so hopeless to place Johnny and Jane in schools with kids who already are richer? Whatever the answer, recall that, by starting up "New, More Efficient 'Sorting Machine[s]," choice proposals accomplish just the opposite.<sup>153</sup>

The next clearest answer to the question "Why don't Jane and Johnny learn?" is that Jane and Johnny do not have sufficient intellectual resources.<sup>154</sup> Although a proposal to make Johnny and Jane smarter may seem no less facetious than one to make them richer, consider that the authors use prior achievement (sophomore test scores) to measure ability, and that at least one condition short of redistribution—enrollment in academic programs—is associated with prior achievement.<sup>155</sup> Even accepting, as suggested above, that academic program is merely a proxy for educational tastes,<sup>156</sup> this line of analysis suggests that policymakers could enhance Jane's and Johnny's learning by convincing Jane, Johnny, and their parents to place a higher priority on education. Moreover, the research on school desegregation suggests that this last formulation is not facetious.

As I have discussed elsewhere, there is reason to think that, done early and right, desegregation improves the achievement of African American chil-

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151. See *supra* notes 9, 22, 117 and accompanying text.

152. See *supra* note 5.

153. See William Snider, *School Choice: New, More Efficient 'Sorting Machine'?*, EDUC. WK., May 18, 1988, at 1 (quoting MOORE & DAVENPORT, *supra* note 146, at 1); *supra* notes 111-25, 138-41, 145-47 and accompanying text.

154. See *supra* note 22.

155. See *id.*; *supra* notes 43, 50 and accompanying text; *supra* note 74.

156. See *supra* notes 49-52 and accompanying text.

dren.<sup>157</sup> It may be, moreover, that the proposition that desegregation improves achievement, like the proposition that private school attendance improves achievement, simply illustrates two successively more general propositions—that enrollment in an academic program improves achievement and that giving priority to receiving academic training improves the likelihood that the students will succeed academically.<sup>158</sup> Just as integrating poor children into schools with significant populations of wealthy children may give poor children the benefit of the rich children’s resources—including the rich children’s taste for academic education—so, too, racial integration may have a similar effect, even controlling for socioeconomic status.<sup>159</sup> This final speculation is not, of course, just that. Rather, it recapitulates a conclusion that desegregation researchers have long espoused and have recently begun to document.<sup>160</sup>

We now have the beginnings of a school improvement policy—or, rather, the extension of a policy the Supreme Court began forty years ago. Thus, instead of choice plans’ new and more efficient *sorting* machines, what policy-makers ought to be installing are new and more efficient racial, class, and motivational combines. Indeed, reconsideration of the critical regression in the authors’ book reveals that the two best proxies for the policy advocated here—school socioeconomic status and academic program—have a *bigger* effect on achievement than making children richer and nearly 80% of the effect of making them smarter.<sup>161</sup>

## B. *Theoretical Speculations*

### 1. *Educational Theory*

Do principals, teachers, and academic programs matter? Or, do schools work or not work according to nothing more than how they sort or combine students? Schools *do* matter, I think. They have good or bad effects based not only on which students and parents they combine or sort, but also on how effectively particular combinations or classes of students and parents *make* schools work. The mechanism for improvement or stagnation, however, is not choice but voice.

How is it, then, that Johnny and Jane get the benefit of their classmates’ and their classmates’ parents’ tastes for education? In addition to peer pressure and parental role modeling, the education literature suggests that a critical mass

157. See Liebman, *supra* note 42, at 1624-26.

158. See *supra* notes 49-52 and accompanying text. This speculation explains the authors’ “controversial” finding that racial integration, although “clearly” associated with achievement *before* controlling for “effective organization” (which includes “academic program”), is not linked to achievement *after* controlling for academic program. Pp. 119, 127.

159. See Bryk et al., *supra* note 39, at 148-51.

160. See p. 297 nn.18 & 19 (citing some of the literature); Liebman, *supra* note 42, at 1624-25 n.675.

161. Pp. 132-33 tbl. 4-10.

of parents with strong educational aspirations for their children causes teachers to exhibit the same aspirations in the classroom. And when teachers do so—and when they satisfy those aspirations by providing the aspired-after academic courses—then *all* children the teachers instruct, and not simply the children of the parents who spoke up, derive the important educational benefit of those expectations.<sup>162</sup> Under the right circumstances, that is, Jane and Johnny take academic courses because everybody else is taking those courses, because the parent-driven ethic of the school is to *want*, and to want *others*, to take those courses, and, eventually, it is hoped, because *Johnny* and *Jane* want to take those courses. Having enrolled in academic programs, moreover, Johnny and Jane are likely to perform more successfully on academic tests than they would have performed had they remained in their former schools suffused with their, or their peers', or their teachers' former indifference to the academic enterprise.

## 2. *Economic Theory*

So much for the educational theory of the matter. Consider the supporting economic theory. Albert O. Hirschman told the tale twenty years ago, but it bears repeating.<sup>163</sup>

Consumers can make firms do their bidding in two ways: They can exit or they can complain.<sup>164</sup> If dissatisfied consumers exit, they can cause firms, fearing the depletion of their market, to change their behavior in order to increase consumer satisfaction. If dissatisfied consumers complain, they can cause firms, seeking ways to improve their product or pacify unhappy customers, to take similar steps.

If consumers have alternatives, those most likely to exit when the quality of a product diminishes are “connoisseurs”—consumers who get the highest degree of return for each increment of quality.<sup>165</sup> Connoisseurs are particularly likely to exit because the relatively higher satisfaction they get from a better product makes them especially willing to spend time shopping for it and to pay more when they find it. Likewise, connoisseurs are the consumers most likely to *complain* when quality diminishes and they do *not* have alternatives.<sup>166</sup> The reason is similar. When quality wanes, connoisseurs lose more than other customers, hence have more to complain about when a substitute is unavailable.

Quality declines are least likely to be arrested when connoisseurs can afford to exit but the remaining customers cannot.<sup>167</sup> In this situation, the firm benefits from the discipline of neither exit (because the loss of connoisseurs

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162. See pp. 92-95; authority cited in Liebman, *supra* note 42, at 1615 n.644, 1624-25 n.675. Intraschool tracking spoils the effect. See *supra* note 140; *infra* note 264.

163. See HIRSCHMAN, *supra* note 17.

164. *Id.* at 4, 15-16.

165. See *id.* at 46-50.

166. See *id.* at 49.

167. See *id.* at 44-46.

does not deprive the firm of a market for its goods) nor voice (because the most vocal complainers have left). This, Professor Hirschman points out, is the situation of the urban public schools.<sup>168</sup> As quality declines, educational connoisseurs move to the suburbs or to private schools where they can get the high quality product they desire, albeit at higher tax or tuition cost. These shifts to competitors do not trouble the public schools much because those schools retain a guaranteed pool of consumers—all those families that are legally required to send their children to school and financially unable to move to the suburbs or the private market, and all those taxpayers required to pay for those children to go to school. Free of the discipline of exit, public schools also are rid of a good bit of the constraint of voice, because the people who care most about education have left.<sup>169</sup>

Quality declines are most likely to be arrested when connoisseurs cannot exit.<sup>170</sup> In the absence of an exit option, declines in quality cause the most sophisticated consumers to complain and to tell the producer how to improve the product. This, Professor Hirschman points out, is the situation not only of conservative connoisseurs of Republican Party politics in 1964 (and liberal connoisseurs of Democratic politics since 1972) but also of patrons of private and suburban public schools.<sup>171</sup> Having fled the urban public schools for high-cost private schools or high-tax suburban districts, and having nowhere else to go (quality being what it is elsewhere), the dissatisfied consumer of private and suburban education has no choice but to stand and fight. As a result, “deterioration will be more strenuously fought ‘from within’ in the case of the private than in that of the public schools.”<sup>172</sup>

The consequence of this process for the public schools is an exit-ignoring, voice-avoiding triple whammy. First, if quality declines, the public schools “lose the children of those highly quality-conscious parents who might otherwise have fought deterioration. Second, if quality thereafter declines in the private schools, then quality-conscious parents will keep their children there for much longer than was the case when the public schools deteriorated.”<sup>173</sup> Third, “because exit is not a particularly powerful recuperation mechanism in the case of public schools . . . the failure of one of our two mechanisms [voice] is here compounded by the inefficiency of the other [exit].”<sup>174</sup>

168. *See id.* at 44-52.

169. *See id.* at 33-34, 45-46.

170. *See id.* at 55. This sounds a lot like monopoly, which it is. But, as the existence of the successfully functioning monopolies we call families, churches, political parties, and polities makes clear, when voice is both assured and effective, the result need not be indolence and mediocrity. *See id.* at 33, 56-61; *infra* notes 178-82 and accompanying text.

171. *See HIRSCHMAN, supra* note 17, at 50-52, 68-72.

172. *Id.* at 52.

173. *Id.* at 51-52.

174. *Id.* at 52. Thus, the “wholesome” competition that private schools sometimes are said to provide public schools, *Wolman v. Walter*, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part and dissenting in part), is better characterized as “noxious.” *HIRSCHMAN, supra* note 17, at 45.

The same connoisseur flight characterizes residential moves to the suburbs.<sup>175</sup> Once urban out-migrants reach the suburbs, their exit options are reduced to whatever private school possibilities remain within financial reach, leaving voice as a primary reliance. To the extent that suburban schools come in academically ahead of the urban public schools but behind private schools, the reason, *a la* Hirschman and contrary to Chubb and Moe, is the suburban schools' intermediate ability to avoid pathologically disciplining choice and take advantage of beneficially critical voice.<sup>176</sup>

Hirschman's image of the private and suburban school consumer seems more realistic than Chubb and Moe's. The latter's claims notwithstanding, we don't imagine dissatisfied parents, having tried Exeter one year, trying Choate the next, and The Dalton School the next.<sup>177</sup> Rather, with Hirschman, we imagine disgruntled private and suburban consumers speaking to teachers, mobilizing the PTA, lobbying the headmistress, or taking control of the board.

This image is especially apt for parochial school "customers." Even if other educational consumers regularly shop for schools, the parochial school consumer is unlikely, having tried St. Thomas Aquinas this year, to try St. Albans next year, and the Yeshiva the next. Rather, churches and their schools are archetypal Hirschmanic organizations from which members *cannot* in good communitarian conscience exit. Consequently, those members are especially prone to voice. Indeed, the authors' best (some would say their only) examples of successful private schools—Catholic institutions<sup>178</sup>—also best exemplify the power of voice, given the five barriers to exit and catalysts of voice that combine in Catholic schools: (1) religious loyalty (the absence of religiously viable alternatives);<sup>179</sup> (2) a relatively high quality education compared to the urban public schools (the absence of educationally viable alternatives at less cost); (3) a church subsidy (the absence of financially accessible competitors, given the relatively higher cost of nonsectarian private education);<sup>180</sup> (4) a geographic (parish) approach to school assignments (the discouragement of alternative assignments within the same system);<sup>181</sup> and (5) inflexible adherence to the "common school" ideal requiring all children in the same school to enroll in the same program (the absence of alternative tracks within the same school).<sup>182</sup> Indeed, Catholic schools are so immunized from exit that Chubb

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175. HIRSCHMAN, *supra* note 17, at 51.

176. *See supra* notes 65-71 and accompanying text.

177. *See supra* note 79.

178. *See supra* notes 96-97 and accompanying text.

179. *See* JAMES S. COLEMAN & THOMAS HOFFER, PUBLIC AND PRIVATE HIGH SCHOOLS: THE IMPACT OF COMMUNITIES (1987); Bryk et al., *supra* note 39, at 135, 191; James W. Guthrie & Ami Zusman, *Unasked Questions*, 51 HARV. EDUC. REV. 515, 516 (1981).

180. *See* Weiss, *supra* note 145, at 111.

181. *See* Elmore, *supra* note 146, at 315 n.5.

182. *See* Bryk et al., *supra* note 39, at 135, 176-78; Witte, *supra* note 23, at 15-16. There is a certain amount of irony in the authors' inclusion of the Catholic Church among the "radically decentralized" organizations that let "the people who run each school decide what they will teach, how they will teach it, who will do the teaching, how much to charge for their services, and virtually everything else." Pp. 27,



and Moe's best example of well-functioning private schools confounds their exit-dependent thesis.

As we began to discern in Part II, upon examining various proposals to inject choice into the public-good world of elementary and secondary education: voice works, choice won't. Hirschman explains why. Imperfect markets become pathological when connoisseurs are free to exit but less "voicy" consumers are trapped. Moreover, short of giving up such public-good features as compulsory consumption by some and mandatory purchase by others, more choice will only mean more pathology. By withdrawing the lost-subsidy penalty and actually *funding* exit, most choice proposals promise to make the schools of poor and minority children the very epitome (rather than just an example) of pathology. For those schools would have *only*—and not, as now, merely high proportions of—parents and students lacking the resources, the ability, the desire, and the political clout to improve their schools or go elsewhere. If the plight of urban children looks bad now, then heaven protect them from what any choice-driven future holds in store.

### C. A Counterproposal

As its subtitle states, Hirschman's book is about "Responses to Decline in . . . Organizations," including the public schools. What his analysis omits is an explanation of why the public schools went into decline in the early 1970's.<sup>183</sup> Passing the usual explanations for urban educational decline—racial conflict, urban blight, the drug culture<sup>184</sup>—let me propose a simpler reason. Towards the end of the 1960's, the baby boom went bust. As a result, the older and less fertile constituencies whose approval was needed to increase property tax rates as educational costs inflated simply stopped saying yes.<sup>185</sup> Being less well funded, school systems declined.

The baby bust not only may have triggered exit-impelling urban decline, but also may have affected the *direction* of exit by causing movement to places where families with children could mitigate the political effects of the baby bust by huddling with *other* families with children. Parents, that is, may have used the process of suburbanization, as well as the option of private schools, as a way to decrease the political costs of financing their children's education by

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183. See Peterson, *supra* note 80, at 69 ("The turning point in [public] education seems to have come around 1970.").

184. See John F. Witte, *Introduction to 1 CHOICE AND CONTROL*, *supra* note 36, at 30.

185. See Weiss, *supra* note 145, at 111; see also VI-B Joint Appendix in *Jenkins v. Missouri*, 855 F.2d 1295, (8th Cir. 1988), *aff'd*, 110 S. Ct. 1651 (1990), at 1334, 1339 (between 1964 and 1969, voters approved half of Kansas City school district's proposals to increase levy rate; between 1970 and 1986, voters defeated all nine proposals to increase rate).

congregating in scattered child-rich islands in the midst of a baby-busted sea.<sup>186</sup>

All told, there are three voice, not choice, activated reasons why parents of private and suburban school students may secure better schools for their children than parents of urban public school students. First, paraphrasing Erik Erikson, the former parents are unable actively to flee to another sector of schools, leaving them no choice but actively—and vocally—to stay put.<sup>187</sup> Second, because they have especially strong educational motivations, private and suburban school parents have more to say, and say it louder, when educational decline threatens. Third, when incipient decline causes private and suburban school parents to speak, the resulting chorus of calls for change achieves more unison and volume than urban parents can muster, because private and suburban parents form a larger proportion of the political constituency than urban parents do.

The way to better schools lies via voice, not choice—via the more successful mobilization of existing parental and student tastes for education on behalf of all children. Increased parental voice requires two reforms: First, as a catalyst to greater voice, exit options for educational connoisseurs and others should be reduced. Second, to assure that parental voices are heard, the proportion of political power over the schools entrusted to parents, as opposed to other interested parties, should be increased.<sup>188</sup> Though not always explained in these terms, a number of educational innovations being implemented or considered around the nation promote one or both of these reforms. Indeed, the extant innovation that attracts the most lavish praise from Chubb and Moe turns out, upon examination, to be a mechanism for enhancing voice, not choice.

### 1. *Reducing Exit*

Chubb and Moe have it backwards. The trick is not to increase exit but to reduce it. Let me begin my illustrative list of suggestions near where Chubb and Moe leave off—with open-enrollment programs.

Most of the exit options that siphon off educational connoisseurs from urban public schools are suburban, not private, school options.<sup>189</sup> Connoisseurs prefer to keep as much of the existing public subsidy as they can, while still congregating in higher quality schools. One means of discouraging such escape—long familiar to interdistrict school desegregation advocates—is to

186. See, e.g., Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

187. See *supra* note 1 and accompanying text.

188. The second reform helps foster the first. See HIRSCHMAN, *supra* note 17, at 37 (“If customers are sufficiently convinced that voice will be effective, then they may well *postpone* exit.”). Using both reforms, the public schools can be made to emulate the salutary choice-denying, voice-inspiring qualities of the Catholic system without having to be subsumed—unconstitutionally—in that system. See *supra* notes 96-102, 178-82 and accompanying text.

189. The percentage of private school enrollment dropped from 1960 (13.9%) to 1975 (10.0%), but has climbed since (to 12.7% in 1990). See Peterson, *supra* note 80, at 53, 71 & tbl. 2.12.

break down school district lines. If parents know, to paraphrase Joe Louis, that they can run but they can't hide, at some point they may stand and fight for better schools. Properly administered open-enrollment plans can accomplish this goal if they encompass entire multiethnic, multiclass *districts* (as in the Massachusetts plans discussed above), *metropolitan areas* (as in the desegregation plans in metropolitan Kansas City, Milwaukee, and St. Louis), and *states* (as in the Minnesota and Nebraska plans).<sup>190</sup> By voluntarily distributing urban poor and minority children among all the schools in a given area, those plans effectively distribute the educationally motivated families now concentrated in the suburbs among the wider range of urban magnet and suburban schools to which city kids gain access.

Once poor and minority children freely can breach district lines, and wealthier children no longer can escape behind them, the next logical step may be to abolish the boundaries altogether. Abolition may occur either by consolidating large metropolitan areas into single districts (as in the Wilmington desegregation plan)<sup>191</sup> or, by removing control from local districts and effectively turning *states* into single districts (as a former education official in the Reagan Administration recently proposed).<sup>192</sup>

Increasing the proportion of state, as opposed to local, financing for schools, as Kentucky, Texas, and Wisconsin recently have done,<sup>193</sup> also can make escape to the suburbs more costly, by diverting a greater share of the tax revenues collected there to city districts and forcing suburbanites to pay even higher taxes than before to maintain their schools' quality differential. Municipal payroll taxes then can be used to increase the incentive of suburban commuters to move back to the city to take better advantage of the services their payroll taxes buy, while rising suburban taxes make it harder for urban employers to flee the payroll tax.

As suburban schools become less insular, private schools presumably will attract an escalating share of urban exiters. The states easily could stem the existing private school-bound trickle, and forestall its becoming a tide, by terminating the myriad subsidies they currently give private and parochial schools. The Supreme Court decisions upholding the grant of such subsidies

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190. See Liebman, *supra* note 42, at 1656; *supra* note 142 and accompanying text. As discussed, *supra* notes 145-50 and accompanying text, open-enrollment plans must be strictly controlled in order to avoid stratification on the basis of consumer sophistication and information.

191. See Liebman, *supra* note 42, at 1659-60.

192. Chester E. Finn, *Reinventing Local Control*, EDUC. WK., Jan. 23, 1991, at 40; see also Karen Diegmüller, *R.I. Governor Proposes Creating 6 Regional Districts*, EDUC. WK., May 22, 1991, at 16 (governor's proposal to reduce number of school districts in Rhode Island from 37 to 6).

193. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 37 (1990); Edward B. Fiske, *Historic Shift Seen in School Finance*, N.Y. TIMES, Oct. 4, 1989, at B9; Lonnie Harp, *Hard-Won Finance Measure Faces New Challenge in Texas*, EDUC. WK., July 31, 1991, at 29; Debra Viadero, *Wis. Lawmakers Adopt Controversial School-Finance Plan*, EDUC. WK., July 31, 1991, at 32 (permitting state income tax credit equal to amount of schools-targeted local property tax paid on first \$30,000 of value of primary residence).

(as long as the benefit parochial schools derive is “indirect”<sup>194</sup>) provide a rough catalogue of existing subsidies: States fund private school transportation,<sup>195</sup> lend textbooks to private school students,<sup>196</sup> provide remedial programs to parochial students on public school premises,<sup>197</sup> and reimburse private schools for the cost of state-imposed examinations.<sup>198</sup> All of these programs provide “financial assistance inuring to the benefit of the private schools,” which “‘make[s] it more likely that some children choose to attend’” such schools.<sup>199</sup> As the Court has acknowledged, however, “a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance.”<sup>200</sup>

The most important benefit that state and federal governments give to nonprofit private and parochial schools is exemption from property, sales, payroll, and other taxes.<sup>201</sup> “Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become ‘indirect and vicarious ‘donors.’”<sup>202</sup> Recent Supreme Court decisions, however, allow governments to jettison such exemptions without fear of free exercise objection and reveal a growing interest in doing so on the part of revenue-starved taxing jurisdictions.<sup>203</sup> As the Court has noted, “[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but [is permissible because it] will not prevent those schools from observing their religious tenets.”<sup>204</sup>

194. *Norwood v. Harrison*, 413 U.S. 455, 464 n.7 (1973); *Walz v. Tax Comm’n*, 397 U.S. 664, 674-75 (1970); *Board of Educ. v. Allen*, 392 U.S. 236, 243-45 (1968); see *supra* note 100.

195. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

196. See *Wolman v. Walter*, 433 U.S. 229, 236-38 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Allen*, 392 U.S. 236.

197. See *Wolman*, 433 U.S. at 244-48.

198. See *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980). See generally Stanley S. Litow, Deputy Chancellor of the New York City Public Schools, *Letter to the Editor*, WALL ST. J., Mar. 5, 1991, at A13 (public taxpayers fund “hefty portion of the cost per pupil for Catholic schools in New York City,” including “food, transportation, remedial reading and math programs, and substance-abuse education”).

199. *Norwood v. Harrison*, 413 U.S. 455, 464 & n.7 (1973) (quoting *Tilton v. Richardson*, 403 U.S. 672, 679 (1971)).

200. *Norwood*, 413 U.S. at 462; see *id.* at 469; *infra* note 246.

201. See, e.g., *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 29-33 & nn.2-3 (1989) (Scalia, J., dissenting) (citing statutes exempting religious organizations from taxation); *Bob Jones Univ. v. United States*, 461 U.S. 574, 577-79, 581-92 (1983) (describing federal tax exemptions and charitable-deduction status for religious entities); *Walz v. Tax Comm’n*, 397 U.S. 664, 676 (1970) (all states exempt at least some religious property from taxation).

202. *Texas Monthly*, 489 U.S. at 14 (plurality opinion) (quoting *Bob Jones Univ.*, 461 U.S. at 591).

203. See *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S. Ct. 688, 696 (1990) (validating extension to religious organizations of “generally applicable income or property tax[es]” and sales taxes on “religious . . . ‘training’ services”); *Hernandez v. Commissioner*, 490 U.S. 680, 694-700 (1989); *Texas Monthly*, 489 U.S. at 21-25; *United States v. Lee*, 455 U.S. 252, 256-60 (1982).

204. *Bob Jones Univ.*, 461 U.S. at 603-04. Legislators could make terminated tax exemptions do double exit-detering duty by giving the additional revenues collected to the public schools, thus increasing the lost subsidy penalty for exit to private schools.

According to the collective action literature, even low mean levels of constituent interest and resources need not impede successful agitation for change if the constituency includes a “critical mass” of patrons who strongly desire change and have the means to pursue it.<sup>205</sup> Although the exit-reduction proposals discussed here would increase the number of “connoisseurs” in public school constituencies, the question remains whether there are enough to go around. Widely distributing *all* the connoisseurs who currently congregate in suburban and private schools probably would suffice; distributing only those connoisseurs who respond to the reforms discussed above might not. Were those reforms insufficient, a more radical—even incendiary—measure might deserve attention, namely, making *public* school attendance compulsory. Although in *Pierce v. Society of Sisters*,<sup>206</sup> decided in 1925, the Supreme Court held unconstitutional a seemingly identical idea, *Pierce* merits reconsideration against the possibility that drastic exit-reduction measures come to be required.

The *Pierce* story began with *Meyer v. Nebraska*,<sup>207</sup> which struck down a World War I-era statute forbidding teachers to conduct public or private school classes in German. *Meyer*’s holding was a terse application of the *Lochner v. New York*<sup>208</sup> principle, long since overruled, that the Due Process Clause prohibited Nebraska from suspending—although the state could regulate—*Meyer*’s economic right to pursue the calling of his choice.<sup>209</sup> The case more recently has come to stand for a curious dictum in which Justice McReynolds quoted, then cast out of our constitutional realm, Plato’s proposal

205. See Pamela Oliver et al., *A Theory of the Critical Mass. I. Interdependence, Group Heterogeneity, and the Production of Collective Action*, 91 AM. J. SOC. 522, 529, 543 (1985); cf. Ronald J. Gilson & Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863, 879-90 (1991) (because they now comprise critical mass of highly interested constituents, institutional investors can help overcome collective action problems that keep other investors from successfully monitoring management).

206. 268 U.S. 510 (1925).

207. 262 U.S. 390 (1923); see also *Bartels v. Iowa*, 262 U.S. 404 (1923).

208. 198 U.S. 45 (1905).

209. See *Meyer*, 262 U.S. at 399-400. But see *Harrah Indep. Sch. Dist. v. Martin*, 440 U.S. 194, 198 (1979) (*Meyer* affords no “constitutional right to retain [one’s] employment as a teacher”); *Day-Brite Lighting v. Missouri*, 342 U.S. 421, 423 (1952); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). The affinity between *Lochner*, *Meyer*, and *Pierce* is no accident. As Professor Woodhouse is documenting, William Guthrie, the constitutional scholar and lawyer who designed the litigation strategy that led from *Meyer* to *Pierce*, also laid the intellectual groundwork for the *Lochner* Court’s constitutionalization of classical economics, see WILLIAM D. GUTHRIE, LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1898), and argued many of the watershed cases of the *Lochner* period, including *Champion v. Ames*, 188 U.S. 321 (1903), *McCray v. United States*, 195 U.S. 27 (1904), *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922). See Barbara B. Woodhouse, *William Dameron Guthrie: The Case of the New York Conservative and the Birth of Fundamental Family Liberties*, in *NEW YORK AND THE UNION* 637, 638-39, 643-50 (Stephen L. Schechter & Richard B. Bernstein eds., 1990) (sketch of longer work in progress, which author has graciously shared with me). As Professor Woodhouse shows, the same libertarian notions about the evil of public welfare programs and about a man’s rightful control of his property—including, in this view, his children (gender specificity intended)—motivated Guthrie’s arguments and the Court’s decisions in both the *Lochner*-era economic due process cases and in *Meyer* and *Pierce*. See *id.* at 644-49, 652-53.

that the Republic remove children from their parents at birth and raise them itself.<sup>210</sup> Even if interpreted as establishing a “right of the individual to . . . bring up children,”<sup>211</sup> *Meyer* is limited by additional dicta recognizing that “[t]he American people have always regarded education and the acquisition of knowledge as matters of supreme importance” and “[t]hat the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally.”<sup>212</sup> Accordingly, as long as students were free at *some* point to receive formal foreign language lessons, *Meyer* acknowledged the right of the states to require “all schools . . . [to] give instruction[] in English.”<sup>213</sup>

Two years later, *Pierce* struck down Oregon’s requirement that “every parent . . . of a child between eight and sixteen years . . . send him ‘to a public school.’”<sup>214</sup> Again, the Court’s holding applied the *Lochner* principle. Adopting the private school plaintiffs’ unanswered allegations, the Court found that “[t]he inevitable practical result of enforcing the Act under consideration would be destruction of appellees’ primary schools, and perhaps all other private primary schools for normal children within the State.”<sup>215</sup> Because Oregon had undertaken to abolish and not simply to regulate the plaintiffs’ schools, the Court granted their request for “protection against arbitrary, unreasonable and unlawful interference with their patrons and the consequent destruction of their business and property.”<sup>216</sup> With this holding extinct, like those of *Lochner* and *Meyer*, *Pierce* now stands for Justice McReynolds’ dictum—that “[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.”<sup>217</sup> The Court tempered this dictum, however, by emphasizing the state’s broad power to regulate schools, including the power to specify the courses that may and may not be taught and who is qualified to teach.<sup>218</sup>

On close analysis, the post-*Lochner* incarnations of *Pierce* and *Meyer* may go no further than the proposition that the state may require children to secure a state-defined education, in English, but may not “forc[e] them to accept

210. *Meyer*, 262 U.S. at 401-02.

211. *Id.* at 399.

212. *Id.* at 400, 401.

213. *Id.* at 402. The *Meyer* law might never have reached the Supreme Court had the Nebraska high court not replaced an earlier interpretation, allowing formal foreign language instruction as long as every child also received specified instruction in English, with an interpretation forbidding foreign language instruction in all formal educational settings. Compare Nebraska Dist. of Evangelical Lutheran Synod v. McKelvie, 175 N.W. 531, 534-35 (Neb. 1919) with *Meyer v. Nebraska*, 187 N.W. 100, 103-04 (Neb. 1922), *rev’d*, 262 U.S. 390 (1923).

214. *Pierce*, 268 U.S. at 530.

215. *Id.* at 534. The plaintiffs were the Society of Sisters, which operated numerous Catholic schools in Oregon, and Hill Military Academy. *Id.* at 531-33.

216. *Id.* at 536.

217. *Id.* at 535.

218. *Id.* at 534.

instruction from public teachers [and in English] *only*.”<sup>219</sup> The decisions thus may consist with the principle that the state may control part, but may not occupy the entire field, of each child’s education.<sup>220</sup> Put the other way around, the decisions may mean only that the state must let parents *supplement*, but need not let them *replace*, the state’s control over *whether*, *when*, and *how*—and, if the greater power includes the lesser, *where* and *by whom*—children are educated.

Although the Court often has cited *Meyer* and *Pierce* for the principle that Plato’s parent-supplanting Republic is not our own,<sup>221</sup> only once, in *Wisconsin v. Yoder*,<sup>222</sup> has the Court actually relied upon those decisions to limit the state’s freedom to regulate education as it chooses. Even in granting the Amish an exemption from the final two years of Wisconsin’s compulsory school attendance laws, however, the *Yoder* Court took pains to limit its decision and those in *Meyer* and *Pierce*.

The *Yoder* Court: (1) emphasized the intersection of the Amish parents’ *Pierce* claim with a claim under the Free Exercise Clause, carefully confining the decision to the right of parents “to guide the *religious* future and education of their children”<sup>223</sup> and vowing to reject *any* objection “to reasonable state regulation of education if [the objection] is based on purely secular considerations”;<sup>224</sup> (2) emphasized that the Amish parents’ faith interposed an absolute conscientious objection to, and “not merely a . . . preference” against, secondary education which, if ignored, would imperil “the continued survival of Amish communities” in the United States;<sup>225</sup> (3) noted that even these individual interests would be overcome by the “compelling” nature of “the State’s . . . interest in its system of compulsory education,” but found less compelling

219. *Id.* at 535 (emphasis added).

220. From the oral argument in *Meyer* until today, the laws invalidated in that case and in *Pierce* have been understood to have “forb[idden] absolutely the maintenance of primary private schools in th[e] State.” Oral Argument of Petitioner at 2, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (No. 325) (likening statute before Court to another Nebraska bill, proposed the same year, which would have outlawed all formal private education in state); see Woodhouse, *supra* note 209, at 651 (modern scholar’s description of *Pierce* as involving “[e]xclusive state control of all organs of education and the closing of all religious schools”).

221. See, e.g., *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2943 (1990); *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

222. 406 U.S. 205 (1972).

223. *Id.* at 232.

224. *Id.* at 215 (emphasis added); see *id.* at 215-16 (“A way of life, however virtuous and admirable, may not be interposed as a barrier to a reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.”); *id.* at 233 (*Pierce* is “a charter of the rights of parents to direct the *religious* upbringing of their children” (emphasis added)). Also suggesting the need for a religious free exercise facet to make a *Meyer-Pierce* claim viable are: *Employment Div. v. Smith*, 110 S. Ct. 1595, 1601-02 & n.1 (1990); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 & n.29 (1983); *Prince v. Massachusetts*, 321 U.S. 158, 165, 166 (1944).

225. *Yoder*, 406 U.S. at 209; see *id.* at 218. The Court often has rejected free exercise attacks on state laws that make religious practices more difficult or costly but do not require adherents to engage in conduct their faiths forbid. See, e.g., *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S. Ct. 688, 696-97 (1990); *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 141 (1987).

the State's actual interest in the case in giving Amish children an additional two years of compulsory education against the "speculative" possibility that they might someday leave the community and need the two extra years of schooling;<sup>226</sup> (4) acknowledged the existence of state educational interests that might not be attainable *except* through compelled *public* education;<sup>227</sup> and (5) emphasized the limited nature of *Meyer* and *Pierce*.<sup>228</sup> Since *Yoder*, the Court consistently has "stressed the limited scope of *Pierce*," which simply forbids the states to "'pre-empt the educational process by requiring children to attend public schools'" and "len[ds] 'no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society.'"<sup>229</sup>

Even in their heyday in the early 1970's, therefore, *Meyer* and *Pierce* continued to bear the admittedly stingy construction offered above—that the decisions forbid states Platonically to "preempt" control over the education of minor children but, short of preemption, allow the states to take substantial portions of that control for themselves. More importantly, the two decisions' heyday may have passed. In *United States v. Lee*<sup>230</sup> in 1982 and *Employment Division v. Smith*<sup>231</sup> in 1990, the Court substantially limited *Meyer* and *Pierce* in the process of narrowing the two decisions' only modern application—in *Yoder*.

In *Lee*, the Court denied an Amish farmer a free exercise exemption from social security taxes. Acknowledging that paying such taxes is as "sinful" to the Amish<sup>232</sup> as letting their children attend the tenth grade<sup>233</sup> and that the government's interest in its social security system is no greater than a state's interest in its public school system,<sup>234</sup> the Court narrowed *Yoder* considerably

226. *Yoder*, 406 U.S. at 224; *see id.* at 221, 222, 228-29, 231-34; *see also id.* at 213 ("Providing public schools ranks at the very apex of the function of a State."). The Court often has subordinated the *Meyer-Pierce* principle to substantial state interests. *See, e.g., Bob Jones Univ.*, 461 U.S. at 603-04 (state interest in discouraging racial discrimination in college admissions); *Runyon v. McCrary*, 427 U.S. 160, 179 (1976) (state interest in preventing racial discrimination in private elementary and secondary school admissions); *Norwood v. Harrison*, 413 U.S. 455, 462, 470 (1973) (state interest in withholding financial support from racially discriminatory schools); *Prince*, 321 U.S. at 168 (state interest in regulating child labor and limiting exposure of children to "influences of the street").

227. *See Yoder*, 406 U.S. at 221 (state has legitimate interest in providing education "necessary to prepare citizens to participate effectively and intelligently in our open political system," to "preserve [children's] freedom and independence," and to "prepare[] individuals to be self-reliant and self-sufficient participants in society"); *id.* at 240 (White, J., concurring) (state has legitimate interest in "provi[ding children] . . . with an option other than the life they have led in the past").

228. *See id.* at 232-34; *id.* at 239 (White, J., concurring). *But cf. id.* at 213 (majority opinion) (*Pierce* recognizes "right of parents to provide an equivalent education in a privately operated system").

229. *Runyon*, 427 U.S. at 177 (quoting *Yoder*, 406 U.S. at 239 (White, J., concurring) (emphasis added)); *see Norwood*, 413 U.S. at 462.

230. 455 U.S. 252 (1982).

231. 110 S. Ct. 1595 (1990).

232. *Lee*, 455 U.S. at 255.

233. *See Yoder*, 406 U.S. at 209, 218.

234. *Lee*, 455 U.S. at 257-59.



in the process of distinguishing it. The state, the Court held, only needs to grant an exemption when, as in *Yoder*, it can do so without threatening the system because so few citizens want or can claim the exemption. On the other hand, the state need not grant an exemption when, as in *Lee*, it cannot do so without granting "myriad exceptions flowing from a wide variety of religious beliefs."<sup>235</sup> Concurring in the judgment, Justice Stevens went further. Noting that, with the "principal exception" of *Yoder*, the Court's free exercise jurisprudence permits any "valid and neutral law of general applicability" even though it "proscribes (or prescribes) conduct that [a believer's] religion prescribes (or proscribes)," Justice Stevens argued that *Yoder* was aberrational and suggested that it could not survive the ruling in *Lee*.<sup>236</sup>

In *Smith*, a majority of the Court made Justice Stevens' free exercise interpretation its own. Rejecting Smith's claim that Oregon could not penalize sacramental peyote use, and also rejecting any "compelling state interest" or other balancing test, the Court held that the Free Exercise Clause allows "application of a neutral, generally applicable law to religiously motivated action."<sup>237</sup> Acknowledging the tension between its rule and *Pierce* and *Yoder*, the Court limited those decisions to situations in which a conjunction of parental rights—to free exercise and to bring up their children—overcomes the state interest in applying neutral regulations to all citizens.<sup>238</sup>

Given *Lochner's* demise, *Yoder's* decline, and *Smith's* demarcation of free exercise law, the current meaning of *Meyer* and *Pierce* is obscure. Working backwards chronologically, however, the following readings are possible: Under *Smith's* interpretation of *Yoder*, any "neutral, generally applicable" prescription of public school or proscription of private school is constitutional except in the "hybrid situation" of a conscientious objector whose parental-control desires and religious beliefs are simultaneously offended.<sup>239</sup> Even in that situation, or even should the Court release *Pierce* from its post-*Yoder* confinement to "religious education" and reinvigorate a "compelling state interest" test, *Lee* suggests that a neutral prescription of public school or proscription of private school would serve a compelling state interest if parental exemption requests threaten the viability of the public school system.<sup>240</sup> Finally, *Meyer* and *Pierce* (including as construed in *Yoder*) seem to leave the states free to prescribe

235. *Id.* at 259-60.

236. *Id.* at 263 n.3 (Stevens, J., concurring in judgment).

237. *Smith*, 110 S. Ct. at 1601.

238. *Id.* at 1601-02 & n.1. It is conceivable that the "conjunction" language in *Smith* is a screen, and that the Court now understands *Meyer*, *Pierce*, and *Yoder* as purely parental rights decisions. That understanding, however, would: (1) place *Yoder* on a collision course with the compulsory education laws and home-schooling restrictions of 50 states, (2) elevate penumbral parental rights to a higher status than textual free exercise rights, and (3) illogically mix a libertarian approach to parental rights with *Smith's* majoritarian approach to free exercise.

239. *Id.* at 1600-01. Only religious *objections*, and not mere religious preferences, suffice. See *supra* note 225 and accompanying text.

240. See *supra* notes 224, 226-27, 234-35 and accompanying text.

public education as long as the states do not—either directly (as in *Meyer*) or in “inevitable practical result”<sup>241</sup> (as in *Pierce*)—“preempt” or proscribe all reasonable times, places, and manners of supplementary private education.<sup>242</sup>

Interpreted in this manner, *Pierce* would not stand in the way of compulsory *public* school attendance laws that, unlike the one struck down in *Pierce*, contain three explanatory and limiting provisions: (1) factually supported legislative findings that a system of public education is a social *necessity* that (like the social security system in *Lee*) cannot function effectively if more than a few citizens can exit;<sup>243</sup> (2) “release time” and cocurricular provisions, such as those that the Court twice has upheld against Establishment Clause attack, giving students the time and even, if they elect, the “open forum” place in which to engage in religious and other supplementary educational activities of their choosing;<sup>244</sup> and (3) a “conscientious objector” clause that permits unwilling parents or students to avoid participating in the system upon a showing of bona fide religious beliefs that forbid their participation.<sup>245</sup>

By curtailing exit from public schools except by the few citizens whose religious beliefs require them to exit organized society, the states could stem enough connoisseur escape to promote genuine voice-activated educational reform and simultaneously extend a civic education to all young people whose coming participation in the larger society requires it.<sup>246</sup> Moreover, by assuring

241. *Pierce*, 268 U.S. at 534.

242. *Runyon v. McCrary*, 427 U.S. 160, 177 (1976) (quoting *Yoder*, 406 U.S. at 239 (White, J., concurring)). On the Court’s “reasonable time, place, and manner” jurisprudence in the free speech area, see, e.g., GERALD GUNTHER, *CONSTITUTIONAL LAW* 1196-300 (11th ed. 1985).

243. See *supra* notes 80-81, 167-82, 227, 234-35 and accompanying text.

244. See *Westside Community Schs. v. Mergens*, 110 S. Ct. 2356, 2370-73 (1990) (upholding constitutionality of Equal Access Act, 20 U.S.C. §§ 4071-74 (1984), which requires schools with broad cocurricular programs to permit religious clubs to utilize school facilities on same basis as other clubs); *Zorach v. Clauson*, 343 U.S. 306, 308 n.1 (1952) (upholding program allowing public school children to absent themselves from school for “religious observance and education outside the school grounds”); cf. *McCullum v. Board of Educ.*, 333 U.S. 203 (1948) (public school may not include part-time religious instruction *as part of the school program*, even if participation is voluntary and instruction is conducted by nonschool personnel). To discourage parents from essentially writing off the compulsory public school portion of their children’s education and focusing their attention and resources exclusively on private supplemental activities, the states could make public school attendance mandatory during a sizable part of the day and week, use other means to persuade colleges to base admissions on students’ performance in the regular school program, and attract supplemental programs *into* the public schools.

245. See *Johnson v. Prince William County Bd.*, 404 S.E.2d 209, 210, 214 (Va. 1991) (upholding school board’s denial of request for exemption from compulsory attendance law under statutory provision that excuses children from school attendance upon showing that, “by reason of bona fide religious training or belief, [the parent or child] is conscientiously opposed to attendance at school”); cf. *Gillette v. United States*, 401 U.S. 437, 441 (1971) (defining military service exemption for individuals “who, by reason of religious training and belief, [are] conscientiously opposed to participation in war” (quoting 50 U.S.C. app. § 456(j) (Supp. V 1964))); *Welsh v. United States*, 398 U.S. 333 (1970) (similar); *United States v. Seeger*, 380 U.S. 163 (1965) (similar).

246. See *supra* notes 89-92 and accompanying text. This analysis responds to Professor McConnell’s argument that the Free Exercise Clause is violated when the states selectively impose a lost subsidy penalty on children who attend religious, instead of public, schools. See Michael W. McConnell, *The Selective Funding Problem: Abortion and Religious Schools*, 104 HARV. L. REV. 989, 1015-23 (1991). Only parents and children who voluntarily or involuntarily serve the compelling public cause of maintaining a viable (*i.e.*, nearly all-inclusive, thus voice-suffused) system of public schools deserve to be paid for their service. Just

all parents reasonably commodious times, places, and manners in which to supplement their children's education as they please, the states could avoid the wholesale denial of private instructional opportunities that lay at the heart of *Meyer* and *Pierce*. As incendiary as requiring public school attendance might seem, this combination of public obligation and constrained, but still significant, private choice arguably conforms to the proper role of education in a liberal democratic state<sup>247</sup> and the proper role of virtuous political participation in a liberal democratic republic.<sup>248</sup>

## 2. *Concentrating Voice*

Why should suburban and private school parents stand for exit-reduction programs that make them share, pay more for, or even give up their beloved schools? Although the legislatively adopted open-enrollment programs in Minnesota and Nebraska and the loophole-closing taxation policies that the Supreme Court recently has upheld suggest that some suburban and private school parents might abide the lesser changes,<sup>249</sup> those parents surely will *not* abide the greater ones. The latter changes will come, if at all, only when a coalition of urban and rural parents, teachers, and administrators, suburban school patrons and educators feeling the pinch from private school competition, business interests dependent on the public schools for their labor force, disestablishmentarians, and good-government types can defeat the smaller but politically more formidable coalition made up of the remaining suburbanites, private school consumers, and the Catholic and evangelical churches.<sup>250</sup> Happily, the second necessary component of effective voice proposals—a promise of substantially enhanced parental control over the public schools—may expand the former coalition and contract the latter one.

Simply by bringing more educationally oriented and vocal parents into the public schools, exit-reduction programs may increase the ratio of parent to outsider (e.g., union, bureaucrat, taxpayer) voice. Likewise, increased heterogeneity of interest and resource levels within a school's constituency may help surmount collective-action barriers by more clearly designating the constituents to whom the leading role must fall and by avoiding the paralysis that can occur

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as military conscientious objectors have no claim to the wages and benefits paid volunteer and drafted soldiers when the objectors engage in alternative service, parents and children conscientiously compelled to withdraw from public educational "service" have no right to compensation for the alternative educational activities in which they engage in the private sphere.

247. See BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 155-63 (1982); Amy Gutmann, *Children, Paternalism, and Education: A Liberal Argument*, 9 PHIL. & PUB. AFF. 338, 349-51 (1980); Liebman, *supra* note 42, at 1637-40.

248. See BENJAMIN R. BARBER, *STRONG DEMOCRACY* 118, 308 (1984); Liebman, *supra* note 42, at 1548-65; Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 U. FLA. L. REV. 443, 445-52 (1989).

249. See also Mark Walsh, *Upper-Class Parents Support Diversity, Quality of Public Schools, Study Finds*, EDUC. WK., Mar. 13, 1991, at 15.

250. See Peterson, *supra* note 80, at 71-73.

when each constituent believes that her neighbor has more to gain than she from agitating for change.<sup>251</sup> Additional concentration of parents' political power over the schools is necessary, however, to make sure that parents' voices count. Legislators and educators currently are experimenting with three parent-centered programs that illustrate the capacity of public policy to enlarge the proportion of political control given parents.<sup>252</sup>

The first set of programs undertakes a variety of efforts to enhance parents' involvement in the day-to-day progress of their children's education.<sup>253</sup> Obviously, the more opportunities parents have to interact with principals, teachers, and each other, the more likely they are to voice their concerns. Likewise, the more parents participate in their children's learning, the more informed their suggestions and complaints will be.

A second set of policies capable of concentrating parents' voices and diluting those of their competitors aims to decrease the size of schools and school districts.<sup>254</sup> Parents at smaller schools have fewer peers by whom they can be drowned out. In addition, as the communitarian literature makes clear, voice-inspiring trust and collegiality are easier to achieve in smaller than in larger polities.<sup>255</sup> Most important, a proliferation of smaller districts and schools can impose diseconomies of scale on outsiders—e.g., politicians, central office bureaucrats, textbook publishers, and union officials—who compete with parents to have their policy-steering voices heard.<sup>256</sup>

251. *Individuals* with great interest in a particular public service and substantial resources have incentives to congregate with like individuals. Doing so may deflate the cost of obtaining (only) the desired service and make it possible for individuals to take turns agitating for improvement, rather than having to take the lead every time. See *supra* note 186 and accompanying text. By contrast, *interdependent groups* profit from heterogeneous interest and resource levels. Heterogeneity not only permits "exploitation of the great by the small," but also forces highly interested constituents, lacking equally interested neighbors whose "turn" it ought to be to act, to lead the way, and permits strategic sequencing of action ("the least interested first" when returns diminish as more people act; "the most interested first" when returns increase as more people act). MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 29 (1971); Oliver et al., *supra* note 205, at 529, 535-38, 542-48. Indeed, the latter two attributes of heterogeneous collectives suggest that reconfiguring two groups, one homogeneously interested and wealthy and the other homogeneously apathetic and poor, into two heterogeneous groups may coax successful collective action from *each* of the new groups more often than from *either* of the old ones—and almost certainly will coax more collective success from the two new groups combined than from the two old ones combined. See *id.*

252. Confining the franchise in school board, levy, and bond elections to parents might seem ideal in this regard, but neither taxpayers nor the Constitution would tolerate such a change. See *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) (state may not limit voters in school district elections to parents and property owners); *Fumarolo v. Chicago Bd. of Educ.*, 566 N.E.2d 1283, 1299-303 (Ill. 1990) (discussed *infra* note 258). *But cf.* *Ball v. James*, 451 U.S. 355 (1981) (state may restrict voters electing directors of water districts to landowners).

253. See p. 164; see also *Selected Reading on Parental Involvement in Education*, EDUC. WK., Apr. 4, 1990, at 24; William Snider, *Parents as Partners*, EDUC. WK., Nov. 21, 1990, at 11-20.

254. See, e.g., Debra Viadero, *Governor in Wis. Proposes a Limit on Districts' Size*, EDUC. WK., Feb. 20, 1991, at 1.

255. See generally Liebman, *supra* note 42, at 1554-56 (discussing sources).

256. Smaller schools and districts need not be an occasion for easier exit and escape, if the proliferating boundaries remain porous insofar as student assignment is concerned. See *supra* note 190 and accompanying text.

Inducing public participation, increasing the number and heterogeneity of constituents desiring reform and their links to the institutions needing reform, and creating smaller polities may facilitate collective action. But a more distinguished mechanism for doing so, one that makes the concept of school-as-polity more than a metaphor, also may be available: (school-level) representative democracy. Using a variety of "school-based management" and "shared decisionmaking" techniques, school districts from Miami to Seattle are experimenting with plans that devolve the power to set educational policy from the state and district to the school level, and from administrators alone to elected committees of parents and teachers.<sup>257</sup> The most radical proposal, recently adopted by the Illinois Legislature, places the governance of every Chicago public school in the hands of a Local School Council composed of six parents elected mainly by parents, two community residents elected by community residents, two teachers elected by the school's staff, and the principal. After completing an intensive training program, council members appoint principals to four-year performance contracts, develop and approve school operating plans, and design and oversee schools' budgets.<sup>258</sup>

Although proponents of shared decisionmaking offer numerous justifications, the analysis here suggests two of primary importance, one procedural and the other substantive. Procedurally, shared decisionmaking adopts the classic strategy of giving governing authority to representatives of the most highly interested constituents as a means of overcoming collective action problems.<sup>259</sup> This strategy has the capacity to enhance voice by anointing constituents whose "turn" it is to lead the way to reform and by formalizing lines of communication through which parents can convey their views.

257. See pp. 199, 305 nn.17-20; Liebman, *supra* note 61, at 393-97 & nn.150, 165 (citing authority); Betty Malen et al., *What Do We Know About School-Based Management? A Case Study of the Literature—A Call for Research*, in 2 CHOICE AND CONTROL, *supra* note 36, at 289-342; William Celis, *More Schools Being Run by Local Panels*, N.Y. TIMES, June 30, 1991, at A14; see also HIRSCHMAN, *supra* note 17, at 17 (decentralization may make "the channels of communication between members and management in the public school systems less 'cumbrous' than heretofore"); David K. Cohen, *Governance and Instruction: The Promise of Decentralization and Choice*, in 1 CHOICE AND CONTROL, *supra* note 36, at 337, 363-66 (decentralization unlikely to work unless new political structures are created to foster parent and community participation).

258. See Moore, *supra* note 146, at 172-73, 193-95 (critical goal is to transfer "majority control" to "parents and community residents"). Compare *Fumarolo v. Chicago Bd. of Educ.*, 566 N.E.2d 1283, 1299-303 (Ill. 1990) (provisions in original Chicago law giving parents disproportionate representation on local boards and letting only parents vote for parent board members held to violate Equal Protection Clause) with Peter Schmidt, *Illinois Legislature Revises Chicago School-Reform Law*, EDUC. WK., July 31, 1991, at 12 (describing Illinois Legislature's attempt, in response to *Fumarolo*, to enhance parents' political power without offending "one person, one vote" principle by giving all voters five votes to cast for six parent members and two community members on schools' 11-member councils). As is true of the well-known Miami plan and the District 4 plan discussed below, the Chicago plan combines school-based control devices that concentrate voice with open-enrollment devices that help reduce exit and increase voice. See Joseph A. Fernandez, *Dade County Public Schools' Blueprint for Restructured Schools*, in 2 CHOICE AND CONTROL, *supra* note 36, at 223, 238-45, 248-49; Moore, *supra* note 146, at 176; *infra* notes 262-64 and accompanying text.

259. See, e.g., Gilson & Kraakman, *supra* note 205, at 879-81.

Substantively, shared decisionmaking gives parents more to control, hence more of consequence about which to vocalize. By giving parents a role in decisions previously left to the district's or school's central office—decisions about academic priorities, testing, disciplinary policies, and even personnel—shared decisionmaking gives parents responsibilities in the urban public schools that they now officially, or at least implicitly, have only in suburban and especially private schools. Moreover, by enabling parents from diverse backgrounds to construct, and in the process to commit themselves to, a single mission, shared decisionmaking can help solve one of the great dilemmas in education: How schools can achieve the focus and sense of mission that many educators consider the key to school success without giving in to the class-based, ability-grouped, racially segregated, and religiously parochial stratification towards which current arrangements and their choice alternatives gravitate.<sup>260</sup> The communitarian and constructive aspects of shared decisionmaking help resolve two other dilemmas: How (exit-denying) coercion can lead to (voice-enhancing) loyalty, and how withdrawing (escape) options can increase (communally implemented) power.<sup>261</sup>

Notably, the extant school reform program that attracts the most praise from Chubb and Moe because of its open-enrollment feature is more accurately called—as by its architects—a shared-decisionmaking plan.<sup>262</sup> The plan, which operates in elementary and middle schools in Community School District 4 in New York City's East Harlem, combines two important elements. The plan's open-enrollment feature assures that no school in the district can become a haven for educational connoisseurs seeking escape or a warehouse for those left behind. The plan's shared decisionmaking component encourages “[t]eachers, parents, and students . . . to think of themselves as their schools ‘owners’ and to take the responsibilities—and the pride and involvement—that real ownership entails.”<sup>263</sup> If time and study confirm anecdotal evidence that the

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260. Noting this dilemma are, e.g., Levin, *supra* note 36, at 252; Richard M. Merelman, *Knowledge, Educational Organization and Choice*, in 1 CHOICE AND CONTROL, *supra* note 36, at 82-85; see also Liebman, *supra* note 42, at 1614-35 & n.693 (in concert with shared decisionmaking, school desegregation can reform racially divided political processes and constituencies by situating blacks and whites so that they share interests and a fairly organized political context in which to effectuate those interests).

261. See HIRSCHMAN, *supra* note 17, at 78 (“loyalty holds exit at bay and activates voice”). Shared decisionmaking plans also can help solve the problem of excessively bureaucratic teachers' unions. See pp. 11-12, 48-53, 153-55, 286 n.20. Instead of busting teacher organizations, see p. 53, shared decisionmaking modernizes them by transferring power from centralized bureaucracies on the industrial model to localized and more managerially involved associations on the contemporary craft model, see, e.g., Ann Bradley, *Gov. Romer Unveils Teachers' Contract for Denver Schools*, EDUC. WK., Apr. 3, 1991, at 1 (describing proposed contract trading centralized union prerogatives for expanded teacher role in decisionmaking at individual schools); *Denver Teachers Have Ratified a Groundbreaking Contract Written by Gov. Roy Romer of Colorado*, EDUC. WK., May 1, 1991, at 3. See generally MICHAEL J. PIRE & CHARLES F. SABEL, *THE SECOND INDUSTRIAL DIVIDE* (1984).

262. See Seymour Fliegel, *Creative Non-Compliance*, in 2 CHOICE AND CONTROL, *supra* note 36, at 199, 208; Deborah Meier, *Good Schools Are Still Possible, But Teachers Must Be Freed from System ‘Mandates.’* DISSENT, Fall 1987, at 543, 549.

263. Pp. 212-15.

plan has improved the achievement of the district's predominantly African American and Latino children, the credit should go not to the ability of parents to escape, but to a design that forces parents to stay put while empowering them vociferously to fight.<sup>264</sup>

These voice-enhancing practices suggest that the authors have it wrong when they equate democracy with bureaucracy and condemn both as the polar opposites of choice.<sup>265</sup> More accurately, as Max Weber had it decades ago, bureaucracy is a kind of midpoint between voice-based democratic control and exit-based market discipline.<sup>266</sup> It is not surprising, therefore, that bureaucracy took hold in public education when easy escape by vocal citizens rendered democracy unworkable at the same time as socially necessary restrictions on exit rendered market discipline ineffectual. Analyzed this way, bureaucratic control over the schools is not so much an unmitigated evil as the best solution nominally democratic governments can muster when the polity's vocal citizens stop complaining and leave.

More important, as the authors' District 4 and suburban examples establish, and as private school board elections and governance procedures also reveal, properly voice-activated democracy is quite capable of eluding bureaucracy and coexisting with effectively organized schools.<sup>267</sup> The authors thus miss their own message: Bureaucratic "behavior is not something that Americans simply have to accept, like death and taxes. People who make decisions about education would behave differently if their institutions were different."<sup>268</sup> As shared decisionmaking exemplifies, however, the way to needed institutional reform

264. See pp. 212, 214; Fliegel, *supra* note 262, at 206-08. James Comer's well-regarded work in New Haven also has as a main purpose the enhancement of parental participation and voice via the construction of family-school alliances. See James P. Comer, *Educating Poor Minority Children*, *SCI. AM.*, Nov. 1988, at 42-48. As do all democratic constitutions, the "constitution" of the school-based polities contemplated here may have to forbid procedures that are antidemocratic in the long run, even if they are supported by a majority in the short run. See Liebman, *supra* note 42, at 1536-37 n.343, 1557-71. Thus, just as a wider polity's constitution might forbid certain kinds of separate but equal segregation and other denials of simultaneous participation and equal protection, the school-based polity's "constitution" may have to forbid tracking and other devices that stratify the political community and, as a result, frustrate voice. See *id.*; *supra* notes 140, 162.

265. In the authors' view, "the most fundamental causes" of school failure in the United States are "the institutions of direct democratic control." P. 2. In their view, interest group politics "inexorably" determine who takes office in a democracy, and bureaucracy "inevitably" describes how democratic officeholders govern. Pp. 17, 21-34, 39-45, 66, 141, 167, 188. The authors acknowledge that there are different "kinds of democratic institutions," and that "different systems of institutional control" produce "different types of schools." Pp. 2, 19-20, 26-27. Despite that acknowledgement, the authors deny that democracy could ever be disengaged from either interest group politics or bureaucracy and that new democratic forms could ever improve schools. See, e.g., pp. 31, 38.

266. MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* (A. M. Henderson & Talcott Parsons trans., 1947); see NONET, *supra* note 125, at 25-26, 42-57.

267. See *supra* notes 65-69, 262-64 and accompanying text; see also Cohen, *supra* note 257, at 337, 363, 366 (noting that "[a]ffluent neighborhoods with many resident professionals (mostly suburban), have been the special locale of a reform oriented, 'non-partisan' and universalistic politics of educational quality" and wondering if "new neighborhood political movements or elites . . . [can] be constructed" that could "invent a new politics" for urban public schools).

268. P. 189.

is to make those institutions *more*—and not, as the authors would make them, *less*—democratic.

### CONCLUSION

Parents' wealth, students' ability, and the motivations of both will continue to determine why one family's Johnny can't read and another family's Jane does just fine. The pressing question facing educational policymakers is how the wealth, ability, and academically oriented motivations of those who are better off in these respects can be mobilized on behalf of those who are less well off. Choice plans are not the answer. They are a recipe for disaster. However designed, choice plans inevitably will turn the schools into new and more efficient machines for sorting educational consumers into numerous homogenized pools of parents and children with the same levels of wealth, intellectual ability, consumer sophistication, academic orientation, and ethnicity. That, after all, is what markets are good for.

One thing markets are *not* good for is allocating public goods, and an educated public is just that.<sup>269</sup> Accordingly, exit and choice will never work well to allocate that good—unless working well means warehousing the poor, the less gifted, and the academically disinclined in educational facilities that make existing public schools look like the Institute for Advanced Studies, and that prepare young adults for no place in the social structure save the correctional facilities they would resemble.

Voice plans, by contrast, may be an answer. By stemming or shutting off exit from the public schools, voice plans encourage the most committed consumers of educational services to bring their recuperative complaints and counsel to bear upon the schools whence they now seek only to escape. By devolving power to the school level, voice plans construct polities that are small and dispersed enough to give the actors most concerned with educational quality—students, parents, teachers, and principals—an advantage over competing constituencies for whom decentralization creates serious diseconomies of scale. In this way voice plans compensate parents for lost exit opportunities and, for the first time since the baby boom went bust, concentrate power in the hands of persons who are able, and have no attractive option but, to stand and fight for better schools. Most important, by creating new and more collegial, even communitarian, political structures for exercising family-school control at the local level, voice plans create the possibility of a new politics. Such a politics might achieve something like the unity of purpose that choice proponents valorize in the homogenized schools at the high-end of their market, but do so more inclusively and appealingly by harmonizing the voices of diverse communities into a single chorus of demands for educational improvement.

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269. See *supra* notes 89-94 and accompanying text.



At the very least, before destroying what not so long ago was the nation's liberal, democratic, and egalitarian treasure—its system of common public schools—shouldn't we give (*real*) voice a chance?

*The Editors dedicate this issue to the memory of  
Thomas I. Emerson: scholar, advocate, and friend.*



Thomas I. Emerson  
(1907-1991)