

2014

What We Disagree About When We Disagree About School Choice

Aaron J. Saiger

Fordham University School of Law, aaronsaiger@gmail.com

Follow this and additional works at: http://ir.lawnet.fordham.edu/faculty_scholarship



Part of the [Civil Rights and Discrimination Commons](#), and the [Education Law Commons](#)

Recommended Citation

Aaron J. Saiger, *What We Disagree About When We Disagree About School Choice*, 99 Iowa L. Rev. Bulletin 49 (2014)

Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/547

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

What We Disagree About when We Disagree About School Choice

Aaron Saiger*

I. WHAT IS “PUBLIC” SCHOOL?	51
II. WHAT IS “GENUINE CHOICE”?	54
III. THE POLITICS OF COMMODIFICATION AND CONVERGENCE.....	58

Is school choice nefarious, for students of color and for everyone else? Or is it helpful? Debates over this question, now decades old, are feeling a bit stale. Diane Ravitch’s just-published *Reign of Error* breaks no new ground when it accuses those of us who sympathize with school choice of embracing “a radical ideology with a fundamental distrust of public education and hostility to the public sector in general.”¹ And Justice Clarence Thomas, were he to read Ravitch, likely would feel no need to update his 2002 denunciation of “cognoscenti who oppose vouchers,” who elevate their “romanticized ideal of universal public education” above the real needs of “urban families [who] just want the best education for their children.”²

One reason for stalemate is that the debate’s participants often avoid declaring, and often purposely obfuscate, whether they disagree about principle or about tactics. Advocates on both sides love to talk about whether schools of choice are effective, as if people generally agree about what constitutes an effective school. They are also fond of accusing their interlocutors of harboring and hiding distasteful ideological commitments.³

* Professor of Law, Fordham University School of Law. I am grateful to Professor Osamudia James for her article and for her comments on an earlier version of this Response. I also appreciate the useful comments of R.A. Lenhardt and Kimani Paul-Emile.

1. DIANE RAVITCH, *REIGN OF ERROR: THE HOAX OF THE PRIVATIZATION MOVEMENT AND THE DANGER TO AMERICA’S PUBLIC SCHOOLS* 19 (2013).

2. *Zelman v. Simmons-Harris*, 536 U.S. 639, 682 (2002) (Thomas, J., concurring).

3. See JEFFREY R. HENIG, *SPIN CYCLE* 34 (2008) (“[K]ey interest groups have been unwilling or unable to find common ground; any movement toward a position of compromise is resisted as symbolic defeat, a first step down a slippery path toward either a Leviathan government or a Wild West scenario in which corporations run amok and the only consumers who count are those with cash in their pockets.”). For examples, see *Zelman*, 536 U.S. at 682 (Thomas, J., concurring) (arguing that opponents of school vouchers that can be redeemed at religious schools “raise formalistic concerns about the Establishment Clause but ignore the core

Disappointingly few acknowledge their positions' deep roots in their own conceptions of justice—conceptions that are far from commanding universal assent.

In this respect, the explicit normativity of Professor Osamudia James's *Opt-Out Education* is refreshing. Equality, James tells us, ought to trump liberty when it comes to schools. Indeed, "the ideal[] [of] . . . individual liberty . . . [is] arguably completely inappropriate in a public school setting."⁴ "If our goal is equality, then choice must be minimized."⁵ To put it this way is to acknowledge that many disagreements about school choice stem from foundational disagreement about the aspirations of this society and its goals for children. The choice debate, in many respects, instantiates the republic's longstanding contest between equality and liberty. Reconciling the tension between these values is of course a perennially difficult undertaking, but it is helpful to identify it as the task at hand.

At the same time, the school choice debate is not exclusively about conflicts between high principles. Another argument favored by opponents of school choice is that for many people it is not "choice" at all because it is deeply constrained by "social, racial, and economic isolation."⁶ According to this view, choice opposes not only equality *but also* freedom; it enhances liberty only for those who already enjoy racial and economic privilege. There are two problems with this claim. First, constrained choice—even when constraints are very substantial—is still choice. Second, traditional public schooling is deeply shaped by the same social, racial, and economic isolation that limits choice. As Professor James admits, the condition of many public schools that serve racially segregated, poor neighborhoods accounts for much of the demand for alternatives in those communities.⁷ To the choice advocate, meeting such demand, and *a fortiori* subsidizing it with public funds, clearly improves welfare, even in an environment of constraint.

A third variety of argument condemns choice as a matter of political strategy. The signal contribution of Professor James's Article is to argue that choice, by displacing responsibility for bad outcomes from the public sector to the choosing parents, undermines public enthusiasm for tackling the deep injustices that marginalize students of color and the poor and

purposes of the Fourteenth Amendment" that school choice would serve); JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 12 (1990) (noting that opponents of choice seek to preserve "their jobs, revenues, and economic security"); RAVITCH, *supra* note 1, at 22–26 (although "some" pro-choice reformers "sincerely believe" in its merits, many are "partisan," "powerful and wealthy," "deeply reactionary," and motivated by money and personal ambition).

4. Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1098 (2014).

5. *Id.* at 1129.

6. *Id.* at 1121.

7. *Id.* at 1085–86.

complicates efforts to build political coalitions to tackle those problems. Exit, to use the classic categories, mutes voice.

The claim that the atomistic, individualistic neoliberalism of choice dampens the capacity of the polity to confront structural problems of racism, poverty, housing, food insecurity, and healthcare is intriguing both as a critical and an empirical observation. It is not, however, a strong policy objection to school choice. In a society already dominated by individualism and market values, and enduringly infected by racism, the new political coalitions that Professor James imagines are unlikely successfully to overcome intractable problems of social inequality. A better strategy, I think, is to capitalize upon the interest convergence between marginalized and privileged groups that school choice offers. Removing some number of poor, minority students from failing public schools and educating them instead in charters or in other kinds of schools that they and their families prefer will perhaps create better-educated citizens who can effectively participate in, and even lead, socially progressive coalitions. This outcome is far from guaranteed. But it seems more plausible than the hope that by foreclosing exit from bad public schools, we will galvanize the polity to fix public schools, whose distress it has over many decades proved itself more than willing to tolerate.

I. WHAT IS “PUBLIC” SCHOOL?

There is great appeal to prioritizing equality when it comes to educating children. Pick your adjective: American educational inequality is a dispiriting, festering, appalling morass, made even more ignominious by the often fulsome commitment of American political culture to equality of educational opportunity in the abstract. When it comes to schooling, the prosperous and entitled rich routinely exercise privilege and power to the detriment of the vulnerable and the subordinated. School choice, however, cannot properly be characterized solely or even primarily as such an exercise.

Education undertakes to inculcate patterns of thought, moral behavior, and citizenship in the young. We have long understood that such an enterprise demands “basic value choices on which school policy and practice are based.”⁸ Such choices are simultaneously central to the democratic project and deeply controversial. Unlike *Milliken v. Bradley*, *Pierce v. Society of Sisters* is not a Potemkin case that gins up tendentious arguments in a transparent effort to protect the powerful at the expense of everyone else. *Pierce’s* objections that children are not “mere creature[s] of the State” were and remain genuine.⁹ Likewise its claim that parents’ prerogative to direct

8. Stephen Arons, *The Separation of School and State: Pierce Reconsidered*, 46 HARV. EDUC. REV. 76, 78 (1976).

9. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

their children's education is "fundamental" to liberty.¹⁰ Oregon parents did not seek religious instruction from the Society of Sisters because they felt "that it's not enough for their kids to win: others must lose."¹¹ They were dissenters and the targets of bigotry.¹² At the time of *Pierce*, it was the Ku Klux Klan whose platform called for mandatory public schooling,¹³ and democrats like John Dewey who argued that the availability of alternative options reflected "American toleration and trust and good faith between various elements of the population and in each other."¹⁴

By no means does the KKK's endorsement of public school monopoly a century ago contaminate by association the views of those who urge compulsory public education under contemporary circumstances.¹⁵ But private schooling was, in the 1920s, a genuine protection of liberty for the persecuted and the marginalized. We have relatively powerless dissenters today too—dissenters as to religion, to be sure, but also as to methods of discipline, as to pedagogy, and, yes, even as to curriculum in fraught areas like history and science.¹⁶ Their liberty interests are neither trivial nor pretextual.¹⁷

For the same reasons, I am reluctant to treat the choices of relatively powerless persons necessarily as "false choices."¹⁸ Minority communities like majority ones, poor ones like rich ones, include dissenters who object to various orthodoxies and to public monopolies that perpetuate them. And they include persons for whom freedom to dissent, and to educate their children consistently with that dissent, resonates more deeply than the claims of equality. Justice Thomas, surely among that group, begins his *Zelman* concurrence by quoting Frederick Douglass: "[e]ducation . . . means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be

10. *Id.*

11. James, *supra* note 4, at 1128 n.203 (quoting Alfie Kohn, *Only for My Kid: How Privileged Parents Undermine School Reform*, PHI DELTA KAPPAN (Apr. 1998), <http://www.alfiekohn.org/teaching/ofink.htm>).

12. David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 AM. HIST. REV. 74, 83–85 (1968).

13. *Id.* at 79–81.

14. *Id.* at 82 (quoting John Dewey, *The School as a Means of Developing a Social Consciousness and Social Ideals in Children*, 1 J. SOC. FORCES 513, 515 (1923)) (internal quotation marks omitted).

15. For examples of legal scholarship arguing for mandatory public education instead of additional choice, see Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1472–73 (2003); James, *supra* note 4; James S. Liebman, *Voice, Not Choice*, 101 YALE L.J. 259, 302, 307 (1991) (reviewing CHUBB & MOE, *supra* note 3).

16. See PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 297–300 (2003).

17. Arons, *supra* note 8, at 89.

18. James, *supra* note 4, at 1085.

made free.”¹⁹ Whether the first goal of education is liberty or equality is genuinely a matter over which reasonable people of conviction disagree. This is a large part of the explanation for the consistent failure of the African American public and its institutions to generate consensus about school choice.²⁰

There is also the incontrovertible truth that, absent charters or vouchers, American educational localism itself establishes an insidious system of school choice. That the nation’s fifteen thousand local school districts each fund and manage monopoly public schools in their own geographical purviews invites Americans to choose their public schools by choosing where to live.²¹ This peculiar system of choice, propped up by racial segregation, economic stratification, and *Milliken’s* holding that segregation in one district is not susceptible to remedies that involve another, is particularly harmful to racial minorities and the economically disadvantaged. To choose an integrated school means that one must choose to live in an integrated jurisdiction or neighborhood. Similarly, to choose a good school means to pay for a house or an apartment, the price of which bundles all sorts of expensive public and private goods together.²² The rich can afford the bundle, while the educationally oriented poor are deprived of access to à la carte pricing.²³ This is no kind of equality.

Because *Milliken* is itself “a notable example of choice in education,”²⁴ because the system of post-*Milliken*, pre-voucher American schools “sanitizes unequal access to the societal good of education”²⁵ at least as much as charters and vouchers do, then one must argue carefully about why market-based choice is better or worse for equality than *Milliken*-based choice. One surely ought not compare the anti-egalitarian consequences of school choice as practiced—vouchers and charters with their real-life warts—to public-sector monopoly schooling as it would exist in an ideal world, where schools are integrated “inclusive communit[ies]” that are of high quality and enjoy ample public support.²⁶ The proper question is whether market-based

19. *Zelman v. Simmons-Harris*, 536 U.S. 639, 676 (2002) (Thomas, J., concurring) (quoting FREDERICK DOUGLASS, *The Blessings of Liberty and Education: An Address Delivered in Manassas, Virginia, on 3 September 1894*, in 5 THE FREDERICK DOUGLASS PAPERS 616, 623 (John W. Blasingame & John R. McKivigan eds., 1992)).

20. See LISA M. STULBERG, RACE, SCHOOLS, AND HOPE: AFRICAN AMERICANS AND SCHOOL CHOICE AFTER *BROWN* 89–91 (2008); Kevin J. Dougherty & Lizabeth Sostre, *Minerva and the Market: The Sources of the Movement for School Choice*, in THE CHOICE CONTROVERSY 24, 31–33 (Peter W. Cookson, Jr. ed., 1992).

21. Aaron Jay Saiger, *School Choice and States’ Duty to Support “Public” Schools*, 48 B.C. L. REV. 909, 911–12 (2007).

22. See SCHUCK, *supra* note 16, at 305.

23. Saiger, *supra* note 21, at 921.

24. James, *supra* note 4, at 1092.

25. *Id.* at 1088.

26. *Id.* at 1129.

choice reduces equality *relative to* our already racialized and unequal system based upon geographic choice.

This leaves me rooting for those who, like Professor James, want to talk about choice explicitly in terms of tradeoffs between equality and liberty. The work of doing so, however, still lies before us. The task going forward is to delineate how a society that values both can reason together across deep and thoughtful disagreement about which should take precedence in the context of schooling. It is insufficient to say that choice is “inherently incompatible” with public education because “[p]ublic schools are about the public.”²⁷ Schools can be public in the sense of being publicly regulated, publicly managed, publicly subsidized, or publicly provided; they can be public in the sense of being open to any child, free of charge for all, or compulsory across the board; they can be public because they are take-it-or-leave-it common resources, like parks, or they can be public notwithstanding that they are commoditized and differentiated.²⁸ That we have associated a particular kind of “publicness” with public schools for the past century or so, since the rise of the Progressive common-school movement, does not mean that other ways of being public are incoherent or out of bounds. What we have to discuss, across the range of what can fairly be called systems of public education, is the balance between equality and liberty that each offers us and how we should value those tradeoffs.

II. WHAT IS “GENUINE CHOICE”?

I have argued to this point that it is helpful to think about school choice in terms of liberty and equality and that it advances matters to think explicitly about tradeoffs between them. But one also encounters arguments that school choice, in many contexts, “can hardly be said to be genuine choice at all.”²⁹ On this view, choice as practiced—voucher and charter programs as actually implemented—not only exacerbate inequality but also fail to enhance liberty. This is because the “choices” they offer to parents of little privilege are impoverished and illusory.

It caricatures school choice advocacy to suggest that “genuine choice . . . can be integral to self-actualization, dignity, and equality”³⁰ only if choices are diverse, rich, and multifarious. The ideas of a quasi-market and of consumer sovereignty do not depend for their force on the fantastic possibility that all options are equally available to everyone, or that people must choose free of constraint—even of “severely limit[ing]” constraint.³¹

27. *Id.*, at 1119.

28. See HENIG, *supra* note 3, at 51–52.

29. James, *supra* note 4, at 1119.

30. *Id.* at 1102; see also KENT GREENFIELD, THE MYTH OF CHOICE 119–22 (2011) (arguing that the benefits and prevalence of choice in economic markets are often misstated or simply incorrect).

31. James, *supra* note 4, at 1104.

Basic welfare economics *rely* upon the budget constraint: consumers working under those constraints realize consumer welfare nonetheless, because the market provides them with goods and services at prices below the value they assign to them.³² One can except Jean Valjean, “choosing” only *pro forma* between theft and starvation, and still recognize that many poor persons enjoy economic agency with respect to many transactions.

Among such transactions are surely K–12 enrollment decisions under choice programs, which universally provide parents with public subsidies. There can be little doubt that more economic welfare can be had if consumers direct a subsidy than if the state does it for them. One might rather (all else equal) be a rich parent in Princeton, New Jersey, deciding between an excellent local public school or a competing charter that emphasizes traditional pedagogy,³³ than an inner-city parent choosing between a distressed public school and a back-to-basics affinity charter.³⁴ But this does not mean that parents with unsatisfying choices are not *choosing*.

Nor is it *res ipsa loquitur* that some charter schools report poor academic achievement that is even worse than their competitor: traditional public schools.³⁵ Choice does not guarantee good results. No serious person can claim that it does. But that choice is less than a panacea does not imply that the institutional form is a conspiracy of the powerful or that it exploits information asymmetries of marginalized minority parents.³⁶ *Contra* Chubb and Moe, bad traditional public schools are not invariably bad *because* they are traditional public schools;³⁷ too many good traditional public schools give lie to that assertion. For the same reason, low-quality charter and voucher schools do not imply that charters and vouchers are intrinsically of low quality. In particular, that several jurisdictions have yanked charters from schools that fail to post minimally adequate test scores does not demonstrate chartering’s failure.³⁸ Quite the opposite: it shows a regulated market capable of self-correction.

Moreover, choice advocates are right to reject the elitist argument that academic quality is the only measure of public schooling. Two schools that post similar levels of measured academic achievement are not necessarily similar across the board. Poor and rich parents alike might have very good reasons for thinking one better, even much better, than the other. Parents

32. Cf. GREENFIELD, *supra* note 30, at 122 (“The market also *limits* choices.”).

33. See CHIARA R. NAPPI, WHY CHARTER SCHOOLS?: THE PRINCETON STORY (1999), available at http://www.edexcellence.net/sites/default/files/publication/pdfs/wcs_8.pdf.

34. See James, *supra* note 4, at 1115.

35. *Id.* at 1085–86, 1097.

36. See *id.* at 1105.

37. CHUBB & MOE, *supra* note 3, at 26–27.

38. See NAT’L ASS’N OF CHARTER SCH. AUTHORIZERS, THE STATE OF CHARTER SCHOOL AUTHORIZING: 2010, at 45–47 & fig.2.9 (2011), available at http://www.qualitycharters.org/assets/files/images/stories/publications/2010_facts_report.pdf.

reasonably choose schools along many dimensions orthogonal to math and reading scores: strength in the sciences, humanities, arts and music; particular pedagogical approaches; small classes or small schools; school cultures of discipline (for some) or nurturance (for others). One should have sympathy for parents in a dangerous neighborhood who trade some academic quality for safety, or for parents working double shifts who need their kids to walk alone to school and so trade quality for proximity to home,³⁹ just as one can appreciate the motives of a rich parent who rejects a traditional math-and-English public school in favor of a competing, constructivist, arts-oriented charter that posts lower test scores. All these choices make sense to me; and what matters, of course, is that they make sense to the chooser. I cannot agree that even such choices are not made in “an *education* market, but rather a racialized social market.”⁴⁰ School is about academics but also about arts, about safety, and about social communities.⁴¹ The market reflects it all, and in that market parents choose, from the available menu, the packages that they want.

One should not romanticize markets. They are imperfect. They sometimes fail. They rest upon preferences that many of us dislike. This is true of markets both competitive and monopolistic, heavily regulated and lightly regulated. Some schools of choice are incompetent and some are even corrupt,⁴² just like traditional public schools. But it is striking that Professor James repeatedly mentions food insecurity, inadequate housing, and the inaccessibility of healthcare as contributors to the educational distress of poor communities⁴³ because this nation addresses all three in substantial part through subsidized vouchers redeemable in open, if regulated, marketplaces. In the case of food, where the externalities that one person’s consumption places upon others’ are minimal, the voucher approach is universal and nearly entirely uncontroversial. Notwithstanding minor regulation at the margin, everyone can see why it is better to let SNAP recipients exercise personal choices among groceries on store shelves than

39. See James, *supra* note 4, at 1105 n.91.

40. *Id.*

41. See MARK SCHNEIDER ET AL., CHOOSING SCHOOLS 87–95 & fig.4.1 (2000) (reviewing factors parents “find important” in schools); Eric A. Hanushek, *Throwing Money at Schools*, 1 J. POL’Y ANALYSIS & MGMT. 19, 34 (1981) (asserting rationality of choosing schools for “pleasant surroundings, athletic facilities, [or] cultural advantages”); Bretten Kleitz et al., *Choice, Charter Schools, and Household Preferences*, 81 SOC. SCI. Q. 846, 847 (2000) (reviewing prior literature raising “[s]erious questions . . . about the validity of” the claim “that all households seek the same thing from schools—quality education”); Kent L. Tedin & Gregory R. Weiher, *Racial/Ethnic Diversity and Academic Quality as Components of School Choice*, 66 J. POL. 1109, 1111–12, 1130–32 (2004) (analyzing the relationship between preferences for school quality and diversity, and also noting preferences for “teaching moral values”).

42. James, *supra* note 4, at 1106 n.102.

43. *Id.* at 1089 n.15.

to issue each of them an identical food basket.⁴⁴ With respect to housing, Section 8 vouchers have been deployed in no small part because choice can, in addition to SNAP-style direct welfare benefits associated with choice, ameliorate externalities related to the residential concentration of poverty.⁴⁵ With respect to healthcare, where externalities are perhaps even greater, the nation provides and subsidizes consumer choice among providers, both under multiple-payer schemes like that of the Affordable Care Act and under single-payer programs like Medicare. All charter and voucher programs, it is worth noting, are “single-payer.”

These sectors do not perfectly parallel schooling. Nevertheless the partial analogies they offer are instructive. Each makes vivid the incontrovertible welfare benefits that private choice offers relative to public assignment. Housing and healthcare highlight, as well, the potential of consumer choice to mitigate as much as to exacerbate spillover effects. Surely these analogies suggest at least why it is not obvious that bad or inadequate choices should lead us to limit choices further. The alternative approach is to multiply options, expand their range and quality, and develop regulatory tools to address market failures. Policy levers that could accomplish this are available, and I have argued in favor of many of them. Raise voucher amounts.⁴⁶ Increase per-student charter subsidies.⁴⁷ Repeal caps on the number of charter schools in a jurisdiction.⁴⁸ Develop rich, diverse, and culturally competent methods to communicate useful information about school options to parents. Vest chartering authority in institutions other than school districts.⁴⁹ Expand the geographic scope of choice programs from cities to metropolitan areas.⁵⁰ Force suburban

44. *But see* Tina Rosenberg, *To Fight Obesity, a Carrot, and a Stick*, N.Y. TIMES (Nov. 16, 2013, 2:35 PM), <http://opinionator.blogs.nytimes.com/2013/11/16/to-fight-obesity-a-carrot-and-a-stick> (arguing in favor of limiting food stamps to healthier foods). *Cf.* JAMES C. OHLS & HAROLD BEEBOUT, *THE FOOD STAMP PROGRAM* 12–18 (1993) (documenting the shift from a commodities distribution program to one of coupons that permit food aid recipients to select groceries in the general marketplace).

45. *See* Sara Aronchick Solow, Note, *Racial Justice at Home: The Case for Opportunity-Housing Vouchers*, 28 YALE L. & POL’Y REV. 481, 503–04 & n.86 (2010) (noting Congress’s expectation that Section 8 vouchers would reduce the concentration of poverty, and suggesting reforms that would further that goal); *see also* Paulette J. Williams, *The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions*, 31 FORDHAM URB. L.J. 413, 443 (2004) (reviewing HUD data on residential concentrations of poverty).

46. Saiger, *supra* note 21, at 957.

47. *Id.*

48. *Id.* at 959–60.

49. *See* Sebastian Mallaby, *A Bridge for the Underclass*, WASH. POST (June 13, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/12/AR2005061201418.html> (“[G]iving school boards power over charter schools’ facilities is like entrusting decisions on Wal-Mart to Costco.”).

50. Saiger, *supra* note 21, at 958–59.

jurisdictions to admit non-resident students who choose their schools.⁵¹ Minimize creaming by eliminating default placements, requiring all families actively to choose.⁵² Enlist religious educators in choice programs.⁵³

These are changes well within our grasp. Moreover, they should command support across existing cleavages, uniting those who favor more choice with those who favor choice only if it is “genuine.”

III. THE POLITICS OF COMMODIFICATION AND CONVERGENCE

A third argument against choice, developed by *Opt-Out Education* at length, is that market institutions catalyze politics that make it harder for this society to confront and address the root causes of its educational problems.

Michael Sandel has recently argued that the commodification associated with choice generates a particular mindset: “Putting a price on the good things in life can corrupt them.”⁵⁴ Commodifying schools in particular “erodes the sense of community obligation to others” and the centrality of collaboration in schooling, adds Professor James.⁵⁵ Choice also obscures the ways that structural problems like poverty and inadequate, segregated housing worsen educational outcomes.

Most critically, the mindset of marketized education foregrounds concepts of responsibility and of blame.⁵⁶ By asking parents to choose, governments encourage them and everyone else to adopt the view that they are responsible for their choices. The concomitant conclusion is that bad outcomes are their own fault⁵⁷—an effect multiplied manyfold when choosing parents are not white. In particular, Professor James elucidates the potential of choice to exacerbate the identification of educational deficiencies with supposed cultural deficiencies of students, their parents, and their communities. This is an observation both disturbing and important.

At one level, this set of claims makes a descriptive claim about American politics. Markets offer no panacea. Even when functioning well and

51. Cf. Liebman, *supra* note 15, at 299–300.

52. This is the practice in New York City’s system of universal public high school choice. See *High School Admissions: Frequently Asked Questions (FAQs)*, at 1–2, N.Y. CITY DEP’T OF EDUC., <http://schools.nyc.gov/ChoicesEnrollment/High/Resources/default.htm> (follow “Frequently Asked Questions” hyperlink) (last visited Mar. 2, 2014); cf. Atila Abdulkadiroğlu et al., *The New York City High School Match*, 95 AM. ECON. REV. 364, 365–66 (2005).

53. See generally Aaron Saiger, *Charter Schools, the Establishment Clause, and the Neoliberal Turn in Public Education*, 34 CARDOZO L. REV. 1163 (2013).

54. MICHAEL J. SANDEL, WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS 9 (2012).

55. James, *supra* note 4, at 1106 (“[Commodification] alienates individuals from the community nature of public schooling.”).

56. *Id.* at 1086; accord Christopher Lubienski, *Instrumentalist Perspectives on the “Public” in Public Education: Incentives and Purposes*, 17 EDUC. POL’Y 478, 482, 497 (2003).

57. James, *supra* note 4, at 1086.

regulated optimally, they alone cannot cure educational distress in economically and racially segregated communities. Given that choice, even at its best, will leave much educational dysfunction in place and given that choices on offer are often deeply unsatisfactory, Professor James is right to critique the political ascendancy of choice, which she says catalyzes a politics of blaming parents and children for the problems that will inevitably persist. A program of education reform broader than choice, and one that locates responsibility in the state rather than in its less powerful members, is clearly necessary.

But observations like these about the politics of choice also address questions of political strategy. Given its imperfections, should choice be rolled back, tolerated, or advanced? As I asked at the opening, is choice *helpful*? As to that question, James advocates rollback. One of her reasons is that the availability of choice makes it harder to develop political coalitions that fight educational inequity effectively.⁵⁸

This claim is in striking counterpoint to a different view of the political landscape, one that urges those who seek educational equity to capitalize upon, rather than shun, interest convergences between the educational preferences of relatively rich, relatively white suburbanites and poorer, less white families in urban and rural districts. Under this latter view, the lock that privileged suburban interests enjoy over education policy, centered as it is in state legislatures, state courts, and local districts, is something just short of an iron law; to promote equity or any other goal, one must work with it rather than merely bemoaning it. The argument for this claim, which cites the history of desegregation and re-segregation, *Milliken*, school finance litigation, and the accountability movement, has been developed at length, most prominently by James Ryan of the Harvard School of Education.⁵⁹ In his view, choice is an instance of potential interest convergence that might allow real improvement in distressed public school systems in ways otherwise unavailable.

If Professor James is right, however, to go down that road carries high costs. It makes it much harder to backtrack, not just because policy must be undone but because the political will to undo it will have been further attenuated and redirected. Even if one believes that choice is a second-best reform, one might abjure it for the roadblocks it places before the possibility of ever reaching the first-best.

This is a genuine and important insight. It deserves to be highlighted and studied further. But to the extent that this objection to choice is about

58. *Id.* at 1086, 1127.

59. See JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART* 5-17 (2010); James E. Ryan, Brown, *School Choice, and the Suburban Veto*, 90 VA. L. REV. 1635, 1645-47 (2004); James E. Ryan, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 566-67 (1999); James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2087-91 (2002).

strategy, it needs to be analyzed in terms of *realpolitik*. One must assess the potential political effects of commodification and of cultural-deficiency thinking not only in terms of the political culture in general but of the political baseline that determines American educational policy. For myself, I am inclined to think that the baseline political potential of the kinds of coalitions in the interest of which Professor James abjures choice is low indeed. The utopian character of her vision is precisely what makes analysts like Ryan propose to work within, rather than in opposition to, suburban interests. (Indeed, a parallel utopianism with respect to educational equality among 1970s “civil rights lawyers” spurred Professor Derrick Bell to develop the theory of interest convergence in the first instance.⁶⁰) As between regimes of school choice as a second-best, even ones that carry the political costs Professor James identifies, and hoping that distress within the traditional public system will somehow generate a radical new education politics, I opt for second best. Both history and politics make choice the better gamble.

If we choose instead to reaffirm small-district localism, residence-based assignment, and top-down, state-based bureaucratic school management, educational policy will only continue to be shaped by decisions made in response to the continued racial and economic subordination—as well as the monopolist’s indifference to consumer preferences—that these institutions impose and reflect. Ultimately, what choice is that?

60. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523, 532 (1980).