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Unbundling School

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Consider cable television. To subscribe to cable in the United States is to pay for either more or less TV than you actually want. Cable companies offer customers a relatively small menu of choices. You can have the basic package, or the standard, or the luxe; in some markets you can get a sports package, or one targeted at kids. Each of these packages offers access to a subset, selected by the cable company, of the universe of channels available. If you want some particular channel, you have to subscribe to a package that contains it. That package likely also contains many channels in which you have no interest. But cable packages are, not only by definition but by design, package deals. Customers must take the bitter with the sweet.¹

Traditional schooling is likewise a package.² A child attends “a” school. That single institution provides instruction across a range of subjects, along with facilities, classmates, discipline, and extracurricular activities. If you would rather do without some of its offerings, you may

* Professor of Law, Fordham University School of Law. I am grateful to participants in the 2019 International School Choice and Reform Conference for their comments and suggestions, and to the Fordham Law School and the Fordham Law Library for their support.

¹ See Jade Brewster, *Cracking the Cable Conundrum: Government Regulation of à la Carte Models in the Cable Industry*, 62 UCLA L. REV. DISCOURSE 20, 23 (2014); Adam D. Rennhoff & Konstantinos Serfes, *The Role of Upstream-Downstream Competition on Bundling Decisions: Should Regulators Force Firms to Unbundle?*, 18 J. ECON. & MGMT. STRATEGY 547, 549 (2009). Many providers also bundle cable, phone, and internet service into a single, indivisible package. See Note, *Enabling Television Competition in A Converged Market*, 126 HARV. L. REV. 2083, 2088, 2093 (2013).

² Bundling and unbundling in the television industry have recently become popular analogies for problems in, and reform of, higher education. See, e.g., Megan M. Carpenter, *Legal Education Unbundled (and Rebundled)*, 50 U. TOLEDO L. REV. 265, 266–67 (2019) (analogizing TV unbundling to the reform of legal education); Mark Garrett Cooper & John Marx, *Why We Love to Hate English Professors*, CHRON. HIGHER EDUC., Nov. 30, 2018, at B4 (describing the “handful of majors ... that one could find at pretty much any postsecondary institution” as “basic cable channels”); Karen Sloane, *Ahead of the Curve: Law School Unbundled*, LAW.COM, March 26, 2019, <https://www.law.com/2019/03/26/ahead-of-the-curve-law-school-unbundled/> (analogizing an executive education program to Netflix, and noting that in comparison “traditional legal education is a lot like a Direct TV package”).

abstain only at the school's grace, and subject to its often constraining rules. If you want some class or activity the school does not offer, you are stuck—unless you live in a jurisdiction with school choice, or have the means to pay for services on the private market. In those latter cases, you can seek out a school that offers a particular educational good. Likewise, a student looking to avoid a particular kind of thing tries to find a school whose program does not require it. Even then, however, the choosing student gets the chosen school's whole program, which likely includes many *other* things that she might have preferred in a different form, or even preferred not to have had at all.

Cable TV need not be provided under a package-deal model. Quite the contrary: cable companies deployed it in response to particular market, economic, business, and regulatory conditions.³ Lately, though, those same forces—markets and regulators—have dragged the industry some considerable distance away from its preferences for bundling.⁴ Customers are less willing than ever to buy what they don't want in order to get what they do want, living as they do in a world where streaming technology makes it possible and practical to pick and choose.⁵ For-pay streaming services are also, of course, bundles of a sort; you can only stream the shows they offer, and each service offers a different set. But one is often able to pay à la carte.⁶ Free streaming is entirely unbundled. Overall,

³ See Brewster, *supra* note 1, at 26–27; Keith Brown & Peter J. Alexander, *Bundling in Cable Television: A Pedagogical Note with a Policy Option*, 6 INT'L J. MEDIA MGMT. 162, 163 (2004) (some types of bundling act “as a monopolist's mechanism for extracting surplus from consumers”); Gregory S. Crawford, *The Discriminatory Incentives to Bundle in the Cable Television Industry*, 6 QUANTITATIVE MARKETING ECON. 41, 50–51 (2008); Gregory S. Crawford & Joseph Cullen, *Bundling, Product Choice, and Efficiency: Should Cable Television Networks be Offered à la Carte?*, 19 INFO. ECON. & POL'Y 379, 380 (2007) (“bundling can be used by firms to price discriminate among consumers or to extend market power into related product markets”); U.S. GEN. ACCOUNTING OFFICE, GAO-04-8, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry* i (2003) (“technological, economic, and contractual factors explain the practice of grouping networks into tiers, thereby limiting the flexibility that subscribers have to choose only the networks that they want to receive”); David Waterman, Ryland Sherman, & Sung Wook Ji, *The Economics of Online Television: Industry Development, Aggregation, and “TV Everywhere,”* 37 TELECOMMS. POL'Y 725, 728 (2013) (suggesting that brand development is an important motive for bundling).

⁴ See Brewster, *supra* note 1, at 23–24.

⁵ See Christopher T. Buckley, Note, *À La Carte v. Channel Bundling: The Debate over Video Programming Distribution*, 20 LOY. CONSUMER L. REV. 413, 414 (2008).

⁶ See Brewster, *supra* note 1, at 35–36; Waterman et al., *supra* note 3, at 727 & fig.2 (2013) (noting services that offer disaggregated content on a subscription and advertising business model). Some services, like the Amazon Prime video service, combine a

consumers are much closer to paying only for TV that they want than they have been since cable began to compete with free broadcast television. Schooling also need not work on a bundled model. Students, especially older students, could secure different services from different providers: math from one, literature from another, football coaching from a third.

This kind of “unbundling,” which has long existed at the margins of schooling, is poised to enter the mainstream. Although not as straightforwardly as in the television industry, unbundling will be dramatically facilitated by the infrastructure of information technology. Online education, as its technological sophistication increases, makes it increasingly possible and practical to pick and choose.⁷ As it did for television, this portends drastic changes in the educational marketplace. New kinds of service providers, both governmental and private, will arise. Established players will face new kinds of competition.

It is natural to object that, from the point of view both of law and policy, TV and school are completely different. Television and school are both culturally very important and we, as a nation, spend a lot of time with both. Nevertheless, the state doesn’t care enormously much what kind of TV you watch, or even whether you watch at all. Its regulation of the television market focuses primarily on pricing and access.⁸ In contrast, the state compels children to go to school, and pervasively regulates what they learn and experience there. Government, in closely regulating schools, seeks to advance all sorts of goals.⁹ Schools ensure the continuity

packaged set of free shows for a flat fee plus *à la carte* access to a much wider variety of products. See Michael L. Wayne, *Netflix, Amazon, and Branded Television Content in Subscription Video On-Demand Portals*, 40 MEDIA, CULTURE & SOC. 725, 731 (2018).

⁷ See Heather Staker & Michael B. Horn, *Blended Learning in the K–12 Education Sector*, in 2 BLENDED LEARNING: RESEARCH PERSPECTIVES 287, 294–95 (Anthony G. Picciano, Charles D. Dziuban & Charles R. Graham eds., 2014).

⁸ See Nodir Adilov, *Bundling Information Goods Under Endogenous Quality Choice*, 24 J. MEDIA ECON. 6, 7 (2011).

⁹ See William A. Galston, *The Politics of Polarization: Education Debates in the United States*, in THE PUBLIC SCHOOLS 57, 59 (Susan Fuhrman & Marvin Lazerson eds., 2005) (claiming that there is “agreement at the most general level about the purposes of K–12 education” and listing them as the transmission of “basic knowledge and skills” and preparing children for further education, “social life,” and “democratic citizenship,” and “imparting to students a love of knowledge, learning, and artistic excellence.”); AMY GUTMANN, DEMOCRATIC EDUCATION 49 (1987) (emphasizing the formation of “the moral character of citizens” as a key goal of schooling); TRACY L. STEFFES, SCHOOL, SOCIETY, AND STATE: A NEW EDUCATION TO GOVERN MODERN AMERICA, 1890–1940, at 4–5, 11 (arguing that public schools were the preeminent public institution of social policy in the early twentieth century, and further describing the public school as “an important site of state formation ... where public power and individual rights were

of our political, economic, and social systems. They train the labor force. They prepare children to be effective citizens. They express our civic ideals, and provide a site where we as a polity work out many of our most basic civic conflicts. They are the preeminent institution implementing social policy regarding children. They lay the groundwork for lifelong learning. And, for very large numbers of children and their families, they provide a crucial social community, as well as an academic one.¹⁰

None of that, though, obviates pressure from the consuming public to unbundle. Schools in this respect are very much like cable companies. They might prefer to hold onto the bundled model; they might even have good reasons.¹¹ Nevertheless they will increasingly feel the need to let go of that preference as a sufficient number of consumers recognize that technology makes it possible for them no longer to buy things they don't want.¹² In the case of cable, that pressure was exerted substantially through market signals, as many customers cut the cable cord (or chose not to tie it to begin with). In the case of schools, which are primarily provided by governments, the ratio of regulatory and political pressures to market ones will likely be larger, even much larger. Nonetheless, the school system is likely to feel with increasing urgency the need to serve customers who are looking to cut the metaphorical, educational cord.

Families operating in an unbundled educational marketplace are, by definition, engaging in educational "choice." The essence of unbundling is to facilitate consumer choice among discrete elements, rather than having pre-set packages of services handed to them. But unbundling is a genus of choice different from the classic choice among schools. It casts families, at least potentially, as the *assemblers* of bespoke educational packages for their children, responsive at once to their own particular needs and desires, to what is available in the marketplace, and to the regulatory environment. Such choice has the potential to be more efficient, more broad-based, more diverse, more destructive to a common

negotiated").

¹⁰ See PETER BLATCHFORD, ANTHONY D. PELLEGRINI, & ED BAINES, *THE CHILD AT SCHOOL: INTERACTIONS WITH PEERS AND TEACHERS* 18 (2d ed. 2016) ("[S]chool is where children in the industrialized world learn to interact and form relationships with others."); Aaron J. Saiger, *The School District Boundary Problem*, 42 *URB. LAW.* 495, 519, 526 (2010).

¹¹ See *supra* note 3 and accompanying text.

¹² See Michael A. Salinger, *A Graphical Analysis of Bundling*, 68 *J. BUS.* 85, 86 (1995) (bundling "is only practical if there is some way to prevent people from buying both components separately").

civic culture, and more transformative of the education sector than school choice as currently understood.¹³

For the state, the question will be how best to adapt law and regulation to the unbundled context while preserving its policy and regulatory goals with respect to schooling—and, it is to be hoped, while still realizing some of the welfare improvements that unbundling offers. The purpose of this brief, exploratory Essay is to begin to imagine the scope of such a project and some of the directions states might take in enacting it. The Essay argues for two primary propositions. First, state regulation of schools consistently intertwines the regulation of delivery of educational goods and the regulation of their assembly. Unbundling requires regulators to disaggregate these enterprises. Second, unbundling will change the role of existing institutions and give birth to new varieties of players in the schooling marketplace. Regulation needs to account for these changed and new institutions' likely forms, capacities, and incentives.

Dimensions of Educational Bundling and Unbundling

Educational unbundling remains a nascent trend, and one being shaped by technology that is changing very quickly. It is therefore impossible to specify exactly what an unbundled educational system might look like or how it might operate. But some critical, if preliminary, observations are possible.

¹³ Considered from the perspective of consumers, the straightforward economic intuition is that bundling will increase the distributive efficiency of the market for education. The argument tracks that for traditional school choice. Allowing parents to choose schools increases the total consumer utility in the system, restoring to consumers the surplus otherwise lost to monopolist, government providers. See Julian R. Betts, *The Economic Theory of School Choice*, in *GETTING CHOICE RIGHT: ENSURING EQUITY AND EFFICIENCY IN EDUCATION POLICY* 14, 16–22 (Julian R. Betts & Tom Loveless eds., 2005). Likewise, unbundled assembly would improve upon traditional choice at the school level, by restoring to consumers the surplus otherwise lost to the school-level bundler when the consumer pays for educational components (even at her optimal school) that she does not want. Put differently, bundling makes practical the creation of many more assemblages of educational goods (“schools”) than traditional school choice. Bundling thus more closely approaches the welfare effects of perfect competition than ordinary school choice. At the same time, however, under some circumstances bundling permits the production of more, more diverse, and higher quality goods than those that would be produced in a fully unbundled marketplace. See generally Brown & Alexander, *supra* note 3. The net effects of bundling on efficiency therefore require empirical inquiry. They are unknowable at a moment when unbundling is only beginning to penetrate the education sector. See *id.*

One might productively distinguish between a *bundle*—a group of items which must be consumed (or at least purchased) together—and a *menu*, a set of items from which a consumer may choose. Like bundles, menus restrict choice; most things are, so to speak, not on the menu. And the restrictions imposed by a menu, like those of a bundle, are decided by suppliers, rather than customers—although in both cases consumer demand is a factor in suppliers’ decisions. But menus are decidedly more friendly to demand-side preferences than bundles. If a menu item has no takers, it will not be purchased or consumed. In the educational context, when a set of goods is unbundled, it is often transformed into a menu. The unbundling trend I describe moves schooling away from bundles and towards menus.

Today, primary and secondary schools remain more bundle than menu. Indeed, schools are ubiquitous bundlers. Schools determine that certain courses or subjects will be taken together, and that other subjects will be taught in a particular sequence.¹⁴ Schools choose teachers from a universe of teachers available, but generally tell students which subset of teachers they will get. Likewise, schools select curricula from a wide variety of those available, or create their own—and again impose their selections upon students. And schools make the plethora of educational decisions involved in combining such elements, everything from scheduling to the availability of materials. These are bundling decisions.

Individual teachers also ubiquitously bundle. They develop their lessons by relying on a variety of materials available to them. On any given day and at any given lesson, a teacher deploys some of his knowledge, experiences, and techniques, but not others.¹⁵

Schools also set some menus. Middle and high schools have elective classes and permit students to choose among them.¹⁶ The school

¹⁴ See WILLIAM J. REESE, *THE ORIGINS OF THE AMERICAN HIGH SCHOOL* 105 (1995) (“The earliest high school advocates had championed a sequenced, textbook-oriented course of study.”); ARTHUR G. POWELL, ELEANOR FARRAR, & DAVID K. COHEN, *THE SHOPPING MALL HIGH SCHOOL: WINNERS AND LOSERS IN THE EDUCATIONAL MARKETPLACE* (1985) (referring to such bundling as the “vertical curriculum”).

¹⁵ See D. Jean Clandinin & F. Michael Connelly, *Teacher as Curriculum Maker*, in *HANDBOOK OF RESEARCH ON CURRICULUM* 363, 385ff. (Philip W. Jackson ed., 1992).

¹⁶ POWELL, FARRAR, & COHEN, *supra* note 14, at 12–13 (describing “shopping-mall,” “consumption oriented” middle and high schools where “the wish to maximize variety is clear”). The contemporary period has seen substantial variability in the views of education policymakers regarding how to balance sequential, vertical curricula in required subjects with menus of elective offerings. See RICHARD NEUMANN, *SIXTIES LEGACY: A HISTORY OF THE PUBLIC ALTERNATIVE SCHOOLS MOVEMENT, 1967–2001*, at 197 (2003); Richard Elmore & Gary Sykes, *Curriculum Policy*, in *HANDBOOK OF*

extracurriculum is menu, not bundle.¹⁷ Tracking is sometimes a form of educational menu to the extent that children and their families control their placement.¹⁸ Even then, however, once a track is chosen it operates as a bundle of educational experiences that students must consume as a set.

Looking upward from the school, educational authorities at the district and state levels do several things that clearly constitute menu setting. For example, they stock school libraries.¹⁹ State chartering authorities also create a menu when they permit, facilitate, or fund some charter schools but not others.²⁰

More generally, the ways in which district and state level educational governments group schools together creates both bundles and menus. The chartering of charter schools is menu-creation in its purest form. Policies that define sets of schools as portfolios among which parents may choose, such as intra-district school choice, are also menus.²¹ Sometimes such menus are created by recasting existing bundles as portfolios of choice.²²

Other groupings of schools, especially at the district level, are not menus but bundles. The traditional school district practice of maintaining separate elementary, middle, and high schools creates a bundle of schools through which students are expected to pass sequentially. In larger districts, which have multiple elementary, middle, and high schools, the

RESEARCH ON CURRICULUM, *supra* note 15, at 185, 202.

¹⁷ See Laura Berk, *The Extracurriculum*, in HANDBOOK OF RESEARCH ON CURRICULUM, *supra* note 15, at 1002, 1002. (“[P]articipation is voluntary rather than required, leading the extracurricular program to be a domain of schooling that is especially responsive to individual differences in student interests and abilities”).

¹⁸ Choices among tracks preceded discrete course electives in American secondary schooling. See DIANE RAVITCH, *LEFT BACK: A CENTURY OF FAILED SCHOOL REFORMS* 55 (2000).

¹⁹ See Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 862, 870 (1982) (“library books ... by their nature are optional rather than required reading”) (emphasis omitted).

²⁰ See Stephen D. Sugarman & Emlei M. Kuboyama, *Approving Charter Schools: The Gate-Keeper Function*, 53 ADMIN. L. REV. 869, 893–95 (2001).

²¹ See Atila Abdulkadiroğlu, Parag A. Pathak, & Alvin E. Roth, *The New York City High School Match*, 95 AMER. ECON. REV. 364, 364–65 (2005) (citywide high school choice in New York City); Dana Goldstein, *In San Francisco, A Hard Lesson on Integration*, N.Y. TIMES, Apr. 26, 2019, at A1 (discussing implementation of district-wide choice in San Francisco); Kevin Hesla, *Unified Enrollment: Lessons Learned from Across the Country* 2 (Nat’l Alliance for Public Charter Schools 2018) (describing six cities that offer parents “unified enrollment system[s]” that “have a common website, a common application, and a common deadline for all public school options within the system”).

²² See sources cited *supra* note 21.

practice of distributing students among these schools using attendance zones or some other non-choice-based admissions policy is bundling.²³

Perhaps most importantly, every state maintains a system of school districts. The set of districts is a menu, but each individual district is a bundle. A school district is chosen by families, albeit most often through the operation of the peculiar American institution, mediating choice of school by choice of residence.²⁴ Although many families do not experience the set of school districts as a menu, it is one. The chosen district, however, is in most cases a bundle, unless it permits itself to function as a menu.

There are also cases that resist categorization. Whether textbooks²⁵ are more bundle or more menu depends upon the regime in which they are produced and used. Textbook authors clearly choose what to put in and what to leave out.²⁶ But if jurisdictions permit teachers to choose which parts of textbooks to assign, omit, and emphasize, then teachers create bundles from the menus that textbook authors define.²⁷ If jurisdictions require teachers to follow the textbook with minimal deviation, however, then the books are themselves bundles.²⁸

Some textbooks and other learning materials are designed explicitly as “modular,” anticipating teacher and student choice within the menu they set out.²⁹ In other cases, even when teachers are formally permitted discretion regarding whether to use or omit sections of books, rules regarding what teachers must cover interact with given textbooks to render

²³ See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 8 (1971) (describing the manipulation of attendance zones based upon residence to achieve racial balance in student populations).

²⁴ See Saiger, *supra* note 10, at 500. Cf. *Freeman v. Pitts*, 503 U.S. 467, 495 (1992) (“Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies”).

²⁵ “Textbooks” in this context include all sorts of commercial and noncommercial instructional materials, on paper and online.

²⁶ See, e.g., *Smith v. Bd. of Sch. Comm’rs of Mobile Cty.*, 827 F.2d 684, 693 (11th Cir. 1987) (noting that history textbooks perforce involve the “omission of certain historical facts”); Jay D. Wexler, *Darwin, Design, and Disestablishment: Teaching the Evolution Controversy in Public Schools*, 56 VAND. L. REV. 751, 752 (2003) (collecting cases and legislation involving textbooks’ presentation of evolutionary and theistic approaches to the origin of human beings).

²⁷ See Krishna Kumar, *Textbooks and Educational Culture*, 21 ECON. & POL. WKLY. 1309, 1309, 1311 (1986).

²⁸ See *id.*

²⁹ See Barbara Goldschmid & Marcel L. Goldschmid, *Modular Instruction in Higher Education: A Review*, 2 HIGHER EDUC. 15, 16 (1973).

teacher choice largely illusory.³⁰ This is mitigated in states that set limited menus of textbooks from which schools and teachers can choose.³¹ Again, however, such menus may ultimately offer minimal substantive choice.³² At the same time, regardless of formal policy concerning textbooks, all teachers enjoy some level of residual discretion when using textbooks; some bundling decisions are theirs alone.³³

Bundling, menu-setting, and unbundling, in short, are all ubiquitous at every level of schooling. Nevertheless, bundling at the level of the individual school is a uniquely important phenomenon. A school bundle defines the educational experience of any given student at any given time.

All the other aggregative and disaggregative activity in the educational system is secondary to the assignment of a student to a school. The bundle that is a school is, in our system, the primary, discrete unit of educational provision. We (often) give schools proper names.³⁴ Nosy grandparents or new neighbors ask kids where they go to school, whether they like a new school, when they might change schools. The school is

³⁰ See Nicholas C. Polos, *Textbooks: What's Wrong with Them?*, 38 CLEARING HOUSE: J. EDUC. STRATEGIES, ISSUES AND IDEAS 451, 451 (1964) (“For many years ... [t]he textbook was ‘king,’ and, with its tyrannical narrowness, was too often the procrustean grave of learning.”).

³¹ See M. David Bieber, Comment, *Textbook Adoption Laws, Precensorship, and the First Amendment: The Case Against Statewide Selection of Classroom Materials*, 17 J. MARSHALL L. REV. 167, 168 & nn.9–10 (1984) (cataloguing rules for textbook adoption by state); Rebecca Tanglen, Comment, *Local Decisions, National Impact: Why the Public School Textbook Selection Process Should Be Viewpoint Neutral*, 78 U. COLO. L. REV. 1017, 1019–20 (2007). Even if textbook choice is formally available, moreover, school budgets often have no room for new book purchases.

³² See, e.g., Stephen P. Ruis, *Something's Wrong with Chemistry Textbooks*, 65 J. CHEMICAL EDUC. 720, 721 (1988) (“narrowness” in curricular preferences results in there being “little if any difference between textbooks for a given course”).

³³ See *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971) (“[T]eachers have a substantially different ideological character from books [and][i]n terms of potential for involving some aspect of faith or morals in secular subjects, a textbook’s content is ascertainable, but a teacher’s handling of a subject is not”).

³⁴ See, e.g., SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 24 (2018); Derek H. Alderman, *School Names as Cultural Arenas: The Naming of US Public Schools after Martin Luther King, Jr.*, 23 URB. GEOGRAPHY 60, 605–06 (2002); Peter W. Moran, *What's in a Name: Issues of Race, Gender, Culture, and Power in the Naming of Public School Buildings in Kansas City, Missouri, 1940–1995*, 35 PLANNING AND CHANGING 129 (2004). Cf. Joseph Blocher, *School Naming Rights and the First Amendment's Perfect Storm*, 96 GEO. L.J. 1, 7–9 (2007) (cataloguing instances of the sale of naming rights to facilities within public schools, especially athletic facilities, to private parties).

the child's most important social world.³⁵ It is for this reason that the primary arena for school choice is choice among schools. Approaches to unbundling that undermine the school as the central bundled unit of educational provision, and instead permit the assembly of educational components from menus, therefore deserve particular attention.

Bundling, unbundling, and the setting of menus also look very different depending on the developmental stage of pupils, the subject matter at issue, and various species of communities. The age of students is obviously quite important. Middle and high schools where students move from course to course are more straightforwardly unbundled than primary school classrooms whose single teacher who moves seamlessly from subject to subject. Children with the ability to engage in self-direction and to move from task to task independently or with minimal supervision—generally older children—can consume unbundled education more easily than those who cannot. Students whose learning emphasizes informal education through play, social interaction, and similar modalities are less easy subjects for unbundling than those whose instruction is formal and discrete. This group primarily consists of younger children, but also includes many special education students. The special education sector's focus upon the mainstreaming of students, which is demanded by the Individuals with Disabilities Education Act,³⁶ poses particular challenges to unbundling, because unbundling challenges the premise that there exists a primary "stream" into which special education students can and should be integrated.

The feasibility of unbundling also depends on the content being taught. Under current and immediately foreseeable technological conditions, where one imagines that the market for unbundled services will be substantially online, unbundling appears likely to be much more straightforward for some curricular areas than others. At least until virtual reality technology matures, subjects where instruction is accomplished almost exclusively through seeing, hearing, talking, and writing will adapt to an unbundled marketplace much more readily than those that require hands-on activities, in-person interaction, or substantial capital expenditure. The former can aggregate students regardless of residence, and the students can do a substantial part of their work asynchronously. The latter require students to be in the same place at the same time and therefore to live near one another.

³⁵ See sources cited *supra* note 10.

³⁶ 20 U.S.C. § 1412(a)(5) (2012).

In the first category are mathematics, literature, and history. In the second are the arts (visual, musical, and dramatic). Laboratory sciences are also in the second category to the extent that they are in fact taught using hands-on exercises, in labs with special equipment; such practices in many schools are more aspirational than real, however. Team sports also belong in this second category. Physical education, however, has been very successful as an unbundled, online academic offering as exercise can be a solitary pursuit and does not necessarily require specialized equipment.³⁷ Unbundling also applies more easily to the extracurriculum and the academic curriculum than to the social services that today's schools provide, and to moral and ethical education that is conveyed more by example and atmosphere than by direct instruction. This issue will be developed *infra*.

Population density is also a critical feature that shapes the nature of unbundling. The denser the immediate area, the more choice a marketplace can generate. Density makes it possible for a market to develop with respect to educational activities that require colocation, synchronicity, and physical capital; and it enriches the market for all activities by allowing variations that include these features. Geographic density, however, is relevant only insofar as the services in question are live. For online menus, density becomes irrelevant, except to the extent that areas with cheap and ubiquitous broadband can unbundle more easily than those that lack these features.

Legislation and Litigation Regarding Bundling and Unbundling

The unbundling of school is not unknown to American law. The concept has cropped up over time in various ways. In the case reports and the statute books, the clearest cases are those involving families that seek to opt in to, or opt out of, portions of a full public school program. A child who is home schooled or attends a private school might seek to participate in some part of the public school's curriculum, or its extracurricular activities. These are opt-in requests. Conversely, public-school parents sometimes seek to withdraw their children from portions of school programs without withdrawing them entirely from school. These are opt-out requests. Public authorities often resist both kinds of requests, on the grounds that public school is a package deal, not a cafeteria where one

³⁷ Sarah Gonzalez, *How Students Take Physical Education Online*, STATEIMPACT FLORIDA (Aug. 28, 2012, 1:07 PM), <http://stateimpact.npr.org/florida/2012/08/28/how-students-take-physical-education-online>.

may pick and choose. When officials make such arguments, they are claiming that public school is a bundle, not a menu.

These disputes have generated not only case law and state legislation but also a secondary literature that is both positive and normative.³⁸ I will not recapitulate that literature here. The upshot of the positive research is that courts are quite unfriendly to selective enrollment, often taking the view that that public school is an all-or-nothing proposition.³⁹ Legislatures and educational regulators have been substantially less negative.⁴⁰ Regardless, for my purposes here what is important is the arguments of the parties and the different ways those arguments frame unbundling.

Recall some paradigmatic opt-in situations. Children who wish to pursue the bulk of their education at home, or at least outside of the public schools, nevertheless seek to participate in components of the local public school's curriculum or extracurriculum. They do so usually because these endeavors require specialized equipment, specialized pedagogical

³⁸ See, e.g., Joshua Roberts, *Dispelling the Rational Basis for Homeschooler Exclusion from High School Interscholastic Athletics*, 38 J.L. & EDUC. 195 (2009); John T. Plecnik, *Equal Access to Public Education: An Examination of the State Constitutional & Statutory Rights of Nonpublic Students to Participate in Public School Programs on A Part-Time Basis in North Carolina & Across the Nation*, 13 TEX. J. C.L. & C.R. 1, 3 (2007) (focusing on North Carolina law); William Grob, *Access Denied: Prohibiting Homeschooled Students from Participating in Public-School Athletics and Activities*, 16 GA. ST. U. L. REV. 823 (2000); Jeff Prather, *Part-Time Public School Attendance and the Freedom of Religion: Yoder's Impact Upon Swanson*, 29 J.L. & EDUC. 553 (2000); David W. Fuller, *Public School Access: The Constitutional Right of Home-Schoolers to "Opt In" to Public Education on a Part-Time Basis*, 82 MINN. L. REV. 1599 (1998); Eugene C. Bjorklund, *Home Schooled Students: Access to Public School Extracurricular Activities*, 109 EDUC. L. REP. 1 (1996); Lisa M. Lukasik, Comment, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C. L. REV. 1913 (1996).

³⁹ See Kevin Rogers & Richard Fossey, *Same-Sex Marriage and the Public School Curriculum: Can Parents Opt Their Children out of Curriculum Discussions about Sexual Orientation and Same-Sex Marriage?*, BYU EDUC. & L.J. 423, 425–37 (2011) (reviewing caselaw across subjects that have stimulated opt-out requests).

⁴⁰ See *id.* at 438–59; Matthew Lashof-Sullivan, *Sex Education in Schools*, 16 GEO. J. GENDER & L. 263, 266 (2015) (nearly all states permit parents to withdraw students from sex education in public schools); Christina Sim Keddie, *Homeschoolers and Public School Facilities: Proposals for Providing Fairer Access*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 603, 617–19 & nn.72–97 (2007) (cataloguing state statutes, which “ru[n] the gamut from merely allowing homeschooler participation in interscholastic sports, to mandating access to classes, school facilities, and extracurricular and interscholastic activities”).

expertise, and/or a large group of participants.⁴¹ Families' arguments that public schools must accede to such requests are straightforward. They begin with their uncontested legal right to enjoy the entirety of a public school program. Therefore, they argue, they are surely entitled to avail themselves of *only some* of the public school curriculum. This argument seems uncontroversial when translated to other public services.⁴² In a jurisdiction that provides public garbage pickup, a resident who withholds some of her garbage for a backyard compost heap does not lose the right to have the city pick up the rest.⁴³ Public parks are open to all, including patrons of private gymnasias or health clubs—even though one might engage in identical activities in the private gym as in the public park.⁴⁴

In the case of education services, the argument, in some respects, is especially compelling. Families that seek opt-out remind us that the choice to forgo public schooling in favor of private instruction is a constitutional right, one that reflects the nation's "fundamental theory of liberty" that "excludes any general power of the state to standardize its children."⁴⁵ Homeschooling in particular is a choice that most states protect by statute.⁴⁶ To deny students access to services to which they would otherwise be entitled on account of a choice that is legally and constitutionally protected is not only perverse but, in the latter case, an unconstitutional condition.

Families seeking to opt in also have strong policy arguments. They pay their taxes and their children are residents like any other. States,

⁴¹ See, e.g., *Bradstreet v. Sobol*, 225 A.D.2d 175 (N.Y. App. Div. 1996) (home-schooled student seeks to participate in interscholastic sports; school rejects eligibility; court affirms). The case in this and the subsequent note are collected and analyzed in Ralph D. Mawdsley, *Parental Rights and Home Schooling: Current Home School Litigation*, 135 WEST EDUC. REPT. 313, 317–19 (1999).

⁴² See Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U.L. REV. 1185, 1214–15 (1996) (private purchase of additional quanta of services provided at a baseline level by government is compatible with legal requirements that government provide equal services to all).

⁴³ Cf. Alexandra I. Evans & Robin M. Nagele, *A Lot to Digest: Advancing Food Waste Policy in the United States*, 58 NAT. RESOURCES J. 177, 194 (2018) (noting policy in some jurisdictions of subsidizing residents who engage in private composting).

⁴⁴ See Gillette, *supra* note 42, at 1995, 1209–10. Cf. Lauren C. Abercrombie, et al., *Income and Racial Disparities in Access to Public Parks and Private Recreation Facilities*, 34 AM. J. PREVENTIVE MED. 9, 10 (2008) (distinguishing between "access to free-for-use facilities, such as public parks," and "pay-for-use facilities such as health clubs and dance studios").

⁴⁵ *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

⁴⁶ See Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123, 124 (2008).

moreover, offer free public schooling to all children for many reasons: to ensure an educated populace, to train good citizens, to be confident that future voters will competently exercise their right to vote and future jurors their duty to serve, to promote equity, fairness, and diversity.⁴⁷ All of these goals are furthered when more children participate in some fashion in public school programs, and are compromised by a policy that entirely excludes children willing to participate in part.

While families seek to opt in to public schools for all sorts of reasons, families who want to withdraw their children piecemeal from the public school program are less varied. Requests to opt out are typically motivated by religious objections to sex education, to teaching about evolution, and to curriculum regarding sexual preference, gender identity, and nontraditional family structures.⁴⁸ The more overt religious cast of exemption requests has resulted in somewhat different, and less friendly, judicial treatment than opt-in cases.

Conceptually, however, opt-in and opt-out cases pose the same problem. They differ only in the magnitude of the fraction of the public school program that parents seek for their children. For this reason, the arguments of opt-out families very closely track those of families who wish to opt in. Why should a family's constitutional right to public education for their children be subject to their waiver of their constitutional right to withdraw from education that standardizes their children? And doesn't a no opt-out policy seek unconstitutionally to "standardize" children? Furthermore, why would the government want to force objectors from public school altogether, depriving them and society of the many benefits that come with participation in public schools that is as wide and diverse as possible?

Opponents of both opt-in and opt-out are committed to the view that public school programs are unseverable. Although treating schools as bundles will lead some families to opt out entirely, it will leave others, and perhaps many more, who choose to accept the whole of the package offered. This advances whatever policy motivated the creation of the

⁴⁷ See *supra* note 9 and accompanying text.

⁴⁸ See, e.g., *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008) (parents sue for right to prior notice and opportunity to withdraw their children from public-school lessons involving "books that portray diverse families, including families in which both parents are of the same gender" until the seventh grade; court denies relief); *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003) (parents seek to exempt child from "family life education program"); Mary-Michelle Upson Hirschhoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction?*, 50 S. CAL. L. REV. 871, 873–74 & nn.3–7 (1977) (collecting incidents from the mid-1970s).

package in the first instance. Selective enrollment and disenrollment also undermines schools' efforts to create coherent instructional programs and learning communities that have disciplinary, pedagogic, and democratic coherence. Students opting in and out make it impossible to develop and enforce school rules fairly and easily. They undermine the desirable interrelatedness and interdependence of curriculum. And civically, public schools are meant to be educational *communities*, little democracies that teach children by example and through participation what it means to live in community.⁴⁹ This has been a basic tenet of the hegemonic, Deweyian Progressivism of American education for many decades.⁵⁰ But communities are the opposite of cafeterias. To be in community *means* to accept compromises and package deals.

These objections are simultaneously logistical and ideological. Consider, for example, the way a home-schooler's request to opt-in to the varsity football squad might interact with a school policy requiring athletes to maintain some minimum academic average.⁵¹ Or consider how both opting in and opting out might interfere with efforts to teach children relationships between mathematics and the sciences through course sequencing and coordinated instruction.⁵² These are quite practical problems.

But they are not exclusively practical. Granting such requests disrupts the nature of the community within the public school in its educational, civic, and social dimensions. If one finds a way to accommodate the home schooled athlete on a public school football team, that player will be subject to different rules than his teammates who are enrolled in the full curricular and co-curricular program of the public school. How would such students react, and how would they be entitled to react, to such disparities? To what extent is the opting-in student *part* of the team?

Likewise, physics classes designed to interlock with a parallel math class would need to change in practical ways if some students could enroll in one without the other. But such changes would also signal a change in the community of learners that the developers of an interlocking STEM program might have sought to create. *A fortiori*, opting out of

⁴⁹ Cf. Gillette, *supra* note 42, at 1213–16 (elaborating this argument with respect to public goods generally, including but not limited to schooling).

⁵⁰ See Saiger, *supra* note 10, at 522.

⁵¹ See Roberts, *supra* note 38, at 198–199.

⁵² See, e.g., Douglas B. Larkin, *Putting Physics First: Three Case Studies of High School Science Department and Course Sequence Reorganization*, 116 SCH. SCI. & MATHEMATICS 225, 232–33 (2016).

controversial pedagogy, especially with respect to sex and to diversity on any number of dimensions, could very substantially undermine community-building efforts designed for a school community whose membership is full-time and stable.

Unbundling is Pervasive

These arguments, on both sides of the selective enrollment debate, appear in an entirely different light when one leaves the frame of “school.” Once one considers the informal education sector, educational unbundling reveals itself to be everywhere. In its ubiquity, it is largely uncontroversial.

Public-school parents unbundle every time they supplement their child’s schooling with after-school “lessons” in things like karate, ballet, or piano. It seems entirely normal, in middle- and upper-class communities, to buy these services on private markets and consume them during non-school time.⁵³ Such behavior might be seen as a symptom or even a cause of systematic social and economic inequity in society, but as a matter of day-to-day practice it raises few objections.⁵⁴ Parents unbundle services like these, moreover, notwithstanding that physical education and fine arts are part of the academic program of many schools.⁵⁵ The level and intensity of such programs are insufficient to meet many families’ desires. Therefore, such families supplement, even as they continue to get most of their educational services from their school.

⁵³ See Douglas Kleiber & Gwynn M. Powell, *Historical Change in Leisure Activities During After-School Hours*, in ORGANIZED ACTIVITIES AS CONTEXTS OF DEVELOPMENT: EXTRACURRICULAR ACTIVITIES, AFTER-SCHOOL AND COMMUNITY PROGRAMS 23, 36 (Joseph L. Mahoney, Reed W. Larson, & Jacquelynne S. Eccles eds., 2005).

⁵⁴ In order to mitigate this problem, many advocate for public agencies other than schools to fund after-school programming for youth. Karen Pittman, Joel Tolman, & Nicole Yohalem, *Developing a Comprehensive Agenda for Out-of-School Hours: Lessons and Challenges Across Cities*, in ORGANIZED ACTIVITIES AS CONTEXTS OF DEVELOPMENT, *supra* note 53, at 375, 377. This is a public form of unbundling.

⁵⁵ See National Endowment for the Arts, *A Decade of Arts Engagement: Findings from the Survey of Public Participation in the Arts, 2002–2012*, at 64 (2015) (reporting that, with the exception of dance, most arts instruction occurs inside of school, but that a substantial amount of arts instruction is informal; however, these data do not differentiate programs for school-aged children and informal arts education that targets adults), <https://www.arts.gov/publications/decade-arts-engagement-findings-survey-public-participation-arts-2002-2012>.

Somewhat more controversy arises with respect to privately obtained enrichment and drill in those academic subjects that our culture views as the core subjects of school curricula. In many places, there is a robust private market for such supplementation, primarily serving middle- and upper-income households but also including not insubstantial numbers of less privileged families. The most pervasive is private preparation services for college entrance exams.⁵⁶ Parallel industries prepare younger students for high-school entrance exams in jurisdictions that use them.⁵⁷ There are also extracurricular academies, modeled upon Japanese and Korean “cram schools” or similar to them, that provide academic supplementation without targeting a particular standardized test.⁵⁸

Providers of these services find customers for the same reason that piano teachers and karate schools do: Although the subjects are taught in school, for some families they are not taught well enough, intensely enough, or in the appropriate fashion. The result is a so-called “shadow education system,” targeted at public school students but independent of public schools and run in parallel to them.⁵⁹

The shadow system finds many critics, who view it as an engine of educational inequality.⁶⁰ These concerns are serious. Only families able and willing to pay can avail themselves of such instruction. But it is impossible to imagine a legal argument to support prohibiting the purchase of such supplementary, unbundled services. The Supreme Court has specifically voided state restrictions on parental efforts to secure

⁵⁶ See Alice Yin, *Asian Test-Prep Centers Offer Parents Exactly What They Want: 'Results,'* N.Y. TIMES, Oct. 25, 2017, <https://www.nytimes.com/2017/10/25/magazine/asian-test-prep-centers-offer-parents-exactly-what-they-want-results.html>.

⁵⁷ See *id.*

⁵⁸ Jean Park, *From Culturally-Driven to Market-Driven Academic Success: Korean “Cram Schools” in the New York Metropolitan Area*, GOTHAM CENTER FOR NEW YORK CITY HISTORY BLOG (Aug. 6, 2016), <https://www.gothamcenter.org/blog/from-culturally-driven-to-market-driven-academic-success-korean-cram-schools-in-the-new-york-metropolitan-area>; Kyle Spencer, *Centers See New Faces Seeking Test Prep*, N.Y. TIMES, April 2, 2013, <https://cn.nytimes.com/education/20130404/c04cram/en-us/>. On cram schools in Asia, and their distributional effects, see Nancy Ukai Russell, *Lessons from Japanese Cram Schools*, in THE CHALLENGE OF EASTERN ASIAN EDUCATION: IMPLICATIONS FOR AMERICA 153, 153–54, 168–70 (William K. Cummings & Philip G. Altbach eds., 1997).

⁵⁹ See Claudia Buchmann, Dennis J. Condron, & Vincent J. Roscigno, *Shadow Education, American Style: Test Preparation, the SAT and College Enrollment*, 89 SOCIAL FORCES 435, 438–39 (2010).

⁶⁰ See *id.* at 455.

extracurricular instruction for students, holding that the right “to acquire useful knowledge” is a liberty interest protected by substantive due process.⁶¹ Although the state may set a floor for private as well as public education, it may not interfere in parental efforts to supplement above that floor, outside of the school day. This seems to be an obviously correct application of the principle that states may not “standardize” children.⁶² The First Amendment also independently protects the provision of such supplementary schooling.

Unbundling is also institutionalized in pockets of the formal education sector. Higher education, for example, is unbundled to a much greater extent than primary and secondary schooling. The higher-education sector is of course in a category of its own for many important reasons. Although it includes many public schools, colleges and universities serve adults and attendance is voluntary. Therefore, less social expectation and fewer diverse policy goals attach to their activities. But it is important nevertheless to acknowledge that the standard college and graduate school model is an unbundled educational menu, at least regarding academics. The college or university has a provider role, making available a universe of courses. The student, not the school, selects those courses.⁶³ The college or university also fulfills a regulatory role, requiring that all courses take certain forms and that the assembly of courses conform to particular rules.⁶⁴ The government in turn relies upon private accreditors who regulate the schools’ regulations.⁶⁵

Primary and secondary schools themselves have also adopted a more unbundled self-conception. The Individuals with Disabilities Education

⁶¹ Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

⁶² Pierce v. Soc’y of Sisters, 268 U.S. 510, 535 (1925).

⁶³ This ubiquitous practice was catalyzed by Harvard President Charles W. Eliot, who upon assuming the presidency of the College dismantled its standardized, one-size-fits-all undergraduate curriculum in favor of a system of electives. See Hazen C. Carpenter, *Emerson, Eliot, and the Elective System*, 24 NEW ENGLAND Q. 13, 25–26 (1951).

⁶⁴ See Darrell B. Warner & Katie Koeppl, *General Education Requirements: A Comparative Analysis*, 58 J. GENERAL EDUC. 241, 243 (2009). Unbundling has been much less prevalent with respect to the nonacademic functions of colleges and universities, especially in upmarket institutions that also house and care for students. See, e.g., Robert D. Reason & Ellen M. Broido, *Philosophies and Values*, in STUDENT SERVICES: A HANDBOOK FOR THE PROFESSION 39, 46–47, 49–51 (John H. Schuh, Susan R. Jones, & Vasti Torres eds., 6th ed. 2016).

⁶⁵ See generally JUDITH S. EATON, COUNCIL FOR HIGHER EDUCATION ACCREDITATION, AN OVERVIEW OF US ACCREDITATION (rev. ed. 2015) <https://www.chea.org/sites/default/files/other-content/Overview%20of%20US%20Accreditation%202015.pdf>.

Act (IDEA) has been a critical force moving them in this direction. One of the IDEA's primary requirements is that schools prepare an "individualized education program" (IEP) for each student with a disability.⁶⁶ The IEP sets out how the school will marshal resources to meet the individual educational needs of each particular student.⁶⁷ This means that each student has their own program particularized by the school (or, in many cases, negotiated between school officials and the particular family).⁶⁸ To require states to provide this sort of bespoke educational program is to require schools to provide special education in an unbundled form.

Although the legal obligation to provide "individualized education" applies only to students with disabilities, the institutionalization of unbundling in the special education context demonstrates its broader feasibility. "Differentiated instruction," the idea that schools should tailor educational experiences to every student's particular needs,⁶⁹ has become an important pedagogical reform in general as well as special educational contexts.⁷⁰ Numerous teachers' guides both emphasize the desirability of differentiation and presents strategies for its implementation.⁷¹

"Differentiated instruction" is the general-education analogue of the "individualized education" to which students with disabilities are entitled under the IDEA. Like the development of IEPs, differentiation is a species of unbundling. It involves assembling various components particularistically and differently for each individual.⁷²

⁶⁶ 20 U.S.C. §§ 1401(18) (2012 & Supp. 2018), 1415(b)(2) (2012).

⁶⁷ See *id.* §§ 1412(a)(4) (2012), 1414(d) (2012); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1421 (2011).

⁶⁸ See Pasachoff, *supra* note 67, at 1424.

⁶⁹ See Pearl Subban, *Differentiated Instruction: A Research Basis*, 7 INT'L EDUC. J. 935, 940–41 (2006).

⁷⁰ See, e.g., Timothy J. Landrum & Kimberly A. McDuffie, *Learning Styles in the Age of Differentiated Instruction*, 18 EXCEPTIONALITY 6, 14 (2010) (listing, in a special-education journal, children with disabilities as one student population among many that can benefit from differentiated instruction); Subban, *supra* note 69, at 938 (listing the "inclusion of students with disabilities" among factors that have given rise to differentiation in instruction).

⁷¹ See, e.g., CAROL ANN TOMLINSON, *THE DIFFERENTIATED CLASSROOM: RESPONDING TO THE NEEDS OF ALL LEARNERS* (2d ed. 2014); AMY BENJAMIN, *DIFFERENTIATED INSTRUCTION A GUIDE FOR ELEMENTARY SCHOOL TEACHERS* (2003).

⁷² There are pedagogical as well as legal differences. Many supporters of differentiation support it precisely because they see it as a way to preserve the common nature of the public school program, by insisting that diverse learners can be accommodated in the context of a single, public school.

Another important sector is religious schooling. To freely purchase supplementary religious schooling is a component of the constitutionally guaranteed free exercise of religion.⁷³ It is also a due process right, just as the purchase of any other supplementary schooling would be.⁷⁴ The Supreme Court has also established that parents for whom supplemental religious instruction is insufficient have the right to choose to exit the free public schools and enroll children in religious private schools.⁷⁵ These principles were established early in the twentieth century. Since then, most of the legal controversy over extracurricular religious training has been the extent to which public funds may be used for religious instruction or by religious educational institutions.

Two observations about bundling emerge from the religious instruction cases. One is that the Court continues to analyze the Establishment Clause implications of religious instruction in public schools based upon the extent to which that instruction is discretely provided, apart from the regular services of the school. The greater the extent to which some kind of secular instruction is impermeable to religious concerns, the more courts are willing to tolerate public funding of such instruction.⁷⁶

Regardless whether this concern is expressed in terms of “entanglement,” as it was for many decades in cases where funding is fungible or the programmatic boundaries between religious and secular elements are fluid, public funding in such cases is thought to be more constitutionally problematic. One might restate this principle as one of greater reluctance to permit public funding of the secular portion of

⁷³ See *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927) (holding that the right of a parent “to direct the education of his own child without unreasonable restrictions” prohibits intrusive regulation of supplementary schools that conduct their activities after the regular school day).

⁷⁴ See *id.* at 298–99.

⁷⁵ See *Meyer v. Nebraska*, 262 U. S. 390, 400 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

⁷⁶ See *Roemer v. Bd. of Pub. Works of Maryland*, 426 U.S. 736, 749 (1976); see also *Agostini v. Felton*, 521 U.S. 203, 226 (1997) (overruling past precedent and permitting publicly funded secular teachers to provide discrete services in public schools because “there is no reason to presume that” such a teacher “will depart from her assigned duties and instructions and embark on religious indoctrination”); *Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 248 (1968) (permitting provision of secular textbooks to religious schools because it is implausible that such books are “intertwined” with “the teaching of religion”); *Lemon v. Kurtzman*, 403 U.S. 602, 616–617 (distinguishing, for Establishment Clause purposes, books with fixed content from teachers whose inclination to mix religious and secular instruction is difficult to police).

bundles that combine religious and secular instruction than to fund the secular portion of menus that do the same.

More important is the regime that has emerged from the cases to govern private, religious schools. Governing law understands religious private schools themselves to be bundles. The religious purpose and content of the bundle is assumed to reach all of its contents. Religious schools, therefore, must use their own private resources to teach secular and state-mandated topics like mathematics and chemistry, as well as to provide religious instruction.⁷⁷

Treating private religious schools as bundles makes sense if the components of religious education are unseverable.⁷⁸ In an unbundled marketplace, however, it does not make sense. If schooling is an assemblage of discrete components, there is no reason to exclude those who purchase religious components (or those to whom they are provided philanthropically) from also taking advantage of publicly provided secular components. To restrict enrollment in a state-supported online mathematics course to those not also enrolled in a religious private school is clearly unlawful. It is flat-out unconstitutional, just as it would be to restrict public school enrollment to students who do not attend supplementary Sunday schools.⁷⁹

Some educational actors, religious, antireligious, and disinterested, feel that religious and secular training are and should be interwoven in religious schools.⁸⁰ The religious actors in this group include both religious providers of education and its consumers. Other actors would gladly disentangle the secular and religious components of religious schools' programs in return for public funding of the former,⁸¹ and plenty of religious parents would accept such segregation in exchange for the

⁷⁷ See Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1017 (1991) (“[I]f a family chooses to integrate a religious element into primary or secondary schooling, not only must they bear the costs of the religious education, but they also forfeit all public subsidy for education, including secular subjects.”); Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151, 167 (2003).

⁷⁸ See *Lemon v. Kurtzman*, 403 U.S. 602, 641 (1971) (Douglas, J., concurring) (“The school is an organism living on one budget.”).

⁷⁹ See McConnell, *supra* note 77, at 1017 (“It is as if those who get an abortion were thereby excluded from Medicaid”).

⁸⁰ See *id.* at 1019–20.

⁸¹ See *Roemer*, 426 U.S. at 759 (recognizing that some religious schools are organized not to be “so permeated by religion that the secular side cannot be separated from the sectarian”).

savings.⁸² The unbundling of the educational marketplace leaves room for both types of religious enterprises. Some religious educators will provide at private expense, and find customers for, secular training that is religiously infused. But others will build programs of study that bundle strictly secular components, which can receive public subsidy, along with religious ones.

Finally: The quintessential unbundlers of the contemporary educational scene are the home schoolers, both religious and secular.⁸³ Home schooling families *assemble* an educational program for each of their children, using materials available to them. They are generally Catholic with respect to modality, pedagogy, and provider.⁸⁴ Thus, they may choose to teach some of their children some subjects at home. For other subjects—or for the same subject, but other children — home schooling families band together, instructing children in small groups.⁸⁵ Students may move from house to house (more precisely, venue to venue) as they secure instruction in various subjects; group membership can be fluid across these many transitions. In both direct and group instruction, home schoolers access or purchase curricula and materials feeling no duty or expectation that they will purchase all their materials from the same supplier. Likewise, they may acquire specialized instruction from one of their number or from outsiders, again with no expectation that all outside provision will come from the same individual or firm.⁸⁶ In still other cases, they deploy online courses and curricula, again without any expectation that they will have only one provider.⁸⁷

Home schoolers are *unbundlers* in the sense that they reject existing schools' packages of services. Instead they go onto the open market to secure the services they want, à la carte. They are also unbundlers because they often deploy a set of providers unconnected one to another. This is the reason that home schooling is generally treated as a species of

⁸² See, e.g., Yigal M. Gross, *The Yeshiva Day School System — Costs and Considerations*, TIMES OF ISRAEL: THE BLOGS (June 24, 2016, 10:44 AM), <https://blogs.timesofisrael.com/the-yeshiva-day-school-system-costs-and-considerations/>.

⁸³ See Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75, 77–78 (2002) (discussing varied estimates of how many homeschoolers are religiously motivated).

⁸⁴ See Aislin Davis, *Evolution of Homeschooling*, 8 DISTANCE LEARNING 29, 32 (2011).

⁸⁵ See *id.* at 34.

⁸⁶ See, e.g., Eric Wearne, *A Descriptive Survey of Why Parents Choose Hybrid Homeschools*, 10 J. SCH. CHOICE 364 (2016).

⁸⁷ See Davis, *supra* note 84, at 33–34.

school choice.⁸⁸ Its practitioners choose it and then choose, cafeteria-style, the services that they think are best for their children. This is similar to the way those who choose schools, private or public, select the school that they believe best suits them from among the available options.

At the same time, home schoolers are *bundlers*, in the sense that they stand in the place of schools. In this they resemble schools and school systems, which bundle educational goods from a variety of sources. Schools and home schoolers both choose sets of teachers, develop sets of curricula, and select sets of textbooks and materials. Unbundled education moves the assembly function, or at least the right and duty to assemble, from schools to families.

Limning the Unbundled Education Space: Deconstructing “School”

Identifying home schooling as the fullest contemporary expression of unbundling signals the basic regulatory move that governments must make as unbundling becomes more pervasive. Today, the state regulates “schools,” both public and private.⁸⁹ The schools that are the objects of that regulation do two things: they *provide* educational services and they *assemble* them. Current law and policy assumes that these two functions will be performed by the same institution, the school. In an unbundled world, this assumption is unsustainable. The state will face the job of disentangling these two arenas of regulation.

The first challenge, and arguably the most jarring, will be to find a paradigm for the regulation of educational content. The state may (and should) continue to demand that whatever set of educational components is chosen for any given student meets certain requirements. Such regulation is justified by the state’s interest in an educated public. But to do so will require a regulatory approach to curriculum entirely different from the school-based approach of today. It will require the coordinated regulation of families, who bear the duty of assembly in an unbundled regime, and of producers of the educational content that those families will assemble. It will also require more use of regulatory authority over the public relative to supervisory authority over state employees.

⁸⁸ E.g., Clive R. Belfield, *Perspectives on Homeschooling*, in HANDBOOK OF RESEARCH ON SCHOOL CHOICE 521, 521 (Mark Berends ed., 2009) (“Homeschooling ... is possibly the most revolutionary form of school choice available within the U.S. educational system.”)

⁸⁹ See, e.g., Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 245 (1968) (noting the scope of permissible regulation of private schools by public authorities).

And content regulation will need to be pedagogically and socially sound, administrable, and constitutional—three criteria that will often push against one another. Regulation of unbundled curriculum will constantly butt up against the expressive and religious rights both of families and of providers. While the state has the ability to compel speech in the context of schools, this power is limited.⁹⁰ And the state may interfere neither with the publication of materials aimed at schoolchildren—no matter what their content—nor with children’s ability to access them.

Beyond the regulation of curriculum, the state will also need to regulate the educational institutions of an unbundled world. First among these will be providers of educational services, who will create both materials required to meet curriculum regulations and other materials that are discretionary with families. Such institutions already exist, but their numbers will grow and their forms will proliferate. In addition, many new institutions will surely arise that will offer to help families with their duties of educational assembly. Both these kinds of institutions will likely range across the for-profit, not-for-profit, religious, governmental, and unincorporated sectors. One important question is whether these various sectors should be regulated differently.

In short, unbundling will require fundamental reconceptualization of how education is regulated. Current regulatory approaches will not translate easily or directly to a new unbundled reality.

Regulation of Curriculum

When school is unbundled, every family will bear a legal duty to assemble an educational program for each child that meets the requirements of the state. It is in this sense that the unbundled marketplace makes home schoolers of everyone. The basic question that drives the regulation of home schooling (and of private schooling too) thus becomes a basic problem for all of schooling: How directive can the government be?

One has the sense that the relatively loose regulation of the content of private school education by most American jurisdictions today,⁹¹ and the

⁹⁰ Saiger, *Deconstitutionalizing Dewey*, 13 FLA. INT’L U. L. REV. 765, 771–72 (2018) (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

⁹¹ See generally U.S. DEP’T OF EDUC., OFFICE OF INNOVATION AND IMPROVEMENT, STATE REGULATION OF PRIVATE SCHOOLS (2009), www.ed.gov/admins/comm/choice/regprivschl/index.html (providing a 50-state survey of

even more *laissez-faire* regulation of home schooling,⁹² is in part a consequence of the fact that these methods of schooling are dear to consumers. Private school tuition is often high, and home schooling requires a substantial expenditure of time as well as treasure. This means that the home schooling sector is small, and is dominated by highly motivated families.⁹³ The private school sector is larger, but remains limited, which is unsurprising since private school is an expensive substitute for a good universally available free of charge.⁹⁴ Under current conditions, therefore, government can meet most of its regulatory goals for education by pervasively regulating public schools, which are cheap and popular. It can afford to regulate costly private schools less rigorously, and treat home schoolers with benign neglect.

That will not be so if everyone unbundles. Government will therefore be inclined to demand more of assemblers than it does of home schoolers today. Some new equilibrium will need to be achieved between legitimate exercise of the police power to further states' interest in an educated populace, and the freedom of individuals and families.⁹⁵

At the constitutional level, the resulting disputes are likely to look like those from the 1920s over the scope of state regulation of private schools. The three key cases from that era in the United States Supreme Court — *Meyer v. Nebraska*,⁹⁶ *Pierce v. Society of Sisters*,⁹⁷ and *Farrington v. Tokushige*⁹⁸ jointly establish that compulsory education is constitutional;⁹⁹ that parents have a right to refuse public education and secure private education instead; that the state may regulate private schools for public

public regulation of private schools); EdChoice, *Private Schools and School Choice Programs Are Regulated, Too*, <https://www.edchoice.org/school-choice/regulations/> (visited May 8, 2019).

⁹² See Yuracko, *supra* note 46, at 129.

⁹³ Home schoolers enrolled 3.4% of all children enrolled in school in 2012. JEREMY REDFORD ET AL., U.S. DEP'T OF EDUC., NCES 2016-096.REV, HOMESCHOOLING IN THE UNITED STATES: 2012, at 5 (2017), <https://nces.ed.gov/pubs2016/2016096rev.pdf> at page 5.

⁹⁴ Private schools enrolled 10.3% of all children enrolled in school in 2015. NATIONAL CENTER FOR EDUCATION STATISTICS, 2016 NCES DIG. EDUC. STAT., at tbl.205.10, https://nces.ed.gov/programs/digest/d16/tables/dt16_205.10.asp?current=yes

⁹⁵ See E. Vance Randall, *Private Schools and State Regulation*, 24 Urb. Law. 341, 341–42 (1992) (describing this as the essential dilemma of private school regulation).

⁹⁶ 262 U.S. 390 (1923).

⁹⁷ 268 U.S. 510 (1925).

⁹⁸ 273 U.S. 284 (1927).

⁹⁹ The Court subsequently recognized a right to religious exemption from compulsory schooling, but severely limited its scope. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

purposes; and that regulation of private education may not be so intrusive that it renders a private school unable to carry out its particular educational mission.¹⁰⁰ On this round, perhaps the outcome will also be the same, yielding a rule that states can regulate assembly they quite substantially, as long as they leave room for families to pursue their own idiosyncratic educational goals.¹⁰¹ But the particular metes and bounds of this rule will need to be re-litigated.

At the legislative and bureaucratic level, regulation of assembly will require a thorough reconsideration of how curriculum regulation should be specified. Today's regulation of curriculum is somewhat scattershot. State legislators often pass general delegations to state departments of education, and then supplement them with specifications of particular subjects or activities that may or must be included in curricula.¹⁰² State departments in turn promulgate a bewildering variety of documents of varying specificity—frameworks, guidelines, implementation manuals—that offer little clarity regarding whether or how much legal force they express.¹⁰³ A great deal of discretion is left with local districts, school principals, and individual teachers. This approach can be effective in a system where the bulk of education occurs in publicly managed schools, where conflict can be dealt with pursuant to organization charts under which supervisory authority over teachers lies with the government.¹⁰⁴

¹⁰⁰ Although the 1920s private-school cases were decided under a pre-*West Coast Hotel* understanding of the substantive due process of commercial enterprises, the cases are universally regarded as still good law. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 393 (1937).

¹⁰¹ See *Farrington*, 273 U.S. at 298.

¹⁰² See STATE REGULATION OF PRIVATE SCHOOLS, *supra* note 91; EdChoice, *supra* note 91; Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461, 1466 (2017).

¹⁰³ Consider, as an example, the regulation of the teaching of social studies in New York State. The New York State Board of Regents formally convened and adopted a document entitled “New York State K–12 Social Studies Framework,” at a regular meeting. New York State Educ. Dept., K–12 Social Studies Framework, <http://www.nysed.gov/curriculum-instruction/k-12-social-studies-framework>. The *Framework* document itself is not stated as a series of legal requirements. Rather, it “is anchored in the New York State Common Core Standards for Literacy and Writing and New York State Learning Standards for Social Studies,” and that it should “serve as a consistent set of expectations for what students should learn and be able to do.” *Framework* at 2 (rev. Nov. 2014).

¹⁰⁴ For example, a school that wishes to substitute a different social studies course for the standard prescribed course may do so if the new course is “equivalent” to the standard. “Equivalency is approved by the local public school superintendent or his or her designee or by the chief administrative officer of a registered nonpublic high school.” New York State Educ. Dept., *K–12 Social Studies Frequently Asked Questions*,

The professional socialization and mores of teachers also constrain curricular decisions in public schools. The curriculum of private schools is then regulated, again haphazardly and with great variation across the states, in terms of the unclear curricular requirements of the public schools.¹⁰⁵

Reliance upon public schools as institutions whose internal working will yield acceptable curricula will not be possible when regulating unbundled producers generally. There will be no organization charts, no constraining professional mores, and no room for vagueness about the difference between a legal requirement and a statement of pedagogical preference. Regulations will have to be more specific, less fuzzy, and of a different character than they are now. In particular, rules that now require, for example, that students in a given grade have x hours of instruction in mathematics will need to shift, instead setting out requirements for what particular subjects must be taught and, perhaps, what kinds of mathematics instruction needed to be given.¹⁰⁶ This shift will surely accelerate a critique, already ongoing, of the use of input rather than outcome measures to describe education.¹⁰⁷

What can the state require of *producers* of education in the unbundled marketplace? Such requirements will be substantially constrained by the First Amendment. Education and expression are inextricably intertwined. Both individuals and firms have the right to speak to and in front of children however they like. A publisher can publish a children's book or a textbook that says the Earth is flat, or that it is only six thousand years old.¹⁰⁸ A preacher can tell children that they are saved—or that their neighbors are damned—even if his message is inimical to the values of tolerance and community the state wishes to promote. And parents have both First Amendment and liberty rights to buy the flat-earth book for

<http://www.nysed.gov/curriculum-instruction/frequently-asked-questions>.

¹⁰⁵ See STATE REGULATION OF PRIVATE SCHOOLS, *supra* note 91; EdChoice, *supra* note 91.

¹⁰⁶ See Randall, *supra* note 95, at 370 (“Private school regulations are ... primarily programmatic in character and focus on the ingredients that conventional wisdom says must be present to ensure quality education—items such as instructional time, teacher certification, teacher/pupil ratio, class size, curriculum, adequate physical facilities, etc.”).

¹⁰⁷ See *id.* (“Empirical research, however, reveals that there is little if any correlation, let alone causal connection, between these specific types of educational “inputs” and academic achievement or other educational outcomes”); Jessica M. Shedd, *The History of the Student Credit Hour*, 122 NEW DIRECTIONS FOR HIGHER EDUC. 5, 11 (2003).

¹⁰⁸ E.g., EDWARD HENDRIE, *THE GREATEST LIE ON EARTH: PROOF THAT OUR WORLD IS NOT A MOVING GLOBE* (2016).

their children, and take them to hear the preacher. The state cannot interfere with their doing so.

There remains, however, a regulatory role for the state in helping consumers understand whether and to what extent given educational services will help them to satisfy the requirements placed upon assembly. Consider again the example of a provider who wishes to provide a mathematics module for use by, say, fifth and sixth grade students. Anyone can say anything they like about mathematics, and package those statements for sale. But the government can insist that assemblers find and use instructional materials that meet state requirements (although they cannot insist that they use such materials *exclusively*). The state can therefore also require providers to state truthfully whether their packages meet state requirements. A demand that merchants engage in accurate self-description in an area where such accuracy furthers a crucial state interest does not violate the First Amendment.¹⁰⁹

The primary regulatory challenge in this sphere will be to ensure that the government does not tread upon free expression in certifying some kinds of instruction as adequate. In the current system, the government's right to speak on its own behalf allows it to determine what public schools say.¹¹⁰ But in the new system, the government will not be able to discriminate based upon viewpoint, though it will still be able to require generally that certain content be taught. The paradigm for regulating all content providers will therefore be contemporary private school regulation, which will need to become more rigorous and less vague.

Private schools can be required to meet state-defined subject-matter requirements with respect to their secular curriculum. They cannot be required not to provide other lessons. Certification of materials as compliant with state assembly standards must reflect these principles.

This approach to regulation of production will surely generate daunting controversies. It would clearly be constitutional to require providers to disclose whether a state had certified particular materials as meeting curricular requirements.¹¹¹ Such a case is one where "the possibility of deception is ... self-evident," which permits the government to regulate

¹⁰⁹ See Lars Noah & Barbara A. Noah, *Liberating Commercial Speech: Product Labeling Controls and the First Amendment*, 47 FLA. L. REV. 63, 76–82 (1995).

¹¹⁰ See Saiger, *supra* note 90, at 771–72; Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 2–4 (2000).

¹¹¹ See *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

speech in order to protect consumers from false claims.¹¹² Much more difficult, however, would be the regulation of claims that some set of educational materials would be found to, or ought to be found to, meet assembly requirements. Such assertions might well mix commercial statements whose truth or falsity should be uncontroversial with other claims that elicit enormous controversy in areas that are of core public concern. For example, producers of a flat-earth instructional package, or a homophobic one, might advertise that it was consistent with an assembly requirement demanding that students receive instruction regarding certain topics relating to earth-science and social studies, as defined by some set of state-approved standards. Governments and other private parties might vociferously insist that the assertions in such packages, or their general pedagogic approach, is inconsistent with such standards. Such claims would present enormously difficult questions regarding whether the speech involved is commercial or political, what levels of scrutiny are appropriate, and how such scrutiny should be applied.

Moreover, decisions will need to be made regarding whether certification rules should apply equally to all providers, or whether for-profit providers should be expected to meet requirements that are not incumbent upon nonprofits, churches, and families. Current private school regulation in many states not only treats them differently from public schools, but treats church schools differently from nonreligious private schools.¹¹³ The political pressure to distinguish these categories with respect to certification will be considerable.

Regulation of Public Institutions

Although families individually will bear the duty to assemble educational services for their children, few will have the resources or the inclination to do so on their own. Most parents, especially those who are not home schoolers or educators, will look to *hire* someone to curate the components. They will be the general contractors of the education sector, in charge of making sure all of the necessary elements for the project are in place, subcontracted out, and interacting properly.

The premier third-party bundlers—at least at first—will almost certainly be public school districts. Perhaps sets of districts, or individual schools, or states themselves, will fill this role. These institutions will

¹¹² *Id.* at 652.

¹¹³ See STATE REGULATION OF PRIVATE SCHOOLS, *supra* note 91; EdChoice, *supra* note 91.

enjoy several advantages. They will be first to the market. They will engage in both provision and bundling, and therefore will be able to offer families a ready-made package guaranteed to meet government requirements. They will also offer the advantages of institutional schooling, which many families will find congenial: a single community, a structured day, a place for children to go, a neighborhood-based student body, teachers and students who are likely to be present for more than a few months at a time, and so on. The evidence on school choice suggests that many families are satisfied with their current public schools, and would therefore be likely to keep them even if alternatives were made available.¹¹⁴

At the same time, it seems almost certain that government will begin to act itself as a provider within the *unbundled* marketplace: not only will it provide ready-made assemblies, but it will offer unbundled goods to other assemblers. This will be especially true of services that are not delivered in person on school sites. The prototypes for such institutions will be the state-funded online school districts already operating in several states.¹¹⁵ These not only educate students in-state as part of the public school system, but offer à la carte services in a nationwide market.

With respect to à la carte provision, government authority will have to determine what sorts of services it will offer to families, how those services will be divided into discrete products, and what each product will contain. This will require many more decisions than those codified by the state legislature or by the state education department. Such decisions include those routinely made today by principals, departments, and individual teachers. These decisions will need to be responsive to market forces, but government providers will still make them. Such decisions will be of considerable moment, and it will be necessary to determine whether and to what extent they will subject to regulation or be left to institutional discretion. Current statutes governing curriculum¹¹⁶ might also apply to what states may or may not include in products they offer in the marketplace.

One of the most concerning of issues with respect to production is how governments will supply the social services that are now incidental to

¹¹⁴ See Albert Cheng & Paul E. Peterson, *How Satisfied Are Parents with Their Children's Schools?*, 17 EDUC. NEXT 21, 24 (Spring 2017).

¹¹⁵ E.g., OR. REV. STAT. §§329.840, 338.005 (2012) (creating the Oregon Virtual School District).

¹¹⁶ See STATE REGULATION OF PRIVATE SCHOOLS, *supra* note 91; EdChoice, *supra* note 91.

many public schools' programs but that are still vital.¹¹⁷ These depend upon most students being at a particular public school site on a regular basis. School lunches and breakfasts feed students who are hungry;¹¹⁸ how will children be fed, or food insecurity be identified, in an unbundled system? Teachers and other adults in the school system are mandatory reporters for child abuse and neglect;¹¹⁹ who must report in an unbundled world, and how? Public schools conduct health screenings and watch for drug abuse;¹²⁰ can unbundled providers do that? Schools operate libraries for their students; can public libraries take over this function?¹²¹ Schools provide an opportunity for mainstreamed disabled students to interact with non-disabled peers, and for mixing of other kinds; how can that be accomplished?

These problems represent the coming home to roost of the American decision to put such a large proportion of its social and family services under the umbrella of the school system. An institutional school could handle such tasks (though not always easily). If the pressure on schools to unbundle curriculum crashes that arrangement, substantial investment in social services outside of school will have to be considered (in the alternative, one might conclude that the loss of a central venue for providing these services ought to doom the unbundling project.)

One other service that shares many characteristics with social services but is distinct from it is discipline. The school that is a miniature society has what amounts to a miniature law enforcement system. For serious crimes, it calls in the police and engages societal law enforcement; at the margins, there are disputes.¹²² But schools routinely deal with disciplinary infractions far short of crimes: rudeness, absence, failure to heed authority, bullying of others. In doing so, they utilize carrots and sticks far

¹¹⁷ See McMullen, *supra* note 83, at 86 (noting these problems with respect to homeschooling).

¹¹⁸ See Anna Karnaze, *You Are Where You Eat: Discrimination in the National School Lunch Program*, 113 Nw. U. L. REV. 629, 630–31 (2018).

¹¹⁹ See Jason P. Nance & Philip T.K. Daniel, *Protecting Students from Abuse: Public School District Liability for Student Sexual Abuse Under State Child Abuse Reporting Laws*, 36 J.L. & EDUC. 33, 35–36 (2007).

¹²⁰ See Delaney Gracy et al., *Missed Opportunities: Do States Require Screening of Children for Health Conditions that Interfere with Learning?* 13 PLOS ONE (2018), available at <https://doi.org/10.1371/journal.pone.0190254>.

¹²¹ See Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 868 (1982) (“A school library, no less than any other public library, is a place dedicated to quiet, to knowledge, and to beauty”) (citation omitted).

¹²² See Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 878 (2012).

short of criminal punishment: a stern word from a teacher, a trip to the principal's office, a bad or lukewarm recommendation letter for higher education, withdrawal of privileges, detention, suspension.¹²³ In the Progressive mindset, this system epitomizes why we set up schools as miniature communities: it teaches children how to follow the law and negotiate a justice system in a system that is both low-stakes but also has more aspirational standards for behavior than the criminal law (respect for adults, for example).¹²⁴ Who can provide this service in an atomized marketplace? And is there a way that families could be required to obtain it?

Regulation of Third Party Assemblers

Public schools and districts will likely be the first institutions to offer to act as educational general contractors; but they will not be the only ones. It is almost certain that persons, firms, and other institutions will enter the marketplace as agents for assembly.

Unbundling will therefore immediately demand very different state school finance systems. The obvious conceptual framing for such funding, already associated with voucher and charter schools, is to give each student a budget that the student's family could then use to assemble an educational program. Presumably, these grants would not be in cash but in scrip, redeemable only by suppliers who meet government requirements, and parents could not cash any balance remaining.

Government would have to assure that the budget was sufficient to assemble a package that met the legal requirements of the education codes. This goal could be met by some combination of ensuring that allocations are sufficient, and price controls upon producers. Allocations could also be made to vary by student. Today, some states use student-based funding allocations that varies the per-pupil allocation to public schools based upon whether students are disabled, live in poverty, or are English-language learners.¹²⁵ Similar things could be done with allocations to families. Voucher programs for the disabled provide an additional model.¹²⁶

¹²³ See *id.* at 865–67.

¹²⁴ See Saiger, *supra* note 90, at 780, 787.

¹²⁵ See Lauren A. Webb, Note, *Educational Opportunity for All: Reducing Intradistrict Funding Disparities*, 92 N.Y.U. L. REV. 2169, 2197–2200 (2017) (gathering research and practitioner literature on weighted student funding).

¹²⁶ See Wendy F. Hensel, *Recent Developments in Voucher Programs for Students with*

Government will very likely interact with private bundlers beyond paying for their services. And these institutions will likely be very diverse. Some will be for-profit, offering their services to curate packages ideal for particular children or particular types of children. One would expect such services to seek market niches, much as charter and traditional private schools do today: some will pitch to rich overachievers, some to poor urban residents, some to rural students, some to the intellectually gifted. It is also possible that non-religious ideological communities of various kinds—socialists, separatists, populists, vegans?—will go into the bundling business. But, almost surely, some private bundlers will be churches and other religious entities, who will bundle for children in ways that they promise will meet both state requirements and that will further their doctrines and beliefs. Most of these bundles will contain religious training that must be privately paid for or funded.

Religious bundlers will raise special, but familiar, issues. Can religious bundlers incorporate into their bundles services paid for with public money? Almost surely; the reasoning of *Zelman v. Simmons-Harris*, the Cleveland voucher case, applies fairly directly.¹²⁷ Any bundle they created would receive public funds only because of parents' "true private choice."¹²⁸ Must they be allowed to do so? This is more debatable. The better argument is that *Locke v. Davey*¹²⁹ does not apply, and that to prevent religiously affiliate bundlers from using publicly funded resources would impermissibly discriminate against them.¹³⁰ This is especially true because concerns about entanglement and endorsement are mitigated in the unbundled context. If it becomes a basic organizing principle of education that assembly and production are distinct, no reasonable observer would infer state endorsement of religion from the inclusion of both religious and secular components in a particular student's bundle of

Disabilities, 59 LOY. L. REV. 323, 325–39 (2013) (cataloguing such programs).

¹²⁷ 536 U.S. 639, 653 (2002) (state funds flowing via voucher to religious schooling is permissible so long as parents exercise "true private choice").

¹²⁸ *Id.*

¹²⁹ 540 U.S. 712 (2004).

¹³⁰ See, e.g., Stephen D. Sugarman, *Is It Unconstitutional to Prohibit Faith-Based Schools from Becoming Charter Schools?*, 32 J.L. & RELIGION 227, 228 (2017); Aaron J. Saiger, *Charter Schools, the Establishment Clause and the Neoliberal Turn in Public Education*, 34 CARDOZO L. REV. 1163 (2013); Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155 (2004).

educational services.¹³¹ And, because each component could be produced discretely, entanglement would not be a concern either.

In short, religious bundlers will be able to offer in the marketplace packages that include both publicly funded secular components and other components that are explicitly religious. To do so is at the core of the right to free exercise, no different than the establishment of a religious private school. The effect, however, is to encourage the creation of institutions that look like religious schools but that receive public funding—and this has long been a red line in Establishment Clause jurisprudence. Does unbundling make that red line untenable? I think it does.

Both churches and non-religious ideologues might offer their services for free or for cut rates; because they have nonpecuniary missions, they might look to maximize their market penetration even if doing so meant taking an economic loss. One would then become concerned that the state-funded system of education systematically biases consumers in favor of selecting religious “assemblers.”¹³² This, of course, would be the converse of the current system, in which the system biases consumers against religious education by making religious schools pay for secular training without public support.¹³³

Third-party bundlers who arise to respond to an unbundled regime may, if they are successful, ultimately come to play many of the same roles today played by the institutions we know today as “schools.” Almost everyone will use some bundler, religious or secular. The bundler will make the major educational decisions under regulatory constraints; parents will choose the bundler whose choices they prefer. Perhaps this will bring us around full circle, to focusing regulation primarily upon that single, assembling institution. We probably will not call these assembling institutions “schools.” But we will ask: How can such bundlers be regulated, to what ends, and subject to what First-Amendment limits?

¹³¹ *Zelman*, 536 U.S. at 655 (a “reasonable observer in the endorsement inquiry must be deemed aware’ of the ‘history and context’ underlying a challenged program”) (quoting *Good News Club v. Milford Central School*, 533 U. S. 98, 119 (2001)).

¹³² *But see id.* at 653–54 (displaying an unwillingness to recognize this sort of systemic bias).

¹³³ *Cf. id.* at 654 (noting financial disincentives affecting parents who opt for religious schooling in the Cleveland voucher program, but noting that the program would be constitutional even absent such disincentives).