

## SCHOOL FUNDING UNDER THE NEUTRALITY PRINCIPLE: NOTES ON A POST-*ESPINOZA* FUTURE

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Once again, school choice is on the docket at the U.S. Supreme Court. The case, *Espinoza v. Montana Dept. of Revenue*,<sup>1</sup> involves a tax credit enacted in Montana. The credit is provided to individuals who make donations to scholarship organizations that subvent student tuition at private schools, including religious schools.<sup>2</sup> The Montana Supreme Court set aside the program,<sup>3</sup> holding that, given the constraints of the First Amendment to the U.S. Constitution, the program could not be made compatible with the provision in the Montana constitution that prohibits legislative “direct or indirect appropriation or payment from any public fund or monies . . . for any sectarian purpose or to aid any church [or] school . . . controlled in whole or in part by any church, sect, or denomination.”<sup>4</sup> Plaintiffs argue that, if that is the case, then the Montana constitutional provision itself violates the First Amendment. The grant of certiorari rested, one may reasonably surmise, upon the fact that a majority of states have constitutional provisions, known as “Blaine Amendments,” similar to Montana’s.

Its direct challenge to the Blaine Amendments makes *Espinoza* a blockbuster case. *Espinoza* is also a direct successor of the Supreme Court’s 2002 decision in *Zelman v. Simmons-Harris*,<sup>5</sup> in which the Court upheld a school voucher program. Both cases concern programs that direct public money (or money that, but for its tax treatment, would have been public money) to offset tuition in private schools, including religious schools.<sup>6</sup> Parental decisions, rather than government budgets or contracts, determine which private schools benefit from those funds. In *Zelman*, the Court was asked to decide whether the First Amendment permits states to include

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1. No. 18-1195 (U.S. argued Jan. 2, 2020).
2. MONT. CODE ANN. §§ 15-30-3101–3114 (2020).
3. *Espinoza v. Mont. Dep’t of Revenue*, 435 P.3d 603, 614 (Mont. 2018), *cert. granted*, 139 S. Ct. 2777 (2019).
4. MONT. CONST. art. 10, § 6, cl. 1.
5. 536 U.S. 639 (2002).
6. *See generally id.*

religious schools among the private schools eligible to receive such funds. The Court held, subject to several provisos, that it does. Eighteen years later, in *Espinoza*, the Court is considering whether the First Amendment *requires* a state with such a program to permit religious schools to receive program funds on the same basis as any other private school.

*Espinoza*, as *Zelman* did before it, has two discrete policy communities on edge, both oscillating between excitement and dread.<sup>7</sup> The first community cares about religion. Disputants offer competing visions of the proper relationship between religion and the public sphere. The second community wars over educational markets. Its organizing question is whether public schooling should be organized as a set of local public monopolies, as has been traditional, or whether multiple schools ought to be allowed to enter local markets and compete with one another. Although these two issues seem, at least on the conceptual level, to be discrete, *Espinoza* has galvanized both policy communities, each viewing the case to be a potentially momentous turning point.<sup>8</sup>

But that discreteness is ultimately illusory. At their deepest level, debates over church and state on one hand and over market competition in schooling on the other both ask how the state should involve itself in people's decisions about how, fundamentally, it is best to view the world. And American constitutionalism approaches this issue fundamentally differently, and inconsistently, pursuant to the church/state frame than it does under the school-choice frame. The guarantee of religious freedom is understood to require government to abstain as people formulate many aspects of their fundamental world view. But the Progressive imperative of "common schooling," which is the small-c constitution of American public education (and an explicit constitutional requirement in some states), takes exactly the opposite view. Common schooling requires people to come together, through the institutions of popular sovereignty, to define a worldview and then build schools that will inculcate it in *all* children, so that, ultimately, values will be widely shared across the polity. Religious freedom is pluralist. Common schools are communitarian. Religious freedom requires the state to be agnostic about the nature of the good. Common schooling insists that the state take a stand.

By bringing these two frames together, *Espinoza* is the harbinger of possible, future, direct conflict between them. Under the principle that government may not privilege irreligion over religion, one might ask why public, common education, which the Court has held must be secular, can enjoy public subsidies not available (in size or kind) to religious education. *Espinoza* and *Zelman* by no means ask that question. Indeed, they are

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7. Aaron Jay Saiger, *School Choice and States' Duty to Support "Public" Schools*, 48 B.C. L. REV. 909, 946–47 (2007).

8. See Emma Green, *Your Neighbor's Christian Education, Courtesy of Your Tax Dollars*, ATLANTIC (Oct. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/10/supreme-court-private-schools/599956/> [https://perma.cc/M8TL-QY8N] (summarizing expectations of various groups).

carefully framed *not* to suggest that the special status of public education might violate the First Amendment. But the question awaits. It took eighteen years to get from *Zelman*'s "may" to *Espinoza*'s "must." Perhaps in another eighteen, a case may ask whether common schools, both free and secular, can receive public funds only when they are simply players in a market, competing on equal terms with all other schools.

If the Court, and the country, get to that question, it is hard to be sure which view will prevail. Based on current conditions, and for a variety of reasons, the best guess—and it is only a guess—is that common schooling might be forced to give way before a rigorously read First Amendment duty of the state to avoid preferring irreligion over religion. This need not signal the end of the Progressive educational vision, however. It will be possible for those committed to the values inherent in common schooling to regroup, reconsidering some of their positions in order to advance their core commitments.

#### I. CHOICE VERSUS THE COMMON SCHOOL

90 percent of American students attend public schools,<sup>9</sup> which are funded by the state and charge no tuition. The parents of the remaining 10 percent, exercising their constitutional right to reject public schooling in favor of private alternatives, send their children to schools that receive only negligible state funding and (with rare exceptions) do charge tuition. A number of states now use public funds to offset the tuition costs of families who exercise this right. States' arrangements take a variety of institutional forms, including vouchers, tax credits, and education savings accounts.<sup>10</sup> All of these arrangements share a fundamental design. They direct public money to private schools—but which particular private schools receive funds depends on families', not governments', choices.

*Espinoza*, along with *Zelman* and several other cases that have been decided during the decades that separate the two, are framed only as applications of First Amendment principles to those subsidies, given that some recipient schools may be religious.<sup>11</sup> The cases thus seem to say nothing about the funding or management of the *public* schools that educate 90 percent of American schoolchildren free of charge.

None of this is remarkable. Education is not the only or the most important sector in which religious providers participate and in which the government subsidizes private purchases of privately produced goods in order to further the public interest. Obvious examples include vouchers for food purchased

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9. See *Private Elementary and Secondary School Enrollment and Private Enrollment as a Percentage of Total Enrollment in Public and Private Schools, by Region and Grade Level: Selected Years, Fall 1995 Through Fall 2015*, NAT'L CTR. FOR EDUC. STAT., [https://nces.ed.gov/programs/digest/d17/tables/dt17\\_205.10.asp](https://nces.ed.gov/programs/digest/d17/tables/dt17_205.10.asp) [https://perma.cc/2ACZ-DRRE] (2015 data).

10. Julie F. Mead, *The Right to an Education or the Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees*, 42 *FORDHAM URB. L.J.* 703, 706 (2015).

11. See, e.g., *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011).

by the poor and tax credits for health insurance purchased by the employed. Moreover, such programs can operate in parallel with in-kind provision of similar services by the state. A state that partially subsidizes private schools even as it provides free public schooling on request is similar to a government that provides food stamps<sup>12</sup> while also purchasing and directly distributing foods to needy consumers,<sup>13</sup> or a nation that provides tax subsidies to purchases of private health insurance,<sup>14</sup> even as it also directly insures persons through Medicaid or Medicare Part A.<sup>15</sup>

This is not to say, of course, that subsidies in a private market have no impact on the parallel public sector. Every market subsidy affects markets for substitute goods, including goods publicly provided. Government provision of agricultural surplus goods to schools affects how food stamps are used. That premiums for employer-provided health insurance are not taxed affects demand (and prices) for both Medicare and insurance provided on the open market. Educational subsidies likewise depress demand for publicly provided education, as any subsidy must.

Briefs and judicial opinions in cases like *Espinoza* and *Zelman*—cases that ask whether and how religious schools may be included among private schools receiving public funds—generally treat these substitution effects as marginal, just as they would if the subsidies at issue were destined for kosher grocery stores or Catholic hospitals. Substitution effects enter the analysis where relevant, but the focus is on the place of religion in the semi-subsidized, private sector of the industry. It is assumed that the public sector—public schools—will continue to provide services directly, using only public monies, with no financial transaction whatsoever involving students’ families.

In the broader legal, political, and popular conversations regarding government subsidy for school choice, however, subsidies for private school tuition have for decades been framed as frontal attacks upon the *institution* of the public school. This framing is quite different from that applied to food aid, hospitals, or other state efforts to subsidize the private side of a market that includes both government and private providers. And it is a framing equally prevalent among educational subsidies’ detractors and their proponents. On the mainstream and Democratic left, the public school is an embattled institution that needs defending against rapacious “neoliberals.”<sup>16</sup>

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12. See 7 U.S.C. § 2011 (2018).

13. See 7 C.F.R. § 250.1 (2020) (stating that food purchased by the Department of Agriculture is then donated to consumers pursuant to various federal statutes).

14. See I.R.C. § 106(a) (2020).

15. See 42 C.F.R. § 405.201 (2020).

16. “Neoliberal” is a perfectly good word, denoting a preference for market-based policies over government provision of services. See David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 1, 1–3. But the term’s adoption by its academic and political opponents as a self-explanatory synonym for “contemptible,” and its concomitant abandonment by those sympathetic to it, have ruined it for descriptive use. See *id.* at 1–3, 6. For a failed attempt to rescue the term in the context of schools shorn of emotional valence, see Aaron Saiger, *Charter Schools, the Establishment Clause, and the Neoliberal Turn in Public Education*, 34 CARDOZO L. REV. 1163, 1166 (2013).

On the religious and libertarian right, the “government school” is a sclerotic beast long past its usefulness, ripe for tearing down. Only recently, as “Medicare for All” proposals have entered public discourse, have we seen comparable levels of emotion and binary thinking in other sectors where state subsidy is important.<sup>17</sup>

These reactions seem disproportionate and overwrought in both legal and economic terms. Why, then, do they take up so much space in the dialogue over this issue? Among several possible explanations, the most basic is that the debate over educational choice is a deeply ideological one. The government that subsidizes your food purchases is entirely indifferent to whether you do your grocery shopping at government-run or private groceries. Proposals for a public health care option (though not for single-payer insurance) seek a health-care system that leaves it up to patients whether they prefer public or private insurance, without imposing a preference as to which they choose. But, for many, the government that subsidizes public education necessarily must provide it in a publicly run and publicly governed institution.

This commitment can be clearly traced to the project initiated by Horace Mann and his colleagues in the antebellum period. Mann sought to replace a system of haphazard, hyperlocal, and privatized institutions with a system of *common* schools. Common schools would be experienced by rich and poor, Congregationalist and Calvinist, native and immigrant, alike. Common-ness, Mann thought, was critical to a functioning polity. Furthermore, it was essential in a period when class differences loomed large, immigration was surging, and the diversity of the nation changing—all features shared by Mann’s age and our own.<sup>18</sup> Common-school reformers were explicit that their project was motivated in substantial part by a desire to detach immigrant children from the culture and politics (and religions) of their families and instill in them opinions and attitudes more “American.” The common school thus was designed to mitigate parental preferences about their children’s education in favor of a state orthodoxy.<sup>19</sup>

As the idea that education was not only a public good but a tool to achieve desirable political homogenization penetrated the United States, it became

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17. *Compare Medicare for All Is a Meaningless Slogan*, *ECONOMIST* (Oct. 13, 2018), <https://www.economist.com/leaders/2018/10/13/medicare-for-all-is-a-meaningless-slogan> [https://perma.cc/DTV3-CGHE], and Reihan Salam, “*Medicare for All*” *Is a Fantasy*, *ATLANTIC* (Aug. 30, 2018), <https://www.theatlantic.com/ideas/archive/2018/08/medicare-for-all-is-a-fantasy/568957/> [https://perma.cc/23X4-HXBM], with Meagan Day & Bhaskar Sunkara, *Opinion, Why America Needs Medicare for All*, *N.Y. TIMES* (Aug. 10, 2018), <https://www.nytimes.com/2018/08/10/opinion/medicare-for-all-health-costs.html> [https://perma.cc/6KAJ-YU4Z].

18. A committee of the National Education Association wrote in 1919 that the purpose of education is to “insure the acquisition of those habits, skills, knowledge, ideals, and prejudices which must be made the common property of all, that each may be an efficient member of a progressive democratic society.” LAWRENCE A. CREMIN, *THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION, 1876–1957*, at 193 (1964).

19. See Aaron Saiger, *Deconstitutionalizing Dewey*, 13 *FLA. INT’L U. L. REV.* 765, 785 (2019).

entangled with various other principles that we now associate with the Progressive era. The emphasis on the nonsectarian nature of the public schools became more emphatic. A particular compromise between democracy and elitism, in which public schools would be governed by locally and democratically elected boards, but with a strong de facto noöcratic presumption of deference to self-styled “experts,” became the norm. Pedagogically, public schools were to function in important respects as miniature democratic communities, so that students could learn citizenship experientially. All of these principles both rely and expand upon the idea of the public school as a common, standardizing, homogenizing, and state-centered enterprise.<sup>20</sup>

In the 1920s, as the diffusion of Progressive schooling progressed, the Lochnerian Supreme Court tapped the brakes. In a series of cases it set aside various state efforts, motivated by various forms of nativism and anti-Catholic sentiment, to prohibit or onerously regulate private schooling.<sup>21</sup> The Court held that the Fourteenth Amendment does not permit states to seek entirely to “standardize” children.<sup>22</sup> Compulsory education was constitutional but compulsory public education was not.

These cases made clear, however, that parents who chose to exit the public schools were obligated not only to find a private substitute but to pay for it themselves. This created an enormous financial incentive to use the public schools.<sup>23</sup> As a result, a private sector grew up alongside the Progressive public schools, but the latter dominated the field. The private sector, moreover, was dominated by religious schools, where parents might be thought to be especially willing to pay and where philanthropy as well as tuition was available to support the effort. In the subsidized public schools, meanwhile, the common-school and Progressive paradigms saw enormous success. They were widely adopted by World War I. By the middle of the century, they were hegemonic, the small-c constitution of American public schooling. Indeed, many states explicitly included the word “common” in the education clause of their constitutions.<sup>24</sup>

This explains why advocacy for school choice is understood, on both sides, as an attack on the very idea of public schools. The common school views the private sector as a grudging concession, and the cost advantage of public education as one of that concession’s most important mitigators. School

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20. In a recent op-ed on *Espinoza*, Sarah Vowell wrote, “The public schools the framers [of the Montana constitution] conjured ask the taxpayers to splurge on fairness, not privilege, to pull together, not away.” Sarah Vowell, Opinion, *The Supreme Court Could Upend This State’s Schools Over \$150*, N.Y. TIMES (Feb. 18, 2020), <https://www.nytimes.com/2020/02/18/opinion/supreme-court-school-choice.html> [<https://perma.cc/H5X8-32JL>].

21. See generally *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

22. This conclusion was founded squarely in *Lochner*-era ideas of freedom of contract. But these holdings have survived the repudiation of *Lochner*, having been recast as questions of parental liberty to raise children as they like.

23. See Stephen D. Sugarman, *Using Private Schools to Promote Public Values*, 1 U. CHI. LEGAL F. 171, 181 (1991).

24. See Saiger, *supra* note 7, at 932 & n.138 (2007).

choice, on the other hand, finds no virtue in common-ness. The genius of the market is that it can accommodate diverse preferences without government intervention. One needs a free (and fairly subsidized) market in order to generate a diverse population of schools, with different approaches, philosophies, and curricula, that responds to consumer demand. A system that revolves around democracy, expert control, and homogenization is inimical to one that centers the sovereign consumer. And a school system that relies upon consumer sovereignty is *exactly the opposite* of a system of common schools.

One can think of unfairness, or discrimination, in terms of markets or of democracy. From a market point of view, it is hard reasonably to deny that the common school is *unfair*, or even, perhaps, *discriminatory*. Parents whose politics and culture are in the mainstream generally find their preferences satisfied by the common school; those with atypical backgrounds or dissident views generally do not. To say that the former can have the schools they want for free, whereas the latter must arrange for and pay for the schools that they want, is not “fair.”

On the other hand, even though public schools are local monopolies, the single free-of-charge option is available to everyone. What those schools are like and how they are funded is determined through democratic decision-making. If the polity’s procedures for reaching decisions are fair, then this arrangement is *politically* “fair.”

It is a hallmark of the success of Progressivism that political fairness, not consumer fairness, was for so long the unquestioned basis of school governance. This posture is deeply tied to the Progressive view that schools’ task is to form future citizens, which centers democratic decision-making as a fair procedure. But the political account of fairness is no longer absolutely dominant. This is due, in no small part, to the ways in which the democratic procedures of contemporary school governance are deeply *unfair*, due mostly to hyperlocalism inflected by race.<sup>25</sup> Even setting procedural unfairness aside, however, some school choice advocacy directly critiques the Progressive idea of political fairness. In our contemporary moment, they argue, commonality is no longer and should no longer be our governing value. Even in politics, we should be committed to diversity, to formal fairness to individuals, to the idea that there is no one single idea of the good.

## II. RELIGIOUS FREEDOM VERSUS THE COMMON SCHOOL

These latter claims—that markets are fairer, and in particular more tolerant of dissidence, than politics—resonate in American First Amendment constitutionalism. The principles of both nonestablishment and of free exercise are about protecting the opinions of the few from the potential tyranny of the many. With respect to religion, there is no question in American law that what I have called consumer fairness, not democratic fairness, is the kind of fairness we seek. The religious views of the

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25. *See infra* Part III.

individual, however divergent from the norm, are entitled to equal treatment as against dominant views. The guarantee of free exercise means that individuals get to choose whether, how, and with which kind of religion they wish to affiliate, and that the state must keep its hands off those choices. That word *choose* makes the First Amendment friendly to claims about markets, which are based on choice, and unfriendly to claims that people should be treated the same and their political and social opinions standardized.

This—along with the fact the private-school sector is predominantly religious, with religious schools enrolling more than 80 percent of all private schools—has drawn pro-market, anti-Progressive ideologues to the First Amendment like moths to a flame. The complainants in *Espinoza*, as in *Zelman* before it, insist upon a consumer view of unfairness. However far a religious school may be from the mainstream, in matters of religion, that distance cannot be allowed to matter. In particular, the principle that the state cannot prefer irreligion to religion means that it cannot have an opinion as to whether religious education is better or worse than secular education.<sup>26</sup> Common schooling, of course, is all about the state having an opinion.

By framing their cases as cases about religion—and by litigating in federal court, under a federal constitution that is understood to grant no educational rights—school choice has elevated the market frame to the center of the choice debate.

If we understand the First Amendment framing as elevating a kind of choice foreign to the idea of the common school, *Espinoza* can be seen, potentially, as midwifing a tremendous paradigm shift in American education. It took nearly two decades to arrive at *Espinoza*'s “must” from *Zelman*'s “may.” What seeds might *Espinoza* plant that could flower several decades from now?

During oral argument in *Espinoza*, Justice Breyer imagined one such flowering. He asked the lawyer for the complainants whether a state's decision to fund its secular public schools might trigger a duty to fund religious schools as well, under a First Amendment principle of nondiscrimination against religion:

What [do] you think of this? . . . Say in San Francisco or Boston or take any city or state, and they give many, many, many millions of dollars to the

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26. See *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963) (“[T]he State may not establish a ‘religion of secularism’ in the sense of affirmatively opposing or showing hostility to religion, thus ‘preferring those who believe in no religion over those who do believe.’” (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952))); Douglas Laycock, *Formal, Substantive and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990) (“[T]he religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.”); see also Christopher B. Harwood, *Evaluating the Supreme Court's Establishment Clause Jurisprudence in the Wake of Van Orden v. Perry and McCreary County v. ACLU*, 71 MO. L. REV. 317, 339 (2006) (“The neutrality principle calls for government to remain nonaligned with respect to religion—that is, government must not favor one religion over another, religion over secularism, or secularism over religion.”).



public school system. And a lot of them give a lot of money to charter schools. Now, they don't give money to Catholic schools. All right? Now, if—if we decide you're [i.e., the complainants are] right, does that all change?

. . . I'm not talking about scholarships. . . . I'm talking about the *X* billion dollars that the State of New York spends on the public school system, and I don't know how much, but I suspect they might spend money on charter schools. . . . If I decide for you, am I saying that they have to give money to the—same amounts proportionate to—to the parochial school?<sup>27</sup>

When complainant's counsel responded as if Justice Breyer was asking about the structure of state funding across different types of private schools, the justice tried again:

Oh, oh, what's the private? Why is it that they [i.e., state subsidies] have to be equal with private [i.e., equal for both religious and secular private schools] but they [i.e., the subsidies given to religious schools] don't have to be equal with [those given to] public [schools]? . . . My hypothetical was they give it out in—it's called the Public School System of the United States. I'm saying that's what I'm talking about. Now, what's your response? What's the difference between this case, you win, and the same with the public schools, they have to give it to parochial schools too. What's the difference?<sup>28</sup>

Once again, the attorney ducked Breyer's question. He either did not understand it or pretended that he did not. When Justice Kagan changed the subject, Breyer gave up.

What Justice Breyer wanted to know is: might providing public education *at all*, given that it must be secular under the Establishment Clause, trigger a state duty to proportionally fund private religious education, lest it violate the principle that states may not favor irreligion over religion?<sup>29</sup>

Breyer's question is not only incisive but resonates particularly in the context of *Espinoza*. The *Espinoza* complainants make a supremacy-clause argument, arguing that a state constitutional provision, the Blaine Amendment, must yield to the federal First Amendment. The Montana Supreme Court acknowledged that supremacy problem but sought to reconcile the two by disallowing tax credits that support *any* private scholarships, religious or not.<sup>30</sup> The court thus sought to avoid religious discrimination by cementing the special advantages of the public school system, which is secular. The complainants argue that this is unacceptable

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27. Transcript of Oral Argument at 24–26, *Espinoza v. Mont. Dep't of Revenue*, No. 18-1195 (U.S. Jan. 22, 2020) [hereinafter *Espinoza* Transcript]; cf. Mead, *supra* note 10, at 704 (noting a colloquy with Justice Nancy Rice of the Colorado Supreme Court similar to the one described here).

28. *Espinoza* Transcript, *supra* note 27, at 26–27.

29. See *supra* note 26.

30. *Espinoza v. Mont. Dep't of Revenue*, 435 P.3d 603, 615 (Mont. 2018), *cert. granted*, 139 S. Ct. 2777 (2019).

because a retreat to secularism constitutes discrimination against “religion in general,” and is therefore unconstitutional.<sup>31</sup>

Breyer’s hypothetical tracks the structure of this argument precisely. The duty to provide public schooling is imposed by state constitutions.<sup>32</sup> The First Amendment requires that schooling be secular. But that secularism in publicly provided schools is necessary does not obviate the possibility of unconstitutional discrimination against “religion in general.”<sup>33</sup> And this possibility raises Breyer’s extraordinary question. Is the public school as we know it, free, common, secular, and governmentally (expertly) run—is that school, whatever its failings, still a pillar of the republic?<sup>34</sup> Can the public articulate the values of society and educate all its students in those values, permitting exit, to be sure, but only partially<sup>35</sup> and while triggering a substantial additional financial burden?

This question is so far out of the mainstream that it seems almost fanciful. Even among school choice advocates, it is rare to hear that equal funding should be provided to all schools, including public schools, on precisely the same terms. Among choice opponents, energy has focused on building new arguments that would enlarge the special status of public schools, given state constitutional requirements, as against other kinds of schools.<sup>36</sup> The Supreme Court itself, not very long ago in *Locke v. Davey*,<sup>37</sup> blessed a decision to make students in religious graduate programs ineligible for a secular scholarship program, finding that this sort of preference for secularism reflected no “animus toward religion” and citing the “play in the

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31. Brief for Petitioners at 14–16, *Espinoza v. Mon. Dep’t of Revenue*, No. 18-1195 (U.S. Sept. 11, 2019) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993)).

32. See, e.g., Derek W. Black, *Preferencing Educational Choice: The Constitutional Limits*, 103 CORNELL L. REV. 1359, 1403 (2018). Breyer’s reference to the “Public School System of the United States,” *Espinoza* Transcript, *supra* note 27, at 27, is of course legally imprecise, as the justice would surely concede. Each state has, under its own constitution, a duty to establish its own “Public School System.” See also *supra* note 28 and accompanying text.

33. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

34. Cf. CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860* (1983).

35. See *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (“The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned.”); *id.* at 401 (“That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear.”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925) (“No question is raised concerning the power of the State . . . to require that . . . [nonpublic school] teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.”); *Runyon v. McCrary*, 427 U.S. 160, 178 (1976) (“[W]hile parents have a constitutional right to send their children to private schools . . . they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.”).

36. See Black, *supra* note 32, at 1363–64; Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 746 (2018); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334–35 (2006).

37. 540 U.S. 712 (2004).

joins” between the Establishment and Free Exercise Clauses.<sup>38</sup> And the mere fact that the question came from Justice Breyer, who is “legendary for asking absurd hypothetical questions,” might lead one to discount it further.<sup>39</sup>

I am not suggesting here that the special status of public schools is unconstitutional, or that the Supreme Court is poised to declare it to be unconstitutional in the short term. I mean to suggest only that Breyer’s hypothetical is far from “absurd.” It is consistent with trends in American constitutional law, which *Espinoza* tees up. Why is it unconstitutional to treat private religious schools differently from secular private schools, but still constitutional to treat them differently from secular public schools?

The recent *Trinity Lutheran* decision holds that churches may not be excluded from participating on equal terms in a “government benefit program without having to disavow its religious character.”<sup>40</sup> It is not that large a stretch, especially with the advent of student-based budgeting methods for allocating public school funds,<sup>41</sup> to treat education funding as “a government benefit program.” Already, several scholars have wondered about the constitutionality of state statutes that make religious schools ineligible for charter-school status.<sup>42</sup> Among them, Professor Stephen Sugarman has argued forcefully that the religious charter exclusion is unconstitutional, precisely because it prefers irreligion to religion.<sup>43</sup>

In 2020, in short, Breyer’s hypothetical has coherence. The First Amendment does prohibit public programs that discriminate because of religion. This includes discrimination against religion. When a state chooses not only to fund but to manage free, public schools, which are secular, perhaps that does trigger a duty to treat religious schools the same, and fund them proportionately. That the Establishment Clause demands that religious schools exist only in the private sector, and that the Fourteenth Amendment liberty guarantee demands that they not be forced into secular schools, does not change this duty.

The avulsive character of this question naturally led complainants’ attorney in *Espinoza* to insist that he sought only equity within the private

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38. *Id.* at 719, 725. The program excluded in *Davey* was a graduate theology program with no secular content, and so the case can be read narrowly not to apply to religious K–12 schools that provide both secular and religious instruction. See Stephen D. Sugarman, *Is It Unconstitutional to Prohibit Faith-Based Schools from Becoming Charter Schools?*, 32 J.L. & RELIGION 227, 257–58 (2017).

39. Lisa S. Blatt, *In Front of the Burgundy Curtain: The Top Ten Lessons I’ve Learned About Advocacy Before the Nation’s Highest Court*, 14 GREEN BAG 2D 9, 17 (2010).

40. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017). Sugarman suggests that the treatment of *Davey* in *Trinity Lutheran* suggests that *Davey* no longer enjoys support on the sitting Supreme Court. See Sugarman, *supra* note 38, at 260.

41. See Ellen Foley, *Equity and Student-Based Budgeting*, VOICES URB. EDUC., Fall 2010, at 6, 11 (defining student-based budgeting as “formulas which allocate actual dollars directly to schools on the basis of both the number of students enrolled and weights assigned to various categories of students”).

42. See Sugarman, *supra* note 38, at 288 n.2 (providing a more extensive literature review). See generally Saiger, *supra* note 16.

43. Sugarman, *supra* note 38, at 260.

sector, not between private schools and public ones.<sup>44</sup> But the intuition that religious-school pupils deserve the same level of subsidy for their educations as other pupils resonates with contemporary First Amendment thinking. In 2020, it still seems a bridge too far; but *Espinoza* would have seemed similarly overambitious when *Zelman* was decided in 2002. Perhaps Breyer has outlined the core claims of the big school-choice case a few decades down the road.

### III. A VISION OF THE REPUBLIC: COMMON SCHOOLING IN A PLURALIST CONTEXT

Suppose we were to find ourselves, some decades hence, in a world—I emphasize again, this is not our world in 2020, but it is a plausible future—when the twin First Amendment commands that (a) the state not privilege irreligion over religion, and (b) state schools themselves can have no religion—might be thought to demand public funding of religious schools, at levels equal to funding for public schools. What would that world hold for those committed to common schooling? They will continue to think that a vital democratic education is one, as Horace Mann put it, that is “free, financed by local and state government, controlled by lay boards of education, mixing all social groups under one roof, and offering education of such quality that no parent would desire private schooling.”<sup>45</sup> To this list might be added the Progressive values that schools should instill “American” values in all children, and that going to school should be practice for citizenship.<sup>46</sup> Would such persons find their vision finally extinguished by the neoliberal apocalypse that had been predicted, but failed to materialize, in the wake of *Zelman* and *Espinoza*?<sup>47</sup> Not necessarily. Common-schoolers could act to maintain their educational commitments even if a strong version of First Amendment nondiscrimination insisted upon treating religious and government-run schools with parity.

Three strategies suggest themselves. They will not maintain everything valuable about the common-school vision of the Progressives, but they will help to preserve most of its most important features.

1. *Practice what you preach.* There can be no question that the greatest challenge to the viability of the common-school paradigm is not market competition but the overwhelming extent to which we have permitted the

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44. *Espinoza* Transcript, *supra* note 27, at 25–27.

45. DAVID TYACK & ELISABETH HANSOT, MANAGERS OF VIRTUE: PUBLIC SCHOOL LEADERSHIP IN AMERICA, 1820–1980, at 30 (1982); accord Diane Ravitch, *Education and Democracy*, in MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY 15, 15 (Diane Ravitch & Joseph P. Viteritti eds., 2001).

46. See Emily Buss, *Developmental Jurisprudence*, 88 TEMP. L. REV. 741, 758 (2016); Saiger, *supra* note 19, at 780–81. See generally Emily Buss, *Developing the Free Mind*, in THE OXFORD HANDBOOK OF U.S. EDUCATION LAW (Kristine Bowman ed., forthcoming 2020).

47. See Aaron Saiger, *The Unintended Consequences of School Vouchers: Rise, Rout, and Rebirth*, in EDUCATIONAL POLICY GOES TO SCHOOL: CASE STUDIES ON THE LIMITATIONS AND POSSIBILITIES OF EDUCATIONAL INNOVATION 125, 125–39 (Gilberto Q. Conchas et al. eds., 2017).

quality and shape of education to vary across social gaps in the United States, above all the gap between rich and poor.<sup>48</sup> If the schools in poor zip codes, in distressed rural and urban areas, are wretched, and those in tony suburbs fabulous, in what sense do we have “common” schooling?<sup>49</sup> Many would argue that the world today defined by American public schooling treats schooling nearly as a purely private good,<sup>50</sup> one bargained for in the marketplace for real estate.<sup>51</sup> On this view, commitments to “public” schooling are just a thin patina, a pretext whose plausibility is preserved only because we have unjustifiably joined the marketplace for school with the marketplace for housing.

If schooling is understood as a private good, and public schools are known to be in no way common, then it will be virtually impossible to seek to preserve the common-school ethic. On the other hand, if public schools could in fact become more “common” and less stratified, appreciation for Progressive education might improve. Efforts like *Zelman* and *Espinoza* have capitalized upon the low quality of the public options available to poor parents, which makes them interested in religious schools and available to be drafted as plaintiffs.<sup>52</sup>

2. *Regulate.* States routinely regulate industries that span the public and private sectors by enacting generally applicable rules. The willingness to regulate private education in this way has generally been low. This, I feel sure, is because publicly provided education is “regulated” as a concomitant feature of its production, while the large subsidy for public education has suppressed demand for private alternatives. Absent the differential subsidy, the state can realize some of the common-school vision by explicitly demanding that private as well as public schools pursue it. Command and control, without discrimination based upon religion, does not elicit First Amendment objections.

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48. See generally JAMES RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* (2011).

49. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 682 (2002) (Thomas, J., concurring) (“[T]he promise of public school education has failed poor inner-city blacks. While in theory providing education to everyone, the quality of public schools varies significantly across districts.”).

50. See Lee Anne Fennell, *Beyond Exit and Voice: User Participation in the Production of Local Public Goods*, 80 TEX. L. REV. 1, 6–9 (2001).

51. Jennifer Jellison Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, 72 HARV. EDUC. REV. 177, 177–78 (2002); Saiger, *supra* note 7, at 918.

52. Brief for Petitioners at 6, *Espinoza v. Mont. Dep’t of Revenue*, No. 18-1195 (U.S. Sept. 11, 2019) (“Petitioners are all low-income mothers who were counting on the scholarships to keep their children in . . . a nondenominational religious school . . . . Petitioner Kendra Espinoza is a single mother who transferred her two daughters out of public school after her youngest struggled in her classes and her oldest was teased and sometimes bullied by her classmates.”); cf. *Zelman*, 536 U.S. at 677 (Thomas, J., concurring) (“Besieged by escalating financial problems and declining academic achievement, the Cleveland City School District was in the midst of an academic emergency when Ohio enacted its scholarship program.”).

What could be regulated? Most obviously, curriculum, and civics curriculum in particular. Many states are quite laissez-faire about this, but they need not be. New York State is an outlier, with substantial curriculum regulation and newly enacted (and controversial) provisions for strong enforcement.<sup>53</sup> (The wisdom of New York's approach in a world where differential subsidies persist can be questioned.) The old 1920s cases make it clear that extensive curricular regulation like New York's applied to private schools is constitutional.<sup>54</sup> Moreover, those cases strongly suggest that regulation can include requirements of values education and with respect to pedagogical methods.<sup>55</sup>

The other obvious area to consider for regulation is admissions and the design of peer groups. Insisting upon nondiscrimination in schools is no more problematic than doing so in places of employment; religious schools, like religious employers, might be exempted with respect to religion but not other categories. And discrimination could be defined to extend to socioeconomic class and place of residence. Regulations could govern individual classrooms as well as entire schools. Regulations could tackle the disparate impact of admissions rules as well as facial discrimination.

The principle that the state cannot standardize children would stand. So would the prohibition of too much entanglement of state regulators with religious schools. But these kinds of regulation are not inconsistent with those principles.

3. *Double down on the market.* If the Constitution were to be read to require that students in nonpublic religious schools must receive public subsidy on the same basis that students in public schools do, the values of common schooling would best be served by insisting that parity should also extend to nonpublic secular schools.<sup>56</sup> This counterintuitive move would limit the customer base for religious education, so that most parents signing up for religious schooling would do so because they genuinely prefer it. (This was emphatically not the case under the Ohio choice programs approved in *Zelman* or the Montana program contested in *Espinoza*.) This approach also recognizes that a rich, true diversity of schooling options

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53. N.Y. EDUC. LAW § 3204 (McKinney 2020). See generally U.S. DEP'T OF EDUC., STATE REGULATION OF PRIVATE SCHOOLS (2009), <https://www2.ed.gov/admins/comm/choice/regprivschl/regprivschl.pdf> [<https://perma.cc/B2RV-J6L2>] (providing a fifty-state survey of public regulation of private schools).

54. See, e.g., *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). For an argument for this proposition, see Aaron Saiger, *State Regulation of Curriculum in Private Religious Schools: A Constitutional Analysis*, in RELIGIOUS LIBERTY AND EDUCATION: A CASE STUDY OF YESHIVAS VS. NEW YORK (Jason Bedrick, Jay P. Greene & Matthew H. Lee eds., forthcoming 2020).

55. See *Pierce*, 268 U.S. at 534 (“No question is raised concerning the power of the State reasonably to regulate all schools . . . to require that . . . teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.”).

56. Although such parity would be compelling policy, it is hard to argue that it is constitutionally required.

comes closer to providing a common experience than a marketplace contaminated by differential subsidies that favor religion.

Differential subsidies that favor religion are in fact ubiquitous in the current school-choice landscape. As I have argued in the past, the subsidies associated with voucher and scholarship programs are too small actually to make it possible for educational providers to observe demand in the market for particular educational approaches and then to open schools designed to meet that demand.<sup>57</sup> A \$150 scholarship or \$2250 voucher is not enough to cover the most basic of costs in a start-up venture. The result is that school choice is limited to rich schools and schools with sources of funding other than tuition. That latter category primarily consists of church schools. This is a skewed marketplace that no one who actually embraces market-based thinking in the educational sphere should tolerate. Only in a working market does the full range of parental preferences about schooling find expression. In that market, the parents who choose religious schools would almost always be parents who actually prefer religious education. That is clearly not the case now.

Would such a move find common cause with those now in the school choice movement? I think so. If not, this would be evidence that the rhetoric of choice really is primarily a pretext for diverting government money to religious institutions. If that were the case, we should expect to see divisions emerge within the pro-choice right. Libertarians and religious schools, many of which promote religious values to which libertarianism is foreign, might no longer make common cause. (Perhaps true libertarians, who object to educational subsidy at any level, might accept a market skewed to religion even without having a commitment to religion. But such people are almost entirely absent from the current school-choice debate.)

It may be desirable for Progressive educators in our time to recast their goals in a somewhat more pluralist way. Contemporary understanding of American democracy, and in particular, of the goals of immigration and the process of socializing immigrants into a new nation, do not demand the “standardization” of students that so motivated the Progressives and that was half-approved by the *Pierce* Court, with its talk of “patriotic disposition.”<sup>58</sup> We no longer think that good education seeds all students, especially those from other nations, with similar political ideas and reflexive respect for political authority. That part of Progressivism no longer appeals.

The part that does is perhaps best served by a richly diverse, but strongly regulated, set of schools that educate students with all sorts of different ideas about what constitutes education for a good life. In that world, religion would neither be a maligned stepchild nor have pride of place. Church schools would offer some visions of schooling, among many others. All those views, taken together, fixed by the joint operation of markets and regulatory agencies, would constitute the (pluralist) vision of education for this Republic. If that is the vision at the heart of *Espinoza*, those attuned to

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57. Saiger, *supra* note 7, at 956–57.

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

Progressive ideas need not feel that losing the case means the failure of their cause.