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## **Markets as Mere Means**

RUTGER CLAASSEN\*

There has been a remarkable shift in the relationship between market and state responsibilities for public services like health care and education. While these services continue to be financed publicly, they are now often provided through the market. The main argument for this new institutional division of labor is economic: while (public) ends stay the same, (private) means are more efficient. Markets function as ‘mere means’ under the continued responsibility of the state. This article investigates and rejects currently existing egalitarian liberal theories about this division of labor and it presents and defends a new theory of marketization, in which social rights and democratic decision-making occupy center-stage.

In the last decades there has been a remarkable shift in the relation between market and state responsibilities for providing public services in many countries. Formerly public companies providing telephone services and railroads have been privatized, and welfare state services like health care and education have been subjected to market-based reforms. Commercial agents have taken over part of the state’s responsibility to safeguard the public interests at stake. The main arguments in favor of this shift are economic: marketized public services are claimed to be functionally equivalent to state provision, but at the same time more efficient. The (public) ends stay the same, the (private) means are better. The idea is that markets function as a ‘mere means’ under the continued auspices of the state.

To get a better grip on this new institutional division of labor, we may start by distinguishing two state functions: production and finance. These can be combined in three different ways. First, the state can finance public services and also produce them directly. This is the ‘old-fashioned’ model of public services. Second, the state can finance public services but have them produced by private providers. This is the new configuration described above. Third, the state can withdraw from production and finance altogether. Then public services basically become private services. This libertarian alternative, although rarely defended in its radical form, will function as a back-drop to the discussion here. The question is what to think of the promise of the new model to combine public ends with private means. In this article I will take up this question in terms of egalitarian liberal political theory. Should egalitarian liberals endorse or reject markets for public services?<sup>1</sup>

In the first section, I start by explaining the concept of public markets and the economic case for their superior efficiency, at least, if certain ‘design challenges’ can be met. In the second

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<sup>1</sup> The focus on egalitarian liberalism is not meant to exclude similar investigations for other political theories. This is partly pragmatic: egalitarian liberalism is a good place to start given its overwhelming dominance in political theory. More to the point, the question is especially interesting for liberals since they accept public responsibility for equal access to public services (in contrast to libertarians), but are also committed to an important role for markets in the economy (contrary to most Marxists).

section, I present prevailing pragmatic and principled liberal stances to the question. Liberals have generally been attached to welfare state services, but they have been divided about the introduction of markets in the public sector. *Pragmatic liberals* have argued that public markets may be compatible with liberalism. With the egalitarian ideal of universal access guaranteed by state finance, individuals as consumers would get more choice while as tax payers they would get more value for their money; at least – and here they follow economists – when these markets are designed in the right way. They have no principled opposition to the use of markets, but they endorse them whenever they think they will be able to function as good means to liberal ends. By contrast, *principled liberals* have expressed fundamental opposition to the introduction of markets. They have argued that there are strong, non-instrumental reasons for not marketizing the production of (some) public services.

The rest of the article is devoted to the presentation and defense of an alternative combination of production and finance. Pragmatic and principled liberals each in a different way tend to depoliticize the question (the first group by transforming it into a technical question, the second group by transforming it into an ontological question). The alternative presented in the third section is to start from a liberal framework in which access to public services is a matter of social rights. This framework will be shown to generate a defense both of individual choice between service providers (hence, markets), but also of certain limits to market-based choices. The conflicts between these interests in choice and restrictions on choice needs to be mediated, which leads to a crucial role for democratic decision making in public service delivery. After presenting this framework, I discuss in Section 4 one major objection to it, based on the idea that such public markets cannot be kept under democratic control, so that liberal governance will degenerate into a neoliberal take-over of such markets by powerful producer interests. In the fifth and final section, drawing on general democratic theory, I discuss the prospects and problems of democratic decision making in this context.

The perspective that emerges is considerably less principled in its opposition to markets than principled liberalism, but considerably more engaged with the question of means than pragmatic liberalism. It re-politicizes the question of the means chosen by arguing about markets in terms of conflicts over the ascription of social rights and over the choice of decision making authority. Loosely following the Kantian injunction, my approach maintains that although markets are means toward ultimate human ends they should nonetheless never be treated as *mere* means.<sup>2</sup> While many details deserve further exploration, the overall argumentative strategy hopefully redresses the debate amongst political theorists in a more fruitful direction.

#### THE ECONOMIC CASE FOR MARKETS AS MERE MEANS

There is a potentially endless variety in the details of the design of public markets.<sup>3</sup> To keep the discussion tractable, I will focus on Ronald Daniels and Michael Trebilcock's defense of voucher markets as an exemplary case of introducing markets in public services (throughout I will refer to 'public markets' and voucher markets synonymously).<sup>4</sup> Here I follow them in

<sup>2</sup> The reason for saying that markets should not be treated as mere means is not because they always also deserve intrinsic moral respect (as persons do for Kant). Rather, I use it to express the double fact that while markets stand as means (institutions) toward ultimate human ends, the questions surrounding markets are never merely *technical*, but always remain political.

<sup>3</sup> Barr (2004), p. 91.

<sup>4</sup> Daniels and Trebilcock 2005. Julian Le Grand introduced 'quasi-markets' as a similar concept: there is choice for consumers, competition between providers, and the service is paid by government and free to users (see Le Grand 1991; Le Grand 2003; Le Grand 2007; Le Grand 2011).

considering public services in general, but the reader should have in mind educational and health care services as primary examples.<sup>5</sup> Daniels and Trebilcock define vouchers as:

a tied demand-side subsidy, where public dollars follow consumers rather than suppliers, with the objective of fostering competition on the supply-side and choice on the demand-side in order to improve efficiency in the delivery of classes of social goods and services, and enhance autonomy on the part of consumers of those services.<sup>6</sup>

Daniels and Trebilcock argue for voucher markets on the basis of the theory of incomplete contracts.<sup>7</sup> Since public services are complex it is impossible to specify all details of the service in advance. Two principal-agent problems arise. First, the government (agent) may have insufficient incentives to execute the wishes of citizens/users (principal) and the latter may have insufficient information to prevent the government from abusing its position. Second, when contracting with specific providers – whether public or private – the same problems of incentives and information may arise between government (now principal) and providers (agents). Daniels and Trebilcock use this analytical perspective to compare three modes of social service delivery.<sup>8</sup> In each case, they try to diagnose the potential to overcome these principal-agent problems.

First, *pure public provision* scores worst. In the relation between citizens and government, control is diffused amongst many citizens and, therefore, ineffective. While they do not elaborate on this, Daniels and Trebilcock are deeply pessimistic about the functioning of the electoral market. In the relation between government and public sector workers, there are also insufficient incentives for efficient production, because these workers ‘have no claim on the residuals arising from efficient “production”’<sup>9</sup> and because they are not subject to any competitive pressures. To the contrary, they may have an incentive for inefficient production so as to maximize future budgets for their organizations.

Second, *supply-side subsidies* refer to the introduction of markets in the form of ‘contracting out’. Governments contract with private suppliers for a service over a specified amount of time. This promises better results in the government-provider relationship, since it introduces competitive pressures and the opportunity for providers to keep residuals from the service. Both potentially enhance efficiency. However, the citizen-government relationship remains problematic. While governments have an incentive to reduce costs (since they can claim the residuals), consumers usually have an interest in increasing quality, and government will fail to represent that interest absent effective control by citizens.<sup>10</sup>

Third, *demand-side subsidies (vouchers)* remedy this problem.<sup>11</sup> The key to their superiority is that government falls out of the equation: consumers bargain directly with providers. The latter have incentives to satisfy consumer demands (given competition and a claim to residuals) and the former have an incentive to press for cost-effective delivery (given that they are

<sup>5</sup> Many of the problems and arguments to be discussed may not be simply transposed to the public utilities (energy, telephone, public transport) or to social security services (cash benefits).

<sup>6</sup> Daniels and Trebilcock (2005), pp. 14–15.

<sup>7</sup> For an elaboration of this framework, and its intellectual roots in institutional economics and public choice theory, see Trebilcock and Iacobucci (2003).

<sup>8</sup> They also present a fourth one – tax-and-transfer policies that give citizens cash grants which they can spend as they wish. I leave this out of consideration, since such policies are not a means for organizing a specific public service.

<sup>9</sup> Daniels and Trebilcock (2005), p. 22.

<sup>10</sup> Daniels and Trebilcock (2005), p. 25.

<sup>11</sup> This makes it sound as if contracting out and vouchers always represent viable alternatives. However, for network utilities contracting out must be chosen because only a single provider can offer the service at a time (competition *for* the market, not *on* the market).

responsible for costs exceeding the voucher). Voucher markets, then, basically reduce the double principal–agent problem to a single one, which can be effectively managed, at least if favorable market conditions obtain.<sup>12</sup> For voucher markets face two series of challenges: issues about the design of vouchers and about market failures.

Daniels and Trebilcock distinguish five design issues. First, entitlements to vouchers can be granted either on a universal or on a means-tested basis. Second, the value of the voucher needs to be determined. The voucher can give a right to unlimited services (under a certain description of the service) or be fixed or capped. Moreover, co-payments from consumers may be made obligatory or not. Third, extra (‘top-up’) payments above the value of the voucher can be allowed or prohibited. Such payments may create a much larger market but obviously lead to inequalities in access for consumers. Fourth, on the supply side, providers can be allowed or prohibited to refuse unattractive customers (‘cream-skimming’). The freedom to do business here may lead to the exclusion of some citizens (such as patients with prior conditions). Finally, governments must decide on what basis providers can qualify to act in the market. For example, governments may choose to include or exclude religious schools, but also require a certain size, management structure, etc.<sup>13</sup>

A second series of challenges is about market failures. Daniels and Trebilcock discuss two often-recurring market failures. First, given the benefits they expect from competition, it is incredibly important to have effective competition and prevent monopolies from arising, so that consumers have a real choice between several providers. Second, mechanisms need to be established to remedy information failures. Consumers need to have good information about the quality of services; governments may need to step in with mandatory disclosure requirements or other measures.<sup>14</sup> This list of markets needs to be extended.<sup>15</sup> In many public markets consumers are vulnerable or weak agents (think of patients, children, addicts, etc.). In these cases they may not be able to compare offers made by providers and make effective consumer choices. Finally, there may be negative externalities from consumer choices. For example, one critic of public markets argues that many working-class parents judge it more important that children are happy at school (compared to the achievement focus of middle-class parents). This would lead to suboptimal benefits from the education system on a national scale.<sup>16</sup>

These challenges to the creation of voucher markets have led to debates amongst economists about the opportunities to meet these conditions. Skeptical economists argue that the promised benefits will not materialize because the conditions for perfect competition cannot be met. Much of this debate is empirical, and at the level of specific services. The empirical evidence seems inconclusive; economists differ in their assessment of how strong the obstacles are.<sup>17</sup> However, the issues are not *merely* empirical. The term ‘design challenges’ has an inappropriately technocratic ring. As I will argue later, these issues raise thoroughly political questions about power and authority, equity and exclusion. But first we inquire how liberal theorists have related to this debate.

#### PRAGMATIC AND PRINCIPLED LIBERALS

Pragmatic liberals are mainly concerned with the end of universal public provision. They consider public finance necessary for reasons of distributive justice: because otherwise citizens

<sup>12</sup> Daniels and Trebilcock (2005), p. 28.

<sup>13</sup> Daniels and Trebilcock (2005), pp. 31–4.

<sup>14</sup> Daniels and Trebilcock (2005), pp. 35–6.

<sup>15</sup> Blank 2000.

<sup>16</sup> Lipsey (2007), p. 177.

<sup>17</sup> Donahue 1989; Megginson and Netter 2001.

who cannot pay for these services out-of-pocket will have no access. But when public funding is guaranteed, they are pragmatic about who provides these services. Mathias Risse, in a response to Julian Le Grand's advocacy of quasi-markets, provides a good example:<sup>18</sup>

For liberal egalitarians, in particular, the philosophically interesting battles are won once it is established that the state has a duty to finance equal and universal basic education in the first place. Within limits, how to organize it is plausibly left to efficiency considerations. That is, the political identity of liberal egalitarians is at stake at the conceptually earlier stage of arguing about the provision of funding for universal basic education, not at the later stage of organizing the service delivery.<sup>19</sup>

This position is agnostic about the extent to which pragmatic liberals will be supportive of voucher markets: this is 'left to efficiency considerations'. Therefore, liberal egalitarians – like their economic counterparts – may come down on either side of the divide between optimists and pessimists about the realization of the conditions for well-functioning markets. This is considered to be an empirical, not a philosophical issue. The pragmatic liberal is led down the economic path of technocratic tinkering with market conditions to see if a satisfying structure for these markets can be designed.

Note that pragmatic liberals' concern for efficiency considerations means that optimal satisfaction of consumer preferences is their only relevant criterion at the level of means. Consumer choice is valued in so far as it enhances competition between providers, and thus leads to a better price/quality balance. There are also authors who stress the gain in freedom of choice as a separate normative ground for favoring markets, either because freedom of choice is intrinsically valuable or because it enhances well-being.<sup>20</sup> However, other authors refuse to go down this road. For example, Risse explicitly claims it follows from Rawlsian egalitarianism that liberals should treat citizen-users as empowered choosers in some respects, but in other respects deny them choices within the public system so as to maintain that system as a whole.<sup>21</sup>

Overall, then, the core conviction of the pragmatic liberal is that *if* (better: to the extent that) marketization leads to more efficient public services than direct public provision, *then* it can be endorsed by egalitarian liberalism. The means of public markets then deliver the best-possible realization of the liberal end of universal public services. Ends and means are treated as strictly separate matters.<sup>22</sup>

Now let's turn to the principled liberals. They believe pragmatic liberals are mistaken to leave the question of means to economic theory. They deliberately collapse ends and means, by arguing that (at least some) public services are inherently public, and therefore cannot be left to the market. Different arguments are used to support this position – what follows is an attempt at reconstruction.

<sup>18</sup> Another example is Rothstein (1998), p. 208. It is difficult to find many explicit defenses of this stance in the philosophical literature, although my impression is that it is widespread and influential, both in academia and in politics. The reason for this may be exactly that these liberals think that not much needs to be said about the mode of provisioning.

<sup>19</sup> Risse (2005), p. 302.

<sup>20</sup> Le Grand (2011), pp. 82–4.

<sup>21</sup> Risse (2005), p. 297. Despite the pre-eminence of efficiency-considerations in theory, in political practice additional arguments for the intrinsic value of consumer choice seem to have played an important role (e.g., in Third Way in the 1990s; see also the following section).

<sup>22</sup> An exception to the rule, in the philosophical context, is Joseph Heath, who endorses efficiency considerations for both the question of ends (public interests) and means (modes of provision) (see Heath 2001; Heath 2006; Heath 2011).

Common to many principled liberal arguments is an ontological starting point. Some goods can only be enjoyed as public goods, i.e. when government provides them uniformly to all citizens. They cannot, by their nature, be marketized. Some speak of ‘communal goods’,<sup>23</sup> others of ‘solidarity goods’,<sup>24</sup> ‘inherently public goods’,<sup>25</sup> or ‘irreducibly social goods’.<sup>26</sup> This ‘impossibility theorem’ may seem a non-starter, since we can witness marketized provision of most of these goods in many places. However, appearances are deceptive. Principled liberals argue that once an inherently public good is delivered privately its nature changes. What we then observe is the provision of a surrogate with different characteristics.

This claim of a changing nature may be plausible or not. It may be plausible for some examples, especially for goods with a public goods-structure in the economic sense (non-rivalness, non-excludability). For many other examples, especially for divisible goods that can be delivered on an individualized basis (like health care and education), the ontological flavor of the argument may be misleading. But whatever of its plausibility, we can always ask the question: why should we have the public version of the good instead of the market version? To maintain the claim that marketized provision changes the nature of the good does not help, for we cannot escape the question: so what? Why not go for the marketized version instead?<sup>27</sup> To answer that question, the principled liberal argument needs to turn to normative grounds. And in fact, under the guise of ontological claims, most authors do argue that the public version is more desirable than the market version. Roughly, two types of arguments are prominent.

First, some claim that people have a preference for the public version. Fred Hirsch, in his famous attack on the ‘new commodity fetishism’, argued that people may intrinsically value the characteristics that come with public provision, such as the commonness of public places, the fact that a place is accessible to all without charge. In the market these people are badly served: ‘Their bad luck is that they derive utility from environmental characteristics that are outside of the capacity of the market to provide’.<sup>28</sup> A similar argument is made by Michael Walzer in his discussion of the limits to the sphere of money and commodities.<sup>29</sup> These arguments are problematic, because they may not be shared by other members of the community, who do not have these preferences and hence do not object to marketization. From their point of view, they must contribute to something they do not want; they could complain that a government catering to people on these grounds is being perfectionist. Elsewhere I have discussed this dilemma and argued that the stand-off between these two groups legitimates a political solution.<sup>30</sup> Here let it suffice to say that the preference-argument is severely weakened by the perfectionist critique.

The second argument is that the public good in question is functionally necessary for its role in constituting a political community (or: social solidarity, cohesion, citizenship, social capital). Sometimes this is expressed in talking about the expressive role of having goods provided publicly.<sup>31</sup> One prominent example has been security provision by the police, which is seen as fulfilling this role of a ‘social glue’.<sup>32</sup> To prevent this argument from ultimately being grounded

<sup>23</sup> Waldron (1993), pp. 354–9.

<sup>24</sup> Sunstein and Ullmann-Margalit 2001.

<sup>25</sup> Dorfman and Harel 2013.

<sup>26</sup> Taylor 1995.

<sup>27</sup> Walsh 1998.

<sup>28</sup> Hirsch (1999), p. 91.

<sup>29</sup> Walzer (1983), p. 115.

<sup>30</sup> Claassen 2013.

<sup>31</sup> Minow (2003), p. 1254; Sandel (2012), pp. 117, 173.

<sup>32</sup> Claassen 2011b; Loader and Walker 2006.

in a holist position (i.e. that the community is intrinsically valuable), it needs to take the further step that community is necessary for something which ultimately refers to the value of individuals. Liberal nationalists explain this in terms of a need for citizens to share a sense of collective destiny, if they are to accept state redistribution for public goods programs.<sup>33</sup> The latter goods are in turn necessary for citizens to lead autonomous lives, so that the final basis of the argument is normatively individualistic.

There are several problems with this type of argument. One is that the argument seems circular: public goods provision is necessary to maintain support for a political community that in turn provides public goods. I hesitate to call this a vice, however, because we could just as well think this is a relation of mutual reinforcement (virtuous circle) between community and public goods. A more serious problem is that the argument cannot explain which goods should fulfill this function. Jonathan Wolff admits this when he says: 'I am coming around to the view that, a few key elements aside, it may not matter so much what is in the market sphere and what is not, as long as the non-market sector is significant in size'.<sup>34</sup> This is fine as far as it goes, but it means the argument cannot help us to decide whether to marketize a public service or not. Finally, the argument cannot explain why public financing is not enough as an expression of solidarity. Ultimately, it might be an empirical question how many goods need to be provided publicly to sustain a political community (this might lead to different conclusions for different cultures). This does not invalidate the argument completely, but it does not provide much help for our question either.

Both principled liberal arguments, then, have some value, but I also think both have important limitations. In the remainder of this article, I will present an alternative, which I hope is ultimately more fruitful in thinking about public markets.<sup>35</sup>

#### REVISITING ENDS: SOCIAL RIGHTS

The theory that I will propose in the remainder of this article diverges from the theories discussed so far in two crucial respects. It relies on a rights-based normative justification for public services: these services satisfy basic social rights to which every human being is entitled. In addition, it defends a crucial role for democratic decision making in public services. In this section I introduce these points and their connection to the marketization of public services. I will do so by arguing for three claims. First, citizens' social rights provide a principled liberal justification in favor of public markets. Second, the same liberal framework also generates important objections to public markets. Third, a process of democratic decision making is needed to balance these considerations in concrete cases.

#### *Justification of Public Markets*

Different normative bases for justifying welfare state services can be distinguished.<sup>36</sup> Within liberal theories, basic rights are a crucial component. Almost every liberal author recognizes that the normative appeal to individual freedom needs to be translated into a set of basic rights that the state should protect and respect. Part of such a liberal framework of basic rights is a list of

<sup>33</sup> Miller (1995), pp. 91–4.

<sup>34</sup> Wolff (2011), p. 186.

<sup>35</sup> It should be noted that some of the existing commodification literature goes in the same direction (e.g. Anderson (1993), pp. 158–63; Satz (2010), pp. 100–4). I have discussed the differences between Satz and other commodification literature in Claassen (2012).

<sup>36</sup> Claassen 2011a; Heath 2011; Rothstein 1998.



social rights. Social rights are recognized in many national constitutions and international human rights documents. Philosophically, several authors have convincingly argued that positive rights are on a par with negative rights, because they are equally necessary conditions for leading a minimally free or autonomous life. Anyone accepting classical civil and political rights, then, must also accept these social rights.<sup>37</sup> I endorse these arguments, but will not rehearse them here.<sup>38</sup> Instead, in this section I will explore the implications of accepting such a rights-based justification for public services.

Many public services can be defended on the basis of social rights: citizens should have rights to education, health care, social security. Having these rights is crucial to citizenship – this has been recognized at least since the rise of the welfare state in the period after the Second World War.<sup>39</sup> However, the question is how public concern for these services relates to their marketization. We should start by observing that many goods required for meeting basic needs are the object of market exchanges, without this being taken as objectionable. Food, clothing, and housing have always been predominantly delivered by markets, even though they are also the subject of social rights. The political stake in these goods as necessary conditions for an autonomous life translates into public regulation, not direct public provision. Do we have good reasons for accepting this for services like education and health care as well?

I think we have. A deep assumption in liberalism is that individual freedom to exchange should be allowed unless there are good reasons not to do so. This assumption is not so much defended on efficiency grounds but by reference to the value of choice to individuals (*pace* the pragmatic liberals in the second section). Choice is an exercise of one's autonomy and leading an autonomous life is the ultimate liberal ideal.<sup>40</sup> The value of autonomous choice depends on the thesis of value pluralism.<sup>41</sup> Different values are good for different persons. Just as some may want to become an artist and others a lawyer, so some may want to eat spicy food and others favor a spiceless diet. Different clothes, houses, foods: all are part of the legitimate life choices individuals in a liberal society should be able to make.

This argument can be extended to services like education and health care. There are deep differences between schools and university programs, doctors, and hospitals. Some of these relate to differences in general world outlook (for example, religious or atheist). Others relate to differences in the provider's view of the service (such as philosophies of teaching, ways of running a caring home). Still others relate to the simple fact that the provider is a (collection of) person(s) – teachers, doctors – and that we all experience a better 'fit' with some persons than with others. The fact of these meaningfully different ways of supplying a service should lead us to accept the baseline-argument for choice in this context.<sup>42</sup>

### *Objections to Public Markets*

This argument does not imply that a liberal rights-based framework has to treat individual choice as sacrosanct. It does mean that restrictions to choice have to be carefully argued for.<sup>43</sup>

<sup>37</sup> Fabre 1998; Gewirth 1996; Shue 1996.

<sup>38</sup> Those who criticize social rights often do so from a libertarian point of view. However, I have assumed that one accepts state finance of public services (see introduction). This excludes libertarianism.

<sup>39</sup> Marshall 1950.

<sup>40</sup> I do not defend this claim here, or take a stance on the ultimate question: how to defend individual autonomy philosophically, i.e. through Kantian, Millian, or any other theories.

<sup>41</sup> Raz 1986.

<sup>42</sup> Note how this is directly in conflict with the principled liberals' idea that a homogenous public supply is needed to support social solidarity.

<sup>43</sup> Dworkin 1988.

A liberal rights-based framework not only generates an argument in favor of public markets, but also at least three objections against such markets.

A first objection to market choices is that in some situations individuals are not (sufficiently) autonomous, and others are better placed to make decisions on their behalf. This kind of ‘soft paternalism’ is justified in liberal theory: the criterion of restricting choice lies in the lacking capacities for choosing.<sup>44</sup> This is highly relevant to public services in that users are in important ways non-autonomous. Patients and pupils often are vulnerable, and have limited information or understanding of these services. They have to leave important judgments in the hands of the providers to which they are subject. This may seem to suggest a categorical rejection of markets. The rights-based justification for these services refers to these rights being necessary conditions for our autonomy. It then seems that only once our health has been restored and we are well educated, have we *become* autonomous. So how can we exercise our autonomy in market choices if, by presumption, we have not developed it in advance of our consumption of these services? However, we should reject this dichotomous way of thinking about the development (i.e. presumed lack) and exercise (i.e. presumed presence) of capacities for autonomous decision making. Most patients and pupils are somewhere in-between, they exhibit partial autonomy. They can often make meaningful choices between providers, even where they do not have full information and decision-making capacities. It is to the extent that they cannot make autonomous choices that restrictions on market choices are legitimate.<sup>45</sup>

A second objection to markets arises in situations where allowing individual choices would lead to unjust inequalities between citizens.<sup>46</sup> Where one stands on this issue depends to a large extent on one’s theory of distributive justice. Rights do not come with fixed distributive principles. So we need a fully worked-out view of justice in the distribution of public services. This can best be done on a good-specific basis, i.e. thinking about justice in health care, education, etc. separately. Nonetheless, these discussions will be informed by general theories of justice. For example, a luck egalitarian theory would ascribe responsibility to individuals for some of their own choices. From this perspective public services are part of a scheme compensating for circumstances beyond an individual’s control (‘bad brute luck’). For a sufficientarian theorist by contrast, a threshold level of services provision needs to be guaranteed to everyone, even where this requires disregarding an individual’s responsibility for his choices (e.g. medical treatment of uninsured car victims, even if they voluntarily chose not to insure.<sup>47</sup> These and other general theoretical considerations obviously influence the extent to which inequalities between service users will be judged unjust, and market provision problematic.

Third, it is very inefficient to have several providers for some services, like most public utilities (railways, energy, mail). These can best be delivered by one private provider who has to bid for a temporary concession (contracting-out) or by a public provider. Choice is then absent for citizens, but from a liberal point of view, this seems an acceptable sacrifice in the face of the obvious efficiency gains. It should be noted that it is much easier to reconcile oneself with the absence of choice where the choice between different providers is not meaningful, in the sense described above. It would be grotesque to describe the choice between different providers of garbage collection as meaningful in the same sense as the choice between different doctors.

<sup>44</sup> Feinberg 1986.

<sup>45</sup> In addition, there may be tools to mitigate this problem in markets: reputation effects, use of proxies (trustees), information-enhancing devices.

<sup>46</sup> Greve 2009.

<sup>47</sup> Anderson (1999), p. 295; Dworkin (2002), p. 114.

Citizens usually do not care if their garbage is collected by a Catholic or a Muslim, and in as far as there are different ‘philosophies of garbage collection’ one should simply pick the most efficient one. The aim is relatively clear, so that there is much less dispute about what efficient provision is – while legitimate differences over what good teaching or nursing consists of translate into services which are each efficient in a different way.<sup>48</sup>

### *Democratic Decision Making*

The arguments so far have established both a justification for markets in public services and three very important, potentially wide-ranging, objections against such markets. The task of the democratic political process will be to weigh the general liberal endorsement of autonomous choice against the three exceptions equally endorsed by liberalism. There is no general theoretical stance we can take here, since each of the parameters outlined so far requires fine-tuned political judgment in concrete situations: how meaningful is free choice for this service? How bad are the gaps in users’ autonomy? How serious are the inequalities? All of these interests have been shown to arise within a framework in which public services are justified as fundamental social rights. The social rights justification is internally complex and its institutional embodiment requires balancing the different parts of this whole. Moreover, the need for democratic decision making in this context is reinforced by two further considerations.

First, a rights-based justification highlights the fact that rights form a *system*, in which one right limits the scope of other rights. Only through a unified process of political decision making can legitimate trade-offs be made about how to allocate scarce resources between different social services. The claims of health care, education, and other social services have to be balanced. This can only be done in an integrated process which establishes priorities from the point of view of the necessity of these goods for citizens’ opportunities to lead autonomous lives.<sup>49</sup> Moreover, establishing the content of social rights cannot be left to markets in so far as this involves controversial political questions; whether, for example, religious education or abortions should be allowed or not. The democratic determination of these matters transcends the user interests (consumer preferences) that are the core of the economic model of public service provision.

Second, a difference with other justifications is also in the normative force of a *rights-claim*. Rights-claims are especially strong normative demands, which are often considered to trump other normative considerations. It is remarkable that even where public services are privatized, the public continues to have strong expectations about the quality, cost, and accessibility of these public services. Highly mediatized scandals about service delivery often lead to political pressure to intervene and reform. These expectations point to limits to the acceptability of placing responsibility for these services at a large distance from political authorities. The politician’s defense that delegation to private actors implies that they have lost authority over the issue is rarely accepted. The unavoidability of such politicization can best be explained and is normatively justified by the rights-nature of the stake all citizens have in these services.

<sup>48</sup> We do face a dilemma where the market structure leads to a single provider, although a choice between providers would be meaningful (but one may doubt whether there are many examples of this).

<sup>49</sup> The mode of service delivery may have effects on costs for the community. For example, market-based health care systems create incentives to increase the volume of transactions; consumers as patients want to be ‘better safe than sorry,’ health care providers gain a larger income. This may lead to an overburdening of state budgets where the market is financed collectively, and crowding-out of other public expenditures. Here the state’s responsibility for financing health care requires regulation of the content. The distinction between finance and production is too sterile.

A social right is a vital claim, and citizens will always direct vital claims at government (whether it wants this or not).<sup>50</sup>

In conclusion, individual users have specific wishes about the service delivered to them here and now, but citizens collectively need a political process to weigh their individual interest in choice against social reasons to limit markets and safeguard the coherence and force of the body of social rights as a whole. The perspectives of the individual user and of the citizen need to be reconciled. The implications of this will be further discussed in the final section. First, however, we need to confront one crucial objection.

#### REVISITING MEANS: A DIFFERENTIATION OF MARKETS

Some may think that there is one major weakness in the liberal framework introduced in the previous section: it presupposes that it is possible to have democratic control over private providers. But, so the objection goes, once services are marketized, public control will prove exceedingly difficult, and powerful producers will be able to capture these markets and use them in their own interest. Thus, we face a hard choice: either to keep these services firmly in public hands (violating the value pluralism case for meaningful choice) or to accept full-blooded marketization (relinquishing control over them in democratically desired directions). The ‘markets as a mere means’ option, by wanting to have it both ways, is politically naïve. Liberal design will play into the hands of a neoliberal scheme in which public services are organized as a means for private rent-seeking. Let’s call this the ‘Neoliberalism Objection.’

Let us first reconstruct the objection theoretically. It is based, first of all, on the view that the exercise of power in markets is the norm, not the exception. Neoclassical economists tend to see power as a specific phenomenon (market power) arising only in contexts of market failure (monopolistic or oligopolistic markets). By contrast, the Neoliberalism Objection presupposes that power is an unavoidable part of all markets: the rules of the market and the ensuing market structure give power to some over others. This presumption can be defended by recourse to the analysis of power in markets given by Brian Barry. He showed that the widely accepted liberal claim that consumers can have power over firms depends on rejecting the picture of a kind of state of nature in which consumers and firms contract with each other from a baseline situation without any transactions (on that picture they do not exert power over each other but only make offers which may be mutually beneficial). When taking current levels of sales as a baseline, consumers can exert power over firms by threatening to make them worse off, i.e. by not buying their products any longer. Similarly, employers may exert power over employees, and capitalists over politicians.<sup>51</sup> On the basis of this conception of power, analyses can be made of the power balance between contracting parties by showing how the rules of the game alter the ability of each party to make credible threats to the others.

The Neoliberalism Objection uses this theoretical starting point for an analysis of public markets. In these markets, there are three main types of actors: consumers, producers, and the state.<sup>52</sup> The objection holds that within public markets producers will be able to exert power over both consumers and the state. This leads to a form of neoliberal governance. Liberal governance of society presumes a rather strict separation between public and private responsibilities. Neoliberal governance blurs these boundaries. The state is captured by special interests that use

<sup>50</sup> For a legal perspective on recurring political conflicts after privatization of public services, see Teubner (1998).

<sup>51</sup> Barry (2002), p. 166. For responses to Barry, see Christiano (2010), Dowding (2003).

<sup>52</sup> The analysis here (and generally my thinking in this section) has been strongly inspired by Gingrich (2011), although she presents a more descriptive framework.

the machinery of government to further their private interests. In public markets, producers lobby governments for favorable rules and exploit open contracts with governments, so as to make excess profits to the detriment of accessibility and quality for consumers. Some of the market strategies mentioned earlier within an economic framework (such as cream-skimming or exploiting information failures) need to be understood in this light. Neoliberal governance in effect is a return to feudalism, in which the boundaries between private and public sphere are deliberately violated, so that political functions can be organized so as to favor targeted private interests.<sup>53</sup> Once markets are opened, this degeneration from a liberal to a neoliberal governance structure automatically arises.

Having thus reconstructed the Neoliberalism Objection, we now respond to it. My response will be in two parts, partly affirmative, partly critical.

First, the theory defended here concurs with the objection in that it is critical of developments toward markets in which producers control public services and successfully lobby political bodies only to reap maximum profits. Producer-dominated markets embody a view of public services as a nexus of private contracts only; both between producers and consumers and between producers and government. This is a libertarian view, and, as Samuel Freeman has convincingly argued, libertarianism is antithetical to a liberal-democratic view of political authority. He too explains this with recourse to the analogy with feudalism: 'Like feudalism, libertarianism conceives of justified political power as based in a network of private contracts. It rejects the idea, essential to liberalism, that political power is a public power, to be impartially exercised for the common good.'<sup>54</sup>

I propose that the notion of the common good mentioned by Freeman should be operationalized as the reconciliation of a set of potentially clashing liberal interests: on the one hand the liberal interest in markets for public services, grounded in the value of autonomous choice, and on the other hand the liberal interests which may serve as exceptions or restrictions to markets. Finding the common good means democratically balancing these interests which together make up the framework developed in the third section. From this perspective, I would agree with the Neoliberalism Objection that the detrimental effects of marketization on access and quality that occur where producers dominate both consumers and governments, are morally problematic. Liberalism requires a balancing between user and citizen interests in public markets. Producer interests in profit maximization are instrumental to these and should not predominate.

However, where I would diverge from the objection, is in its view that such a development toward producer dominance is a *necessary* consequence of introducing public markets. In effect, what the critics are claiming is that things go wrong as soon as one introduces public markets, and thus deliberately attempts to give leeway to private actors and price signals (the market as means), while at the same time wanting to keep the system under public control (the public ends). By contrast, I would argue that the dominance of producers in public markets is a possible, but not necessary effect. Much depends on the *institutional* set-up of such markets and this in turn depends on the balance of forces within politics. This somewhat more optimistic view of institutional opportunities for maintaining democratically controlled public markets is based on a two-pronged critique of the Neoliberal Objection, both conceptual and empirical.

On the conceptual front, the objection presupposes an overly sterile distinction between liberal and neoliberal governance. It presupposes an ideal-typical image of (good) liberal governance within which there is a clear demarcation between the private and the public, and

<sup>53</sup> Crouch 2011; Freedland 2001; Leys 2001.

<sup>54</sup> Freeman (2001), p. 107.

(bad) neoliberal governance, where the boundary between public and private responsibilities is blurred. But it is philosophically controversial, to say the least, to presuppose that in social life a clear private/public distinction can be drawn.<sup>55</sup> In the present context, drawing a strong demarcation risks distorting the picture both of what happens on the public and on the private side. On the public side, a system of purely public production is not necessarily *less* vulnerable to private rent-seeking. In such a system private interests can also creep in. Actors within public systems remain, after all, private individuals. Even if many of them develop a loyalty to their publicly defined roles, it remains possible that some of them abuse their roles for private gain. On the private side, the ideal-typical image presupposes that ‘normal’ markets for standard consumption goods are completely detached from public influence. But that too is misleading. Markets are always (also) publicly constructed, if only because governments and courts have to recognize and enforce claims about private property and contracting before any market can get off the ground.

There is thus no alternative to looking at public markets with an open eye. They may or may not undermine publicly set ends, depending on the institutional set-up. This brings us to the empirical point. Comparative empirical research by political scientist Jane Gingrich shows how political actors in different countries try to marketize public services according to their own ideological commitments. In her framework ‘the Left’ and ‘the Right’ in politics have preferences for different types of markets, with different balances of power between government, users, and producers. The outcomes of the political processes vary between countries and between markets, with producer-dominated markets as only one possible outcome.<sup>56</sup> Other researchers have stressed, too, that politicians over the last decades have used *specific* forms of marketization for ideological and strategic reasons.<sup>57</sup> This kind of research confirms that we need to look at the institutional details of marketization. Rules on market access, quality control, profit constraints, price regulation, etc. differ widely. There is no indication of a general tendency for public markets to escape democratic control.

Bringing together the conceptual and empirical point, the objection to public markets needs to be rejected. It starts from the legitimate (liberal) wish to safeguard public interests in public markets. It also starts from a credible picture of markets as always embodying power relations between actors. However, it overstates the dangers of private provision under public control, compared to available alternatives which are always also vulnerable to private rent-seeking. We need to move from ‘the market’ to a much more *differentiated view of markets*, the institutional frameworks in which they are embedded, and the different types of effects on the power relation between actors. Different actors will have the upper hand within public markets, depending on which rules of the game are adopted.

All of this does not diminish the fact that the Neoliberalism Objection points to a very important danger for public markets. It is extremely valuable as a warning signal. This is one more reason to be concerned with the quality of democratic decision making in this area.

#### FROM ENDS TO MEANS: DEMOCRATIC DECISION MAKING

The argument in favor of the need for democratic decision making was made earlier. As we saw, even when public service delivery has been marketized, there are still many decisions to be taken. Many of these decisions remain politically controversial and cannot be fully decided at

<sup>55</sup> Benn and Gaus 1983; Steinberger 1999; Weintraub 1997.

<sup>56</sup> Gingrich 2011.

<sup>57</sup> Feigenbaum and Henig 1994; Michaels 2010.

the highest level, in national legal frameworks, for these leave many details unspecified. Concrete decision making at lower levels, in municipalities, in public organizations, and even in the professional execution of these services will often bear on the same sets of politically charged issues. This problem is framed in the economic approach: one of incomplete contracting between principals and agents. The solution within this approach is to remove government as intermediary principal/agent between consumers and providers and have a direct bargaining process between users and providers. The democratic approach defended here recognizes the same problem: the inherently incomplete, open nature of the decision-making process in these complex services. However, it presents a different solution. Government should not be withdrawn from the triangle with consumers and providers, since decisions at all levels are unavoidably politically charged. Democratic decision making is the best way to deal with such an unavoidably political predicament.

The philosophical background of this approach is a different way of thinking about ends and means. As we have seen, principled liberals often collapse ends and means: avoiding or allowing markets becomes itself a matter of ends. Pragmatic liberals distinguish ends and means very sharply and once public ends have been set they relegate thinking about means (i.e. the desirability of markets) to efficiency considerations. The perspective defended here conceptualizes ends and means as a *continuum*. ‘Ends’ refer to abstract moral considerations – about social rights, inequality, autonomy, etc. – which provide relevant considerations when evaluating the legitimacy of public markets. These have been identified in the third section above. When we descend to lower-level issues of institutional means, these moral considerations do not disappear; they rather re-appear transformed into very concrete policy issues and even professional decisions on the work floor. The moral dispute is carried over to lower levels.<sup>58</sup>

For example, at the highest level of abstraction, different theories of distributive justice are on offer, as an input into the question when inequalities on public markets are unjust. Some will defend a sufficientarian view, others a luck egalitarian view, still other a Rawlsian view, etc. But these views will also affect one’s position on lower-level policy issues in health care or education systems. Today, there may be a controversy about whether physicians should be allowed to give priority to treatments of employed persons over unemployed ones (even if this would benefit the latter as well). Tomorrow, it might be whether a hospital can refuse treatment of uninsured persons. Next week, whether it is acceptable to close down an emergency facility, which will mean that some citizens will have to travel further to hospital in an emergency than others. Next month, whether a physician should prescribe a cheaper drug to her patients than she used to, in order to save costs for her organization.

If we accept – as most theorists and citizens do – that the most abstract decisions about public services should be decided democratically, then the same should be true for many of these less abstract decisions specifying the more abstract ones. It is much too crude to see governments as setting the ends and market agents (public service providers and/or citizens in their role as users) as setting the means.<sup>59</sup> The division of labor on which the edifice of public markets is built (public

<sup>58</sup> Henry Richardson argues that practical reasoning is best conceived as consisting of a chain of means and ends. Each end is also a means toward a lower end (except for the highest, ‘final’ end). Practical deliberation is a process of selecting progressively more specific means (lower ends) toward one’s highest ends (see Richardson (1997), pp. 49–57). Richardson explains this in terms of a specification relation: lower ends specify the way that higher ends are to be pursued. This is not a matter of merely aggregating raw preferences: we can deliberate rationally about the specification of ends (Richardson 1997, pp. 69–74).

<sup>59</sup> This view Henry Richardson calls ‘agency instrumentalism’: ‘The legislature is to set the ends, while the agencies are to be constrained by the norms of end-means reasoning to selecting effective and efficient means to those ends’ (Richardson (2002), pp. 114–15). What is wrong with this is that ‘Given the unavoidability of

responsibility for finance, market execution of provision) needs revision. Public responsibility extends to details of provision, since the devil is in the details. This is not meant to deny that there will remain higher and lower levels of decision making. It would be absurd to make every doctor's decision a matter of national parliament. Rather, the democratic approach calls for appropriate decision-making mechanisms at every level, since it recognizes that at every level in public service delivery the moral interests identified in the third section are bound to re-appear. Hence at every level democratic mechanisms are needed to balance these interests in a legitimate manner when they conflict.

This leaves wide open the exact forms this democratic engagement can take. What does favoring democratic decision making in public services mean concretely? A convincing answer to this question cannot be given in the abstract. We need to do justice to the specifics of different public services as well as different levels of decision making. Obviously, democratic control over teachers does not require that a teacher's single decision to let his pupils practice math today instead of geography should be susceptible to majority-voting by his pupils (or their parents). Or that every parent in the country should partake in a national decision to allow experiments with parental co-payments at public schools. The teacher's decision is part of an ongoing working relationship, and he needs to be accountable to his pupils and their parents in a more general manner. The decision on co-payments arguably needs to be debated by stakeholders (including representatives of parents), but ultimately determined by vote of parliament. I cannot here deliver fine-grained discussions of democracy for all public services and decision making at all relevant levels. Instead, I want to mention three pertinent issues that general democratic theory suggests would need resolution in order to develop a theory and practice of democratic decision making for public services.<sup>60</sup>

First, here as elsewhere in the debate about citizen participation, we face a choice between more representative and more direct mechanisms of democratic decision making. I mention one example of this tension. In the field of organization science, there is an increasingly widespread recognition that mechanisms of 'exit' need to be supplemented by (or even replaced with) mechanisms of 'voice.'<sup>61</sup> However, many have argued that those individual consumers who participate actively, either by changing providers (exit) or by using complaint mechanisms or participating on patient assemblies and the like (voice), are not necessarily representative of the whole group of consumers. In response, some have suggested that we need to turn to mechanisms of delegated decision making, which would mimic representation in formal representative organs. Here, for example, patient organizations could make up for the unrepresentativeness of individualized voice mechanisms.<sup>62</sup> This proposal remains confined to representation of users. But even those who do not (at present) use a service have a stake in its delivery, if only because they contribute to it by paying taxes, and consume other services which compete for the same budgets. Therefore, we also need to think about adding representatives of the public at large to the democratic arena – but only at those levels where their interests are at stake.

significant vagueness in legislation, which in turn rests on a sensible division of deliberative labor between legislatures and agencies, agency instrumentalism cannot achieve its aim of confining significant evaluative controversies to the legislature' (Richardson 2002), p. 118). Here I apply Richardson's theory beyond its own scope (executive agencies), to public service provision.

<sup>60</sup> In the search for such a theory, existing theories of associative democracy (like Cohen and Rogers 1992; Hirst 1994) and participatory democracy (Hsieh 2008; Pateman 1970), although these were not explicitly created for public services, may be a source of inspiration.

<sup>61</sup> Hirschman 1970; Mintrom 2003.

<sup>62</sup> Bovenkamp et al. 2013.



Second, a theory of democratic decision making for public services needs to be situated with respect to the opposition between theories of aggregative and deliberative democracy.<sup>63</sup> Deliberation has been seen by many as superior because it promises a more informed and reasoned democratic process. However, an important problem has been that citizens are not equal in their power, resources, and capacities to influence decision making.<sup>64</sup> This puts a heavy burden on the organization of fair and inclusive deliberative processes. This problem is especially acute for public services. As we have seen earlier, many users of public services are in weak and vulnerable positions. They (partially) lack autonomy, which impinges on their capacities for choosing between services. These same deficits recur as a problem for participating in deliberations, although this will obviously differ from case to case (a victim from a car accident will lack the information about his injuries, but chronically ill patients may be very well informed about their illness). Similarly, we need to address other well-known problems of deliberative democracy, such as those relating to the procedures of deliberation and how these may (subtly) exclude or marginalize the voices of certain groups.<sup>65</sup>

Third, within general democratic theory a classical problem is how to decide the proper scope of the authority of a democratic community: who should be subject to its decisions, and how far does this authority extend into private life? In the context of public services this translates into the problem of the relation between democratic and market-based mechanisms. Traditional justifications for democracy often appeal to the fact that the authority of the state cannot be evaded (except by emigration, which is often prohibitively difficult). Because of its coercive power, citizens need to be able to participate in making the decisions that will eventually affect them. By contrast, private associations, since they are voluntary (exit is possible) are not subject to such a heavy justificatory burden. Given this dichotomy, increasing the scope for individual choice for public services would seem to suggest that we can do with a lower democratic burden. If a Catholic can pick a Catholic school, the state need not set up decision making at other (say, secular) schools to ensure that Catholic interests are represented there as well. Pupils of Catholic schools may be free on Catholic holidays, while other schools may make different choices. These and many other decisions would *not* require the democratic involvement of every citizen (whether directly or represented by government).

The argument in this article shows that this kind of reasoning is only partly correct. For example, if Catholics are an important part of the population in a given society, we could imagine that they have a legitimate interest that secular schools at least provide basic information about Catholicism, in order for their pupils to be able to participate in social life in that society. In general, part of what happens within the walls of a school will be legitimately parochial and this can be justified by the market-based mechanism of choice and exit. Another part of it, however, will be legitimately of concern to every citizen and this part needs to be justified by democratic mechanisms. The scope-question then is where to draw the line between these two parts. Which issues can be left to private actors, which ones need to be resolved collectively? That is itself a matter that needs democratic resolution.

All of these questions are opened up once we recognize that public services need not be uniformly provided by the state, nor completely left to the market. It is only in that configuration – markets as means to public purposes – that liberalism's general commitments to democracy in political life and to markets in economic life come together on one and the same battle field.

<sup>63</sup> Elster 1997; Knight and Johnson 1994.

<sup>64</sup> Bohman 1997.

<sup>65</sup> Ryfe 2005; Sanders 1997.

This requires a continuous democratic engagement with these public markets, both to ensure individual choice and to restrain such choices where necessary to protect effective social rights for everyone to enjoy these services.

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