

## Attenuated Governance: How Policymakers Insulate Private School Choice from Legal Challenge

Ursula Hackett 

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*Indirect or delegated governance engages private organizations, tax expenditures, or service users to deliver programs that would otherwise be provided by the government directly. This paper explains the rise of indirect governance in terms of policymakers' strategic use of "attenuation" to avoid political and legal challenge. Attenuation is the process by which a government obscures its role in promoting a particular policy goal, through communication strategies (attenuating rhetoric), or by utilizing private third parties and the tax system to deliver a benefit (attenuated design). Deploying policymaker interviews and an original historical database of private school choice programs and their legal and political defense, 1953–2017, I argue that pursuing both attenuated design and attenuating rhetoric at once helps policies pass and spread by publicly dissociating the government from legally contentious policy outputs.*

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间接或委托治理方式使得私人组织、税务支出或服务用户能够提供一些本由政府直接提供的计划项目。政策制定者会战略性地使用“衰减”策略以避开政治和法律上的挑战，本文从这一角度入手来解释间接治理的兴起。衰减是政府通过沟通策略（修辞衰减）或利用私人第三方和税收系统（布局衰减）来为自己带来利益的过程，这种方法可以掩盖其在促进特定政策目标中的作用。本研究对政策制定者进行了访谈，并使用了一个涵盖1953年至2017年间有关私立学校择校项目及其在法律上和政治上的辩护资料的原始历史数据集。本文认为，修辞衰减与布局衰减两种策略能够以公开的形式将政府与在法律上有争议的政策结果分离开来，并可即刻促进政策的通过与传播。

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Hidden, delegated, or “submerged” forms of governance are expanding rapidly across America in health care, education, and many other policy arenas (Faricy, 2011; Hacker, 2002; Hackett, 2017; Mettler, 2010). These governance arrangements utilize private organizations and the tax system to deliver government social policy, weakening the link between the state and the institutions it funds. Since 2008, tax credit education scholarship programs have tripled in number, the amount devoted to the Home Mortgage Interest Deduction rose 24 percent, and the net federal subsidy of health-care plans for under-65s reached \$704 billion, with projected future rises (Congressional Budget Office, 2017; Joint Committee on Taxation, 2008, 2013).

This growth presents a puzzle because such policies seem to offer policymakers few opportunities to claim credit for policy successes. They appear to exacerbate central government's principal-agent problems by delegating functions to others. They are also typically regressive,<sup>1</sup> often expensive, and involve government growth "under the radar"—that is, failing to register with most ordinary voters—issues of concern both to liberals (worried about their distributive consequences) and to conservatives (publicly committed to shrinking the state). So why do hidden, delegated or "submerged" forms of governance pass and endure?

The explanation lies in the strategic use of "attenuation" to avoid political and legal challenge. *Attenuation* is the process by which policymakers in local, state, or federal government hide the state's role in promoting a particular policy output. *Attenuated governance* is an indirect governance arrangement in which the state distances itself from policy outputs, either rhetorically (by emphasizing the intervention of market actors and de-emphasizing the role of the state in the provision of a benefit) or through third-party policy delivery (where tax expenditure funding streams and individual citizen-consumers intervene between government and the ultimate beneficiary of the funds).

One way to distance the state from certain policy goals is to utilize third party organizations or the tax system to deliver a benefit (attenuated design). Another is to obscure the state's role in delivering certain policy outputs through communication strategies (attenuating rhetoric). In this paper, I argue that doubling up two forms of "attenuated governance"—pursuing *both* attenuated design and attenuating rhetoric at once—helps policies pass and endure by thwarting legal and political opposition.

For Suzanne Mettler, the growth of the submerged state is rooted in a conservative public philosophy's dominance of public discourse over the past 30 years (Mettler, 2009). Conservatives deploy third-party delivery or tax system funding arrangements to provide the appearance of public spending restraint. Once passed the programs acquire a fiercely protective interest group support network consisting in the private beneficiaries of government subsidy. Any efforts to reform or eliminate such policies are hobbled by an enthusiasm gap borne of informational asymmetries between organized interests and the public.

This explanation is sound but incomplete. Mettler's 30-year timeframe overlooks the fact that hidden forms of governance pre-date her period by at least four decades. In addition, Mettler's emphasis on the *political* stability of hidden forms of governance obscures the ways in which such policies are also insulated from successful *legal* challenges. Their political and legal advantages extend beyond the appearance of public spending restraint to the achievement of multiple state purposes under the radar, from regulation of private providers to more contentious goals (Fellowes & Wolf, 2004).

This paper disaggregates submerged or indirect governance into its constituent parts: rhetorical framing and policy design. Drawing upon the case of private school choice programs—policies that are quintessentially "submerged" in that they encourage private providers to deliver core educational services—this paper argues that programs are more likely to be successful if they *combine* a deeply attenuated

policy design with a deeply attenuating rhetoric. By “successful” I mean more likely to be passed into law and upheld in court, and less likely to be overturned by voter referendum or subjected to legal challenge.

The first part of this paper argues that attenuation can help explain the rise of the hidden state, setting out its contribution in the context of other scholarly accounts. The second part of the paper demonstrates the analytical value of disaggregating the hidden state into two underlying dimensions. The rhetorical and policy design dimensions are analytically separable. They occur in different spheres of political activity: policymaker communications and policy design. Combining these two dimensions produces different sorts of politics, with implications for the passage and survival of submerged policies. I term these phenomena *two dimensions of attenuated governance*.

The third part of this paper deploys 30 policymaker interviews conducted personally with policymakers, bureaucrats, and advocates, on the record, in Illinois and Missouri, and an original historical dataset of private school choice programs and their legal and political defense, 1953–2017. It demonstrates that while attenuated policies can pass and endure under many circumstances, they are most likely to do so when policymakers combine a deeply attenuated policy design with a deeply attenuating communications strategy.

These “doubly distanced” policies provide one major advantage to policymakers: distancing the state from policy failure and politically contentious purposes. “Politically contentious purposes” are policy goals that attract substantial controversy, whether support for racially segregated institutions, subsidy of religious activity, policing voter access to the polls, contraceptive provision, or other polarizing issues. Attenuated governance de-emphasizes the role of the state in attaining these controversial goals. By placing responsibility for program management with third-party organizations or individual service users, policymakers can avoid or limit pushback.

This paper demonstrates that the supposed trade-off between program defense and credit-claiming or control opportunities is illusory. Policymakers can claim credit and exert control through attenuated governance; they just do so in an oblique, coded way. Distancing mechanisms may diminish *some* types of control and credit claiming, but they also enhance the chances that a program will pass and endure.

## Part I: The Rise of the Hidden State

Scholars have uncovered many determinants of hidden state growth. For Jacob Hacker (2002), early development of private forms of welfare in the United States made it politically challenging to enact visible, public social policies. The hidden state exhibits path-dependency because such policies generate policy feedbacks that mobilize organized interests—particularly labor unions and business interests—in the programs’ defense. Christopher Faricy (2015) argues that Republicans grow the hidden state with upwardly-redistributive tax expenditures, while Democrats pass tax credits targeted at their core constituency: the working poor.

Andrea Campbell and Kimberly Morgan root the rise of “delegated governance”—the delegation of responsibility for publicly funded welfare programs to non-state actors—in public opinion, the lobbying power of beneficiaries, and institutional obstacles in Congress. Delegating responsibility to private actors helps policymakers navigate the fundamental ambiguity at the heart of American public opinion: distrust of the state coupled with desire for government services (Morgan & Campbell, 2011). It also helps policymakers sidestep Congressional veto players and construct broad political coalitions by deferring difficult decision making.

These accounts of hidden state growth are richly documented and fundamentally convincing, yet they are incomplete, for two reasons. First, they tend to focus upon the federal government rather than the state governments where many social policy decisions are made, especially in the field of education. Second, by emphasizing electoral mobilization and citizen understanding, these accounts largely overlook the role of the courts in sustaining or curtailing the growth of the hidden state, particularly in areas of hot-button political contestation.

This paper complements existing accounts of hidden state growth by extending its scope to state level and judicial contestation, and by elucidating an additional strategic imperative facing policymakers: how to insulate contested policy goals from legal and political challenge. Policymakers grow the hidden state because it rewards their constituents, delegates conflict, and placates organized interests, but *also* because such programs are less likely to be struck down as unconstitutional. Attenuated governance has insulating qualities.

Attenuated governance is an indirect governance arrangement in which the state distances itself from policy outputs, either rhetorically (by emphasizing the intervention of market actors and de-emphasizing the role of the state in the provision of a benefit) or through third-party policy delivery (where tax expenditure funding and individual citizen-consumers intervene between government and the ultimate beneficiary of the funds). “Attenuation” is the process by which policymakers obscure the state’s role in promoting a particular policy goal.

Why would governments wish to hide their role in promoting a policy output? We know that voters’ negativity bias—their tendency to grant greater weight to public failures than successes—makes blame avoidance a powerful impetus (Hood, 2002; Weaver, 1986). For controversial issues, the dangers of associating with a polarizing program are even greater. Aside from the political mobilization of opposition forces there may be constitutional matters in play. After the Supreme Court struck down segregated education, state governments’ attempts to perpetuate it were vulnerable to legal challenge. Forty state constitutional provisions prohibiting public aid for denominational schools make it risky to fund religious education openly (Hackett, 2014).

Similarly, given the partisan implications of ballot access measures and fundamental democratic principles at stake, governments have historically pursued indirect means of influencing who votes. Placing responsibility for policing voter registrations to third party organizations such as the Interstate Voter Registration Crosscheck Program attenuates the connection between governments and the

removal of voters from the rolls. The “color-blind” deployment of voter ID laws has racially disparate impact but is much easier to justify publicly than direct voter suppression (King & Smith, 2014).

It is not only governments that have incentives to engage in attenuation. Corporations keen to avoid criticism for excessive executive pay during the Financial Crisis utilized “camouflage”—attenuated mechanisms that hid the role of the company in providing benefits, as Jacob Hacker and Paul Pierson explain: “Out, for the most part, were seven- and eight-figure bonuses. In were complicated ‘stock options’ and ‘deferred compensation’ that promised equally big returns down the road” (2010, p. 2). Providing an attenuated benefit rather than a direct one was safer. Attenuation matters.

### *Why Attenuation?*

Attenuated governance is the process by which the state obscures its role in producing a policy output. I use the term “attenuated governance” rather than “delegated governance” to signify different phenomena. Delegation in Morgan and Campbell’s (2011) work denotes a process by which central government entrusts the delivery of a function to another government, a non-governmental organization, or an individual “consumer citizen.” Attenuation, by contrast, is not necessarily a directed process. Organizations delegate *to* another actor. Attenuation involves *distancing* the state from responsibility for a particular policy output, whether by formal delegation or simply by obscuring the role of the state through communications.

Current accounts of the hidden state give little consideration to the legal framework within which such programs exist. Hence they miss an important source of strategic incentives facing officials across the country, and on both sides of the aisle. Policymakers certainly engage in posturing—voting for policies that cannot hope to become law, or are certain to be struck down by the courts—in order to mobilize co-partisans. But they are also concerned with policy and posterity, sustaining their legislative achievements into the future.

Jacob Hacker and Paul Pierson assert that American governance is better understood as “politics as organized combat” rather than “politics as electoral spectacle.” Most voters are weakly informed and aware, with little or no knowledge of policy or political process, so the true competitors in American politics are organized groups rather than atomized voters (Hacker & Pierson, 2010, p. 109). The prize for which these organized groups fight is *policy* rather than electoral victory (Hacker & Pierson, 2010, p. 102). America is a “policy state” in which policymaking consumes more and more of the business of government as the state expands (Skowronek & Orren, 2016, p. 29). Insofar as policymakers are interested in sustaining their policies for posterity, there is a strategic incentive to insulate such programs from legal and political challenges when those programs face intensive contestation. Attenuated governance can protect programs from challenge.

## Part II: Disaggregating the Hidden State

For policies such as vouchers, government gives individual consumer-citizens public funds to spend in private markets (Morgan & Campbell, 2011). Hence the relationship between funder (government) and funded (the private organization that ultimately banks the money spent by the consumer) is indirect. “Indirect” is a slippery term. It can mean “unintended,” but it also means “opaque” (in its description), “circuitous” (in design), or “untraceable” (if public understanding is weak). The multidimensionality of this concept is loosely evident in the literature but, until now, has rarely been disaggregated explicitly. The result is a set of concepts that are theoretically rich but fuzzy around the edges.

The meaty theoretical apparatus of “submerged state,” “delegated governance,” “government out of sight,” “kludgeocracy,” and “hidden welfare state” tells us much about interest group politics, social policy development, and the shape and scope of the state (Balogh, 2009; Howard, 2007; Mettler, 2009; Morgan & Campbell, 2011; Teles, 2013). Scholars in the field elaborate compelling explanations for voter apathy, partisan polarization, and welfare reform. But these theoretical schemes amalgamate several different aspects of policymaking activity that can be usefully distinguished because “hidden” governance has differential effects in different spheres of political activity.

For instance, in Suzanne Mettler’s (2009) “submerged state,” submerged policies are identified not only by their complex *design*—utilizing private organizations or tax expenditures to deliver government benefits—but also by the fact that they are *invisible* to ordinary people: the public knows little about them and are typically misinformed about their scope and purpose. The term “submergence,” then, could refer to either of two analytically separable phenomena: complexity or low visibility.

Mettler’s submerged policies seem to be *both* but these dimensions do not necessarily stand and fall together. For instance a policy may be indirect in design without generating user misunderstandings in a court of law: well-informed judges give legal weight to the indirectness of a policy design despite full knowledge of its intended purpose. When judges consider the constitutionality of religious school aid programs, indirect modes of program delivery are more likely to be upheld (Hackett, 2017). Only policy design—not public visibility—is relevant here. There are also complex policies with relatively high visibility to the public (tax-efficient Section 529 college savings accounts, for instance), and directly provided policies with relatively low visibility (most environmental regulation). Submergence has powerful effects, but we need to know which aspect of submergence does the explanatory work.

“Hidden” governance is multidimensional. In Kimberley Morgan and Andrea Campbell’s concept of “delegated governance,” for example, delegating responsibility for publicly funded social welfare programs to non-state actors utilizes “an opaque set of tools to achieve social welfare goals” (2011, p. 9) and can have unintended consequences when confronting poorly informed, apparently irrational consumer-citizens. Thus consumer-choice delegation, such as Medicare Part D is rhetorically indirect—policymakers engage in distancing rhetoric in an attempt to alleviate public skepticism toward government—but also “indirect” in that it

creates unintended consequences: fraud, abuse, “market stickiness,” and consumer frustration.

Consumer-choice reforms that delegate policy decisions to individual consumers may be particularly prone to market failure and other unintended consequences. “Pork barrel markets,” to use Jane Gingrich’s (2011) term, can unintentionally empower producers at the expense of the state’s own goals. Like Morgan and Campbell, Gingrich identifies several different types of social policy marketplaces. Delegation takes different forms.

Brian Balogh’s (2009) “government out of sight” is indirect because it is defined in an anti-statist way by elites and is poorly understood by the general public. Most programs are ignored or misunderstood by ordinary citizens. Fewer are explicitly designed to downplay the government’s role. For example Mettler’s (2009) data reveal that even a quarter of food stamp recipients—designed to be a more “visible” service—are unaware that they use a government social program. For those recipients the policy both is and is not indirect in Balogh’s two senses. Despite government’s best efforts to inform them, this policy is “out of sight” for a significant portion of recipients.

The patchwork of programs that compose Steven Teles’s (2013) “kludgeocracy” were not originally intended to be so byzantine but have become more corrupt and incoherent over time. Is a “kludge” a “kludge” because it is corrupt, or complex, or incoherent, or because the intentions of its creators have been lost in a rising tide of impenetrable policy fixes? Most complex policies are neither corrupt nor incoherent. Divergence from policymaker intention is an additional conceptual layer to “kludgeiness” that is analytically separable from its other features.

Indeed, complexity or incoherence may themselves become the goals of policymaker action—rather than an unfortunate side effect to be avoided—in situations where it is advantageous to obscure policy purposes. Some tuition grant programs during the era of segregation, for example, were specifically designed to obscure the goal of racial discrimination by utilizing intermediary organizations for policy delivery (Forman, 2007; Hackett & King, forthcoming). These cases had kludgy features—complexity that obscures policy purpose—but were otherwise not kludgy at all, because they stood alone, rather than existing as mere temporary bolt-ons. Distinguishing the effects of kludginess from similar forms of indirectness, incoherence, and complexity requires a differentiated approach.

Finally, Christopher Howard’s “hidden welfare state” is indirect in policy design, since it is delivered through tax expenditures, but its defining feature seems to be its hiddenness to the general public, since explaining it will make it “start to disappear” (2007, p. 3). The best-known tax expenditures, such as the Home Mortgage Interest Deduction (HMID) or the Earned Income Tax Credit (EITC), are both hidden (by design) and not so hidden (in terms of public understanding).

Defining “hiddenness” leads to a further conceptual quagmire: from whom are the programs hidden? Is partial or incomplete information among the many equivalent to full information among the few? Do hidden policy designs and weak public understanding always rise and fall together? The HMID and EITC cases suggest not.

Ironically the burgeoning scholarship on the hidden welfare state may contribute to its demise (but only in the public understanding sense; the policy design remains).

### *Two Dimensions of Attenuated Governance*

In the submerged state literature, distinctions between different flavors of indirectness are not typically distinguished. These characteristics are considered complementary to one another. Indeed, a policy that is indirect in that policymakers use rhetorical devices to distance themselves from its administration is often *also* a policy that utilizes a submerged policy design and is poorly understood by the public, with unintended consequences for democratic governance and market efficiency.

But these manifestations of indirectness are in fact analytically separable. They do not stand and fall as one. They occur in different spheres: politicians' speechmaking and policy design as articulated by policymakers. Setting aside unintended consequences and limited public understanding for reasons of space, here I examine *two dimensions of attenuated governance*: attenuated design and attenuating rhetoric. A policy can be attenuated on one of these dimensions but not the other, or both, or neither.

Attenuated governance obscures the state's role, a purpose that may be accomplished through rhetorical means as well as through the formal transfer of powers from one institution to another. Delegated governance, the submerged state, tax expenditures, and some kludges are versions of attenuated governance that lean upon the attenuated design dimension. "Government out of sight" and the hidden welfare state are versions of attenuated governance that tend toward the rhetorical, communications dimension.

The distinction between attenuating rhetoric and attenuated design matters because these dimensions diverge in real cases, with politically significant effects. Table 1 displays the policy articulation and policy design dimensions with illustrative examples from the field of school choice politics.

*Attenuating rhetoric* involves policymakers distancing themselves from a policy in speechmaking by obscuring the state's role in producing policy outputs. Rhetorical attenuation involves the claim that the state does *not* deliver a particular policy; rhetorical *de*-attenuation is the claim that the state *does* deliver a particular policy. In communications, school choice supporters often seek to weaken the connection between state and private school, while their opponents seek to link the state to the private institutions it funds.

Policymakers can attenuate by emphasizing the way individual consumer-citizens intervene between government and policy delivery, rhetorically distancing the state from policy outputs.<sup>2</sup> For example, in recent debates over school choice legislation in Virginia and Arizona, Virginia Attorney General Ken Cuccinelli said the program involves no direct appropriation of public funds and Arizona State Schools Superintendent John Huppenthal argued that it "only indirectly benefits private schools" (Fischer, 2013b; Walker, 2012). Opponents highlight the role of the state. For Arizona School Board's Association general counsel, Chris Thomas: "It's a voucher

Table 1. Two Dimensions of Attenuated Governance

Dimension	Arena	Voucher Governance	Voucher Politics Example
<i>Attenuating Rhetoric</i>	<p><b>Policy articulation</b> How policymakers publicly describe their policies</p>	<p>Policymakers engage in distancing rhetoric to increase the perceived distance between government and policy administration, or obscure the government role entirely</p>	<p>Supporters describe school vouchers as “scholarships” rather than “grants,” emphasizing private individual choice. This linguistic sleight-of-hand <i>rhetorically attenuates</i> the connection between government and private academies</p>
<i>Attenuated Design</i>	<p><b>Policy design</b> How the policy functions and is administered</p>	<p>Policy utilizes private organizations or the tax system to deliver benefits</p>	<p>Tax credit scholarships are administered by a complex system of scholarship tuition organizations or through individual tax deductions or credits. This <i>attenuated policy design</i> helps protect such programs from legal challenge by distancing the state from private school beneficiaries</p>

program that results in government money being used potentially for an unconstitutional program" (Ringle, 2011). For Virginian Delegate Scott Surovell (D-Fairfax): "It allows people to do through the back door what you're not allowed to do through the front" (Walker, 2012).

Similarly, during the 2013 passage of voucher bills in Mississippi and North Carolina, the executive director of the NC Values Coalition, Tami Fitzgerald, attenuated the connection between state and school by emphasizing parental intervention: "It puts control back in the hands of the parents and it removes the state-created barrier to success for children with disabilities" (Bonner, 2013). Her opponents sought to *de*-attenuate the connection between state and private schools. *The Fayetteville Observer* editorialized: "It may be going there indirectly, but public money would nevertheless send our kids to schools that are unaccountable to public oversight" (White, 2012). The *Northeast Mississippi Daily Journal* also highlighted the state's role in subsidizing private schools: "It diverts tax dollars—indirectly, but still at public expense—into private schools" (Northeast Mississippi Daily Journal, 2012). Attenuating rhetoric distances the state from policy outputs; *de*-attenuating rhetoric emphasizes the role of the state.

Distancing rhetoric is a common feature of policymaking, particularly in a federal polity. For example, regional officials rhetorically shift blame toward central government in order to downplay their role in making unpopular spending cuts (Mortensen, 2012). I make no claim here about the underlying intention. Policymakers may or may not *intend* to obscure the role of the state when they engage in attenuating rhetoric. I simply observe that elites do, in practice, either emphasize or attenuate the connection between the state and particular policy outputs.

The rhetoric of the marketplace is one form of attenuating rhetoric, and it may not accompany attenuated policy design. In the politics of health reform, for example, the most "seductive" feature of market-rhetoric may be "its essential ambiguity, as crystallized in the popular reform cry of the 1990s ('managed competition') and its similarly ambiguous spin-offs ('planned markets,' 'internal markets,' 'public competition,' and 'quasi-markets') ... the turn to the market has been as rhetorical as it has been real" (Hacker, 2004, pp. 23–24). The multivocality of attenuated rhetoric—its essential ambiguity—can be useful. Tax expenditures are politically appealing because they can be defended on numerous grounds (Howard, 2007, p. 179).

*Attenuated policy design* utilizes private mechanisms for the delivery of policy, attenuating the connection between government and ultimate beneficiary compared to directly funded provision: for example, subsidies to private lenders for student loans (as opposed to direct federal loans or grants), vouchers that provide a sum of public money to be spent in the private rental market (as opposed to public housing), tax expenditures for child care, medical expenses, home mortgage interest, or earned-income tax credits (as opposed to in-kind benefits funded by direct spending or lower headline tax rates) (Hackett, 2017). A tax expenditure is a policy tool that allows policymakers to spend money through the tax code (Faricy, 2016). Attenuated policy design occurs in other areas of policy also: for example, subsidy of the civilian aircraft construction industry or credit control through the

use of discount windows by Federal Reserve Banks whose boards are dominated by private bankers.

The rhetorical and design dimensions of attenuated governance often correlate, but not always. Attenuating rhetoric has value even for policymakers creating a directly administered program because it helps them to avoid blame for policy failure (e.g., criticizing “irresponsible” gun owners or “predatory” mortgage lenders for policy disasters). Conversely, even extremely attenuated policy designs may be “revealed” if advocates are able to communicate the state’s role in delivering a policy effectively (e.g., policymaker communications about subsidized Section 529 savings accounts or health-care exchanges). There is a disjuncture between the rhetoric of tax reform and policymakers’ willingness in practice to embrace tax breaks and loopholes (Patashnik, 2008, p. 36). The components of attenuated governance do not necessarily rise and fall as one.

The disjunction between attenuated delivery and attenuating rhetoric helps solve persistent puzzles in American political development. For example, Chloe Thurston argues that although the postwar state channeled housing benefits in racially discriminatory ways through private organizations, those excluded from such benefits became *politicized* rather than de-politicized as the classic submerged state literature would expect (Mettler, 2009; Thurston, 2015, p. 250). One way to explain Thurston’s surprising observations is to consider the disjuncture between attenuated delivery and attenuating rhetoric. The Federal Housing Administration (FHA) utilized an attenuated delivery: deploying private housing providers to distance the government from politically contentious issues of racial discrimination in housing. But it could not prevent civil rights organizations from de-attenuating communications about such programs.

Advocates ... worked to challenge the FHA’s tendency to submerge its role in black housing exclusion from public view. Along with others, these actors detected and aggregated individual exclusion from the FHA into broader patterns, traced it back to the government as well as to the private sector, and then contested the role of the government and private lenders in promoting such exclusion. (Thurston, 2015, pp. 256–257)

The result of this disjuncture between attenuated design and de-attenuating rhetoric was growing agitation by civil rights campaigners, pressing for government to demolish rather than reinforce racial hierarchies.

### *Weakly and Deeply Attenuated Policy*

Scholars identify the hidden or submerged state as having different degrees of visibility. In Jacob Hacker’s words:

American’s framework of social provision has at least three levels, each less visibly governmental than the last. The most visible benefits are

direct-spending programs like Social Security. Next are tax breaks with social policy purposes. Finally, there are private benefits that these tax breaks encourage (and which the federal government extensively regulates through tax and labor rules). (2016, p. 780)

All private school choice programs are attenuated in the sense that they encourage private providers to take on the state's education function and rely upon the choices of individual citizen-consumers to distribute program benefits. But some forms of private school choice program *further* attenuate the connection between education providers and the state (Hackett, 2017). For example, tax credit scholarships are funded by providing a tax credit for donations to third-party organizations, which administer the scholarships. I term those policies "deeply attenuated." By contrast, vouchers funded by an ordinary appropriation without additional layers of administration or third-party delivery are "weakly attenuated" (Table 2).<sup>3</sup>

In this paper, I consider all private school choice programs, including the policies known as "vouchers," "tax credit scholarships," "individual tax credits and deductions," and "education savings accounts."<sup>4</sup> Whether the policy is funded directly, through tax deductions, or through private third-party organizations, these programs all fund private K–12 tuition expenses.

As Table 1 makes clear, policy design is not the only way to attenuate the connection between service provider and the state. Policymakers use public utterances to take ownership of, or distance themselves from, policy outputs. Deeply attenuated rhetoric involves a speaker disclaiming state responsibility, attributing policy delivery to somebody else: a private organization, individual service users, or others (Table 2). Weakly attenuated rhetoric involves politicians' efforts to "own" an issue and take clear, direct responsibility for a policy output (Table 2).

The most deeply attenuated policies are "*doubly distanced*": the policy design is indirect and policymakers rhetorically obscure the state's role in the provision of policy outputs. These classically submerged policies form the core of Mettler's submerged state, including tax expenditures, such as corporate tax deductions and the exclusion of interest on owner-occupied mortgage subsidy bonds in which the role of the government is almost wholly obscured. School tax credit scholarships are doubly distanced.

*Quasi-direct* policies at the opposite end of the scale are funded through quasi-direct transfer and the state's role in the provision of the benefit is clearer. In this category are social welfare programs, which may utilize private providers for the delivery of services but policymakers and advocates clarify who is responsible for policy delivery. The direct funding of regular vouchers, and the publication of information about their administration and take-up, makes these quasi-direct programs easily traceable.

In other cases the two dimensions of attenuated governance come apart. Some policies are deeply attenuated in design, insofar as they utilize a variety of third-party providers and tax expenditures to deliver benefits, but policymakers reveal their responsibility for the policy outputs through public communication. Tuition grant payments made by segregationists in the immediate aftermath of *Brown v*

**Table 2.** Divergence and Convergence Between Two Dimensions of Attenuated Governance

	Weakly Attenuating Rhetoric	Deeply Attenuating Rhetoric
Weakly attenuated policy design	<p><b>Quasi-direct</b>  <i>Policy design and justification is relatively direct, making clear the state’s role in delivering a policy output</i></p> <ul style="list-style-type: none"> <li>• Regular school vouchers</li> <li>• “Section 8” housing vouchers</li> <li>• G.I. Bill educational benefits</li> <li>• Food stamps or the Supplemental Nutrition Assistance Program</li> <li>• Public–private partnerships (P3s) through the Build American Bureau (e.g., modernization of air-traffic control)</li> </ul>	<p><b>Distanced Direct</b>  <i>Policy design is straightforward but politicians engage in distancing rhetoric that obscures the role of the state in providing the policy output</i></p> <ul style="list-style-type: none"> <li>• In-kind aid programs for private schools (e.g., textbooks, transportation, science, and sports equipment)</li> <li>• Education Savings Accounts</li> <li>• Voter ID laws justified in “color-blind” terms</li> </ul>
Deeply attenuated policy design	<p><b>Contested Attenuated</b>  <i>Policy design attenuates state–policy output connection but policymakers rhetorically reveal the role of the state in delivering the program</i></p> <ul style="list-style-type: none"> <li>• Segregation vouchers or tuition grants</li> <li>• Subsidized health-care markets under the Affordable Care Act</li> <li>• (Recently) The Home Mortgage Interest Deduction, 529 college savings accounts, and the Earned Income Tax Credit</li> <li>• Mortgage securitization through government-sponsored enterprise the Federal National Mortgage Association a.k.a. “Fannie Mae” (during the financial crisis)</li> </ul>	<p><b>Doubly Distanced</b>  <i>Complex, attenuated policy design. In communications, policymakers obscure state’s role in the provision of policy outputs</i></p> <ul style="list-style-type: none"> <li>• Tax credit scholarships and individual tax credits or deductions for private schooling expenses</li> <li>• Tax expenditures such as lifetime learning tax credits.</li> <li>• The exclusion of interest on owner-occupied mortgage subsidy bonds and of employer-provided defined benefit pension plans</li> <li>• Mortgage securitization through government-sponsored enterprise the Federal National Mortgage Association a.k.a. “Fannie Mae” (during “normal” times)</li> </ul>

*Board of Education* follow this *contested attenuated* pattern. The weakly attenuating political rhetoric belied their deeply attenuated design.

Conversely, many programs with a straightforward policy design, funded by public appropriation and featuring a relatively direct connection between state and

service providers, are obscure to the public because of a lack of high-quality political communication about the government's role in providing the policy benefit. These are the *distanced direct* policies in Table 2. Many policy programs fit into this category because political communication is often ineffective in explaining the government's role in producing policy outputs.

Christopher Faricy distinguishes the political ramifications of tax *deductions* and tax *credits*. Deductions subtract money for a specified activity from a taxpayer's gross income in determining their taxable income, either "below" or "above" the line, that is, computed alongside an individual's gross income or after itemization. Credits reduce an individual's tax liability and come in "nonrefundable" and "refundable" varieties; the latter offering checks even to individuals whose tax liability has been eliminated entirely. For Faricy, the distinction between deductions and credits is politically consequential because the former are regressive and the latter progressive. Hence Republican administrations favor deductions and Democrats favor credits (Faricy, 2016).

The distinction between deductions and credits is less consequential when it comes to the likelihood that a private school choice program will be overturned by court, however, because the regressiveness of the program does not bear upon its constitutionality (although it may bear upon its political acceptability). The key distinction in this paper is between *quasi-direct* and *contested-attenuated* vouchers and *doubly-distanced* tax expenditure-funded programs, which include both deductions and credits.

### *Hypothesis*

My core argument is that high-quality policy feedback from judicial decisions, ballot initiatives, and legislative proceedings helps elites construct a policy design and adopt a communications strategy most likely to achieve success. The *doubly distanced* policy form is most successful, so it has come to be adopted more frequently. Learning is a source of endogenous change.

*Hypothesis 1: The hidden state grows because policymakers have learned to combine attenuated policy design with attenuating rhetoric (doubly distanced policies).*

I do not suggest that deploying attenuating mechanisms is the sole cause of hidden state growth but it is a crucial one. Partisan control of government is strongly related to the passage of private school choice programs but partisanship arguments cannot explain why some Democratic legislatures support such policies while some Republican regimes eschew them. Market-based reforms to public services have become more common with the rise of New Public Management—the approach to public administration based on competitive contracting and private sector management styles popularized in the 1980s—but any explanation based upon a consumerist reform impulse cannot account for specific patterns of policy passage across states. Contracting out to third parties can save money, but not invariably. Policy

feedback accounts for citizens' weak knowledge of submerged policies and explains the uphill struggle facing reformers. Yet citizen knowledge is relatively extensive for private school choice policies, varies widely over time and with polling question wording, and cannot explain patterns of legal challenges. This paper asserts that attenuation spurs the passage and endurance of private school choice programs.

*Hypothesis 2: Doubly distanced policies (which combine attenuating rhetoric with attenuated delivery) are more likely to pass, and avoid or survive litigation.*

The reason attenuated governance explains the passage and endurance of private school choice programs is that it offers a legal cushion to policymakers seeking to create and protect their policy gains in legally sensitive areas. Where there is a danger of intensive contestation, attenuating the connection between government and policy outputs makes strategic sense, because court decisions frequently turn upon the extent to which the state is entangled with an unconstitutional purpose. Policy design and policymaker communications about the role of the state in delivering policy outputs are adduced in court to support or oppose program constitutionality. In the case of private school choice programs, I argue that judges are more likely to uphold doubly distanced programs because government is not (or at least does not *appear* to be) excessively entangled in politically contentious areas of race and religion.

I leave arguments about the actual entanglement of government with racially and religiously sensitive subjects to lawyers. This paper makes no claim about the merits of no-aid claims about private religious schooling or segregation academy cases. I simply observe that policymakers, litigants, and judges make, defend, and reject such claims. Attenuated policy design and rhetoric supports programs in court by furnishing an argument in favor of program constitutionality—that the government is *not* entangled with illegitimate purposes—which may persuade judges. Arguments and rationales affect legal decision making and outcomes (Collins, 2004, 2007; Spriggs & Wahlbeck, 1997).

Unlike Mettler's submerged state, the politics of attenuated governance does *not* hinge upon the general public's ignorance of its existence or scope. Judges are not duped by obscure delivery mechanisms. Doubly distanced policies are more likely to survive litigation because the intervention of private delivery mechanisms furnishes a persuasive argument in favor of their constitutionality. Supporters can more easily argue in court that the state is not entangled with an unconstitutional purpose.

*Hypothesis 3: The politics of doubly distanced policies is quieter and less polarizing than that of quasi-direct or contested-attenuated policies.*

The character of political debate is expected to vary according to the degree of attenuation of a policy on each dimension. The doubly distanced combination of attenuating rhetoric and attenuated policy design tends to produce the quietest

form of politics: muted public debate and limited public understanding about the program's nature, scope, and effects. By contrast, a quasi-direct policy—in which neither rhetoric nor policy delivery is deeply attenuated—is likely to produce loud politics: vigorous, polarized public debate. Distanced-direct and contested-attenuated policies are expected to lie between these extremes, with a much more polarized debate for contested-attenuated policies than for the more rhetorically attenuated distanced-direct policies.

*Hypothesis 4: Once a supportive legal precedent exists, policymakers can experiment with policy designs that are less attenuated without penalty.*

By hypotheses 1 and 2, policymakers grow the hidden state because of the insulating qualities of attenuated governance. Attenuated governance distances the state from politically polarizing policy outputs, insulating it from political and legal challenge. Once a supportive body of legal precedent exists, however, it may be possible to relax some of these safeguards without raising the prospect of legal catastrophe. If a body of case law establishes that a certain policy design attenuates the connection between government and politically contentious purposes, then the need for attenuating rhetoric lessens. This need may also diminish if public opinion shifts in a favorable direction. Remove the danger—entanglement with politically polarizing issues—and the incentive to engage in attenuation is diminished.

Sometimes the attenuation mechanism itself becomes politically contentious (e.g., contestation over the use of market mechanisms for the delivery of social policy). However, as Jane Gingrich's (2011) work *inter alia* has demonstrated, both Right and Left have incentives to create social policy marketplaces. I do not imply that all social policy marketplaces are *intended* by their creators to hide the state's role in providing certain benefits; market mechanisms are pursued for many reasons. Instead, I argue that (a) marketplaces do have that effect (attenuated design), and (b) at least some social policy marketplaces are used for the purpose of hiding the role of the state in supporting politically contentious policy outputs. Attenuation can occur through many channels, of which social policy marketplaces are one.

The third part of this paper deploys the two dimensions of attenuated governance—*attenuating rhetoric* and *attenuated policy design*—to explain the passage and endurance of private school choice programs. At root, the success of these policies can be explained in terms of the strategic imperatives for policymakers. Policymakers learn that combining attenuated rhetoric and policy design into the *doubly distanced* tax credit form offers legal and political advantages, systematically reducing the chance of challenge. This part proceeds in four chronological sections corresponding to stages of private school choice development from the 1950s to date: segregation grants, regular vouchers, tax credit scholarships, and education savings accounts (ESAs).

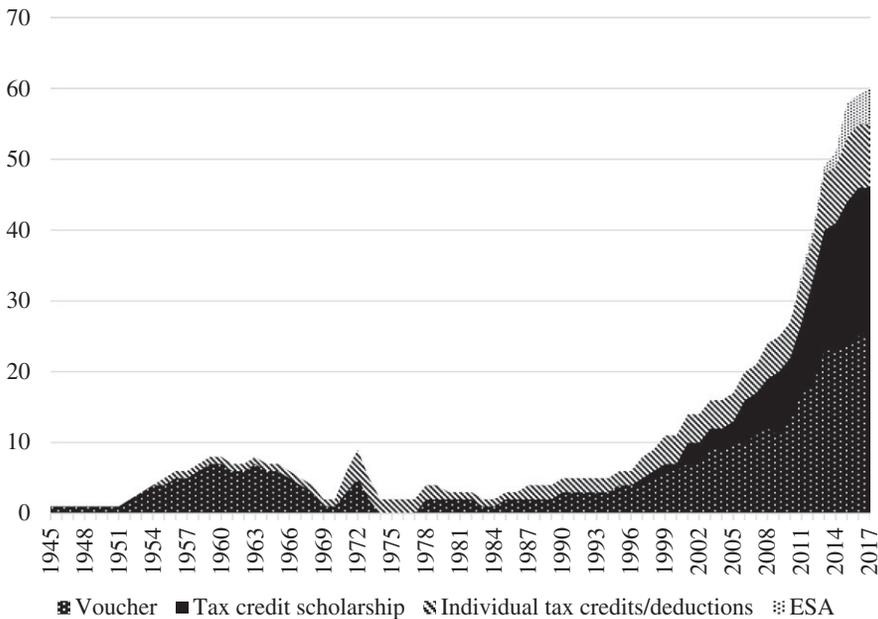
### Part III: Explaining Hidden State Growth

#### *Contested Attenuated Tuition Grants in the era of Brown*

The passage of many private school choice programs has been recent and explosive (Figure 1). Some of the earliest private school voucher programs in Figure 1 were established by southern legislatures between 1953 and 1964 in response to the threat of public school desegregation, in Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia (Bonastia, 2012; Carr, 2012; Hackett & King, forthcoming; Wolters, 1984).<sup>5</sup> In the public school desegregation case *Brown v Board of Education* (1954) southern elites saw an existential threat to the racial hierarchies that had underpinned their dominance. “At a minimum, the federal courts could no longer be counted on to defer reflexively to states’ rights arguments. ... States’ rights, in effect, were yielding in pre-eminence to individual rights” (MacLean, 2017, p. xiv). White elites in the south diverted millions of dollars of public funds into “tuition grants” for parents to send their children to private segregated academies.

Segregation grants soon ran into difficulties. The NAACP and its allies litigated the programs in state and federal court (Bonastia, 2012; Catsam, 2009; Muse, 1961). Virginia alone faced four successful lawsuits in the space of a decade. For policy-makers keen to safeguard the segregation grants from court challenge, defending the programs against lawsuits necessitated an attenuated policy design.

The key to insulating segregation grants from legal challenge was to avoid granting public money directly to segregated schools. States attempted to camouflage the connection between government and segregated academies by funding



**Figure 1.** The Rise of Vouchers—Cumulative Total of Voucher Programs in the United States, 1945–2017. Sources: EdChoice ([www.edchoice.org](http://www.edchoice.org)), National Conference of State Legislatures ([www.ncsl.org](http://www.ncsl.org)).

parents and not schools directly. A crucial legal rationale, known as “child benefit theory,” rendered the program constitutional by benefiting child rather than school (Rogers, 1929). Even if the school ultimately banked the money and thereby benefited “incidentally,” the benefit to the student was the statute’s primary purpose. The connection between state and segregated school was attenuated.

Some states went further in attenuating the state-segregation academy connection through strategic policy design. Louisiana, for example, created an arm’s-length institution, the “education expense grant fund,” to channel public money to parents. In 1962 it established another quasi-private agency to administer tuition grants: the “Louisiana Finance Assistance Commission.” In Arkansas, Governor Orville Faubus assisted the Little Rock Private School Corporation, a private organization, in purchasing private buildings with public funds to operate a school (Associated Press, 1958; Verney & Sartain, 2009). Alabama Governor George Wallace made similar use of “private school foundations” (Rives, Grooms, & Johnson, 1964). Utilizing private buildings and arm’s-length intermediaries, segregationists attempted to insulate their programs from legal challenge.

This effort to attenuate the relationship between state and segregated school was deliberate and calculated. State Senator E. W. Gravolet, Jr., who was Senate Floor leader for the passage of tuition grant legislation in Louisiana, vice-chairman of the Joint Legislature Committee on Segregation, and Chairman of the Financial Assistance Commission from its inception, stated in 1962:

It was primarily because of that federal court decision [*Hall v. St. Helena Parish School Board*] combined with the one in Virginia [*Harrison v Day*] that the Louisiana Legislature took away the administration of the tuition grants from the State Board of Education and the local school boards and created a new commission to disburse the tuition grants directly to the child, following the constitutional theory that grants directly to the child by the states were legal. (Wisdom, 1968)

Gravolet admitted that he and his colleagues deliberately utilized an attenuated policy delivery in order to forestall legal challenge to segregation grants. By attenuating the connection between state and school through the use of private intermediary organizations, segregationists hoped to avoid legal confrontation.

Policymakers calculated that using an attenuated governance arrangement would help achieve white supremacist ends by indirect, less legally vulnerable, means than massive resistance. James Buchanan, the public choice scholar and voucher proponent, helped conduct a multi-year study of Virginia’s tuition grant system for the Virginia Commission on Constitutional Government, the body created by the Virginia General Assembly in 1958 to defend its school policies. As Nancy MacLean relates, “the study reported the private school subsidies to be a great success and, indeed, *a model for evading government control*” (2017, p. 83, italics added).

The problem for the segregationists was that this attenuated *policy design* was not accompanied by attenuating *rhetoric*. Policymakers were unwilling or unable

to obfuscate their racist purposes by communicating obliquely. There were some limited exceptions: Virginia relabeled its tuition grants “scholarships” in 1959 and in 1969 Mississippi re-christened its grants “loans” (Bolton, 2005, p. 175; Bonastia, 2012, p. 96; Muse, 1961, p. 134).<sup>6</sup> Many referred to vouchers as part of “freedom of association” plans and some sought to excise mention of race in tuition grant legislation.

Mostly, however, legislators were open about their segregationist purposes and the state’s role in sustaining Jim Crow through vouchers. Establishing the Gray Commission to consider tuition grants, Virginian Governor Stanley declared: “I shall use every legal means at my command to continue segregated schools in Virginia” (Muse, 1961, p. 7). Louisianan segregation leader Representative Wellborn Jack was explicit about the purpose of the grants: “It gives the people an opportunity to help fight to keep the schools segregated. . . . This is just to recruit more people to keep our schools segregated, and we’re going to do it in spite of the federal government, the brainwashers and the Communists” (Wisdom, 1961).

In his Executive Orders of September 2 and 9, 1963 Governor Wallace referred to the “unwarranted integration” being forced by the federal court (Rives et al., 1964). Representative Risley C. Triche of Assumption Parish, Louisiana, argued in the Louisianan House of Representatives in December 1960 that the grant-in-aid system was the most effective weapon against the integration of public schools (Peltason, 1971, pp. 228–29). The policy design might have been attenuated, but its associated rhetoric was not.

Judges deciding the fate of tuition grant vouchers remarked upon this disjuncture between attenuated policy design and (lack of) attenuating rhetoric. The U.S. district judges in *Hall v St Helena*, a 1961 challenge to Louisiana’s tuition grants, noted: “The sponsors of this legislation, in their public statements, if not in the Act itself, have spelled out its real purpose” (Wisdom, 1961). Similarly, Governor Wallace’s revealing rhetoric about his opposition to “unwarranted integration” was cited by his opponents in subsequent voucher litigation (Rives et al., 1964). The District Court for the Eastern District of Louisiana overturned vouchers on the grounds that the legislature was trying to evade *Brown*: “Open legislative defiance of desegregation orders shifted to subtle forms of circumvention although some prominent sponsors of grant-in-aid legislation have been less than subtle in their public expression. But the changes in means reflect no change in legislative ends” (Wisdom, 1968).

These *contested attenuated* policies—in which policy design, but not political communications, attenuated the connection between state and school—proved legally vulnerable because the state’s purposes were easily exposed. If policymakers had been more adept at concealing their purposes they may have found their programs’ legal defense easier. By 1970 all segregation tuition grants had been struck down as unconstitutional.

### *Quasi-Direct Vouchers and the Church–State Question*

After the demise of segregation grants it took time for vouchers to re-emerge (Figure 1). When they did, they took a *quasi-direct* rather than a *contested attenuated*

approach, attenuating the programs' design, and communications only weakly (Table 2). These policies could be more visible because they were not directed to segregationist ends and drew bipartisan support. There was no perceived need to obscure policymakers' purposes when vouchers were available to all qualifying students rather than whites alone.

Unlike segregation grants, new voucher programs in Milwaukee, Wisconsin (1990) and Cleveland, Ohio (1995) were specifically aimed at remedying racial disadvantage, available to low-income students, and schools were required to abide by nondiscrimination regulations. However they faced new forms of challenge. The overwhelming majority of the vouchers (96 percent in the Ohioan case) were spent at religious schools. For opponents, voucher programs violated the separation of church and state (enshrined in 40 state "Blaine Amendments"<sup>7</sup> and the First Amendment) by unconstitutionally aiding religious institutions (Hackett, 2014). "Child benefit theory" and attenuated policy design could help here: by funding the individual consumer and not the school directly, the state could avoid legal confrontation (Hackett, 2017).

This attenuated program design offered some protection to vouchers, most famously in the 2001 Supreme Court case *Zelman v Simmons-Harris*. But vouchers remained *quasi-direct* in both design and communication. No arm's-length agencies directed public funds to voucher-using parents. No private organizations administered the programs. Legislatures appropriated money directly.

Not only was the design weakly attenuated but there was a vigorous public debate about the government's role in providing such benefits. Voters rejected vouchers in referenda in Maryland (1972), Michigan (1978), Colorado (1992), California (1993), and Washington (1996).<sup>8</sup> Florida's 1998 Constitutional Revision Commission proceedings featured multiple anti-voucher interventions (Florida Constitution Revision Commission, 1997). Opposition to vouchers during a 2007 Utah referendum focused upon the argument that vouchers would "take resources from the public schools." The opposition prevailed, with 62 percent of the vote (Bolick, 2008). This was loud politics. Vouchers had become a matter of nationwide public debate (hypothesis 3).

Judges noted that policymakers were open about the government's role in providing voucher benefits: they used direct, de-attenuating rhetoric. The Court's reasoning in *Sloan v Lemon* is typical in exposing policymakers' intent: "The State has singled out a class of its citizens for a special economic benefit ... at bottom its intended consequence is to preserve and support religion-oriented institutions" (Powell, 1973). Of the 15 private school choice cases heard between the demise of the segregation vouchers and the start of the Obama presidency, 11 resulted in the voucher program being judged unconstitutional. Just four, including *Zelman*, upheld vouchers.<sup>9</sup>

Like the segregationists before them, authors of vouchers were typically open about their purposes. For example, in floor debate during consideration of Nebraska's tuition voucher bill, State Senator Terry Carpenter argued in favor of vouchers on the grounds that "if we don't do something for these private schools, they're going to have to close the doors ..." Introducing the voucher bill, Senator E. Thome Johnson argued that his program would increase the student numbers

for private schools. Senator Harold Moylan stated: “Now it’s not only a thing of keeping these colleges alive, it’s the case of financial assessts (*sic.*) to the state” (Spencer, 1974).

These public utterances were cited by courts striking down voucher programs. The weakly attenuating rhetoric of these voucher programs became, once again, legally significant. By exposing the intention of the bill’s authors to aid private schools, the courts found the statute to be: “a patent attempt to sanction by indirection that which the Constitution forbids” (Spencer, 1974).

Both *contested attenuated* and *quasi-direct* vouchers were attacked on the grounds that they entangled the state with some illegitimate purpose (segregation and religious school funding, respectively). This entanglement could be evidenced in court not only in program design but also in communications by policymakers about the government’s role in providing a policy benefit. Making the hidden state “visible” on either dimension seemed risky. When Republicans gained control of an unprecedented number of state legislatures after 2010, they and their allies switched tack.

### *Doubly Distanced Tax Credits in an Era of Republican Dominance*

As judicial decisions and referendum results provided high-quality feedback, private school choice proponents learned more about the route to success. Failure of voter referenda during the 1990s and early 2000s prompted a switch to state legislatures rather than direct balloting. Quieting the politics of private school choice drew it closer to the classic “submerged state” politics described by Mettler, Howard, and others (Bedrick, Butcher, & Bolick, 2016).

The new tax credit scholarship, a policy form that grew in popularity during this period, is deeply attenuated in both design and communications. These *doubly distanced* programs are funded by tax credits for donations to third-party “scholarship tuitioning organizations” which administer the payments to parents. The rapid growth of private school choice programs after 2010 involved the spread of the tax credit form (Figure 1).

Although regular vouchers continued to pass, the majority of programs after 2010 took a tax credit form (hypothesis 1). Why? Policymakers learned that doubly distanced policies—combining attenuating rhetoric with attenuated policy delivery—were better insulated from constitutional challenge (hypothesis 2). “Supporters feel it [passage of a tax credit scholarship] may be easier than enacting vouchers that are issued by the government ...” (Associated Press, 2011).

To examine policymaker motivations (hypothesis 2) I interviewed 30 policymakers and advocates in neighboring states: Illinois and Missouri. Illinois passed a tax credit program in 2017 while Missouri has repeatedly, narrowly, failed to pass such a bill. Both states have strong “Blaine Amendments” in their constitutions, a similar-sized tax burden and an unusually localized system of education financing (National Center for Education Statistics, 2015). In both states, *quasi-direct* voucher bills—weakly attenuated on both rhetorical and policy design dimensions—were considered and rejected in recent years.

Open-ended questioning<sup>10</sup> reveals that policymakers choose attenuated designs deliberately to avoid challenges. For example, the Illinois sponsors of tax credit legislation passed in 2017 chose the more attenuated form rather than a regular voucher “because the voucher design undoubtedly would be unconstitutional in Illinois” (Manar, 2018). “It was the Speaker’s view and leadership’s view that this was a more palatable way of doing it” (Guzzardi, 2018). “A voucher program would have been too far. It wouldn’t have passed” (Koehler, 2018).

Efforts to pass private school choice in Missouri also took a tax credit form because, in the words of its supporters:

It’s our opinion that in order to be constitutional and not potentially lose this in a court situation, that we need to keep the money outside of the state budget and the only way we know to do that is with tax credits. And that has been adjudicated before and the courts have recognized that if the money never enters the state coffers then it’s never state dollars and therefore it doesn’t become subject to the Blaine Amendment and so that’s the reason we’re ... working at it from the tax credit side. (Emery, 2018)

Missouri has a particularly tough [constitutional prohibition], so that’s why we have to bypass, we can’t give money from general revenue, because if they are using it at a Catholic school then that’s forbidden. So, doing it this way the money never hits general revenue. You decide who’s going to collect it, usually 501(c) groups are the ones that oversee it and they hand out these scholarships. (Roeber, 2018)

Advocates also press the advantages of doubly distanced policies. For Cardinal Blaise Cupich, who worked with legislators in support of the Illinois tax credit scholarship in 2017, the program took an attenuated form because:

We wanted to do something that would not be challenged by those who say that public funds cannot go to sectarian organizations or religious organizations. Many states have the Blaine Amendment which does not allow that kind of funding for religious schools. What this piece of legislation does is it ... the money doesn’t go directly to the schools.

Attenuating the connection between citizen-consumer and the state helps policymakers increase the chances of program passage. Even opponents of such legislation recognize the success of these tactics.

They thought that it made it a little bit more distant from the wording in the Constitution. I think that’s why they did it that way ... They said they thought it really wasn’t using tax payer dollars for private education. (State Representative Morgan)

Awareness of success in other states pushed policymakers to deploy doubly distanced policies.

They really did think this was a way that they could do it that was not going to raise huge constitutional questions. And they had some evidence for that because there had been some court testing of some of these other programs and the courts had said it's okay because you're not funding the program directly. (State Majority Leader Flynn Currie, 2018)

The recent passage of tax credit scholarships can be attributed to Republican victories in 2010 and learning about successful repulsion of court challenge in other states. Wary of legal challenges or voter push-back, legislators increasingly craft *doubly distanced* programs (hypothesis 1).

More attenuated forms of private school choice are indeed subject to fewer legal challenges, and are more likely to survive challenges brought, than less attenuated policy designs (Figure 2).

Fewer than 3 in 10 tax credit programs have been taken to court, whereas the average voucher program is *more likely than not* to be challenged in court. Just 43 percent of voucher challenges resulted in the program being upheld as constitutional, but two-thirds of tax credit challenges had that outcome (Figure 2).

“Where assistance to religious institutions is indirect and attenuated, that is, private individuals choose where the funds will go, the Justices have generally been reluctant to find a constitutional impediment” (Zlaket, 1999). The U.S. Supreme Court’s reasoning in *Mueller v Allen* (1983) is an early example of this reasoning: “The Establishment Clause’s historic purposes do not encompass the sort of attenuated financial benefit that eventually flows to parochial schools from the neutrally available tax benefit at issue” (Rehnquist, 1983).

Drawing upon the universe of judicial votes in 45 private school choice cases (1955–2017), and 231 individual votes, I examine the vulnerability of these programs

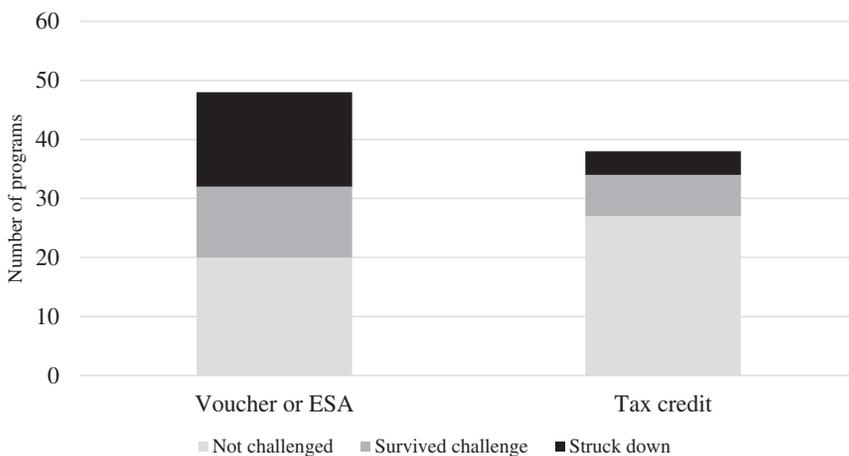


Figure 2. Challenge and Survival Rates by Voucher Program Type, 1955–2017.

by recording each judge's decision about the constitutionality of the private school choice program at issue. An opinion or concurrence upholding private school choice, or a dissent from a decision striking down a program, is coded 1 (supportive of private school choice); an opinion or concurrence striking down private school choice, or a dissent from a decision upholding a program, is coded 0 (opposed to private school choice). Table 3 displays the logistic regression results, with robust standard errors clustered by court.<sup>11</sup>

Tax credit scholarships are statistically significantly more likely to be upheld as constitutional than regular vouchers (hypothesis 2). In other words, the more attenuated the connection between state and service, the more likely the program will be upheld as constitutional. Partisanship matters too. In his investigation of the partisan politics of tax expenditures, Christopher Faricy (2015, 2016) finds that—contrary to received wisdom that Republicans are the party of small government—Republican administrations enthusiastically grow the welfare state through tax expenditures. Table 3 bears out this finding: a judge's partisan affiliation is strongly predictive of his or her vote on the constitutionality of private school choice programs. Republican judges are statistically significantly more likely than Democratic judges to vote to uphold a private school choice program.

This finding is consistent with the discovery that it is Republican legislators who produce higher ratios of indirect to direct social spending (Faricy, 2011). As Monica Prasad (2016) astutely points out, "this is at odds with other scholars' emphasis on bipartisan support for tax expenditures, or on Democrats' wishes to respond to demands for more government in politically palatable ways, or on the role of organized labor." But even controlling for partisanship, deeply attenuated policy designs are more likely to be upheld. While Republicans are more sympathetic to school choice programs than Democrats, all judges are susceptible to arguments for program constitutionality that are rooted in facts about program design and communications. A program that attenuates the connection between state and an unconstitutional purpose can plausibly be said to avoid government entanglement with that purpose.

**Table 3.** Individual Judicial Opinions, Dissents, and Concurrences in Voucher Cases, 1955–2017.

Partisan affiliation (Republican)	1.068*** (0.358)
Sex (Male)	0.325 (0.356)
Race (White)	0.748* (0.448)
Year of challenge	0.083*** (0.015)
No Aid Provision strength	0.013 (0.103)
<i>Policy attenuation (Deeply attenuated)</i>	1.081** (0.478)
Region	
Northeast	0.253 (0.857)
Midwest	0.982** (0.489)
West	-1.176** (0.548)
Constant	-168.166*** (30.256)

$N = 231$ ; Pseudo  $R^2 = 0.304$ . Logistic regression with robust standard errors clustered by court.

\* $p < 0.1$ ; \*\* $p < 0.05$ ; \*\*\* $p < 0.01$ .

Judges frequently acknowledge the importance of attenuated policy design in their opinions. The Arizonan Supreme Court's determination in *Kotterman v Killian* (1999) is typical:

The state does not involve itself in the distribution of funds or in monitoring their application. Its role is entirely passive. Taxpayers who choose to participate may deduct the amount of an STO contribution on their tax returns. The STO operates free of government interference beyond ensuring that it qualifies for §501(c)(3) tax exempt status and complies with state requirements. *Any perceived state connection to private religious schools is indirect and attenuated.* (Zlaket, 1999, italics added)

By attenuating the connection between state and ultimate beneficiary, tax credit scholarships become legally stronger.

Scholars have shown that the low "traceability" of tax expenditures—tax breaks are not typically seen as equivalent to spending—makes the public more supportive of such expenditures than if they had full information about costs (Haselswerdt & Bartels, 2015). But judges do *not* lack information about the costs and benefits of such programs. As Christopher Faricy and Christopher Howard have separately pointed out, "policymakers certainly have no trouble understanding the concept of tax expenditures," and "there is no confusion among policymakers in Washington D.C.—tax breaks are just government spending by another name and a major component of the American social welfare state" (Faricy, 2015, p. 5; Howard, 1997, p. 4).

The general public's relative lack of information about attenuated policies does not affect judicial decisions as to the constitutionality of such programs because these decisions take place in the informationally rich environment of the courts. Policymakers do not need to distance themselves from policy outputs because they fear *electoral* repercussions, but because they fear *legal* repercussions from highly engaged organized interests and hostile judges. By distancing the government from politically contentious policy goals, attenuation affects judicial decision making by providing a legal rationale for the constitutionality of private school choice programs that is embodied in precedent.

Tax credit scholarships are not only *attenuated by design* but also subject to attenuating *rhetoric*: politicians emphasize the role of private market actors and downplay the role of the state in the provision of benefits to private schools. "We needed to get the focus off of the schools, our schools or any school, and onto the kids and what they needed" (Wichmann, 2018). Attenuating the connection between state and school makes it easier to argue in court that the state is not entangled with religion, and that judges should therefore uphold the program as constitutional.

Part of this attenuation process involves careful decisions about labeling. For example, during a "low-key" 2011 Oklahoman legislative debate the sponsor of a successful tax credit bill said his program was not "a voucher system" but rather "a scholarship program allowing individuals and businesses to support a program that would create scholarship funds to give children attending schools that are failing an option to access better schools, including private institutions" (McGuigan & Martin, 2011).

The substitution of the term “scholarships” for “vouchers” extends to states such as Louisiana, where public debate over the 2008 tax credit bill was “relatively muted” (Barrow, 2008; Carr, 2009). The rhetorical attenuation of the connection between state and services is a matter of strategy: avoiding the politically loaded “voucher” label reduces the degree of controversy such policies engender because public opinion varies with survey question wording (McMurray, 2003; Newport & Carroll, 2001; Ray, 2004).

For tax credit scholarship advocates, “it’s mostly framing” (Wichmann, 2018). “That’s almost a dirty word! [‘Voucher’] is a dirty word” (Roeber, 2018). Voucher and tax credit scholarships achieve the same goal but the tax credit is more politically palatable.

These words take on these meanings and get just visceral reactions from people and “vouchers” is one of those words and so you gotta get away from that. And is the policy better? I don’t necessarily think so but it’s a way to achieve a goal, a similar goal yeah. (Wichmann, 2018)

[Durkin] You are saying it’s not a voucher but what it is, it’s a tax credit against donations.

[Reick] It’s a backdoor voucher.

[Durkin] It is, it’s a backdoor voucher. (Durkin & Reick, 2018)

Proponents employ an attenuating rhetoric because the “voucher” label implies too close a relationship between state and private school.

Obviously, the word “voucher” is a great buzz word to kill any school choice measure. I have sponsored education state account, tax credit scholarship bills in the past. I’ve filed one this year which has gone absolutely nowhere. But the word voucher is used because there’s like: “well you’re taking our tax dollars and you’re giving it to this evil organization that’s not us.” (Bahr, 2018)

Tax credit scholarship supporters de-emphasize the role of public money in supporting the markets of the hidden state. For instance, the executive director of the pro-tax credit group Cornerstone Action argued that New Hampshire’s 2012 program is: “not derived from taxpayer funds and is, in fact, a charitable program working to the benefit of our most vulnerable families in the Granite State” (Leubsdorf, 2013).

Sponsors of tax credit legislation typically confine themselves to the themes of parental choice, equal opportunities, and charitable giving. Unlike the originators of contested attenuated or quasi-direct vouchers of the twentieth century, they do not mention the benefits for the private schools (Burnett, 2018; Guzzardi, 2018; Manar, 2018). Instead they emphasize the role of private actors interceding between state and school (Schupp, 2018). A typical example is Senator Bill Stanley’s editorial

justification for his 2012 Virginian tax credit legislation: “The school choice law encourages private contributions from both businesses and individuals to approved not-for-profit scholarship organizations, giving business and individual taxpayers limited credits against their Virginia income taxes” (Stanley, 2012).

For Cardinal Cupich, “this was an argument *not* to keep our Catholic schools open, not to fund religious education, but to give parents ... an opportunity to ... [choose] where they’re going to go to school. I think that turned some people to look at this differently.”

The *doubly distanced* nature of tax credit scholarships—the combination of attenuated delivery and attenuating rhetoric—provides political and legal stability. Service providers feel they can “count on the credits for years to come because they are less controversial.” According to Mike Lindell, chief of the Sagamore Institute scholarship granting organization: “Everyone believes tax credits are fairly stable and here to stay. That’s not the case with vouchers” (Wall, 2012).

Doubly distanced tax credit policies have a further advantage over their *quasi-direct* cousins: not only are they passed through legislation rather than the loud scrutiny of ballot initiatives, but their tax credit nature allows sponsors of such bills to select among several legislative routes (State Representative Morgan). Many scholars point out the policy advantages of tax expenditures over traditional programs, such as the avoidance of veto points and contentious committee politics (Hacker, 2002; Morgan & Campbell, 2011). A Republican Senator in Missouri describes his strategic efforts to enact a private school choice program by utilizing taxation, rather than education committees.

I was able to pass it through the House by not going through Education, but since it was a tax credits scholarship program, I went through Ways and Means, and the Ways and Means Committee was much more favorable towards it. And so that’s how I went around that way, and then I was able to pass it through the House, but then it went to the Education Committee where it died in the Senate [*laughter*]. (Koenig, 2018)

By placing the tax credit scholarship bill with the powerful taxation committee rather than with Education, proponents of private school choice may hope to bypass the contentious politics of private schooling. Jacob Hacker observes that the politics of tax breaks is less contentious than direct social welfare policies. “Public programs typically have clear origins stories ... Private social benefits and the tax breaks for them tend to have more diverse and less noticeable paths to creation (Hacker, 2016, p. 780).

In Illinois the major tax credit scholarship program enacted in 2017 did not receive any committee hearings but was attached to a school funding overhaul at a later stage in the legislative process (Manar, 2018; McConchie, 2018; Sharkey, 2018). Even its Republican supporters were taken by surprised. “It came out of whole cloth and ... we are looking at each other like where the hell did that come from?” (Durkin & Reick, 2018). A Democratic State Senator criticized the low-profile of the tax credit scholarship design process.

This was the first time the State of Illinois has put public dollars into private schools and we had no discussion on it. It went to the House, I think on Monday morning, and came to the Senate on the Tuesday. There were no hearings, there was nothing. It was a deal that the governor had made with folks on the bill and I just said “It’s wrong,” you know, for us to make a major policy change without having public debate and public input. (Koehler, 2018)

The process by which this tax credit scholarship became law was much quieter (and ultimately more successful) than the messy voucher ballot initiatives of the 1990s.

### *Distanced-Direct ESAs and Beyond*

As private school choice supporters seek to build upon their startling recent successes (Figure 1), they draw upon considerable accumulated learning about the most successful political strategies. The newest form of private school choice program, first passed in 2011, comprise the “education savings account” (ESA) programs. These programs offer a sum of public money to parents to spend on educational services, including private school tuition. ESAs are similar to other individual savings accounts—for health expenses, college savings, and pensions—insofar as they are typically introduced by conservatives and emphasize personal responsibility over public programs (Faricy, 2015).

Unlike *doubly distanced* tax credit scholarships, most ESAs are *distanced-direct*: the policy design employs few additional mechanisms of attenuation beyond the parent citizen-consumer. There is no tax expenditure or arm’s-length administrative office. But ESAs are typically presented in a rhetorically attenuated fashion by their supporters, emphasizing the private market and downplaying the role of the state.

One aspect of this rhetorical attenuation is an emphasis on the broad range of educational services included within ESA coverage (Koenig, 2018). Although private school tuition forms the largest expenditure, parents also use ESA funds for other educational purposes (Butcher & Burke, 2016). Clint Bolick, attorney for the pro-voucher Goldwater Institute argues that “what makes the legislation legal is that parents need not spend it on private or parochial schools. Instead, they can use it to get tutors or online education for their students who do not attend public schools, and even buy certain specific services directly from public schools” (Fischer, 2013a). Emphasizing alternative uses for ESAs helps reduce the focus on the state’s private tuition payment.

Rhetorically accentuating the role of private interests has legal benefits. When considering the constitutionality of the Nevadan ESA, the state Supreme Court found the program to be constitutionally acceptable because the “public” funds could be considered “private.” “Once the public funds are deposited into an education savings account, the funds are no longer “public funds” but are instead the private funds of the individual parent who established the account” (Hardesty, 2016).

Similarly the Arizonan Supreme Court found its state ESA constitutional on the grounds that “Any aid to religious schools would be the result of the genuine and independent private choice of parents” (Corella, 2013).

Sponsors of recent ESA legislation acknowledge the importance of learning about successful legal strategies elsewhere:

So we have learned what other states have done successfully in this area, learned that ESA is the newer up and coming way, especially because ESAs are immune to the Blaine Amendment problem and Missouri has a very strongly written Blaine Amendment. So that’s one of the reasons why ... I focus on ESAs. (Bahr, 2018)

For modern private school choice advocates, the *distanced-direct* rhetorical attenuation approach is common. Of the 12 pieces of model legislation the American Legislative Exchange Council (ALEC)<sup>12</sup> publishes for private school choice, just three employ a complex tax credit policy design. Nine are regular vouchers or ESAs. But the language that the bills use makes no mention of “vouchers,” using instead the “scholarship” terminology.<sup>13</sup>

As yet there has been no wholesale switch to ESAs. Tax credit and regular voucher programs continue to pass state legislatures. Doubly distanced programs retain advantages over their more visible voucher cousins. But the broadening of private school choice advocates’ approach to include *distanced-direct* programs such as ESAs might signify greater confidence in the capacity of rhetorical attenuation alone to insulate such programs from attack (hypothesis 4).

Private school choice is becoming more politically acceptable, particularly for Republicans; all of the 2016 Republican presidential candidates stated publicly that they support school voucher programs. As judges become more sympathetic to private school choice, thereby establishing a supportive body of case law, it may no longer be necessary to employ complex hidden mechanisms of tax credits in every instance. Communications are key. Both segregationists and later voucher supporters found—to their cost—that the way policymakers speak about their role in providing benefits has political and legal significance.

### Conclusion

Why does the hidden state grow? Because it serves at least three purposes for policymakers: increasing the likelihood of legislation passage, decreasing the chances of successful challenge, and enabling policymakers to pursue a variety of other goals under the banner of consumer choice. As private school choice supporters become more adept at achieving their purposes, modifying their tactics in response to setbacks, such as court challenges and referendum rebuff, they switch to attenuated governance.

The use of distancing policy designs and communications strategies confirms the truth of Theodore Lowi’s observation: “The typical American politician displaces and defers and delegates conflict where possible; he squarely faces conflict

only when he must" (1969, p. 76). Policymakers try to avoid conflict, particularly conflicts they expect to lose, by attenuating the connections between government and its contested, politically vulnerable policy goals.

Understanding the rise of the hidden state requires us to consider the forms attenuation takes. Private school choice programs have directed toward a variety of purposes over the past 70 years. The earliest vouchers in the South were *contested attenuated* segregation tuition grants, established in opposition to desegregation (Hackett & King, forthcoming). Attempting to accomplish indirectly what they could not do directly, such programs were struck down because their racist purposes were easily exposed. Their successors, *quasi-direct* regular voucher programs of the 1990s and 2000s, received court approval in 2001 but suffered voter-led set-backs.

The slow growth in partially attenuated vouchers helped spur a strategic shift among private school choice advocates. Instead of subjecting the proposed legislation to the public scrutiny of the referendum, advocates switched to a quieter legislative route. Increasingly they also turned to a more attenuated form of design, the *doubly distanced* tax credit.

Receiving Supreme Court endorsement in 2010, in conjunction with Republican gains across the nation, these doubly attenuated forms achieved rapid success. More recently, policymakers experimented with a new breed of *distanced direct* policies—education savings accounts—which do not require legislators to establish such a convoluted program design as that of tax credit scholarships, but which also hope to avoid the anti-voucher scrutiny by softening their rhetoric and emphasizing individual choice. *Distanced direct* policies combine attenuating rhetoric with a less attenuated policy design.

By privatizing policy administration, funding programs through tax expenditures and complicating lines of accountability, elites protect themselves from blame. Many scholars of the submerged state argue that such blame-avoidance muddies channels of accountability and that the solution is to make policy visible: providing citizens more and better information to help them make informed decisions (Mettler, 2009).

However, it is not only through *de-attenuating* policy mechanisms and purposes that ordinary citizens can become aware of the significance of doubly distanced policies. This paper began with the puzzle that attenuated policies seem politically unattractive, despite documented uptake, and growth, because they apparently prevent policymakers from claiming credit for policy successes. In fact, the credit-claiming problem is exaggerated. Politicians actually do take credit for attenuated policy delivery when communicating the policy benefits to its particular constituency, that is, to their issue public. When they do this successfully—unlike the visibly racist appeals of southern white supremacists—they utilize language and terms that appeal to relevant voters. Private school choice proponents typically pitch their policies to conservatives in terms of empowerment, choice, and quality education. "We need to empower [parents] to make the best choices possible" (Wichmann, 2018); "It's about evening the playing field" (Cupich, 2018); "We're going to take those kids and give them school choice" (Koenig, 2018).

Their opponents acknowledge the power of these appeals. “I think publicly their primary argument was probably around the kids, right, because that’s everyone’s first argument” (Guzzardi, 2018). Telling conservatives that a policy “expands choice” or “empowers parents” would not alarm a court, but enables policymakers to take credit for the policy in microtargeted ways. Coded, attenuating rhetoric has a dual function: strengthening the program legally even while allowing policymakers to take credit from relevant constituencies.

The case of private school choice underlines the fact that there is both a linguistic and a policy design dimension to the “submerged” or hidden state, a dimensionality obscured in the literature. For Suzanne Mettler, “There is nothing intrinsically remote about such policies; rather, policymakers could reveal how they operate to the public by providing clear, simple, and straightforward information” (2009, p. 67). The two dimensions of attenuated governance imply this statement is conditionally true. Deeply attenuated policies have advantages over their weakly attenuated counterparts, but rhetoric that seeks to weaken the state-service connection also played a part in the defense and expansion of the hidden state.

Attenuating policy design seems to present problems of *control*: principal-agent problems arise as the distance between funder and funded becomes more attenuated. Attenuating rhetoric seems to present problems of *credit-claiming*: it is more challenging to claim credit for policy successes where the role of the state in the provision of a benefit is verbally obscured. Yet attenuating policy design and rhetoric can both be strategically rewarding for policymakers because they insulate such programs from challenge and enable policymakers to achieve the same ends through oblique, coded means.

Some policies may be more suited to attenuation than others, presenting a hierarchy of strategic possibilities to policymakers. Certain forms of threat—such as the threat of legal action—may be particularly susceptible to attenuation because of the significance of the direct-indirect funding distinction. It may be easier to engage in attenuating rhetoric in more technical policy areas, not experienced directly by the public. But this paper demonstrates that even in education—a high salience policy arena—policymakers find it politically rewarding to attenuate. The strategic advantages of attenuated governance sustain the hidden state.

**Ursula Hackett** is lecturer (assistant professor) in politics at Royal Holloway, University of London, and a British Academy Postdoctoral Fellow. Her research focuses on American political development, federalism, public policymaking, education, and religion and politics.

## Notes

1. Although not always. Christopher Faricy (2015) shows some tax credit programs, particularly refundable credits, benefit the working poor.
2. With *attenuating rhetoric*, a speaker disclaims state responsibility, often attributing policy outputs to somebody else: a private organization, individual service users or some other actor. The opposite,

*direct rhetoric*, involves the government taking direct responsibility for policy goals or outputs. Distinguishing attenuating and direct rhetoric is necessarily a qualitative endeavor because meaning is highly contextual. But judges pay close attention to the distinction. Table A1 in the supporting information appendix provides an extensive list of attenuating and direct policymaker statements cited by judges in voucher cases.

3. Deeply attenuated programs are tax expenditures, rebates and credits, and policies delivered by third parties with more than one private organization interceding between the state and policy outputs; weakly attenuated ones are quasi-direct contractual arrangements between the state and private providers. For a full account of the coding procedure used to distinguish deeply and weakly attenuated programs, see Hackett (2017).
4. These programs are united by the fact that they fund private tuition for K–12 students. They differ in program design, delivery, and communications, and this paper demonstrates that these differences are politically and legally significant. Many school choice experts draw a sharp distinction between these policies. The distinction between tax expenditures—both deductions and credits—and regular “vouchers” is politicized, as the third section of this paper demonstrates.
5. Since the nineteenth-century there had also existed two “town tuitioning” programs in rural counties of Maine and Vermont, allowing students without access to public education to receive a private education at the public expense.
6. The “loan” label was a mere fig leaf to conceal the state’s involvement in the subsidy of segregated institutions, since recipients were not required to pay the money back.
7. “Blaine amendments” are the 40 amendments to U.S. state constitutions that prohibit public aid to denominational institutions, such as religious schools. They are one of the grounds for challenging the constitutionality of voucher programs, although there are many others. There is lively scholarly dispute about the extent to which these No-Aid Provisions and their failed federal counterpart reflected anti-Catholic animus (Green, 1992; Hackett, 2014; Viteritti, 1997), but it is undisputed that the majority passed during a period of widespread anti-Catholicism. States with larger Catholic populations were statistically significantly more likely to pass strongly worded No-Aid Provisions than those with smaller Catholic populations (Hackett, 2014).
8. A 1990 referendum in Oregon and a 1998 effort in Colorado on proposed tuition tax credit programs involved the deeply submerged program design being subjected to a visible debate (a *contested attenuated* scenario). The voters turned both plans down by a two-to-one margin (Menendez, 1999)
9. The cases in which quasi-direct voucher programs were upheld as constitutional between 1972 and 2008 were *Davis v Grover* (1992), *Campbell v Manchester Board of School District Directors* (1994), *Jackson v Benson* (1998), and *Zelman v Simmons-Harris* (2002). For a full list of cases, see the supporting information appendix.
10. Sample question wording: *Why did you choose [do you think the sponsors of the bill chose] a tax credit scholarship form rather than a directly appropriated voucher?*
11. Regarding additional control variables: White judges are more favorably disposed to vouchers than non-whites and Western judges much less favorably disposed to vouchers than Southerners. Judges have generally become more sympathetic to vouchers over time. This effect is statistically distinguishable from the effect of policy attenuation.
12. ALEC is a conservative nonprofit organization devoted to the production of model legislation for lawmakers. The tax-exempt organization, which derives a substantial portion of funding from right-wing organizations such as the Koch Foundation, aims to advance market-oriented solutions to public policy problems, including private school choice.
13. ESAs often focus upon smaller and perhaps more “deserving” segments of the school-age population such as disabled or poor students, so as to smooth the way for voucher legislation passage. Targeting sympathetic constituencies is a tactic well known to scholars of policy feedback and social construction. In their study of Arizonan legislation, Anne Schneider and Kerry Ingram (2019) argue that pieces of modern voucher legislation “often are cleverly crafted to appear to provide benefits to sympathetically-viewed dependent populations by providing a dollar-for-dollar tax reduction for donations to nonprofits providing services to dependents even as the embedded message is one that undercuts the idea that government is responsible for providing public services to disadvantaged people.”

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