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Constitutional Law—School Choice: The Landscape After Espinoza v. Montana Department of Revenue and Contemporary Political Polarization

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CONSTITUTIONAL LAW—SCHOOL CHOICE: THE LANDSCAPE AFTER
ESPINOZA V. MONTANA DEPARTMENT OF REVENUE AND CONTEMPORARY
POLITICAL POLARIZATION

I. INTRODUCTION

“Try selling a product that someone else is giving away!”¹ This short remark captures why American public schools have a *de facto* monopoly over primary and secondary education, limiting any practical school choice for many American families.² Unfortunately, this means many children are stuck in academically subpar public schools³ while better-performing private school alternatives are increasingly becoming income-segregated enclaves available primarily to financially well-off citizens.⁴ As government-run enterprises, public schools are unique among their competitors with the ability to “obtain[] . . . revenue by force” through local, state, and federal taxes.⁵ With this advantage in place, modern public schools typically enroll eighty-seven to eighty-eight percent of all U.S. school children; private schools enroll approximately ten percent, and the small two to three percent remaining students receive a homeschool education.⁶

Advocacy for increasing taxpayer-funded school choice has traditionally come from parents with children assigned to academically struggling schools

1. MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: THE CLASSIC INQUIRY INTO THE RELATIONSHIP BETWEEN FREEDOM AND ECONOMICS* 163 (1st Harvest ed. 1990) (1980) (discussing how public schools have limited competition due to the direct costs of the alternatives).

2. *Id.*

3. *See infra* notes 177–79 and accompanying text.

4. *See* FRIEDMAN & FRIEDMAN, *supra* note 1, at 157–58 (explaining how most private school families are relatively wealthier citizens with the ability to pay for their children’s education once through taxation supporting public schools they do not use, then a second time by private school tuition); Richard J. Murnane *et al.*, *Who Goes to Private School? Long-Term Enrollment Trends by Family Income*, 73 *EDUC. NEXT* 4 (2018) <https://www.education-next.org/who-goes-private-school-long-term-enrollment-trends-family-income/> (last updated July 17, 2018) (discussing a trend of lower-cost Catholic schools closing over several decades and their replacement by secular private schools, resulting in a private school demographic shift favoring wealthier students); *see also* Karen Doyle, *42 States Where Private School Costs Less than Public School*, *YAHOO!* (Aug. 10, 2021), <https://www.yahoo.com/now/42-states-where-private-school-180007815.html> (“The national average for annual private school tuition in 2021 is approximately \$11,645 . . .”).

5. SHELDON RICHMAN, *SEPARATING SCHOOL & STATE: HOW TO LIBERATE AMERICA’S FAMILIES* 11 (1995).

6. NAT’L CTR. FOR EDUC. STATS., *School Choice in the United States: 2019*, https://nces.ed.gov/programs/schoolchoice/ind_01.asp (last visited June 8, 2022) (deriving data from multiple Dept. of Education surveys from 1999 to 2016).

in low-income neighborhoods.⁷ This limited pushback against the public school status quo has broadened significantly in the COVID-era, as more parents are unhappy with their local districts' masking policy or have disagreements with school boards over other polarizing issues.⁸ The pandemic brought additional challenges to brick and mortar schools (both public and private) in April 2020 when seventy-two percent of students' parents surveyed reported their children's schools had shifted to distance learning.⁹ In the 2020 fall semester, private schools' flexibility and independence allowed them to return to in-person classes at higher rates than their public school counterparts.¹⁰

Unsurprisingly, 1.4 million fewer children attended American public schools in 2020 than in the final pre-pandemic year, 2019.¹¹ Private school enrollment absorbed some of the public school departures,¹² and homeschooling saw a notable increase—comprising eleven percent of all “households with school-age children” in the fall of 2020.¹³ Against this backdrop of pandemic uncertainty and the beginning of a potential long-term shift away from clear public school dominance of the education market,¹⁴ the law developed

7. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002); see *infra* note 96 and accompanying text.

8. The COVID pandemic has disrupted American education. Resulting schools' policies regarding masking or other restrictions attempting to combat the pandemic have led to mixed parental reactions. See Deepa Shivaram, *The Topic of Masks in Schools is Polarizing Some Parents to the Point of Violence*, NPR (Aug 20, 2021, 6:00 AM), <https://www.npr.org/sections/back-to-school-live-updates/2021/08/20/1028841279/mask-mandates-school-protests-teachers>. Simultaneously, parents in many districts are passionately split on whether schools should teach Critical Race Theory. Ryan Miller, *Shouting Matches, Arrests and Fed Up Parents: How School Board Meetings Became Ground Zero in Politics*, USA TODAY (July 3, 2021, 6:01 AM), <https://www.usatoday.com/story/news/education/2021/07/03/critical-race-theory-makes-school-board-meetings-political-ground-zero/7785802002/>.

9. *Impact of the Coronavirus Pandemic on the Elementary and Secondary Education System*, NAT'L CTR. FOR EDUC. STATS., (May 2021), <https://nces.ed.gov/programs/coe/indicator/tcb>.

10. Jessica Dickler, *During Covid, More Families Switch to Private School from Public Education*, CNBC, (May 7, 2021, 10:27 AM), <https://www.cnn.com/2021/05/07/during-covid-more-families-switch-to-private-school-from-public-.html>.

11. *Back-to-School Statistics*, NAT'L CTR. FOR EDUC. STATS., <https://nces.ed.gov/fastfacts/display.asp?id=372> (last visited Jan. 16, 2022).

12. Dickler, *supra* note 10.

13. Casey Eggleston & Jason Fields, *Census Bureau's Household Pulse Survey Shows Significant Increase in Homeschooling Rates in Fall 2020*, U.S. CENSUS BUREAU (March 22, 2021), <https://www.census.gov/library/stories/2021/03/homeschooling-on-the-rise-during-covid-19-pandemic.html>. (noting that 2020 saw double the percentage of 2019 homeschool households).

14. The interest in public school's alternatives is unlikely to wane in the near future due to the pandemic's long-term educational impacts. See, e.g., Mike Cummings, *COVID School Closures Most Harm Students from Poorest Neighborhoods*, YALE NEWS, <https://news.yale.edu/2021/01/05/covid-school-closures-most-harm-students-poorest-neighborhoods> (Jan. 5, 2021) (noting a Yale economist's study “predicts that one year of school closures will

significantly to allow more room for school choice by easing the restrictions on public money flowing to religious schools.¹⁵

In June 2020, the U.S. Supreme Court heard *Espinoza v. Montana Department of Revenue*, a case deciding whether a Montana tax credit for primary and secondary school scholarship donors was constitutional, as the scholarships were eligible for religious school use.¹⁶ The Court ruled that states, though not required to subsidize private schools, may not exclude a school purely due to its religious character if electing to do so.¹⁷ The *Espinoza* ruling, coinciding with pandemic-sparked increased interest in educational alternatives, provides a unique moment to roll back the public school market control and move to a more “flexible arrangement for satisfying” students’ educational needs.¹⁸

This Note argues that the *Espinoza* decision bolsters the legal prong of an already solid argument for taxpayer-funded school choice programs; thus, states should create new, or expand existing,¹⁹ school choice programs to compete with public school levels of per-pupil funding, whether through educational vouchers, scholarships, Education Savings Accounts (ESA), or tax credit programs. Further, it argues that doing this would return power to parents, the party with the greatest insight into children’s “capacity and needs.”²⁰ This Note finds that in *Espinoza*’s aftermath, this school choice expansion would mean that legal obstacles limiting public education funds’ reaching beyond traditional public schools should be removed even when parents select religious-based schools.²¹ Additionally, these policy changes would potentially give all families what the wealthy enjoy—school choice.²² This Note concludes that the present legal framework and consumer demand indicate America is ripe for educational reform and that states should pursue policies of greater school choice.

This Note is broken into four sections covering the scope of America’s educational landscape that is primed for change. First, Section II covers the history leading to modern public schooling and school choice law’s development. Then Section III gives legal, economic, philosophical, and educational

cost ninth graders in the poorest communities a 25% decrease in their post-educational earning potential, even if it is followed by three years of normal schooling”).

15. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2261 (2020).

16. *Id.* at 2251.

17. *Id.* at 2261.

18. RICHMAN, *supra* note 5, at 13.

19. Current programs have severe enrollment restrictions. See *infra* note 198 and accompanying text.

20. FRIEDMAN & FRIEDMAN, *supra* note 1, at 159–60.

21. See *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2261 (2020).

22. Katherine Mangu-Ward, *My Family Has School Choice. So Should Yours*, REASON (Jan. 28, 2021, 12:45 PM), <https://reason.com/video/2021/01/28/my-family-has-school-choice-so-should-yours/>.

outcome reasons to expand school choice. Finally, Section IV concludes that now is the time for more educational freedom.

II. BACKGROUND

Early Americans effectively procured education before the advent of compulsory school attendance, with Northern states' literacy above 90 percent and Southern states' literacy above 80 percent by 1840.²³ Early American schools were privately run, and students attended voluntarily.²⁴ Through the early 1800s, local governments supplied funds to "private schools, including religious ones," to facilitate the "education of the poor."²⁵ While school-based education was "neither compulsory nor free" in early America, "it was practically universal" in some areas.²⁶ Likewise, many of the country's brightest individuals were primarily self-educated, such as Abraham Lincoln, who had only "fifty weeks of formal schooling" spread out over several years.²⁷

A. American Public Education's Prussian Influence

The educational environment began slowly shifting when Massachusetts passed the nation's first mandatory school attendance law in 1852.²⁸ Another fifteen years elapsed before the second state, Vermont, passed similar legislation.²⁹ By 1918, all states had compulsory school attendance statutes.³⁰ This public school growth was not a movement with American roots and ideals, but instead began with America's "most famous crusader for free schools," Horace Mann,³¹ bringing the Prussian system home.³²

Mann traveled to western Europe in 1843 to research multiple countries' school systems, "but Prussia left the most impressionable impact on him."³³ Upon returning home, Mann pushed for government-funded schools modeled after Prussia's system.³⁴ As Massachusetts's first Board of Education

23. RICHMAN, *supra* note 5, at 38.

24. FRIEDMAN & FRIEDMAN, *supra* note 1, at 150.

25. *Espinoza*, 140 S. Ct. at 2258.

26. FRIEDMAN & FRIEDMAN, *supra* note 1, at 152.

27. 1 JOHN TAYLOR GATTO, *THE UNDERGROUND HISTORY OF AMERICAN EDUCATION: AN INTIMATE INVESTIGATION INTO THE PRISON OF MODERN SCHOOLING* 52 (David James Rodriguez ed., rev. ed. 2017) (2000).

28. FRIEDMAN & FRIEDMAN, *supra* note 1, at 150.

29. GATTO, *supra* note 27, at 189.

30. FRIEDMAN & FRIEDMAN, *supra* note 1, at 150.

31. *Id.* at 153.

32. Mike Margeson & Justin Spears, *The History and Results of America's Disastrous Public School System, Part I*, FEE STORIES (May 13, 2019), <https://fee.org/articles/the-history-and-results-of-our-disastrous-public-school-system-part-i/>.

33. *Id.*

34. *Id.*

secretary, Mann advocated for the government to provide education to all children by professional teachers.³⁵ This effort led to Massachusetts beginning the nation's shift towards public school primacy.³⁶ States later adopting compulsory school systems understood the Prussian influence.³⁷ At state constitutional conventions in the late 1800s, when deciding whether to adopt compulsory education, the Prussian system's opponents noted that "it relied too heavily on martial virtues."³⁸ At the same time, supporters identified the educational model as playing a role in the European nation's rise to "the rank of the premier world power."³⁹

While Prussian schools were part of a plan to unify Germany,⁴⁰ Mann and others sought a similar system for different purposes.⁴¹ A mandatory "common school" education in America was seen as a means to combat social ills, promote democracy, and provide workers for industrialization.⁴² Unions supported the movement because it would remove low-wage child labor competition.⁴³ Additionally, in the late 1800s, education reformers used public schools to assimilate the high volume of Catholic immigrants.⁴⁴

After common school education's development in the 1800s, the government's interest in American childhood education remains strong in the modern era, as captured in Chief Justice Warren's remark that "education is perhaps the most important function of . . . governments."⁴⁵ Warren further explained that large education budgets and compulsory attendance statutes acknowledged this importance.⁴⁶ He added that education is necessary for basic civic duties, for military service, and that "[i]t is the very foundation of

35. FRIEDMAN & FRIEDMAN, *supra* note 1, at 153.

36. *See* FRIEDMAN & FRIEDMAN, *supra* note 1, at 150–53.

37. John Dinan, *The State Constitutional Tradition and the Formation of Virtuous Citizens*, 72 TEMP. L. REV. 619, 645–47 (1999).

38. *Id.* at 645.

39. *Id.* at 646–47. Notably, Prussia's government-run, universal school system may have been necessary for its survival due to geography as the 1800s nation was surrounded by military rivals on multiple sides. PETER ZEIHAN, *THE ACCIDENTAL SUPERPOWER: THE NEXT GENERATION OF AMERICAN PREEMINENCE AND THE COMING GLOBAL DISORDER* 37 (2014). Coordinated action directed by central authorities allowed Prussia to quickly industrialize and compete with powerful neighbors, and a uniformly educated populace facilitated the process of "national planning to overcome geographic complications." *See id.* at 40. America's geography and strategic situation at the time, however, was much more secure and did not demand Prussian-flavored compulsory education. *See id.* at 46. That a similar system was adopted in America is better explained by "energetic campaign[ing]" from Mann and other public school advocates of his era. FRIEDMAN & FRIEDMAN, *supra* note 1, at 153.

40. *See* ZEIHAN, *supra* note 39, at 40.

41. RICHMAN, *supra* note 5, at 47.

42. *Id.*; Dinan, *supra* note 37, at 640.

43. RICHMAN, *supra* note 5, at 47.

44. *Id.* at 49; *see also* discussion *infra* Section II.B.

45. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

46. *Id.*

good citizenship.”⁴⁷ Warren echoed Mann’s ideals, noting education “is a principal instrument in awakening the child to cultural values” and for national workforce training.⁴⁸

Warren’s then-modern idea that an individual will not succeed without extensive government-supplied schooling⁴⁹ clashed with the founding era reality, where a primarily self-educated intellectual giant like Benjamin Franklin only had two years of formal education.⁵⁰ Massachusetts, the nation’s public school trailblazer, had its literacy peak before compulsory schooling took hold.⁵¹ Additionally, as an indirect early nationwide literacy metric, book sales show top novels could sell up to five million copies in the early 1800s when the total population was still under twenty million.⁵² That Noah Webster’s educational *Spelling Book* sales surpassed the five million mark in 1818 suggests a highly literate public motivated to self-educate.⁵³ In America’s colonial period, “[r]eading was not regarded as an elitist activity,” but rather, there was a broad, “thriving, classless reading culture.”⁵⁴

America’s modern, Prussian-based, state-dominated education system stands in stark contrast to this earlier era where education was more self-directed, “innovative, and well within the reach of the common people.”⁵⁵ This historical perspective is important as it provides concrete examples of successful American education apart from centralized government control.⁵⁶ The historical foundation also lends credibility to educational alternatives’ current and future feasibility, discussed in Section III.

B. Historical Anti-Catholic Bias Leads to State Blaine Amendments

Against the background of increasing government involvement in education delivery, anti-Catholic views during the late 1800s led to widespread statutes that limited school choice options along religious lines.⁵⁷ Originally,

47. *Id.*

48. *Id.*

49. *Id.*

50. Theodore Hornberger, *Benjamin Franklin: American Author, Scientist, and Statesman*, BRITANICA, <https://www.britannica.com/biography/Benjamin-Franklin#ref22465> (last visited June 13, 2022).

51. RICHMAN, *supra* note 5, at 38 (referencing a study by the late Sen. Edward Kennedy’s office showing that the state’s pre-1850 literacy rate was 98%, never to reach that high again).

52. *Id.*

53. *See id.*

54. NEIL POSTMAN, *AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS* 34 (20th Anniversary ed. 2005) (1985).

55. RICHMAN, *supra* note 5, at 38.

56. *See supra* notes 50–54.

57. *See* Nicole Stelle Garnett, *Hartman Hotz Lecture: The Comparative Legal Landscape of Educational Pluralism*, 73 ARK. L. REV. 455, 470 (2020).

a “Protestant ethos” marked most American public schools.⁵⁸ Catholic immigrants in these early institutions experienced “mistreatment and evangelization of their children.”⁵⁹ Many Irish Catholics opposed the establishment of public schools out of concern—which later proved valid—that the schools would intentionally undermine their religion and culture.⁶⁰

In response to the Protestant domination of early public schools, after an 1852 Bishop conference, Catholics began operating their own schools.⁶¹ In the following years, Catholic schools sought public funds, but this caused a major backlash by Protestant political forces.⁶² Ultimately, religious friction and “new waves of nativism” by American-born Protestants against incoming Catholics led to a trend of American public school secularization.⁶³ In 1875, Speaker of the House James Blaine submitted a constitutional amendment that would have barred “any public funds from flowing to ‘sectarian’ schools.”⁶⁴ Despite ample history of the federal and state governments supporting religious schools, discriminating political forces used “sectarian” as a euphemism in place of “Catholic” to legally deny funds to Catholic schools.⁶⁵

Blaine’s proposal nearly became a United States Constitutional Amendment.⁶⁶ Though it failed, Congress gave the dead amendment life by mandating that joining states reflect Blaine’s intent in their state constitutions as a prerequisite for statehood.⁶⁷ The Montana Constitution, later at issue in *Espinoza*, complied by including a Blaine Amendment, an anti-Catholic provision, prohibiting government funds for “any school ‘controlled’ by a ‘sect.’”⁶⁸ Montana’s religious schools at statehood were primarily Catholic.⁶⁹ In addition to this coercive process used with Montana and other new states, some older states voluntarily added Blaine language to their constitutions; in total, thirty-seven states have such a provision.⁷⁰

58. *Id.* at 468.

59. *Id.*

60. See Dinan, *supra* note 37, at 640 (citing DAVID NASAW, *SCHOOLED TO ORDER: A SOCIAL HISTORY OF PUBLIC SCHOOLING IN THE UNITED STATES* 69 (1979)).

61. Garnett, *supra* note 57, at 469.

62. *Id.* at 470.

63. See *id.* at 470.

64. *Id.*

65. See *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2258–59 (2020).

66. See *id.* at 2259.

67. Garnett, *supra* note 57, at 470.

68. *Espinoza*, 140 S. Ct. at 2271 (Alito, J., concurring) (quoting MONT. CONST. art. XI, § 8 (1889)).

69. *Id.*

70. Garnett, *supra* note 57, at 470; see, e.g., MONT. CONST. art. X, § 6 (“The legislature . . . shall not make any direct or indirect appropriation . . . for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.”).

There is no doubt “anti-Catholic animus fueled” the movement that reached thirty-seven state constitutions and nearly amended the United States Constitution.⁷¹ Anti-Catholic bias reached the highest levels of power—Blaine Amendment supporter President Grant saw the Catholic church as a superstitious organization trying to “overthrow the American public school system.”⁷² In the decades leading up to Blaine’s proposed amendment, Catholic children were subjected to violence and discrimination “for refusing to read from the King James Bible.”⁷³ Further, conspiracy theories and rumors about Catholic leaders led to riots and burned Catholic churches.⁷⁴ Early educational discrimination was not against religion in general (Mann’s early public schools promoted a generic form of Protestantism)⁷⁵. Instead, discrimination was targeted via statute specifically against Catholics for unequal treatment.⁷⁶

C. School Choice’s Relevant Legal History

With state Blaine Amendments prevalent and Horace Mann’s compulsory public schooling established nationwide, the 20th century saw a new body of school choice caselaw develop. First, in 1923, the Supreme Court recognized a right of parents and limited the state in *Meyer v. Nebraska*.⁷⁷ The *Meyer* plaintiff was a parochial schoolteacher convicted under a Nebraska law that prohibited religious schools from teaching foreign languages to students in eighth grade or below.⁷⁸ The plaintiff taught German to a ten-year-old student.⁷⁹ The Court held that parents have a Fourteenth Amendment due process-protected liberty to direct their children’s education, ruling that the Nebraska law was unconstitutional.⁸⁰

A few years later in *Pierce v. Society of Sisters*, the Court expanded parental rights to include the choice to educate children by methods other than public school,⁸¹ overturning an Oregon law mandating all children attend the public school in their home district.⁸² While *Pierce* established parents’ fundamental right to school choice for their children, it also acknowledged a

71. See Garnett, *supra* note 57, at 470.

72. *Id.*

73. *Espinoza*, 140 S. Ct. at 2272 (Alito, J., concurring).

74. *See id.*

75. *Id.* at 2271.

76. Garnett, *supra* note 57, at 470.

77. *See* 262 U.S. 390 (1923).

78. *Id.* at 396–97.

79. *Id.* at 396.

80. *Id.* at 399–400.

81. 268 U.S. 510, 534 (1925).

82. *Id.* at 530.

significant state role in regulating education and mandating that children attend *some* form of school.⁸³

With *Pierce* affirming that parents have a fundamental right to educate their children apart from public school,⁸⁴ most subsequent education caselaw deals with whether government educational funds may reach religious schools under Establishment Clause limits.⁸⁵ The modern Establishment Clause jurisprudence regarding public funding for religious education began with *Everson v. Board of Education*.⁸⁶ The *Everson* Court held that public funding for transportation to private religious schools does not violate the Constitution.⁸⁷ The *Everson* opinion also brought Thomas Jefferson's famous phrase about a wall separating church and state into educational case law, adding that the "wall must be kept high and impregnable."⁸⁸

Next, the allowances for aid to religious schools granted in *Everson* shrank to a historic low point following the 1971 *Lemon v. Kurtzman* decision.⁸⁹ The *Lemon* Court held that statutes scrutinized under the establishment clause must survive a three-part test (the Lemon Test) requiring: (1) the law's purpose must be secular; (2) the law's main effect must be neutral towards religion (it "neither advances nor inhibits"); and (3) the law cannot produce "an excessive government entanglement with religion."⁹⁰ Scrutinized laws frequently passed *Lemon*'s first two prongs but rarely escaped the third entanglement standard.⁹¹

Then, in 1997, the pendulum swung back toward friendlier territory for religious schools when the Supreme Court held in *Agostini v. Felton* that public resources may supply "on-site" services to religious school students, provided that proper "safeguards" are present.⁹² Additionally, the *Agostini* Court altered the three-part Lemon test, de-emphasizing the third prong,

83. *Id.* at 534.

84. *See supra* note 81–83 and accompanying text.

85. *See infra* text accompanying notes 87–106.

86. *Everson v. Bd. of Educ.*, 330 U.S. 1, 17 (1947); Charles Russo & William Thro, *The Demise of the Blaine Amendment and a Triumph for Religious Freedom and School Choice: Espinoza v. Montana Department of Revenue*, 46 DAYTON L. REV. 131, 133 (2021).

87. *Everson*, 330 U.S. at 17.

88. *Id.* at 18; Russo & Thro, *supra* note 86, at 134. In later decades, Supreme Court cases regularly cited this portion of *Everson*, sometimes critiquing the use of the phrase, for example, *Wallace v. Jaffree*, 472 U.S. 38, 91–92 (1985) (Rehnquist, J., dissenting), and other times affirming *Everson*'s characterization of Jefferson's wording, for example, *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2105 (2019) (Ginsburg, J., dissenting).

89. Russo & Thro, *supra* note 86, at 134–36.

90. *Id.* at 135 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)).

91. Russo & Thro, *supra* note 86, at 135.

92. *Id.* at 137; *see Agostini v. Felton*, 521 U.S. 203, 208 (1997) (holding it constitutional for New York city to "send[] public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a congressionally mandated program.").

“entanglement,” rendering it a less obstructive mere factor in the second, “neutral effect” prong.⁹³

The following year, the Supreme Court of Wisconsin upheld the Milwaukee Parental Choice Program (MPCP), which provided that parents could use tuition vouchers at religious schools.⁹⁴ The court reasoned that the MPCP had a clear secular purpose of giving “low-income parents . . . opportunity to” remove their children from “the embattled Milwaukee Public School system.”⁹⁵ The court explained that the MPCP met the second prong of the Lemon test by “provid[ing] a religious-neutral benefit” to parents seeking the best educational options.⁹⁶

A few years after the MPCP case, the U.S. Supreme Court heard a similar case, *Zelman v. Simmons-Harris*.⁹⁷ Here, the State of Ohio targeted low-income families in failing Cleveland public schools by providing tuition aid eligible for use at approved private schools, including religious institutions.⁹⁸ The Court emphasized that a neutrally applied state aid program that funds schools “solely as a result of the numerous independent decisions of private individuals” does not equate to “government endorsement.”⁹⁹

In a *Zelman* concurring opinion, Justice Thomas argued that school choice opponents misuse the Fourteenth Amendment to construe the Establishment Clause as a barrier to neutral (i.e., by parental choice) religious school funding.¹⁰⁰ Rather than focusing on “formalistic concerns about the Establishment Clause,” Thomas suggested we should not forget the Fourteenth Amendment’s basic objectives.¹⁰¹ Thomas saw the Fourteenth Amendment as a “guarantee of opportunity” for all, as opposed to something warped into “an obstacle against education reform.”¹⁰² He further asserted that the Amendment’s text—that state law may not “deprive any person of life, liberty, or property, without due process”¹⁰³—is about protecting individual rights.¹⁰⁴ This means the amendment is not a tool “to constrain a State’s *neutral* efforts to provide greater educational opportunity for underprivileged minority students.”¹⁰⁵

93. Russo & Thro, *supra* note 86, at 137.

94. Jackson v. Benson, 578 N.W.2d 602, 607–11 (1998).

95. *Id.* at 612.

96. *Id.* at 617.

97. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

98. *Id.* at 643–47.

99. *Id.* at 654–55.

100. *Id.* at 682–84.

101. *Id.* at 682–83.

102. *Id.* at 683–84.

103. U.S. CONST. amend. XIV, § 1.

104. *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring).

105. *Id.* at 677 (emphasis added).

I. *Espinoza v. Montana Department of Revenue*

As identified in *Zelman*¹⁰⁶ and other intervening cases,¹⁰⁷ a neutral divide between government endorsement and individual choice is a cornerstone in the *Espinoza* Court's reasoning.¹⁰⁸ Drawing from these cases, the *Espinoza* Court noted that private choices will break the link between taxpayer funds and religious institutions.¹⁰⁹ The controversy in *Espinoza* surrounded a 2015 Montana law funding a tax credit program that provided "up to \$150 to any taxpayer" for use at an approved scholarship program.¹¹⁰ Initially, scholarship recipients could use funds at any school meeting "accreditation, testing, and safety" standards.¹¹¹

Though soon after the scholarship scheme's inception, the state Department of Revenue added a program rule that banned scholarship use at religious institutions, saying this was necessary to bring the program in line with the Montana Constitution's "no aid" provision barring government aid to sectarian schools."¹¹² In response, the *Espinoza* plaintiffs, three Montana mothers seeking to use the scholarships for their children to attend Stillwater Christian School, sued for injunctive relief and prevailed at trial.¹¹³ The trial court reasoned that adding a no-aid rule was unnecessary because the state's no-aid requirement applied to restrict only legislative appropriations directly funding religious schools, not scholarship funded through tax credits.¹¹⁴

Following the trial court ruling in 2017, "[s]everal families, most with incomes of \$30,000 or less," sent their children to Stillwater Christian School with the scholarships. The following year, the Montana Supreme Court overturned the trial court decision, holding the scholarship program violated the

106. See *supra* text accompanying note 100.

107. Notably, the *Espinoza* decision validated *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 1212 (2017) (holding that neutrally dispersed government funds marked for playground improvements could go to religious organizations), while narrowing the application of *Locke v. Davey*, 540 U.S. 712 (2004) (upholding a state law restricting state scholarships from being used for university religious ministerial programs, but allowing use for other degrees at religious colleges), ensuring its limited restriction did not apply to children's education. Mithun Mansinghani, *Clarity in an Era of Confusion—The Supreme Court Will Not Tolerate Hostility to Religion*, SCOTUSBLOG (July 1, 2020, 10:38 AM), <https://www.scotusblog.com/2020/07/symposium-clarity-in-an-era-of-confusion-the-supreme-court-will-not-tolerate-hostility-to-religion/>.

108. 140 S. Ct. at 2261.

109. *Id.*

110. *Id.* at 2251.

111. *Id.*

112. *Id.* at 2252.

113. *Id.* ("The injunctive relief freed . . . scholarships to students regardless of whether they attended a religious or secular school.")

114. *Espinoza*, 140 S. Ct. at 2252.

state's no-aid requirement.¹¹⁵ The ruling effectively shut down the scholarship program completely for both religious and non-religious private schools.¹¹⁶

However, the United States Supreme Court reversed the Montana Supreme Court, holding that states subsidizing private schools may not discriminate against schools based on religious identity.¹¹⁷ The Court reasoned that precedent informs "that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs."¹¹⁸ Chief Justice Roberts's opinion further noted that when a state seeks "greater separation of church and State than is already ensured under the Establishment Clause . . . [the state] is limited by the Free Exercise Clause."¹¹⁹ Ultimately, the Court found no-aid provisions, such as Montana's, unconstitutional because they discriminate against the free exercise of religion.¹²⁰

While most of the other states with no-aid Blaine amendments already follow the Court's logic and allow some taxpayer-funded religious education options,¹²¹ the Court's 5-4 decision informs the remaining states that they "need not subsidize private education," but if they do, they "cannot disqualify some private schools solely because they are religious."¹²²

III. ARGUMENT

With the 19th century Blaine laws rendered void after *Espinoza*,¹²³ the legal environment is now more favorable towards both religious and secular school choice programs.

A. The Legal Environment Clearly Permits School Choice

Beyond the *Espinoza* decision, several other portions of recent legal heritage support greater parental school choice among both religious and secular options.

115. *Id.* (citing *Espinoza v. Mont. Dep't of Revenue*, 435 P.3d 603, 609 (2018)).

116. *Id.* at 2253.

117. *Id.* at 2261.

118. *Id.* at 2254.

119. *Id.* at 2260 (quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)).

120. *See Espinoza*, 140 S. Ct. at 2261.

121. *Id.* at 2259.

122. *Id.* at 2261.

123. *See id.* at 2261.

1. *The Fourteenth Amendment's Intent and the Establishment Clause*

First, though Justice Thomas's concurrence in *Zelman* may be a unique perspective among the Court's members,¹²⁴ his Fourteenth Amendment interpretation does bring up a compelling legal and moral case for greater school choice. Thomas notes that while society saw public education as a key to realizing personal liberty during the Reconstruction era, in modern times, due to many dismal inner-city public schools, school choice options now offer the best hope for children in disadvantaged communities.¹²⁵ Blocking better options for these children certainly seems to be more of an "obstacle" than a "guarantee" of equal opportunity.¹²⁶

A disproportionate percentage of children stuck in inadequate public schools are minorities.¹²⁷ In advocating for greater school choice, Justice Thomas stated that "[i]f society cannot end racial discrimination, at least it can arm minorities with the education to defend themselves from some of discrimination's effects."¹²⁸ Though his concurrence is not binding law, Thomas's wisdom is still timely, as the nation is increasingly aware of racial disparities following George Floyd's death and the resulting protests and media coverage in 2020.¹²⁹ According to Justice Thomas, decreasing educational disparities through school choice programs, in addition to any inherent moral justification, aligns with "the core purposes of the Fourteenth Amendment."¹³⁰ Where the promise in *Brown* that "the opportunity of an education . . . must be made available to all on equal terms"¹³¹ has been spectacularly under-delivered to many American families through government-operated schools,¹³² the sensible corrective action is to allow parents alternative options.

Furthermore, according to Justice Thomas, the Establishment Clause, despite being the basis for many anti-school choice arguments, should have minimal, if any, "application to the States."¹³³ He argues that if the Fourteenth Amendment drafters did see a fundamental individual right within the

124. See *supra* notes 101–06 and accompanying text.

125. *Zelman v. Simmons-Harris*, 536 U.S. 639, 681–82 (2002) (Thomas, J., concurring).

126. See *id.* at 684.

127. *Id.* at 681. Unsurprisingly, at the time Thomas wrote his opinion, "75 percent of black public school parents" and "71 percent of Hispanic public school parents" supported school vouchers. *Id.* at 682, n.7.

128. *Id.* at 683.

129. See Ailsa Chang, Rachel Martin, & Eric Marrapodi, *Summer of Racial Reckoning*, NPR (Aug. 16, 2020, 9:00 AM), <https://www.npr.org/2020/08/16/902179773/summer-of-racial-reckoning-the-match-lit>.

130. *Zelman*, 536 U.S. at 681–82 (Thomas, J., concurring).

131. *Brown*, 347 U.S. at 493.

132. See *infra* notes 175–77.

133. *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2264 (2002) (Thomas, J., concurring).

Establishment Clause, the right is limited to the founding era's common understanding of the clause—preventing forced “religious orthodoxy” on citizens or mandated direct financial support to churches.¹³⁴ Though children in school choice programs may end up in religious schools, the programs themselves “neither coerce[] students to study devotional theology nor conscript[] taxpayers into supporting any form of orthodoxy.”¹³⁵ Therefore, religious school choice options are arguably inherently constitutional under the Establishment Clause, even before considering their protection under the Free Exercise Clause.¹³⁶

2. *Addressing Espinoza Dissent Arguments*

Second, it is necessary to address recent legal arguments against greater school choice as expressed in the *Espinoza* Court's dissents. Justice Ginsburg frames the Montana Supreme Court entirely voiding the scholarship tax credit program as neutral.¹³⁷ Ginsburg argues that by ending the program completely (i.e., not merely eliminating scholarships to religious schools), there was no religious discrimination for the majority to consider.¹³⁸ This view overlooks, and implicitly excuses, Montana's inclusion of the discriminatory no-aid Blaine provision into the scholarship program.¹³⁹ The majority disputed Ginsburg's idea of neutrality by eliminating the whole program, noting that the Montana Supreme Court “had no [Constitutional] basis for terminating the program” and erred in ignoring that an unconstitutional Free Exercise Clause violation inherent to the program led to its end.¹⁴⁰ While Ginsburg may have been technically correct that ending the scholarship program for all schools, religious and secular, could be construed as neutral, “the majority appropriately saw that this would perpetuate, not cure, the unequal treatment of religious people.”¹⁴¹

Justice Breyer's *Espinoza* dissent takes a more direct approach to core legal issues, examining Establishment Clause law and bringing up concerns of entanglement between religion and government.¹⁴² Breyer argues that while the Establishment Clause may not necessarily prohibit states from funding

134. *Id.* (citing *Town of Greece v. Galloway*, 572 U.S. 565, 608 (2014)).

135. *Id.* at 2265.

136. *See generally id.* The *Espinoza* Court describes the Fourteenth Amendment's Free Exercise Clause application as “protect[ing] religious observers against unequal treatment . . . on the basis of religious status[.]” *Id.* at 2254 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017)).

137. *Id.* at 2280 (Ginsburg, J., dissenting).

138. *See id.*

139. *See Espinoza*, 140 S. Ct. at 2252.

140. *Id.* at 2262.

141. Mansinghani, *supra* note 107.

142. *Espinoza*, 140 S. Ct. at 2281 (Breyer, J., dissenting).

religious education in some forms, the Free Exercise Clause does not require states to fund religious schools.¹⁴³ Breyer dismisses the majority idea that private choice by parents directing their children's education funds assuages Establishment Clause concerns.¹⁴⁴

However, Breyer's argument is lacking because he asserts without evidence or support that "[p]rivate choice cannot help the taxpayer" who would rather not fund religious education nor the religious taxpayer who does not have a local private school option compatible with their faith.¹⁴⁵ He goes on to contend that such taxpayers "may well feel ignored—or worse" when witnessing state funds "channeled to religious schools."¹⁴⁶ He continues, speculating that this scenario of upset hypothetical taxpayers could lead to religious-based political strife.¹⁴⁷ Contrary to Justice Breyer's assertions, which go so far as to equate public funding of religious schools with the generally rejected idea of taxpayers paying clergy salaries,¹⁴⁸ there is a difference when public funds are directed specifically to education.¹⁴⁹ Additionally, the distance between any supposed government endorsement and a religious educational institution is further increased via "attenuat[ion] by [parents'] private choices."¹⁵⁰

Also, Breyer does not fully appreciate that at least a portion of the tax dollars marked for education originated as resources in the pockets of parents desiring school choice.¹⁵¹ As government forcefully removes funds from parents through taxation,¹⁵² returning education funds to parents without strings attached is hardly an "establishment" of religion. When vouchers, tax credits, or any subsidy goes to parents who then select a religious school for their child, this is no different than a veteran using the G.I. Bill at a religious university or a welfare recipient donating to their local church.¹⁵³ The opposition

143. *Id.* at 2282–83.

144. *Id.* at 2287.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Espinoza*, 140 S. Ct. at 2288. The phrase "generally rejected" is used in the text above because despite the widely accepted idea that federal funds should not directly flow to religious organizations unless targeted at some secular purpose, rare exceptions do exist, *e.g.*, the U.S. military employs full-time and part-time chaplains to address "the spiritual needs of Service members" at world-wide locations. See OFF. OF THE UNDER SEC'Y OF DEF. FOR PERS. AND READINESS, DOD INSTRUCTION 1304.28 THE APPOINTMENT AND SERVICE OF CHAPLAINS (May 12, 2021), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130428p.pdf?ver=scWFipz2YzfxGxhj5mdYwg%3D%3D>.

149. *Espinoza*, 140 S. Ct. at 2258 (explaining that "even States with bans on government-supported clergy" have a history of aiding religious schools).

150. *Id.* at 2261.

151. See *supra* note 5 and accompanying text.

152. *Id.*

153. FRIEDMAN & FRIEDMAN, *supra* note 1, at 164.

to taxpayer funds reaching religious schools on Establishment Clause grounds stems from the failure to distinguish between an organization's religious and educational purposes.

An analogous situation that distinguishes between funding purposes exists in the federal dollars that reach Planned Parenthood, an organization that performs over 350,000 abortions per year,¹⁵⁴ and receives over \$600 million through taxpayer-funded reimbursements and grants to cover women's health expenses.¹⁵⁵ Planned Parenthood can receive these taxpayer dollars despite congressional Hyde Amendment restrictions that prohibit federal funds from paying for nearly all abortions.¹⁵⁶ Planned Parenthood complies with the Hyde Amendment by also providing non-abortion services with which to use public funds.¹⁵⁷ The organization uses other, private revenue sources to cover abortion costs.¹⁵⁸

If Planned Parenthood can separate funding streams between abortions and other services, so can faith-based organizations adequately allocate funds. Using basic accounting methods, faith-based organizations can distinguish revenue sources to keep separate school operations from other organizational endeavors. These sort of accounting arguments against religious education boil down to money's fungibility—that the “presumed interchangeability of government and private funds” amounts to an indirect subsidy.¹⁵⁹ The reason that fungibility-based arguments against abortion providers' funding have repeatedly failed over the decades is because anytime the government funds a privately provided service, “[f]ungibility is an inherent possibility . . . and the only way to avoid it would be for government agencies to exclusively provide any and all such services.”¹⁶⁰ Just as American law has refused to exclude abortion providers from public funds based on money's fungibility, neither should the law exclude education at religious schools from public funds.

154. PLANNED PARENTHOOD, 2019-2020 ANNUAL REPORT 35 (2020), https://www.plannedparenthood.org/uploads/filer_public/67/30/67305ea1-8da2-4cee-9191-19228c1d6f70/210219-annual-report-2019-2020-web-final.pdf.

155. *Id.* at 38.

156. *Public Funding for Abortion*, ACLU, <https://www.aclu.org/other/public-funding-abortion> (last visited Dec. 17, 2021) (noting that exceptions include rape, incest, and the woman's life being in danger).

157. *See generally id.*

158. PLANNED PARENTHOOD, *supra* note 154, at 38.

159. Joerg Dreweke, “Fungibility”: *The Argument at the Center of a 40-Year Campaign to Undermine Reproductive Health and Rights*, GUTTMACHER INST. (Oct. 5, 2016), <https://www.guttmacher.org/gpr/2016/10/fungibility-argument-center-40-year-campaign-undermine-reproductive-health-and-rights>.

160. *See id.*

3. *Fundamental Parental Rights Expounded*

Finally, looking beyond just parents seeking education at religious schools for their children, the Supreme Court has repeatedly affirmed parents' rights to direct their children's upbringing, of which education is a major component. Pointing to *Meyer* and *Pierce*, the *Troxel v. Granville* decision noted that parents' "control of their children" may be "the oldest of the fundamental liberty interests recognized by this Court."¹⁶¹ The *Troxel* Court also echoed the earlier case law acknowledging parents' right to manage their children's education.¹⁶² After reviewing a lengthy string of case law regarding parental rights, the *Troxel* Court concluded that "the Due Process Clause of the Fourteenth Amendment" safeguards the "*fundamental right* of parents to make decisions concerning their [children's] care, custody, and control."¹⁶³

After *Troxel*, more recent cases, though not specifically about parental rights, further developed the fundamental rights concept with a broad brush that certainly would include educational decision-making rights. In *Lawrence v. Texas*, the Court sees at liberty's core "the right to define one's own concept of existence, of meaning," and "the mystery of human life."¹⁶⁴ The Court noted that it would diminish the value of "[b]eliefs about these matters" if they are developed "under compulsion of the State."¹⁶⁵

Granted, attending public school without practical educational alternatives is different from being told unequivocally what one must think. Still, the influence of compulsory school on children cannot be overstated as the average American public school student spends over six and a half hours per day in school for one hundred and eighty days each year,¹⁶⁶ which represents a degree of influence that even the most devoted parent would have difficulty matching temporally. School choice options that give families alternatives to public school would help ensure *Lawrence's* ideals of self-realization and self-determination¹⁶⁷ thrive across America.

Building upon *Lawrence's* ideas, *Obergefell v. Hodges* further acknowledges the importance of fundamental rights. The *Obergefell* Court explained that in addition to most enumerated constitutional rights, the Due Process Clause protects liberties involved in "individual dignity and autonomy . . .

161. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

162. *Id.* at 65 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

163. *Id.* at 66 (emphasis added).

164. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

165. *Id.*

166. *Schools and Staffing Survey*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/surveys/sass/tables/sass0708_035_sl.s.asp (last visited Nov. 14, 2021).

167. *See generally Lawrence*, 539 U.S. at 574 (noting that the self-actualization principles mentioned in *Lawrence* are not specifically targeted at education, yet they are applicable here).

choices that define personal identity and beliefs.”¹⁶⁸ The Court noted that identifying fundamental rights is not a formulaic process but rather is an “exercise [of] reasoned judgment” to pinpoint the liberties “so fundamental that the State must accord them its respect.”¹⁶⁹ This “reasoned judgment” evaluation standard leaves room for debate anytime a right is considered for Due Process Clause inclusion; still, it is hard to counter that the choice of where to send one’s children to school is within the area of individual autonomy and identity development.

It is important to restate that *Meyer* had already established school choice as a fundamental right for parents nearly a century ago.¹⁷⁰ The subsequent parental rights decisions, as well as *Lawrence* and *Obergefell*, merely provide context for implementing school choice policy.¹⁷¹ Of course, the Constitution is one of negative rights;¹⁷² therefore, there is no governmental duty to facilitate multiple educational options based on *Meyer* alone, only a restriction on hindering parents’ choices. The *Espinoza* decision recognizes this reality in clarifying that though a state may not single out and frustrate specific private school options based on religious discrimination, states “need not subsidize private education” in the first place.¹⁷³ Recognizing that the legal environment allows school choice but states are still under no legal obligation to help parents fund private educational options, the remainder of this note discusses why states *should* actively pursue increased school choice policy.

B. Educational Outcome Evidence Supports School Choice

Embedded in *Brown* is the promise that if a state elects to provide its citizens an education, schooling “must be made available to all on equal terms.”¹⁷⁴ Though, in theory, *Brown* dealt with education opportunity inequalities rooted in racial segregation,¹⁷⁵ public school education in execution still produces many failing schools and even entire major city districts in crisis.¹⁷⁶

168. *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015).

169. *Id.* at 664; see *supra* Section II.C.

170. *Meyer v. Nebraska*, 262 U.S. 390, 399–400.

171. See *supra* notes 166–68 and accompanying text (explaining that greater personal choice over individual development is a good thing as *Lawrence* and *Obergefell* demonstrate; applying these principles to education, via greater choice, logically follows).

172. See *Deshaney v. Winnebago Cnty Dep’t of Soc. Serv.*, 489 U.S. 189, 204 (1989) (“The Court’s baseline is the absence of positive rights in the Constitution and a concomitant suspicion of any claim that seems to depend on such rights.”).

173. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2261 (2020).

174. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

175. *Id.* at 487–88.

176. *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002) (“In 1995, a Federal District Court declared a ‘crisis of magnitude’ and placed the entire Cleveland school district under state control.”).

For kids in these bleak schools and districts, *Brown's* promise is conspicuously undelivered.¹⁷⁷ Parents with children in these unfortunate situations deserve “greater choice as to where and in what manner to educate their children.”¹⁷⁸

Considering choices beyond public school, it is important to understand that though private schools provide better academic results on test scores, some of the difference is rightly dismissed as attributable to different demographic and income factors between public and private school families.¹⁷⁹ With demography in mind—when critics target specific school choice programs for comparison against public schools, they often forget to control the demographic variables and instead compare two student pools of vastly different “racial, ethnic, and socioeconomic backgrounds.”¹⁸⁰

To accurately assess comparative outcomes between public schools and their alternatives requires a review of the contrasting institutions “educational results when educating truly comparable students.”¹⁸¹ In a recent analysis comparing charter school to public school academic performance, economist Thomas Sowell selected for evaluation pairs of New York City charter and public schools, with each pair sharing the same building and serving the same neighborhood.¹⁸² Sowell examined this unique data set, evaluating “truly comparable students in truly comparable circumstances.”¹⁸³ He further controlled demographic variables by selecting only public and private school pairs with black and Hispanic students comprising a majority of the student bodies.¹⁸⁴ With this apples-to-apples comparison, likely as good as one may find in the real world, Sowell observed a distinct performance gap between

177. See, e.g., Chris Papst, *13 Baltimore City High Schools, Zero Students Proficient in Math*, FOX BALTIMORE (Nov. 8, 2017), <https://foxbaltimore.com/news/project-baltimore/13-baltimore-city-high-schools-zero-students-proficient-in-math> (explaining that “state testing data” showed one-third of Baltimore High Schools in 2016 had “zero students proficient in math”).

178. *Zelman*, 536 U.S. at 680 (Thomas, J., concurring). Justice Thomas also noted that while 95 percent of Cleveland eighth graders in private school passed the state reading proficiency test, only 57 percent of their public school counterparts did so, he concluded this disparity indicated that school choice “reform can in fact provide improved education to underprivileged urban children.” *Id.* at 681.

179. Emily Pierce, *Private School vs. Public School*, U.S. NEWS AND WORLD REP. (Sep. 15, 2021, 10:45 AM), <https://www.usnews.com/education/k12/articles/private-school-vs-public-school>.

180. THOMAS SOWELL, *CHARTER SCHOOLS AND THEIR ENEMIES 2* (2020).

181. *Id.* at 3.

182. *Id.* New York City provided an ideal case study for this subject, as it frequently housed charter and public schools in the same building. *Id.* at 4. Sowell’s analysis covered over 23,000 students. *Id.*

183. *Id.* at 4.

184. *Id.* at 5.

New York's charter and public schools.¹⁸⁵ On New York State's English test, most students in charter school grade-level groups achieved the test's proficiency standard or higher at a rate over four times greater than the public school groups.¹⁸⁶ Comparing grade-level groupings in the state's math test, charter school groups had majorities reach the proficient level or higher at nearly seven times the public schools' rate.¹⁸⁷ Sowell noted that the achievement gap in this case study is larger than a disparity that receives significantly more traction in public discourse—the educational gap between black and white students.¹⁸⁸ Also, the study's black and Hispanic charter school students outperformed white students in statewide and national comparisons.¹⁸⁹

One seeking anecdotes contrary to the New York City charter school study may find them with a quick internet search,¹⁹⁰ but the more significant point is that despite the existence of some poorly run schools (both public-run and privately-run), an environment of actual school choice would give parents the option of selecting a better school.¹⁹¹ A wide range of options could be a reality for all families, even low-income families, if governments would begin funding all education through parent-directed vouchers.¹⁹² Parents should be able to select the best school fit for their children's voucher use—this includes both private and public schools—even if parents want to send a child to a school out of their town, district, or state.¹⁹³

This flexibility in routing funds through parent-driven school decisions would mean public schools receiving at least a portion of their funds similarly to how private schools receive tuition, that is, at least a portion of all schools' funding would come attached to students.¹⁹⁴ Under a more free, parent-led

185. *Id.* at 49–50.

186. SOWELL, *supra* note 180, at 49–50. Sowell reviewed 65 charter schools paired with public schools, defining a grade-level “group” as a grade level within a single school: 172 charter school groups and 191 public school groups took the state English test; a majority of students achieved a proficient level or higher in 65% of charter school grade-groups, but only 14% of public school groups had a majority achieve proficiency or greater. *Id.*

187. *Id.* (illustrating that 68% of charter school grade-level groups had a majority of students score proficient or above, yet only 10% of public school grade-level groups did so).

188. *Id.*

189. *Id.* at 50.

190. *See, e.g.*, Marc Morial, *School Vouchers are a Failed Experiment*, SEATTLE MEDIUM (May 27, 2019), <http://seattlemedium.com/school-vouchers-failed-experiment/> (showing school vouchers in Louisiana were often used at academically below average schools).

191. The current educational system leaves little room for many parents to choose a school based on academic quality. About ninety percent of U.S. students attend public school, and school assignment is usually based on the students' addresses. S. REP. NO. 6-19, at 2 (2019), https://www.jec.senate.gov/public/_cache/files/f4880936-8db9-4b77-a632-86e1728f33f0/jec-report-zoned-out.pdf.

192. FRIEDMAN & FRIEDMAN, *supra* note 1, at 161.

193. *Id.*

194. *Id.*

system, all public and private schools would compete to offer students a quality education.¹⁹⁵

C. The Constitution's Opposition to Monopoly and Other Economic Arguments for Greater School Choice

In addition to an opportunity for better educational outcomes, school choice would likely provide significantly greater economic efficiency everywhere it is implemented. Basic economics doctrine tells us generally that market competition is desirable from the customer perspective in terms of “lower prices, higher quality goods and services, greater variety, and more innovation.”¹⁹⁶ In education, this would mean innovation not just in private schools but ultimately better academic outcomes for students who stay in public schools as well.¹⁹⁷

For this competition effect to be detectable, though, it would require a massive increase in school choice, as most states have tiny, numerically capped choice programs, averaging nationally to less than 0.4% of state K-12 education budgets.¹⁹⁸ Expanding school choice funding universally, giving every parent options, would replace the state education monopoly with a vibrant market, significantly helping the poorest American families.¹⁹⁹ Poor families, often stuck with the worst-performing schools, lack the finances to

195. *Id.*

196. Heather Boushey & Helen Knudsen, *The Importance of Competition for the American Economy*, THE WHITE HOUSE: BLOG (July 19, 2021), <https://www.whitehouse.gov/cea/written-materials/2021/07/09/the-importance-of-competition-for-the-american-economy/> The White House was providing contextual support to its position before President Biden signed the Executive Order on Promoting Competition in the American Economy, which committed to increase anti-trust enforcement. *Id.* It is notable that governments regularly praise competition and disparage monopolies, as is done by the White House here, but federal, state, and local governments simultaneously give credibility to public monopolies in education.

197. *See generally*, David N. Figlio, Cassandra Hart, & Krzysztof Karbownik, *Effects of Scaling Up Private School Choice Programs on Public School Students* 33–34 (IZA Inst. of Labor Econ., Discussion Paper, Paper No. 14342, 2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3846686 (explaining that in this fifteen-year study on the effects of school choice competition in Florida, the nation's largest voucher program, suggests that public schools most affected by competition show rising academic performance and decreasing disciplinary behavioral issues over time, noting the biggest positive impact occurs in lower socioeconomic areas).

198. *Id.*; *see* Drew Catt, *The States Ranked by Spending on School Choice Programs, 2021 Edition*, FISCAL RESEARCH AND EDUCATION CENTER (Jan 26, 2021), <https://www.edchoice.org/engage/the-states-ranked-by-spending-on-school-choice-programs-2021-edition/>

199. *See* FRIEDMAN & FRIEDMAN, *supra* note 1, at 169 (explaining that while many rich and some middle-class children enjoy school choice, very few poor children do so without subsidies).

pay once for education through taxes and a second time to send their children to a school of their choice.²⁰⁰

Unfortunately, the current educational establishment adamantly fights to avoid a free education market,²⁰¹ seeing educational alternatives as threats and frequently describing school choice options as “siphoning” funds from public schools.²⁰² For example, public school teachers’ unions have fought allowing charter schools to use vacant public school classrooms, sought caps on the number of charter schools, and opposed strict behavior rules that give charter schools fewer classroom disruptions.²⁰³ Some public school districts refuse to sell completely vacant buildings to charter schools.²⁰⁴ Other public school officials even prefer demolishing vacant buildings before allowing the properties to fall into charter school use.²⁰⁵ The common theme between these established educational incumbents’ positions and policies is that they do not advance any benefit to children’s education but instead appear rooted in “adults seeking to restrict the competition from charter schools.”²⁰⁶ This anti-competitive stance is prevalent in the public school establishment, often resulting in monopolies.

1. *Arguments Against Education Monopolies*

When an actor “acquires or maintains . . . a monopoly” not by skillfully providing a better product or by luck, but through “engaging in exclusionary conduct,” anti-trust law violations occur.²⁰⁷ While the term “monopoly” likely evokes thoughts of corporate or “private accumulation of economic

200. *See id.*

201. *Id.* at 171.

202. *See* Green v. Garriott, 212 P.3d 96, 107 (Ariz. Ct. App. 2009); Derek Black, Bruce Baker & Preston Green III, *Charter Schools Exploit Lucrative Loophole That Would be Easy to Close*, THE CONVERSATION (Feb. 19, 2019, 6:30 AM), <https://theconversation.com/charter-schools-exploit-lucrative-loophole-that-would-be-easy-to-close-111792>; Andy Brack, *Voucher Effort seeks to Siphon SC Public Education Dollars*, CHARLESTON CITY PAPER (Nov. 20, 2021), <https://charlestoncitypaper.com/voucher-effort-seeks-to-siphon-public-education-dollars/> (showing just a few of the many examples where school choice opponents use a form of “siphon” to describe school choice programs competing for funds with public schools).

203. *See* SOWELL, *supra* note 180, at 54. Charter schools are government education contracts executed by private organizations, funded by public dollars and free to students, while the private operator has more discretion with decisions involving “curricula, personnel, and budgets” than traditional public schools. Zachary Johnson, *The Battle Over Charter Schools*, HARVARD ED. MAGAZINE (Summer 2017), <https://www.gse.harvard.edu/news/ed/17/05/battle-over-charter-schools>.

204. *See* SOWELL, *supra* note 180, at 59–60.

205. *Id.* at 61.

206. *Id.* at 55.

207. *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001). Though technically exempt from anti-trust law as government entities, public education institutions often operate in a manner fitting monopoly’s legal definition.

power,” the word’s “original meaning . . . was an exclusive grant of power from the government.”²⁰⁸ Many early Americans, including Thomas Jefferson, had a strong distaste for monopolies, as a British tea monopoly “sparked the [American] Revolution.”²⁰⁹ Jefferson and other founders, therefore, sought to avoid similar monopolies in the fledgling nation.²¹⁰ A proposal at the Constitutional Convention to allow federal government-granted corporate charters was ultimately removed due to fears that such charters would result in large monopolies.²¹¹ The Constitution only grants Congress express power to establish limited monopolies in patent and copyright areas, which implies that Congress lacks further power to grant monopolies.²¹²

In addition to its enumerated limits on monopoly, the Constitution’s vitally important Fourteenth Amendment Section One has roots in anti-monopolist thought.²¹³ Abolitionists and Republicans supported nineteenth-century Jacksonian ideology against “class legislation, . . .the granting of exclusive privileges,” and government-granted monopolies.²¹⁴ These parties helped ensure drafters adopted critical language from Section One of the Fourteenth Amendment, including the Privileges and Immunities, Equal Protection, and Due Process clauses.²¹⁵

Abolitionists and Republicans in the Reconstruction era saw “the institution of slavery . . . itself [as] a particularly perverse monopoly.”²¹⁶ These groups, having helped write the Fourteenth Amendment, saw it as a “ban on all systems of class-based legislation, of exclusive privileges, and of monopolies.”²¹⁷ In the 1865 State of the Union Address, President Andrew Johnson spoke out against monopolies in explaining racial equality under the law.²¹⁸ President Johnson later added that “slavery . . . was ‘a monopoly of labor.’”²¹⁹

While “there is a strong anti[-]monopoly tradition in U.S. constitutional law,” modern caselaw has subjected economic regulations to mere rational basis review, thus severely limiting anti-monopoly Constitutional

208. Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL’Y 983, 984 (2013).

209. *Graham v. John Deere Co.*, 383 U.S. 1, 7 (1966).

210. *Id.*

211. Calabresi & Leibowitz, *supra* note 208, at 1011.

212. *Id.* at 1096.

213. *Id.* at 1024.

214. *Id.*

215. *Id.* (citing U.S. CONST. amend. XIV, § 1).

216. Calabresi & Leibowitz, *supra* note 208, at 1096.

217. *Id.*

218. *Id.* at 1040–41.

219. *Id.* at 1041 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 3 (1866) (message of President Andrew Johnson)).

challenges.²²⁰ Yet the Supreme Court has made exceptions to this New Deal-era rational basis standard in many types of discrimination issues such as “sex, sexual orientation, mental retardation, alienage, and illegitimacy.”²²¹ The Court “has also abandoned the rational basis test concerning abortion laws, laws governing contraception, laws banning sodomy,” and the first eight amendments’ incorporated rights.²²² The modern Court’s view on economic regulation is at odds, not only with these above mentioned issues, but with the “original meaning of the Constitution and the Fourteenth Amendment.”²²³

Though the legal argument against monopolies may lack sufficient support in recent caselaw, the argument in school choice context need not stand on economic foundations alone—because a parent’s right to direct their child’s education is a fundamental right.²²⁴ Still, even under a purely economic-based monopoly grievance, parents may have more hope decades after the New Deal Court defaulted to rational basis due to the many exceptions that have accumulated over time.²²⁵ Public schools certainly fit within the definition of a “government-sponsored monopoly provider of public services” that the Constitution’s drafters sought to avoid.²²⁶ Like typical monopolies, “many public schools provide poor service to their consumers . . . while diverting monopoly rents in the form of” increased pay and benefits to education employees and unions.²²⁷

Without funding reform allowing for more parent-directed choice, public schools will continue dominating the *de facto* monopolized education market, as they have over \$700 billion in guaranteed annual revenue from taxpayers, primarily through state and local coffers.²²⁸ With government as the funding middleman between families and schools, this system prevents important consumer (i.e., students and their parents) feedback from reaching public

220. Calabresi & Leibowitz, *supra* note 208, at 1096. Further bolstering the anti-monopolist argument—nineteen state constitutions contain anti-monopoly clauses, *id.* at 1067, *e.g.*, “monopolies are contrary to the genius of a republic and shall not be allowed” ARK. CONST. art. 2, § 19.

221. Calabresi & Leibowitz, *supra* note 208, at 1054.

222. *Id.* at 1054–55.

223. *Id.* (“The Framers of the Constitution understood the shortcomings of the democratic process, and they foresaw the development of factions . . . who would game the legislative process to gain monopoly or oligopoly rents.” Courts have the responsibility to “protect the Republic from the worst excesses of factions.”); *see infra* discussion Section III.D.

224. *See supra* note 80 and accompanying text.

225. *See supra* note 222 and accompanying text.

226. *See* Calabresi & Leibowitz, *supra* note 208, at 986; *see also supra* text accompanying note 208.

227. Calabresi & Leibowitz, *supra* note 208, at 986–87; *see infra* note 233 and accompanying text.

228. Erika Chen, *U.S. Spending on Public Schools in 2019 Highest Since 2008*, U.S. CENSUS BUREAU (May 18, 2021), <https://www.census.gov/library/stories/2021/05/united-states-spending-on-public-schools-in-2019-highest-since-2008.html>.

schools.²²⁹ In a more market-oriented school choice system, where parents decide where to send their kids, these economic transactions would provide consistent feedback regarding whether education consumers desire a given school's performance.²³⁰ Unfortunately, most of the education system involves not economic transactions, but governmental organizations, which may receive some feedback through elections, but that feedback is "neither as fast nor as universal" as market feedback.²³¹ Furthermore, any non-elected administrators are especially "insulated from electoral feedback" under politically based systems.²³²

2. *Education Spending Analysis*

Some key financial figures in education help explain the public education establishment's pushback against competition. First, much of the recent increase in education budgets nationwide are attributable to higher spending on teachers' job benefits.²³³ Looking at the twenty-six states with state-run school choice programs in 2019, the *increase* in public education employee benefit spending from 2002 to 2019, based on inflation-adjusted expenditures, was \$17.8 billion for the 2019 school year.²³⁴ In contrast, the *total* state spending on school choice in those twenty-six states in 2019 was just \$2.6 billion.²³⁵ Put another way, the budgetary pressure on schools does not come from school choice—which only comprises 0.4% of nationwide education spending—but comes chiefly from other cost increases, including employees' benefits spending.²³⁶ Additionally, overall education spending has significantly risen over time.²³⁷ In a four-decade span ending in 2017, America's per pupil

229. See THOMAS SOWELL, KNOWLEDGE AND DECISIONS 35 (1996) (discussing economic and non-economic transactions generally, though the author does not mention schools in this section, the feedback concept is applicable to school funding).

230. *See id.*

231. *Id.* at 36.

232. *Id.*

233. Christian Barnard, *Are New Federal Funds Contributing to K-12 Administrative Bloat?*, REAL CLEAR EDUC. (Nov. 15, 2021), https://www.realcleareducation.com/articles/2021/11/15/are_new_federal_funds_contributing_to_k-12_administrative_bloat_110670.html ("The real culprit [of rising education budgets] is the ballooning cost of employee benefits.").

234. Aaron Smith & Jordan Campbell, *Benefit Costs, not School Choice Programs, are the Real Drain on Public Education Spending*, REASON FOUND. (Sep. 30, 2021), <https://reason.org/commentary/benefit-costs-not-school-choice-programs-are-the-real-drain-on-public-education-spending/>.

235. *Id.*

236. *Id.*

237. See NAT'L CTR. FOR EDUC. STAT., *Total and Current Expenditures per Pupil in Public Elementary and Secondary Schools: Selected Years, 1919-20 Through 2016-17*,

education spending more than doubled in inflation-adjusted dollars to over \$15,000 per student.²³⁸ The spending increases do not appear to be paying dividends; a 2014 study looking back forty years noted that despite the consistent, substantial spending increases,²³⁹ SAT scores adjusted for “participation rates and demographic factors known to be associated with those scores” actually declined by three percent over the forty years.²⁴⁰ Relative to other developed nations’ students, American students’ standardized testing performance has been “stagnant” since 2000 despite continued spending increases.²⁴¹

In contrast to public schools’ rising costs, private schools are better able to control costs. Private schools, on average, cost over \$3,000 less per year to educate a student than public schools.²⁴² Publicly funded, privately-run charter schools cost taxpayers twenty-eight percent less to educate children, on average, than traditional public schools.²⁴³ The greater efficiency at private and charter schools likely is rooted in competition, that they “must offer an education that attracts students and their parents.”²⁴⁴ On the other hand, public schools benefit from compulsory attendance rules and funding flowing in based on the number of students enrolled, not on the quality of education delivered.²⁴⁵

In a healthy economy, for efficiency’s sake and to serve the consumer, “dying industries should be allowed to die” and “growing industries should be allowed to grow.”²⁴⁶ In the education industry, America is doing quite the opposite, subsidizing the less efficient producers to the detriment of more efficient, effective producers.²⁴⁷ Increasing economic efficiency in schools will

https://nces.ed.gov/programs/digest/d19/tables/dt19_236.55.asp?current=yes (last visited Dec. 15, 2021).

238. *Id.* Some states spend far above the average, e.g., New York State with its budget totaling over \$30,000 annually per pupil. Aaron Smith, *New York School Spending Hits Record High*, REASON FOUND. (Dec. 6, 2021), <https://reason.org/commentary/new-york-state-school-spending-hits-record-high/>.

239. Andrew J. Coulson, *State Education Trends: Academic Performance and Spending over the Past 40 Years*, CATO INST. 2 (Policy Analysis No. 746, Mar. 18, 2014), <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa746.pdf>.

240. *Id.* at 57.

241. Dana Goldstein, *It Just isn’t Working: PISA Test Scores Cast Doubt on U.S. Education Efforts*, N.Y. TIMES (Dec. 5, 2019), <https://www.nytimes.com/2019/12/03/us/us-students-international-test-scores.html>.

242. Doyle, *supra* note 4.

243. SOWELL, *supra* note 180, at 81.

244. *Id.* at 86.

245. *Id.*

246. HENRY HAZLITT, *ECONOMICS IN ONE LESSON: THE SHORTEST & SUREST WAY TO UNDERSTAND BASIC ECONOMICS* 108 (1988). This natural economic process diverts capital and labor from less desired goods and services to those preferred by consumers. *Id.*

247. *See supra* notes 239–42 and accompanying text.

require large shifts in funding policies towards free markets in education, allowing more vouchers and tax credits to fund school choice options.²⁴⁸

D. Legal Philosophy Regarding School Choice Expansion

Beyond economic issues, this note's final arguments advocating for more school choice are those found in basic American legal and political philosophy. First, America's official written severance from England affirmed that individuals have "unalienable rights," which include "Life, Liberty, and the pursuit of Happiness."²⁴⁹ Our Declaration of Independence continues to impact the modern "legal understanding of substantive rights," and the document is a reminder of our nation's commitment to self-governance.²⁵⁰ Additionally, the first ten constitutional amendments clearly communicate ideals of limited government and individual freedom.²⁵¹ Early American education systems reflected these core liberty principles,²⁵² but since compulsory education's rise, there has been a glaring dissonance between Americans' ideals and their education system.

Much of this discord is created by the educational establishment's political efforts, as "teachers unions have millions of members and spend millions of dollars" to elect like-minded political representatives.²⁵³ Public education's political special interest organizations are what James Madison would call "faction[s]," as they are citizen groups "united and actuated by some common impulse of passion, . . . adverse to the rights of other citizens," or to the overall community interests.²⁵⁴ Advocates for taxpayer-funded compulsory public education may be a powerful political force, but they are hardly a majority

248. See generally HAZLITT, *supra* note 246, at 17. The key lesson in economics is that when analyzing a policy, one should not only look at how the policy affects one group in the short term but should also consider long-term consequences and how the policy affects all groups. *Id.* From this rule, we can infer that while it may be in the education bureaucracy's interest to continue increasing budgets at academically failing public schools, a long-term view shows more money input isn't providing better educational results, more competition from other schooling options would likely be good for both taxpayers and students. See Doyle, *supra* note 4.

249. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

250. Alexander Tsesis, *Self-Government and the Declaration of Independence*, 97 CORNELL L. REV. 693, 699 (2012).

251. See U.S. CONST. amends. I–X.

252. See discussion *supra* Section II.A.

253. SOWELL, *supra* note 180, at 55.

254. THE FEDERALIST NO. 10 at 46 (James Madison) (Clinton Rossiter ed., 1999).

faction.²⁵⁵ Rather, major national polls show an overwhelming majority—two-thirds of the public or more—support school choice.²⁵⁶

Piggybacking on *Espinosa*'s result, these high poll numbers could drive key policy changes. Support is highest among black and Hispanic respondents, with both groups exceeding seventy percent.²⁵⁷ When pollsters narrow their focus from the general public to parents of school children, support for school choice is even higher, often over eighty percent.²⁵⁸ That a relatively small but politically potent force would dictate a liberty-limiting policy to such a significant majority is not a problem Madison would have likely anticipated.²⁵⁹ Madison saw little threat from a numerically inferior political group, as he expected elections to defeat minority factions' intentions.²⁶⁰ Madison was more concerned about majority factions oppressing a political minority, which is why he championed federalism.²⁶¹

The oddity of our modern education system that exhibits a political minority directing terms and limiting choices for a substantial majority is best explained by the fact that school choice reforms "have *broad but shallow* support among a majority of the population and *intense but narrow* opposition from teachers unions and their allies."²⁶² That an established interest is well-organized politically and effectively uses government as a shield against competition is neither novel nor surprising.²⁶³ Other incumbent industries have used political muscle flexed via government regulations against upstart competition: railroad companies delayed the expansion of early interstate trucking companies, AM radio broadcasters slowed the proliferation of early FM radio

255. John Della Volpe, Brad Coker, & Debbie Beck, *School Choice Polling*, AM. FED'N FOR CHILDREN 1–2, <https://www.federationforchildren.org/wp-content/uploads/2021/06/School-Choice-Polling-4.6.21.pdf> (last visited Sep. 24, 2022) (including polling data from Real Clear Politics, Mason-Dixon Polling & Research, and Beck Research).

256. *Id.*

257. *Id.*

258. Colleen Hroncich, *Latest Edu-Polling: Americans Want Much More Freedom*, CATO INST.: CATO AT LIBERTY (Sep. 23, 2021, 4:58 PM), https://www.cato.org/blog/latest-edu-polling-american-want-much-more-freedom?utm_campaign=Cato%20Education&utm_medium=email&_hsmi=165519056&_hsenc=p2ANqtz--6MnFVxTc9NHrq9JDfIvpyqC3sHyswT43GqC7Sy0l39FTEaG0sJCZ3zkwCFKmBZGrCcAlMct7vX40Whq4oPJ6JlLn5Q&utm_content=165519056&utm_source=hs_email.

259. See JAMES MADISON, THE SAME SUBJECT CONTINUED: THE UNION AS A SAFEGUARD AGAINST DOMESTIC FACTION AND INSURRECTION (1787), *reprinted in* THE FEDERALIST PAPERS 48 (Clinton Rossiter ed., 1999).

260. *Id.*

261. *Id.* at 51 (showing that Madison saw that a large, republican government could dilute and render ineffective various local special interest groups that would have majorities if left in smaller pools of people).

262. SOWELL, *supra* note 180, at 113 (quoting DAVID OSBORNE, REINVENTING AMERICA'S SCHOOLS: CREATING A 21ST CENTURY EDUCATION SYSTEM 290 (2017)) (emphasis added).

263. See SOWELL, *supra* note 180, at 116–17.

technology, and broadcast television decelerated cable TV's initial growth.²⁶⁴ Unfortunately for the education-consuming public, the political “power of incumbent officials to stifle” competition “has nothing to do with improving the education of children” and is instead based on preserving “vested interests . . . in traditional unionized public schools.”²⁶⁵

French political philosopher Frédéric Bastiat called this use of coercive government power by political interest groups a “perversion of the law,” meaning the government has deviated from its natural function of protecting life, liberty, and property and instead harms that which it is meant to protect.²⁶⁶ Bastiat's views were very much in line with early American ideals.²⁶⁷ Despite opposing America's tariff system and the evils of slavery, Bastiat saw the United States in 1850 as the world's most successful nation at maintaining the law “within its proper domain.”²⁶⁸ Bastiat's observation of the American structure occurred just two years before Massachusetts, in 1852, became the first state to enact compulsory school attendance.²⁶⁹ In the years since, America has moved away from Bastiat's preferred option in education—voluntary transactions between teachers and students—towards the more coercive system we have today, which he would see as “violating liberty and property.”²⁷⁰

Under the current system, mainly higher-income families have true school choice, as they can “pay[] twice for their schooling—once in taxes” for public schools and again for their children's private school tuition.²⁷¹ Additionally, those with financial means may elect to live in a particular city, suburb, or neighborhood based on public school quality.²⁷² Conversely, those citizens with the least practical choice and the worst educational outcomes are lower-income residents of large cities.²⁷³ The reality of these opposite situations is “highly unequal educational opportunity” in America.²⁷⁴

The solution to this disparity is to give all parents what the wealthy currently possess: “control over their children's schooling.”²⁷⁵ With schools accountable to parents through financial incentives, educational outcomes

264. *Id.* at 117.

265. *Id.*

266. FRÉDÉRIC BASTIAT, *THE LAW* 2–4 (Dean Russel, trans., Libertas Press, 1st ed. 2017).

267. *Id.* at 13.

268. *Id.* By referring to the law's domain, Bastiat means the scope of government's reach. *Id.* at 58.

269. FRIEDMAN & FRIEDMAN, *supra* note 1, at 150.

270. BASTIAT, *supra* note 266, at 25; *see generally supra* Section II.A (explaining the shift in U.S. public education beginning in 1852).

271. FRIEDMAN & FRIEDMAN, *supra* note 1, at 157–58.

272. *Id.* at 158.

273. *Id.*

274. *Id.*

275. FRIEDMAN & FRIEDMAN, *supra* note 1, at 160.

would improve.²⁷⁶ Whether through school vouchers, education tax credit programs, or education savings accounts, any form of increased school choice would give parents greater control over their children's education and bring the system more in line with America's foundational ideals.

Ultimately, to comply with the American value of freedom, we should honor parents' wishes for the education system. A clear majority of the public prefers school choice.²⁷⁷ Notably, individual school teachers in their parental roles often directly contradict their collective policy advocacy.²⁷⁸ A 2004 study showed that the national rate for private school enrollment included approximately twelve percent of all students, but public school teachers sent their kids to private schools at nearly double that rate.²⁷⁹ In several major urban areas, public school teachers sent their children to private school at over triple the national rate.²⁸⁰ Members of Congress send their children to private schools at triple to quadruple the national average.²⁸¹ Teachers and senators individual understand the importance of school choice—we ought not limit educational choices of any American.

IV. CONCLUSION

Now is the time to allow all citizens—not just those with extra resources—the practical application of their fundamental freedom in school choice. America has a long legacy of proficient self-education.²⁸² The variety of desired individual education preferences manifesting during the pandemic—far beyond what public schools can practically provide²⁸³—suggests it is time to rescind government's near monopoly over children's learning.²⁸⁴ Considering that private businesses face felonies and large fines for any “attempt to monopolize,”²⁸⁵ it follows that governments should heed the inherent principles within anti-trust law and allow all students—rich or poor—practical access to private and charter school successes.²⁸⁶

276. See, e.g., *id.* at 159. Early school choice options serving as alternatives to failing New York City public schools were “phenomenally successful.” *Id.*

277. Volpe et. al, *supra* note 255, at 2–3.-

278. See Ted Balaker, *Where Teachers' Kids Go to School*, REASON FOUND. (Sep. 21, 2004), <https://reason.org/commentary/where-teachers-kids-go-to-scho/>.

279. *Id.*

280. *Id.*

281. See generally, Mark J. Perry, *Why Do Public School Teachers Send Their Own Children to Private Schools at a Rate 2X the National Average?*, AM. ENTER. INST.: CARPE DIEM (Oct. 9, 2013), <https://www.aei.org/carpe-diem/why-do-public-school-teachers-send-their-own-children-to-private-schools-at-a-rate-2x-the-national-average/>.

282. See *supra* Section II.

283. See *supra* notes 8–10 and accompanying text.

284. See *supra* note 2 and accompanying text.

285. 15 U.S.C. § 2.

286. See *supra* Section III.C.

Building upon *Espinoza*, religious schools should fully participate in all forms of taxpayer-funded school choice, leaving the “no-aid provisions of the 19th century” in history’s dustbin.²⁸⁷ The barriers to school choice are formidable, but improvement is achievable—a solid majority of Americans desire school choice.²⁸⁸ Every step we take towards true educational choice “give[s] fuller meaning to equality of educational opportunity.”²⁸⁹

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287. See *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2259 (2020).

288. See *supra* notes 265–67 and accompanying text.

289. FRIEDMAN & FRIEDMAN, *supra* note 1, at 188.

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