COURT ORDERED PARENT CHOICE: A SOLUTION FIFTY YEARS IN THE MAKING

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I. INTRODUCTION

In 1973, the United States Supreme Court held that there is no fundamental right to an education found in the U.S. Constitution.[1] Far from barring the door to future litigation, *San Antonio v. Rodriguez* opened the proverbial floodgates, causing waves of plaintiffs to crash upon the courthouse doors.[2] In the first place, *San Antonio* did not allow federal courts to detach from the subject of education.[3] Nearly fifty years later, the Court continues to issue rulings that have a major impact.[4] Since the turn of the twenty-first century, the federal courts have issued rulings on a number of K-12 and higher education issues, including scholarship programs, playground equipment, and even graduate courses of study.[5]

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1. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 2 (1973).

2. *See* Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963, 1973 (2008).

3. *See* Charles J. Ogletree, Jr., *The Legacy and Implications of* San Antonio Independent School District v. Rodriguez, 17 RICH. J. L. & PUB. INT. 526, 534–35 (2014) (discussing the uncertainty *San Antonio* provided for future litigants in federal courts).

4. *See* Carson *ex rel.* O.C. v. Makin, 979 F.3d 21, 25 (1st Cir. 2020) (challenging a state funding system for schools forty-seven years after *San Antonio*); Geoffrey R. Stone, *How a 1973 Supreme Court Decision Has Contributed to Our Inequality*, DAILY BEAST (May 15, 2014, 5:45 AM), https://www.thedailybeast.com/how-a-1973-supreme-court-decision-has-contributed-to-our-inequality (discussing how battles over education continue in federal courts over forty years after *San Antonio*).

5. *See generally* Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017); Locke v. Davey, 540 U.S. 712 (2004).

In the second place, after dissenting in *San Antonio*, Justice Brennan went on to give friendly advice to those seeking legal protection but who had been turned away by the majority in *San Antonio*.[6] Justice Brennan noted that "[s]tate Constitutions, too, are a font of individual liberties . . . ."[7] This seemingly innocuous sentence in a law review article would embolden districts, taxpayers, and parents to challenge a range of state-based laws and practices related to all manner of education issues.[8] Decisions at the state level could not be shirked—all fifty state constitutions contain language about the provision of an education system.[9] The rulings and their attendant remedies, however, have been mostly underwhelming when viewed from the perspective of parents and students seeking better educational outcomes.[10]

State courts, however, should be given a measure of grace. They were doing the best they could with the situations presented; in effect, making lemonade. Nevertheless, this article contends that in the nearly fifty years since *San Antonio* and through *Carson v. Makin* (heard in December 2021), legal rulings at the state and federal levels, changes in policy mechanics, and decades' worth of evidence have finally converged to remove the barriers that have prevented a truly student-centric system of education.[11] As students across the United States are coping with multiple school years disrupted by the COVID-19 pandemic, this confluence could not be better timed.[12]

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6. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 62–63.

7. William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

8. Throughout this article the term "parent" is meant to include "guardian."

9. Scott Dallman & Anusha Nath, *Education Clauses in State Constitutions Across the United States*, FED. RSRV. BANK OF MINNEAPOLIS (Jan. 8, 2020), https://www.minneapolisfed.org/article/2020/education-clauses-in-state-constitutions-across-the-united-states.

10. *See* Rick Hess, *The Kind of School Reform that Parents Actually Want*, EDUC. WEEK (Oct. 25, 2021), https://www.edweek.org/policy-politics/opinion-the-kind-of-school-reform-that-parents-actually-want/2021/10 (discussing parent dissatisfaction with education generally).

11. *See* Carson *ex rel.* O.C. v. Makin, 979 F.3d 21, 49 (1st Cir. 2020) (discussing "a commitment, rooted in its own founding charter, to pursue the wholly legitimate end of ensuring the distribution of the benefits of a free public education even to those who happen to live in places that cannot provide it of their own accord").

12. *See* Michael B. Henson et al., *Hunger for Stability Quells Appetite for Change: Results of the 2021 Education Next Survey of Public Opinion*, EDUC. NEXT (Aug. 31, 2021), https://www.educationnext.org/hunger-for-stability-quells-appetite-for-change-results-2021-

Part II of this article examines the evolution of K-12 school finance cases before asserting that the reasons undergirding this legal strategy should be reevaluated. Part III analyzes four rationales behind court rulings that resulted in resources being apportioned at the district or state level and why those rationales are now outmoded. Part IV advocates for judicially initiated parent choice programs as an appropriate remedy for families seeking relief under education clauses found in state constitutions.[13]

II. FEDERAL AND STATE COURTS ENTERTAIN EQUITY AND ADEQUACY CLAIMS IN THREE WAVES

By 2022, more than seventy million people across 190 countries have registered to access educational content via the online service Khan Academy, founded in 2004 by Sal Khan.[14] In less than twenty years, Khan Academy has developed tens of thousands of videos, articles, and exercises designed to help students master content in subjects as diverse as second grade English to multivariate calculus to social and emotional skills.[15] The nonprofit offers "[a] free, world class education for anyone, anywhere." Despite the growing ubiquity of this no-cost option, the vast majority of education litigation has centered around questions of money, both in the legal issues presented *and* the judgements issued.

A. The First Wave – Equal Protection Claims

There is no mention of education in the U.S. Constitution, but in 1971, the California Supreme Court found that the Los Angeles County public school system's funding scheme violated both the State and Federal Constitutions, specifically the Equal Protection Clause of the Fourteenth Amendment.[16] Challenging

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educationnext-survey-public-opinion-poll (discussing how parent dissatisfaction with education services has increased during the pandemic).

13. The terms "parent choice," "school choice," "educational choice," are used interchangeably.

14. KHAN ACAD., https://www.khanacademy.org/donors (last visited Jan. 11, 2022).

15. *Courses*, KHAN ACAD., https://www.khanacademy.org (last visited Jan. 22, 2022) (showing, through the use of a drop-down menu, the courses offered); *What Is the History of Khan Academy?*, KHAN ACAD., https://support.khanacademy.org/hc/en-us/articles/20248 3180-What-is-the-history-of-Khan-Academy- (last visited Feb. 27, 2022).

16. Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. 1971).

school finance systems by including an Equal Protection Claim signaled the so-called "First Wave" of school finance litigation.[17] The interplay between the state education financing system and the Equal Protection Clause in *Serrano* never reached the U.S. Supreme Court because successive cases (*Serrano II* and *Serrano III*) were affirmed in reliance upon the California Constitution.[18] The U.S. Supreme Court was finally presented with a comparable issue in *San Antonio* when Rodriguez challenged a property tax-based school funding system that created large disparities in per pupil funding because the amount collected depended upon the value of assessed property.[19] Ultimately, the Court did not find a federal fundamental right to an education within the confines of the Constitution, but this ruling did not deter plaintiffs from seeking other venues.[20]

B. The Second Wave – State Constitutional Claims

Following *San Antonio* and Justice Brennan's 1977 admonition to seek fonts of liberty at the state level, plaintiffs challenged school finance systems through education clauses in the state constitutions, state equal protection clauses, or both.[21] Roughly twenty-five years after *San Antonio*, thirty-six state supreme courts had ruled on school funding cases.[22] During this second wave, the courts avoided being overly prescriptive—they simply sent legislators back to the drawing board to continue tinkering with their state's funding scheme.[23] So, while courts did not necessarily dictate tax weights and teacher-to-student ratios, they did maintain the firm belief that funding is inextricably linked to educational quality.[24] The majority opinion in Wyoming's school finance case is

17. Christopher Roellke et al., *School Finance Litigation: The Promises and Limitations of the Third Wave*, 79 PEABODY J. EDUC. 104, 106 (2004).

18. *See* Serrano v. Priest, 557 P.2d 929 (Cal. 1976); Serrano v. Priest, 569 P.2d 1303 (Cal. 1977).

19. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 46 (1973).

20. *Id.* at 58–59.

21. *See* Douglas Reed, *Twenty-Five Years after* Rodriguez*: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 L. & SOC'Y REV. 175, 176 (1998).

22. *Id.* at 176–77.

23. Roellke et al., *supra* note 17, at 107.

24. *See id.* (discussing a New Jersey court's invalidation of a state school's finance system during the second wave for not providing a thorough or effective education).

telling.[25] In finding that the state's education funding system violated the Wyoming Constitution, the court held that "until the equality of financing is achieved, there is no practicable method of achieving the equality of quality."[26] Over time, the phrase "practicable method" was essentially ignored by both litigants and state courts across the country.[27] The Wyoming holding then reads that "until the equality of financing is achieved, there is no . . . equality of quality."[28] In advancing their interests during the second wave, plaintiffs focused mostly on equality of financing at the school or district level.[29] Meanwhile, courts issued rulings that stayed within the quantifiable, known guardrails of funding formula reform.[30] This failure of imagination regarding the question of "practicable method" led to a failure of education for millions of children in public schools in the U.S.[31] This failure is explored more deeply in Part III.

C. The Third Wave – Equity and Adequacy Claims

Beginning in approximately 1989, some state courts did get more prescriptive.[32] During this third wave, plaintiffs alleged that the school finance formulas prevented poor districts from providing an adequate education as defined by state education clauses.[33] In *Rose v. Council for Better Education*, the Kentucky Supreme Court found that the state's education system, itself a product of the funding mechanism, violated the constitutional requirement to provide an efficient system of common schools.[34] The court then went on to create a standard that included seven expected student outcomes such as the "sufficient knowledge of

25. Washakie Cnty. Sch. Dist. No. One v. Herschler, 606 P.2d 310, 337 (Wyo. 1980) (holding that remedying the state funding system for schools will "require time for adequate study, drafting of appropriate legislation and transition from the present scheme of financing to one in conformity with the sense of this decision").

26. *Id.* at 334.

27. *Id.*

28. *Id.*

29. Reed, *supra* note 21, at 176.

30. Roellke et al., *supra* note 17, at 112–14.

31. *Id.* at 130.

32. *Id.* at 120.

33. *Id.* at 106.

34. Rose v. Council for Better Educ. Inc., 790 S.W.2d 186, 215 (Ky. 1989).

economic, social and political systems to enable the student to make informed choices."[35] Despite the vagueness of "sufficient knowledge" and the difficulty in assessing the efficacy of a teenager's "informed choices," the Kentucky Supreme Court provided a glimmer of hope for plaintiffs seeking more out of their state's education system than additional, or so-called "equitable" funding.[36]

The three waves of school finance litigation all involve plaintiffs seeking a rejiggering of the allocation of resources dedicated to public education.[37] An undercurrent of all three waves is the assumption that by adjusting the primary input (i.e., money), one can expect better outcomes.[38] But this idea was questioned even at the outset of the first wave.[39] In writing for the majority in *San Antonio*, Justice Powell urges judicial restraint in the face of questionable data linking funding and quality.[40] The main source of controversy is "the extent to which there is a demonstrable correlation between educational expenditures and the quality of education."[41] Justice Powell can be commended for his humility.

That a court could know the educational solution for even dozens of students, let alone hundreds of thousands, defies belief. But this does not mean the court lacks a role—indeed, judicial engagement is appropriate when vindicating constitutional rights. Nor does it mean that discerning educational solutions is impossible for *everyone*; it simply means that the court is not in the best position to identify the individual needs of students.

35. *Id.* at 212; Roellke et al., *supra* note 17, at 122.

36. *Rose*, 790 S.W.2d at 212.

37. Roellke et al., *supra* note 17, at 130–31.

38. *See* Jason R. Kopanke, A Contemporary Understanding of the Effects of the Third Wave of School Finance Litigation 29–30 (Dec. 2020) (Ed.D. dissertation, University of Northern Colorado) (on file with the Scholarship and Creative Works at the University of Northern Colorado).

39. *See* Roellke et al., *supra* note 17, at 109.

40. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 43 (1973).

41. *Id.*

III. EDUCATION REMEDY RATIONALES RE-EXAMINED

A. Rationale #1 – Money Matters, a Lot

With the third wave of school finance litigation, courts were finally presented with an opportunity to consider the definition of "adequacy" and other similar terms found in many state constitutions.[42] But the pendulum swung too far in favor of systems-thinking technocrats and away from the intended beneficiaries—students. The first explanation for this movement is the belief that, contrary to Justice Powell's doubts, there is a clear link between funding amounts and student outcomes.[43] It is attractive to use cost functions and formulas because they seem like objective and scientific ways of estimating (and thereby directing) the amount of spending necessary to achieve certain performance results.[44] Even in an article lamenting the disappointing results of years of school finance litigation, one author nevertheless assumes that a better-educated citizenry is a collective good produced by school finance reform.[45] It must be noted that this conclusion is not completely without evidence. In the years immediately following court-ordered funding formula reform, Connecticut, Kentucky, New Jersey, Tennessee, and Texas showed smaller disparities across districts in the per pupil dollars spent.[46] But, as the author notes, there has been scant research on the educational outcomes or the "equity of the distribution of that money."[47] Courts (and plaintiffs) focused on the overall amount of money being spent in a state or across district lines, but especially during the first and second waves, courts had little ability to see whether the funds had been spent in a manner that actually satisfied the underlying purpose of the litigation—better student outcomes.[48] There are any number of difficulties when courts fashion education remedies that are, by their very

42. Roellke et al., *supra* note 17, at 120.

43. *See* Kopanke, *supra* note 38, at 29–30.

44. Eric Hanushek et al., *What Do Cost Functions Tell Us About the Cost of an Adequate Education?*, 83 PEABODY J. OF EDUC. 198, 198 (2008).

45. Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1080 (1991) (citing Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 16–17 (1989)).

46. Reed, *supra* note 21, at 180.

47. *Id.* at 178.

48. Roellke et al., *supra* note 17, at 130.

nature, meant to apply to a vast number of districts, let alone students.[49] These difficulties are compounded when courts simply turn over the revision of a funding formula to the legislative branch.[50]

Clearly, courts can direct state legislatures to enact statutory financing schemes to remedy constitutional injuries.[51] But even well-intended courts and legislatures have yet to demonstrate clear links between funding levels and student outcomes.[52]

i. Funding Does Not Fix Everything

Just after the Kentucky Supreme Court ushered in the third wave of finance reform, yet again built upon the supposedly tight linkage between funding and educational outcomes, another court questioned those very same assumptions.[53] At least some of the justices in North Carolina had reason to be skeptical of finance reform as a panacea for education reform.[54] In *Hoke County Board of Education v. State of North Carolina*, education policy scholar Eric Hanushek testified for the State.[55] His meta-research showed no correlation between increased school inputs and outputs.[56] Hanushek's follow up research indicates that we cannot even be sure that the initial tabulation for the cost of providing a quality education was sound.[57] Research now shows that even sophisticated analysis of education spending and results does not move us closer to identifying the cost of achieving a specific level of performance.[58] It is a "huge and unwarranted stretch" to claim that specific performance levels for districts or demographics can definitively be achieved at known spending levels.[59] However, Hanushek does note that state-created accountability systems can improve the incentive

49. *Id.*

50. *See* Note, *supra* note 45, at 1072.

51. *See* Kentucky Education Reform Act of 1990, 1990 Ky. Acts 476.

52. Hoke City. Bd. of Educ. v. State, 95 CVS 1158 at *73 (N.C. Super. Oct. 2000).

53. *Id.*

54. *See* Hoke City. Bd. of Educ. v. State, 599 S.E.2d 365, 390 (N.C. 2004).

55. *Hoke City. Bd. of Educ.*, 95 CVS 1158 at *73.

56. *Id.*

57. Hanushek et al., *supra* note 44, at 200.

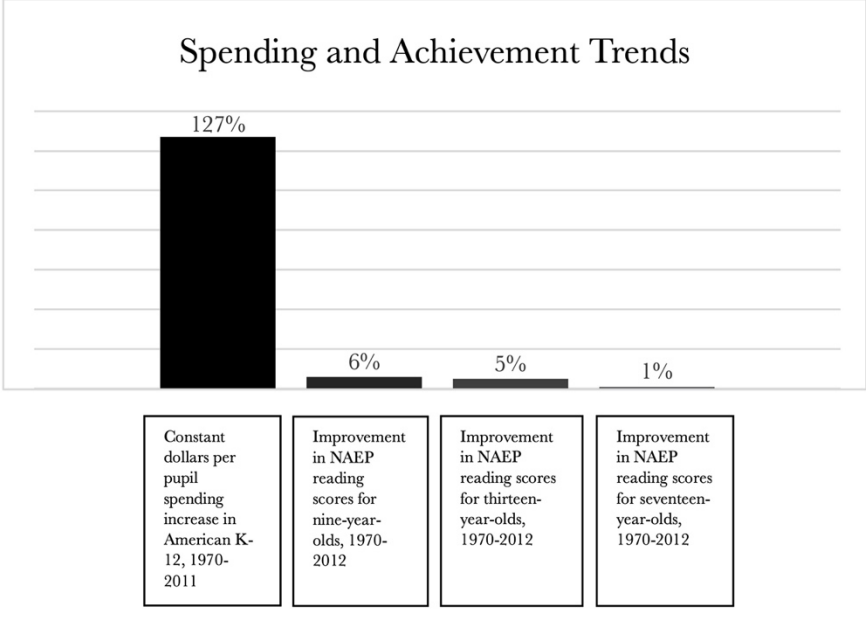
58. *Id.*

59. *Id.* at 199–200.

structure such that schools and districts spend money in such a way as to improve student achievement.[60]

Even putting aside high-level econometrics designed to hone in on precise spending amounts, when analyzing the first rationale for system-level resource allocation, the belief that funding and outcomes are tightly linked, a simple question can be asked: Given the numerous school finance litigation wins over the decades, are students in the public education system any better off?[61] Unfortunately, while this question should be on the tip of the tongues of activists who sought change and courts that demanded reform, it is rarely asked.

The following is a chart showing spending and achievement trends between 1970 and 2012: [62]



While the per pupil expenditure in the U.S. increased by 127% during that time, largely due to spending and staffing levels,

60. Eric Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423, 449–50 (1991).

61. John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351, 2405 (2004).

62. MATTHEW LADNER, *You Say You want an Evolution? The History, Promise, and Challenges of Education Savings Accounts*, *in* EDUCATION SAVINGS ACCOUNTS 1, 4 (Nat Makus, Adam Peshek, & Gerard Robinson eds., 2017).

academic achievement is virtually flat.[63] Another pair of researchers examined the relationship between academic scores on the National Assessment of Education Progress ("NAEP") and per pupil expenditure.[64] When controlling for various cost factors, the researchers found "evidence that state spending appears to have reached a point of zero returns" on state performance.[65]

The negligible relationship between funding and academic achievement poses an interesting question.[66] Can a struggling system reform itself and undo the harm it has caused? Consider an example from torts. In a case where Party B's negligence causes damage to Party A's automobile, the administration of justice would not force the negligent party to manually carry out the necessary repairs. We would not force Party B to upend their life, master the skills of an auto-technician, all to fix the damage caused to Party A. In fact, we might balk at the idea that a demonstrably negligent party would be the same party to remedy the situation. Yet this is precisely what is being asked of public school districts and state education agencies. Plaintiffs with clear educational injuries have come time and again with hat in hand to courts seeking relief only to be placed back under the tutelage of the same district that was unable to educate them in the first place.[67] School finance experts Paul Hill and Marguerite Roza put a fine point on the problem with viewing school improvement solely through the lens of funding:

> [M]oney is used so loosely in public education—in ways that few understand and that lack plausible connections to student learning—that no one can say how much money, if used optimally, would be enough. . . . Districts [and courts] can't choose the

63. *Reading and Mathematics Score Trends*, NAT'L CTR. FOR EDUC. STAT. (May 2015), https://nces.ed.gov/programs/coe/indicator/cnj.

64. Stan Liebowitz & Matthew Kelly, *Fixing the Bias in Current State K-12 Education Rankings*, 854 CATO INST. POL'Y ANALYSIS 9, 11 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3185152.

65. *Id.*

66. *Id.*

67. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973).

> most cost-effective programs because they lack evidence on costs and results.[68]

Some posit that residents in rich districts with financial interests (such as paying low property tax amounts) have an outsized influence in maintaining the gap between education rights and remedies.[69] That is, rich districts have a vested interest in maintaining the status quo funding formula because they want to keep property tax rates low. This is cynical but perhaps not cynical enough. If residents of rich districts are primarily driven by such calculations, they would likely vote to raise property taxes in lieu of spending money on private school tuition. Such an outcome would be economically practical. Perhaps the "gap" exists not because of monied individuals, but because state courts and governments perpetuated an educational model that mirrored turn-of-the-twentieth-century factories. When the prevailing K-12 educational construct is one that mimics an assembly line, a premium is placed on efficiency.

B. Rationale #2 – Public Schools as Efficient Production Hubs

While the phrase "factory model" only came about in the late twentieth century to describe public (or government) run schools, it is not without historical basis.[70] This historical context likely influenced plaintiffs seeking relief and courts crafting remedies. Implicit in most school finance lawsuits is the assumption that the most efficient method for reforming the education system was through the vehicle of local education agencies ("LEAs"), or state education agencies ("SEAs").[71] Even in *San Antonio*, where the

68. Paul T. Hill & Marguerite Roza, *The End of School Finance as We Know It*, EDUC. WEEK (Apr. 29, 2008), https://www.edweek.org/policy-politics/opinion-the-end-of-school-finance-as-we-know-it/2008/04.

69. *See* Note, *supra* note 45, at 1078.

70. *See* Joel Rose, *How to Break Free from Our 19th-Century Factory-Model Education System*, ATLANTIC (May 9, 2012), https://www.theatlantic.com/business/archive/2012/05/how-to-break-free-of-our-19th-century-factory-model-education-system/256881.

71. Most public school districts are "LEA." Some states allow individual schools, e.g., charter schools, to function as LEAs. An example of an SEA is the Florida Department of Education, which serves as the single, statewide repository of education data from primary, secondary, and post-secondary institutions throughout the state. *About Us*, FLA. DEPT. EDUC., https://www.fldoe.org/about-us (last visited Jan. 12, 2022).

Rodriguez family challenged the school funding system on behalf of a group of low-income parents, the relief sought was a dismantling of the statewide reliance on a particular taxing scheme, rather than relief that was tailored to the needs of their particular school-aged children.[72] Though it did not need to, the Court spent considerable time entertaining Texas's argument that the mere provision of supplies, transportation, and teachers across the state constitutes fulfillment of its obligation to maintain an efficient system of public free schools under the Texas Constitution.[73] This systems-first thinking has provided at least a base level of education throughout the country. The vast majority (90%) of school-aged students in the U.S. attend free, public elementary and secondary schools.[74] When considering how to teach thousands of students and disseminate the resources required to administer these programs, it is reasonable to do things that may resemble best business practices. These might include:

- Pooling resources to achieve the benefits of scale (e.g., all schools in a district send students with special needs to a single facility that is better equipped to meet student needs);
- Seeking group pricing from vendors; or
- Hiring a reserve of substitute teachers at the district level to be deployed at individual schools.[75]

Over the past century, the U.S. K-12 educational system has been crafted so that it runs like a well-oiled machine, squeezing out every possible drop of efficiency in the service of the goal its architecture was originally designed to fulfill: efficiently ranking students in order to assign them to their proper place in society.[76] This may sound like a cynical explanation of public schools' (and districts') resemblance to factories, but, when operating under the

72. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 1282.

73. *Id.* at 1292.

74. Imed Bouchrika, *101 American School Statistics: 2020/2021 Data, Trends & Predictions*, RESEARCH.COM, https://research.com/education/american-school-statistics (last visited Jan. 12, 2022).

75. *See generally* Pat Maio, *Districts Pool Resources to Boost Computer Science Education*, EDSOURCE (Dec. 15, 2016), https://edsource.org/2016/districts-pool-resources-to-boost-computer-science-education/574405.

76. TODD ROSE, THE END OF AVERAGE 50–52 (2016).

right leadership, this model functions exactly as hoped by early advocates of the common school.[77]

Noted public school superintendent, professor at Stanford University and, later, Columbia University, Ellwood Patterson Cubberley, invoked the factory model when describing education.[78]

> Our schools are, in a sense, factories in which the raw products (children) are to be shaped and fashioned into product to meet the various demands of life. The specifications for manufacturing come from the demands of twentieth-century civilization, and it is the business of the school to build its pupils according to the specifications laid down.[79]

While it is true that Cubberley warned *against* individual school leaders being overly rigid in their management of faculty, the implication was clear—school *systems* ought to function akin to businesses, which fundamentally involves the top-down allocation (by SEAs or LEAs) of the means of production and resources for lower-level employees (teachers) to function efficiently in their development of products (students). Cubberley's books were widely studied during the first quarter of the twentieth century.[80]

i. Merging Efficiency with Innovation

As the heading of this sub-section suggests, the time has come to consider innovation in education. It must be noted that at the turn of the twentieth century, creating large associations of government-run schools was innovative.[81] Many regions of the country were moving away from hyper-local schools and towards more centrally managed school systems.[82] As states increased the amount of money spent on education, centralized spending

77. *Id.* at 56.

78. ELLWOOD P. CUBBERLEY, PUBLIC SCHOOL ADMINISTRATION 338 (1916).

79. *Id.*

80. *See generally* George E. Arnstein, *Cubberley: The Wizard of Stanford*, 5 HIST. EDUC. J. 73, 73 (1954).

81. *See generally* Gail L. Sunderman, *Evidence of the Impact of School Reform on Systems Governance and Educational Bureaucracies in the United States*, 34 REV. RSCH. EDUC. 226, 228 (2010).

82. *Id.*

allowed resources to be disseminated quickly and to all corners of a district or state.[83] The efficiency rationale was, therefore, plausible for much of the country; however, even then the most important educational actor, a parent, was often left out of the construct.

Again, consider the torts example of an automobile accident. A court is likely to issue a money judgement in favor of Party A, whose automobile was damaged. The amount will approximate the cost of the damage done, the idea being that with the funds, Party A can have the damage repaired and be made whole. Certainly, this solution can be considered efficient. Judicial efficiency could not require courts to individually seek out bids from local repair shops, gauging their quality and craftsmanship. Rather, it is more efficient to allow Party A to take the funds and work out a solution that is suitable. So too, courts cannot be expected to assess the specific needs of all school-aged children in a given locale, crafting a customized educational plan for each child.[84] However, where this solution is virtually impossible for courts (and even districts or state education agencies), this is imminently achievable for the parents of said children.[85] Parents are best positioned to guide the educational experience of their children.[86]

Unfortunately, many of the progenitors of the factory-school model did not believe parents to be the best advocates for their own children.[87] When describing its vision for a better educated populace, the General Education Board, created by John D. Rockefeller, spoke about parents in an especially patronizing tone:[88]

> We shall not try to make these people or any of their children into philosophers or men of learning or of science. We are not to raise up from among them authors, orators, poets, or men of letters. We shall not search for embryo great artists, painters,

83. *Id.*

84. *See generally* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2441 (1995).

85. *Id.*

86. *Id.*

87. *See, e.g.*, FREDERICK T. GATES, THE COUNTRY SCHOOL OF TOMORROW 6, 10 (Gen. Educ. Bd., 1913).

88. *Id.*

> musicians nor lawyers, doctors, preachers, politicians, statesmen, of whom we have ample supply. . . . [T]he task that we set before ourselves is very simple as well as very beautiful one, to train these people as we find them to a perfectly ideal life just where they are. . . . So we will organize our children into a little community and teach them to do in a perfect way the things their fathers and mothers are doing in an imperfect way, in the home, in the shop and on the farm.[89]

No modern school district or state board of education would hold such thinly veiled contempt of parents; however, research shows that as compared to charter and private schools, traditional public school staff still engage parents (as measured by seeking parents' input) at far lower rates.[90] This engagement is key because, ultimately, those served by schools—not lawmakers, researchers, or courts—may be best judges of whether programs and school systems are accomplishing their purpose.[91]

Gathering parental observations, while not efficient, can yield actionable information that would not have been garnered otherwise. For instance, take the example of the McMurray family in Arizona.[92] Parents, Tim and Lynn, have adopted eight children including three of Native American heritage who are developmentally delayed due to their biological parents' substance abuse.[93] Their oldest daughter, Alicia, is 16 years old and suffers from fetal alcohol syndrome and a rare genetic disorder that affects various cognitive and physical functions.[94] Lynn says that Alicia's needs were being met in public school, but after just six months of being home-schooled, her daughter made huge strides.[95] The difference was like "night and day," and friends and family alike

89. *Id.*

90. ANDREW CATT & ALBERT CHENG, FAMILIES' EXPERIENCES ON THE NEW FRONTIER OF EDUCATIONAL CHOICE 14 (2019).

91. ALLYSIA FINLEY, *Parents and Providers speak up*, *in* EDUCATION SAVINGS ACCOUNTS 121, 139 (Nat Makus, Adam Peshek, & Gerard Robinson eds., 2017).

92. *Id.* at 125.

93. *Id.*

94. *Id.*

95. *Id.* at 125–26.

recognized the positive growth in Alicia's life.[96] The McMurray family participates in two of Arizona's parent choice programs.[97] The program allows the family to use money already allocated for Alicia's education at a public school on other educational services, even in the home setting.[98]

Another parent, Katherine Visser, says that after transferring from a public school to a private school, her family has continued to evolve to "crafting our own completely individualized education."[99] Her son Jordan receives an Education Savings Account because of his special needs, which include cerebral palsy, motor processing disorder, hypotonia, dysgraphia, and sensory processing disorder.[100] With the funds that would have followed him to his zoned public school, Jordan was able to access the Sierra Academy, a private school for students with special needs.[101] Eventually, Katherine found that she could use the same funds to craft an even better experience for Jordan in a home-based setting.[102]

Far from being "imperfect" parents who need the centralized expertise of an organization such as the General Education Board, the McMurray and Visser families can tailor an educational experience that meets the unique needs of their children.[103] These actions cannot be replicated by a court, SEA, LEA, or even by a school. True customization requires an intimacy that cannot be achieved through remotely managed policy.

However, the American education system need not create a false dichotomy with parent agency and efficiency staking out opposite poles. The forced closure of schools in every state due to COVID-19 presented an opportunity to marry the two concepts. Seeking to alleviate the burden borne by parents due to school closures and the overall lack of childcare, especially for working parents, the federal government used funds from the American

96. *Id.*
97. *Id.* at 126.
98. *Id.*
99. *Id.* at 123.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 123, 125–26.

Rescue Plan to create the Advance Child Tax Credit ("CTC").[104] This program sent payments of up to $300 per child to parents monthly from July to December of 2021.[105] Most payments were transmitted via direct deposit and payments totaled roughly $15 billion each month.[106] Nationwide survey data indicates that Black and Hispanic families used a greater portion of the CTC towards school-related expenses than White families (42%, 31%, and 26%, respectively).[107] Another 40% of all households used the funds to pay off debt between the months of July and September.[108] This program revealed that the government can swiftly move resources directly to parents. The program also demonstrated trust in parents to determine how best to spend the funds. No spending restrictions were placed on CTC funds and reporting was not required.[109] Data about spending occurred through voluntary survey collection.[110] By December 2021, more than $93 billion reached more than thirty-six million families across the country.[111]

Compare this effort with another federal effort to provide support to state and local education agencies and schools—the federal Education Stabilization Fund ("ESF"), which was established by the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") in March 2020.[112] Additional funds have been allocated to the ESF through successive pieces of legislation, bringing the total investment to over $273 billion.[113] In contrast to the broad spending flexibility of the CTC program, ESF dollars

104. Alicia Adamczyk, *The First Advance Child Tax Credit Arrives This Month. Here's Everything You Need to Know*, CNBC (July 2, 2021, 9:00 AM), https://www.cnbc.com/2021/07/02/what-to-know-about-the-first-advance-child-tax-credit-payment.html.

105. *Id.*

106. I.R.S. News Release IR-2021-113 (May 17, 2021).

107. Daniel J. Perez-Lopez & Yeris Mayol-Garcia, *Parents with Young Children Used Child Tax Credit Payments for Child Care*, U.S. CENSUS BUREAU (Oct. 26, 2021), https://www.census.gov/library/stories/2021/10/nearly-a-third-of-parents-spent-child-tax-credit-on-school-expenses.html.

108. *Id.*

109. *See* Megan Leonhardt, *5 Smart Ways to Use Your Upcoming Child Tax Credit Payments to Get Ahead*, CNBC (June 18, 2021, 11:55 AM), https://www.cnbc.com/2021/06/18/ways-to-use-your-child-tax-credit-payments.html.

110. *See* Perez-Lopez & Mayol-Garcia, *supra* note 107.

111. I.R.S. News Release IR-2021-249 (Dec. 15, 2021).

112. *Education Stabilization Fund Transparency Portal*, U.S. DEP'T OF EDUC., https://covid-relief-data.ed.gov (last visited Jan. 12, 2022).

113. *Id.*

must be used according to statutory and regulatory guidelines that govern everything from the time window during which funds must be spent, to the types of schools that are eligible to apply for funds earmarked to retrofit classrooms to meet COVID safety protocols.[114] The state of Michigan received $7.9 billion since the creation of the ESF in March 2020.[115] As of November 30, 2021, only 26.6% of the funds had been spent.[116] Even the funds that have been disbursed do not seem to be tethered to student needs. For instance, while roughly $406 million ($7,890 per pupil) has been awarded to the Detroit Public Schools District, schools continue to move in and out of remote learning due to COVID outbreaks and lack of sufficient testing materials.[117] At the same time, many students still lack the technology necessary to carry out their studies at home.[118] Michigan was also awarded over $86 million to one specific pot of ESF money, the Emergency Assistance for Non-Public Schools ("EANS") program.[119] These funds can be awarded to schools and other non-public education service providers to alleviate the costs associated with pandemic-induced learning loss, cleaning and sanitizing supplies, personal protective equipment, and other COVID-related remediation items or curricula.[120] As of November 30, 2021, only 14.3% had been spent.[121]

When compared to the Child Tax Credit program, the Education Stability Fund has more of nearly everything—more money, more restrictions on spending, more overhead costs, more bureaucracy. The ESF is anything but a well-oiled machine. Rather, it has become a warehouse for dollars that could be deployed

114. *See* Madie Norris Forcier, *A Closer Look: What the CARES Act Education Stabilization Fund Means for Schools*, SOLID PROFESSOR (Apr. 29, 2020), https://www.solidprofessor.com/blog/cares-act-education-stabilization-fund.

115. *Education Stabilization Fund Transparency Portal for Michigan*, U.S. DEP'T OF EDUC., https://covid-relief-data.ed.gov/profile/state/MI (last visited Jan. 12, 2022).

116. *Id.*

117. U.S. DEP'T OF EDUC., *supra* note 115; Corey Williams, *Families Despair over Post-Holiday Return to Remote Learning*, AP NEWS (Jan. 7, 2022), https://apnews.com/article/coronavirus-pandemic-health-education-detroit-cde614839b15d02a594dab1e690c7d46.

118. Williams, *supra* note 117.

119. U.S. DEP'T OF EDUC., *supra* note 115.

120. Elizabeth Goodsell, *What is the Emergency Assistance to Non-Public Schools Program?*, CURRICULUM ASSOC. (Apr. 1, 2021), https://www.curriculumassociates.com/blog/emergency-assistance-to-non-public-schools-program.

121. U.S. DEP'T OF EDUC., *supra* note 115.

quickly through direct payments to parents, similarly to the CTC program.

Another innovation that gained major traction when millions of students were forced into remote learning in the early Spring of 2020 is the so-called "pandemic pod."[122] The Center for Reinventing Public Education defines a "pod" as a "pandemic learning structure that is formed, operated, and/or controlled by parents or family units, primarily for the benefit of their own children."[123] The term pod is often interchangeable with "home school" and "micro school."[124] Regardless of the name, the concept is essentially an organic, home-based learning environment for a small number of students.[125] Some providers, such as Prenda, offer training courses for parents who need to sharpen their own teaching skills.[126] The Internet is ripe with resources that will allow nearly any parent to guide a child through coursework.[127] Remote learning forced parents, especially those who work outside of the home, to adapt and develop new methods of keeping children academically and socially engaged.[128] Here again, is another solution that a court cannot entertain if doing so requires a court to facilitate the creation of networks of pods across a district or state. However, if all that is necessary to create such learning environments is ordering capital to flow from state coffers to parent accounts, it is well within a court's capacity.

Recent innovations, though brought on by the tragic circumstances of a global health pandemic, show that dollars designated for educational purposes can reach their intended

122. Michael B. Horn, *The Rapid Rise of Pandemic Pods: Will the Parent Response to Covid-19 Lead to Lasting Change?*, EDUC. NEXT (Sept. 2, 2020), https://www.educationnext.org/rapid-rise-pandemic-pods-will-parent-response-covid-19-lead-to-lasting-changes.

123. Ashley Jochim & Robin Lake, *Understanding the Learning Pods Landscape*, CRPE (2020), https://crpe.org/understanding-the-learning-pods-landscape.

124. *Id.*

125. *Id.*

126. *See Resource Hub: A Podcast for Educators and Parents,* PRENDA, https://www.prenda.com/podcast (last visited Feb. 4, 2022).

127. *Resources for Parents and Families,* U.S. DEP'T OF EDUC., THE OFF. OF ELEMENTARY & SECONDARY EDUC. (Dec. 12, 2020), https://oese.ed.gov/resources/learning-at-home/resources- parents-families.

128. *See* Amber Garbe et al., *Covid-19 and Remote Learning: Experiences of Parents with Children During the Pandemic,* 4 AM. J. OF QUALITATIVE RSCH. 45, 45–46 (2020).

beneficiaries with little friction.[129] This development was virtually unimaginable at the turn of the twentieth century.[130] Today's courts need only look at existing programs like the CTC or Education Savings Accounts in Arizona to gain confidence that SEAs and LEAs can be bypassed when issuing judgements granting parent plaintiffs relief under their state constitutions.[131] Moreover, when parents manage educational spending, the money is not only spent but is spent in ways that uniquely align with student needs.[132]

Nevertheless, some still point to the unique positioning of public schools as an unbiased forum integral to the fabric of the United States as a rationale for insisting that educational resources flow only into public school systems, rather than steering resources directly to parents or non-public education service providers.[133]

C. Rationale #3 – Public Schools Are Value-Neutral

The first two rationales analyzed in this article deal with the administration of education. The third and fourth rationales are concerned with the nature of what schools teach when state dollars fund them. Some scholars believe that the education of children is exclusively within the purview of the state.[134] Amy Guttmann, who is now, somewhat ironically, the eighth president of the private, Ivy-league University of Pennsylvania, gives at least three reasons for ceding education to the hands of the state.[135] First, only the state can create a neutral space in which children can engage in

129. *See* U.S. INTERNAL REVENUE SERV., Publication 970, Tax Benefits for Education (2021).

130. GEO. WASH. U., GRADUATE SCH. OF EDUC. AND HUM. DEV., CTR. ON EDUC. POL'Y, HISTORY AND EVOLUTION OF PUBLIC EDUCATION IN THE US, 4 (2020).

131. *Child Tax Credit,* BENEFITS.GOV, https://www.benefits.gov/benefit/938 (last visited Feb. 4, 2022); Josh Cunningham, *Expanding Choices with Education Savings Accou*nts, 24 NAT'L. CONF. OF STATE LEGIS. (2016).

132. Arianna Prothero, *Some States Put Parents in Charge of Student Spending*, EDUC. WEEK (Feb. 24, 2015), https://www.edweek.org/teaching-learning/some-states-put-parents-in-charge-of-student-spending/2015/02.

133. *See The Facts About School Vouchers,* PUB. SCHS. FIRST NC (Dec. 10, 2021), https://www.publicschoolsfirstnc.org/resources/fact-sheets/the-facts-about-school-vouchers.

134. *See id.*

135. *Meet President Gutmann*, U. PA. (Nov. 2021), https://president.upenn.edu/meet-president.

uncoerced democratic deliberation.[136] One might think of this as learning another intellectual language: democratic deliberation at school and religion or partisanship at home.[137] Second, the management of public schools is democratic.[138] While some school boards are appointed by governmental entities such as mayors, most public schools in the United States are governed by locally elected school boards.[139] Finally, Guttmann's third justification for a government-controlled education system is that public schools can confer social and moral capital upon a diverse population, namely religious and ethnic minorities. [140]

i. All Schools Convey Values

To some, Guttmann describes public schools that can serve as the *tabula rasa* for the uncoerced development of young American minds. While this aim sounds noble, it ignores the often racist and anti-religious sentiments that led to the widespread adoption of secularism in American public schools.

Guttmann fails to appreciate that the schools she describes carry implicit values with them. Guttmann applauds public schools' ability to create a space where "democratic deliberation" can flourish, and students have a chance to "share in self-consciously shaping the structure of their society."[141] What Guttmann calls "neutral" reflects a preference for Enlightenment rationalism and individualism.[142] The United States' commitment to a uniform system of government-run schools is joined by only a handful of democratic nations: Brazil, Greece, Latvia, Mexico, and Uruguay.[143] Other countries, with whom the United States may feel more fidelity, operate a wide array of secular, religious, and pedagogical schools.[144] These systems are designed to be pluralistic so that a

136. ASHLEY ROGERS BERNER, NO ONE WAY TO SCHOOL: PLURALISM AND AMERICAN PUBLIC EDUCATION, 34–35 (Lance D. Fusarelli et al. eds., 2017).

137. *Id.* at 36.

138. *Id.* at 35.

139. WILLIAM G. HOWELL, BESEIGED: SCHOOL BOARDS AND THE FUTURE OF EDUCATION POLITICS, 1, 6 (Brookings Institution Press et al. eds., 2005).

140. BERNER, *supra* note 136, at 35.

141. *Id.* at 34.

142. *Id.* at 36.

143. *Id.* at 29.

144. *Id.*

multitude of ideas can interact.[145] This larger list includes: Germany, France, Hong Kong, Denmark, Israel, and most provinces in Canada.[146] The Netherlands tops all—funding more than thirty different kinds of schools, only 30% of which are operated by the government.[147]

Rather than being value-neutral, quite the opposite is the case in public schools, especially those with democratically elected school boards.[148] In a district with democratically elected board members, the decisions of the board are quite literally those of the majority group within a community.[149] The winning group's biases are formalized by its board representatives and enacted upon the entirety of students, regardless of the diverse viewpoints held by the families within the district.[150] Furthermore, Guttmann ought to be wary of a recent trend of state laws that make school board races partisan.[151] One such law was signed into effect by Tennessee Governor Bill Lee in 2021.[152] Local political parties in Tennessee may now host party primary races for the school board seats.[153] The full effects of these partisan races is unknown, but as candidates will be able to raise campaign money in conjunction with political parties, these races are sure to be more expensive over time.[154] This

145. *Id.*

146. *Id.*

147. *Id.* at 40.

148. Joseph Beckham & Barbara Klaymeier Wills, *School Boards: Responsibilities, Duties, Decision-Making, and Legal Basis for Local School Board Powers*, EDUCATIONENCYLCOPEDIA.COM, https://education.stateuniversity.com/pages/2391/School-Boards.html (last visited Feb. 4, 2022).

149. *Id.*

150. *Id.*

151. States like Florida, Indiana, and Tennessee are either considering or have passed bills making school board elections partisan. *See* Andrew Atterbury & Juan Perez Jr., *Republicans Eye New Front in Education Wars: Making School Board Races Partisan*, POLITICO (Dec. 29, 2021), https://www.politico.com/news/2021/12/29/republicans-education-wars-school-board-races-526053; Casey Smith, *Indiana Lawmakers Get Pushback on Partisan School Board Bill*, ASSOCIATED PRESS (Jan. 11, 2022), https://apnews.com/article/coronavirus-pandemic-health-education-indiana-indianapolis9ba4cd85fc2246e2deeb8c6cf527fc6f.

152. TENN. CODE ANN. § 49-22-201(a)(1), (d) (2021).

153. *Id.*

154. Meghan Mangrum, *Gov. Bill Lee Signs Bill Greenlighting Partisan School Board Elections in Tennessee*, TENNESSEAN (Nov. 12, 2021), https://www.tennessean.com/story/news/education/2021/11/12/tennessee-gov-bill-lee-greenlights-partisan-school-board-elections/6284601001.

could have the effect of creating barriers to candidates of modest means.

Perhaps more concerning than partisan school board races are the recent culture wars that have erupted in public school board meetings.[155] Conservatives and progressives cannot agree on school discipline policy, mathematics, or how educators should teach basic matters of history in classrooms.[156] Author Mike Rothschild, who writes about political movements, notes that many people who are engaging in public debate at school board meetings "think it's a battle between good and evil."[157] A political winner must emerge from these battles and one side or another will bear the responsibility of governing schools with students from diverse backgrounds. Given the tone of debate in present-day school board meetings, it cannot be assumed that the winners will seek to operate value-neutral schools simply because they were democratically elected.

As William Galston notes, when the government funds only a single school system, it "side[s] with the ultimate claims of one group and not others."[158] Claims such as Guttmann's claim that the government can create an ideologically neutral public space is not only false, but it cleverly lulls the reader into indoctrination of the worst kind: that which is implicit, unacknowledged, and cut off from diverse thought.[159] When considering a plaintiff's claim in pursuit of relief of a constitutionally guaranteed right to quality education, courts should do their part to encourage an education ecosystem that allows schools of all types to thrive. A plethora of schools is

155. Heather Hollingsworth & Thomas Beaumont, *Culture War Fight Finds Mixed Success in School Board Races*, ASSOCIATED PRESS (Nov. 6, 2021), https://www.usnews.com/news politics/articles/2021-11-06/culture-war-fight-finds-mixed-success-in-school-board-races.

156. *Id.*; Max Eden, *The Bitter Debate Over School Discipline*, QUILLETTE (May 31, 2019), https://quillette.com/2019/05/31/the-bitter-debate-over-school-discipline; Christopher J. Phillips, *The Politics of Math Education*, N.Y. TIMES (Dec. 3, 2015), https://www.nytimes.com /2015/12/03/opinion/the-politics-of-math-education.html.

157. Erin Richars & Lindsay Schnell, *What Happens When Conservative School Boards Gain Power at Districts Around the Country*, TENNESSEAN (Oct. 20, 2021, 11:02 AM),

https://www.tennessean.com/story/news/education/2021/10/20/critical-race-theory-catalyst-rise-conservative-school-boards/8442122002.

158. *See generally* WILLIAM GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 19 (2004) (emphasizing the importance of governments giving parents the freedom to choose diverse education options, rather than making parents' choices for them).

159. BERNER, *supra* note 136, at 44.

needed because the United States remains remarkably diverse, and parents deserve to select from a range of options to meet the needs of their children.

Related to the concept of value-education is the matter of religious education. There may be some people and organizations (e.g., the State of Maine in *Carson*) that accept the right of parents to use state education dollars to attend private and home school, yet they would not extend that practice to include religiously affiliated schools.[160] Indeed this comes close to an argument put forth by the State of Maine in *Carson*.[161] During oral argument, the State responded to Justice Alito's question about whether a school affiliated with a religious organization that held firm to principles such as non-discrimination and charitable work and believed these principles should be encouraged among students, would qualify for the Maine town tuition funding program.[162] The State of Maine responded that "[p]ublic schools often have a set of values that they want to instill: public service, be kind to others, be generous."[163] It is clear that neither public schools, nor all other schools for that matter, can divorce values from education. The final question, then, is the extent to which values that are driven by religion can be freely exercised by parents in the context of education.

D. Rationale #4 – Schools Should Not Establish Religion with Government Funds

The final section in Part III revisits the federal courts to examine the U.S. Supreme Court's treatment of public funds and religion because, in many states, the federal Establishment Clause combines with state constitutional provisions to erect a final barrier to public money flowing freely to parents seeking school choice at religious schools. The seminal case in modern Supreme Court jurisprudence that has restricted the use of public funds for religious purposes is *Locke v. Davey*.[164] In *Locke,* the Supreme Court issued a decision that many state departments of education and public school districts continue to cite in justifying the maintenance

160. *See, e.g.*, ME. STAT. tit. 20, § 5204(4) (2007).

161. Transcript of Oral Argument at 52, 55–56, Carson v. Makin (2021) (No. 20-1088).

162. *Id.* at 63–64.

163. *Id.* at 64.

164. Locke v. Davey, 540 U.S. 712 (2004).

of the government-operated monopoly in K-12 education.[165] *Locke* is an instance of the Court working out the "play in the joints" that exists within the First Amendment.[166] This "play" can be described as the space between the Establishment Clause and the Free Exercise Clause.[167] There may be times when some state actions are permitted by the Establishment Clause but are not required by the Free Exercise Clause.[168]

In *Locke*, the State of Washington created the Promise Scholarship Program to assist academically gifted students with the costs of post-secondary education expenses.[169] Eligible students could use the scholarship to pay for any education-related expense, including room and board.[170] Students could also use the scholarship at any nationally accredited post-secondary institution in the state of Washington; however, students were not permitted to use the funds in their pursuit of a degree in theology.[171]

The plaintiff, Joshua Davey, was awarded a Promise Scholarship and chose to attend Northwest College, a private, Christian college that was an eligible institution under the scholarship program.[172] Intending to pursue vocational ministry, Davey selected a double major in pastoral ministries and business management/administration.[173] At the beginning of the academic year Davey learned that because of his chosen course of study he could not use the Promise Scholarship, then worth about $1,125 per year.[174] Davey brought an action in federal court claiming that the denial of his scholarship solely because his chosen course of study was devotional theology violated his First Amendment rights.[175] While the district court rejected Davey's claim, a divided

165. *See generally* Thomas C. Berg & Douglas Laycock, *The Mistakes in* Locke v. Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 TULSA L. REV. 227, 228 (2004) (explaining how *Locke* will lead to states refusing to fund religious schools).

166. *Locke*, 540 U.S. at 718–19.

167. Walz v. Tax Comm'n of New York, 397 U.S. 664, 669 (1970).

168. *Locke*, 540 U.S. at 718.

169. *Id.* at 715.

170. *Id.* at 716.

171. *Id.*

172. *Id.* at 717.

173. *Id.*

174. *Id.* at 716–17.

175. *Id.* at 718.

Ninth Circuit reversed, concluding that Washington State had in fact impermissibly singled out religion for unfavorable treatment.[176]

Just two years before *Locke,* the Supreme Court allowed state funds to support students attending private and religious schools in Florida.[177] The Court in *Locke* however, decided that it is the "Blaine Amendment" in Washington's State Constitution that tipped the scales in favor of a more restrictive interpretation of the Free Exercise Clause.[178] Washington's Blaine Amendment, adopted in 1889, states in part that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."[179]

The Court reasoned that this limit is an enforceable safeguard not only against state-*sponsored* religion but also against state-*compelled* religious activity.[180] Without such safeguards states might, for instance, compel certain types of religious worship or citizens could be conscripted to build a physical house of worship.[181] In short, the Court in *Locke* failed to find religious animus (which would have violated the Free Exercise Clause), but, rather, a state constitutional provision that prevents religious advancement on the back of a government enacted (and funded) program.[182]

Nearly twenty years later, a state on the far opposite side of the country would rely on *Locke* to seal its public coffers.[183] In *Carson v. Makin*, the State of Maine argues that there is no question that Maine may require its *public* schools to provide a secular education rather than a sectarian education.[184] Extending this reasoning, Maine contends that it is able to bar families from using public dollars for attendance at schools that promote religious or sectarian beliefs.[185] Maine does not limit use of funds to only public schools, parents can choose a private school for their child; however, the Maine Department of Education contends that private schools must

176. Davey v. Locke, 299 F.3d 748, 750 (9th Cir. 2002).

177. Zelman v. Simmons-Harris, 536 U.S. 639, 640 (2002).

178. *Locke*, 540 U.S. at 722.

179. WASH. CONST. art. I, § 11.

180. *Locke*, 540 U.S. at 726.

181. Principles of Religious Liberty, 82 Fed. Reg. 206, 8 (Oct. 26, 2017).

182. *Locke*, 540 U.S. at 726.

183. Carson v. Makin, 979 F.3d 21, 33 (1st Cir. 2020).

184. *Id.* at 25–26.

185. *Id.* at 38.

provide a "rough equivalent" of a public education—one that is non-sectarian and religiously neutral.[186]

In *Locke* the Court ostensibly ruled against a sweeping interpretation of the Free Exercise Clause, but it did not bar the door to further inquiry.[187] Important qualifications remained, the crux of the issue being that the student in *Locke* wanted to use the Washington state scholarship towards his religious training.[188] The Court would have no objection to Davey attending a religious school or studying something else, even religion, but because he was training to become a minister, the Court thought it ran afoul of the Establishment Clause.[189] Nevertheless, a crack was left in the door, and successive cases, including *Carson*, may have kicked it in.[190]

i. Free Exercise Abounds in Education

This section examines several cases that weigh the question of how the federal Establishment and Free Exercise Clauses interface in the context of education. Proponents of a robust Establishment Clause want to cabin off public dollars from all religious entities and uses.[191] Proponents of an expansive interpretation of the Free Exercise Clause want to compel state action when an individual's religious conviction requires it.[192] The space between these views is the "play in the joints," and exploring it first requires investigating the historical forces at play when the United States shifted towards predominantly secular public schools.

a. Blaine Amendments and Anti-Catholicism

Contrary to popular belief, the United States had over a one-hundred-year history of publicly funded private and religious

186. Brief for Respondent at 18, Carson v. Makin (2021) (No. 20-1088).

187. *Locke*, 540 U.S. at 726.

188. *Id.* at 722.

189. *Id.* at 722–26.

190. *Carson*, 979 F.3d at 33.

191. Donald L. Beschle, *Does the Establishment Clause Matter? Non-Establishment Principles in the United States and Canada*, 4 U. PA. J. CONST. L. 451, 451 (2002).

192. *Id.*

schools.[193] President Thomas Jefferson's phrase, "the separation of church and state," did not come into use until the mid-nineteenth century.[194] Some towns in the Northeast afforded residents so-called "education pluralism," where Catholic, Jewish, Congregationalist, and Protestant schools were simultaneously funded by the government.[195] Over time, waves of Catholic immigrants found themselves caught in the zeitgeist of nativist forces such as the Know-Nothing Party and Ku Klux Klan.[196] It was during the latter half of the nineteenth century that some American Protestants sought to take action against Catholic institutions by defunding its biggest mode of outreach—schools.[197] Leading the charge was Congressman James Blaine who proposed a federal constitutional amendment that would prohibit states from funding religious schools.[198] While the amendment ultimately failed at the national level, Blaine Amendments can be found in thirty-seven state constitutions.[199]

Unfortunately, over time, not only were hundreds of school doors shuttered to students from diverse backgrounds but, currently, most Americans are also unaware that the common (public) school as they know it is largely a function of religious prejudice.[200] Not mincing words, the U.S. Supreme Court noted that the federal Blaine Amendment was "born of bigotry" and "arose at a time of pervasive hostility to the Catholic Church and to

193. Mark Walsh, *Long History Underlies Fight Over Religious-School Funding*, EDUC. WEEK (Jan. 14, 2020), https://www.edweek.org/policy-politics/long-history-underlies-fight-over-religious-school-funding/2020/01.

194. *The First Amendment Says Nothing About "Separation of Church and State" or a "Wall of Separation Between Church and State." Where Did This Idea Come From? Is it Really Part of the Law?*, FREEDOM F. INST., https://www.freedomforuminstitute.org/about/faq/the-first-amendment-says-nothing-about-separation-of-church-and-state-or-a-wall-of-separation-between-church-and-state-where-did-this-idea-come-from-is-it-really (last visited Feb. 4, 2022).

195. Robert Kennedy, *How Private Schools Evolved in the United States*, BOARDING SCH. REV. (Nov. 25, 2021), https://www.boardingschoolreview.com/blog/how-private-schools-evolved-in-the-united-states.

196. FREEDOM F. INST., *supra* note 194.

197. Philip Hamburger, *Separation of Church and State*, 43 OCCASIONAL PAPERS FROM U. CHI. L. SCH, 1, 3 (2002).

198. *Answers to Frequently Asked Questions About Blaine Amendments*, INST. FOR JUST., https://ij.org/issues/school-choice/blaine-amendments/answers-frequently-asked-questions-blaine-amendments (last visited Feb 4, 2022).

199. *Id.*

200. *Id.*

Catholics in general" and that many of its state counterparts have a similarly "shameful pedigree."[201] When a state's Blaine Amendment operates in tandem with the federal Establishment Clause, many believe an ultimate separation between religion and public education exists.[202] The next portion of this article details cases that shed light on this important issue.

b. The Supreme Court Starts a Twenty-Year March to Affirming Free Exercise in Public Education

1. *Zelman v. Simmons-Harris* (2002)

Other cases such as *Pierce v. Society of Sisters* laid the foundation for the ultimate right of parents to control their children's primary and secondary education, but *Zelman v. Simmons-Harris* is where the Supreme Court definitively noted that it is the independent and private choice of parents that breaks the link between government funds and religious training.[203] Stated another way, parents not only have the right to make educational decisions for their children, but that right encompasses the ability to use state funds in a private or religious setting without running afoul of the Establishment Clause.[204]

Nearly twenty years after the *Zelman* ruling, more than 67,000 students took advantage of various parent choice programs in the State of Ohio during the 2020-2021 school year.[205] The State of Ohio established the Pilot Project Scholarship Program ("PPSP") to provide educational options for students in Cleveland, the majority of whom are from low-income and minority families.[206] At the time, only one in ten ninth graders in the Cleveland City Public School District could pass a basic proficiency examination.[207] Lest

201. Espinoza v. Mont. Dept. of Revenue, 140 S. Ct. 2246, 2259 (2020).

202. *See generally id.* at 2288.

203. Pierce v. Society of The Sisters of The Holy Names, 268 U.S. 510, 510 (1925); Zelman v. Simmons-Harris, 536 U.S. 639, 640 (2002).

204. *Zelman*, 536 U.S. at 653.

205. AM. FED'N FOR CHILD. GROWTH FUND, 2021 SCHOOL CHOICE GUIDEBOOK 5, 13 (2021).

206. *See generally Zelman*, 536 U.S. at 645.

207. *Id.*

the reader think that this example of academic performance is an aberration, according to the 2021 TN Ready assessment (the State of Tennessee's statewide, end-of-year standardized examination) only one in thirteen students in Shelby County (Memphis, Tennessee) were academically on track or had mastered math content at their grade level.[208] Approximately one in seven students in Shelby County were academically on track in English and Language Arts.[209] To combat the abysmal, and persistent performance of the Cleveland public schools, the PPSP gave families two pathways to remediate educational gaps.[210] First, the program would pay for supplemental tutoring for students who remained in the public school system.[211] The second pathway, which became the subject of litigation, provided tuition assistance for students to attend a participating public or private school of their parent's choosing.[212] Eligibility requirements exist for both students (income-based eligibility with a family income of 200% of the poverty line, or about $33,400 for a family of four) and schools (private schools must be located within boundaries of a covered district, meet certain statewide educational standards, and may not discriminate on the basis of race, religion, or ethnic background).[213] The scholarships are distributed in the form of checks, up to $2,250, which are made payable to parents who then endorse the checks over to their chosen, eligible school.[214]

At the time of the legal challenge to the program, i.e., the 1999-2000 school year, 82% of the participating schools had a religious affiliation, and 96% of the participating students chose one of these religiously affiliated schools.[215] At issue for the initial plaintiffs, a group of Ohio taxpayers, was whether the PPSP violated the federal Establishment Clause.[216] The Court found that there was no dispute that the program was designed with a valid, secular

208. *State Report Card,* TN DEP'T OF EDUC., https://reportcard.tnedu.gov/districts/792/achievement (last visited Feb. 10, 2022).

209. *Id.*

210. *Zelman,* 536 U.S. at 645.

211. *Id.*

212. *Id.*

213. *Id.*; *see also "1999 Poverty Guidelines,"* OFF. OF THE ASSISTANT SEC'Y FOR PLAN. AND EDUC., https://aspe.hhs.gov/1999-hhs-poverty-guidelines (last visited Feb. 10, 2022).

214. *Zelman,* 536 U.S. at 645.

215. *Id.* at 647.

216. *Id.* at 639.

purpose—namely, providing predominantly low-income children in Cleveland with educational assistance due to their being enrolled in demonstrably poor-performing schools.[217] The primary question for the Court was whether, despite the "valid secular purpose," the program nevertheless advanced religion.[218]

In its analysis, the Court reaffirmed prior decisions in which it examined the class of beneficiaries of a given program.[219] Though a great majority of the students in the PPSP attended religious schools, the program was designed for "*all* parents."[220] Likewise, eligible schools need not have a religious affiliation to participate.[221] The Court also deemed it important that a program in question permit recipients to have genuine choice and the attendant ability to direct funds to their chosen institutions.[222] Finally, the Court, in reversing the Court of Appeals, held that the program is entirely neutral with respect to religion and, in fact, provides benefits to a wide swath of people who are defined by financial need and residence.[223] The Court found that genuine choice exists as parents can choose from among public and private, religious and secular schools.[224]

Zelman helped clarify that when individual parents are the recipients of public funds, they may use those funds at private and religious schools as they choose.[225] Quoting Justice O'Connor, *Zelman* held that "no reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief" when government aid supports a school's religious mission only because parents independently choose to direct their scholarship towards the school.[226]

Functionally, the next case answers the question of whether a state may directly transfer public funds to a religious organization if the only reason for prohibiting such transfer is the religious status

217. *Id.* at 649.
218. *Id.*
219. *Id.*
220. *Id.* at 650.
221. *Id.*
222. *Id.* at 651.
223. *Id.* at 653.
224. *Id.* at 662.
225. *Id.*
226. *Id.* at 653.

of the organization. Put another way, does the exclusion of religious organizations from otherwise neutral, government aid programs violate the Free Exercise Clause?

2. *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017)

The Missouri Department of Natural Resources has a program, the Missouri Scrap Tire Program, which offers grants to qualifying nonprofit organizations that install playground surfaces made from recycled tires.[227] Were it not for Trinity Lutheran Church's status as a church, it would have received a grant as part of this program as it intended to resurface a portion of its playground.[228] The Department had a firm policy of rejecting applicants owned or controlled by churches, sects, or other religious entities.[229] This policy was enacted to comport with the Missouri Constitution's Blaine Amendment, which reads:

> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.[230]

It is undisputed that but for its religious status, Trinity Lutheran Church's application in 2012 would have earned it a grant based on the strength of its application and the number of grants ultimately awarded by the Department.[231] In granting the Department's motion to dismiss, the District Court relied on *Locke*, ruling that the Free Exercise Clause does not generally prohibit withholding an affirmative benefit on account of religion.[232]

227. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017).

228. *Id.* at 2018.

229. *Id.*

230. MO. CONST. art. I, § 7.

231. *Trinity*, 137 S. Ct. at 2018.

232. *Id.*

The Supreme Court reversed the lower courts and found for Trinity Lutheran Church.[233] The Department's policy forces Trinity Lutheran to make a choice: it can participate in an otherwise available public benefit program, or it may remain a religious institution.[234] To condition the availability of benefits upon the willingness to surrender religious status or belief effectively penalizes the free exercise of a constitutional liberty.[235]

Unlike an entrenched constitutional right, the Missouri Department argued that there is no loss of constitutional liberty because the state had no obligation to provide the subsidy program in the first place.[236] However, Trinity Lutheran did not claim entitlement to the subsidy itself; rather, the express discrimination is that it must disavow its religious character simply to participate in the program.[237]

Despite the numerous arguments put forth by the Department that this program should be analyzed through the *Locke* lens, the Court finds numerous differences between the two underlying fact patterns, including that the State of Missouri's policy goes so far as to disqualify participants from the receipt of public benefit solely based on religious character.[238] The reader should fully examine the majority decision in *Trinity Lutheran* for more detailed analysis, but it is worth noting that the Court was particularly careful to note that *Trinity Lutheran* involves express discrimination based on religious identity.[239] In footnote three, the Court makes clear that it did *not* address religious use of funding or other forms of discrimination.[240] The "status" versus "use" distinction, such that one exists, would be explored more deeply four years later in *Carson v. Makin*.[241]

It is almost certainly the case that, having read the Court's footnote three in *Trinity Lutheran*, some state and local governments believe there is no obligation to confer a public benefit on a

233. *Id.* at 2024–25.

234. *Id.* at 2024.

235. *Id.* at 2022 (citing McDaniel v. Paty, 435 U.S. 618, 626 (1978)).

236. *Id.*

237. *Id.*

238. *Id.* at 2023–24.

239. *Id.* at 2024 n.3.

240. *Id.*

241. Carson v. Makin, 979 F.3d 21, 21 (1st Cir. 2020).

religious organization (or person) as long the laws or rules in place merely block religious *use* of public funds, rather than barring a party because they claim a religious *identity* or *affiliation*.[242] In his concurrence, Justice Gorsuch writes that the status-use distinction is a line too blurry to be helpful when evaluating First Amendment cases.[243] Does a religious man say grace before dinner (i.e., status)? Or does a man begin his meal in a religious manner (i.e., use)? The answer to this hypothetical may not matter because, as he notes, the First Amendment guarantees free *exercise* of religion, not merely the right of inward belief.[244]

Prior to addressing the issue of status-use head on, the Court would hear another case, this time one that involves a state aid program that explicitly denies parents the use of the aid at a religious organization.[245] *Espinoza* is offered as a melding of *Zelman* (parents directing state aid to a religious school) and *Trinity Lutheran* (a state law that excluded the participation of religious schools).[246]

3. *Espinoza v. Montana Department of Revenue*[247]

Montana has a tax credit scholarship program, enacted in 2015, that grants a tax credit of up to $150 to any taxpayer who donates to a participating scholarship granting organization.[248] The stated goal of the Montana Legislature when enacting the law was "to provide parental and student choice in education."[249] Similar tax credit scholarship programs exist in twenty-one states and served 319,223 students during the 2020-2021 school year.[250] A family whose child receives the scholarship may use it at a "qualified education provider."[251] The Montana Legislature also directed the

242. *Trinity,* 137 S. Ct. at 2025 (Gorsuch, J., concurring).

243. *Id.* at 2025–26.

244. *Id.*

245. Espinoza v. Mont. Dept. of Revenue, 140 S. Ct. 2246, 2246 (2020).

246. *Id.*

247. *Id.*

248. *Id.* at 2250–52.

249. Tax Credit for Qualified Education Contributions, 15 MCA § 30 (2021).

250. AM. FED'N FOR CHILD. GROWTH FUND, *supra* note 205, at 5, 12.

251. *Espinoza,* 140 S. Ct. at 2252 (citing Mont. Const., Art. X § 6(1)) ("Aid prohibited to sectarian schools . . . Legislature . . . shall not make any direct or indirect appropriation

program to comport with Article X, Section 6, of the Montana Constitution which contains a so-called "Blaine Amendment," prohibiting aid to "sectarian schools."[252] The provision reads:

> Aid prohibited to sectarian schools. . . . The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property 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.[253]

After the passage of the tax credit scholarship program, the Montana Department of Revenue promulgated rules to allow for the implementation of the program.[254] "Rule 1," created over the objection of the Montana Attorney General, changed the definition of "qualified education provider," that is, a school or setting at which a scholarship can be used, to *exclude* any school "owned or controlled in whole or in part by any church, religious sect, or denomination."[255]

A trio of low-income mothers, including petitioner Kendra Espinoza, had children enrolled at Stillwater Christian School in Kalispell, Montana.[256] Despite having an overtly Christian mission, the school admits students of any race, sex, or national and ethnic origin.[257] Stillwater Christian School meets the statutory definition of a "qualified education provider," but according to Rule 1, the petitioners would have been unable to use the scholarship to defray

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or payment from any public funds or monies . . . for any sectarian purpose or to aid any church, school, academy. . . controlled in whole or in party by any church, sect, or denomination.").

252. MONT. CODE ANN. § X-6-1 (2021).

253. *Id.*

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

255. *Id.*

256. *Id.*

257. Stillwater Christian School's mission is to "equip students with the tools for learning through a Christ-centered education." *See Who We Are*, STILLWATER CHRISTIAN SCH., https://www.stillwaterchristianschool.org/about-us/who-we-are (last visited Feb. 4, 2022).

the cost of tuition because of the school's religious mission.[258] The parents challenged Rule 1 on the grounds that it was in conflict with the aim of the statute that created the scholarship program and that it could not be justified on the grounds that it was compelled by the state's Blaine Amendment.[259] Furthermore, petitioners alleged that the rule discriminated based on their religious views and the religious nature of the school they had chosen for their children.[260]

In 2018, the Montana Supreme Court found first that the scholarship program, even disregarding Rule 1, provided aid by subsidizing tuition payments at religiously affiliated schools, in violation of the State Constitution.[261] The court went on to hold that the statute without Rule 1 could not stand, given the state's Blaine Amendment.[262] Because the statute had no mechanism for preventing aid from flowing to religious schools, it could not be construed as consistent with the no-aid provision.[263] Finally, the Montana Supreme Court agreed with the petitioners' argument that the Department of Revenue exceeded its authority in promulgating Rule 1 because it transformed the definition of qualifying schools.[264]

The question *Espinoza* posed, as framed by the United States Supreme Court, is relevant to those courts and policy onlookers who have been wary of state-sponsored religion through the vehicle of educational aid. As stated by the majority, *Espinoza* asked "whether the Free Exercise Clause precluded the Montana Supreme Court from applying Montana's no-aid provision to bar religious schools from the scholarship program."[265] Key to the Court's ruling is determining whether the exclusion of religious schools, which subverted the will of certain families, was consistent with the U.S. Constitution.[266]

The Court in *Espinoza*, like that in *Trinity Lutheran*, found the case to turn on religious *status* (that is, the status of the excluded

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

259. *Id.*

260. *Id.*

261. *Id.* at 2253.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* at 2254.

266. *Id.*

schools) rather than the religious *use* of the funds.[267] The Montana Court did not rule on the particulars of how scholarship funds might be used by recipients, only *where* the funds would be used.[268] The Supreme Court found, therefore, a great deal of overlap between the programs in *Espinoza* and *Trinity Lutheran* rather than likening the Montana program to that in *Locke*.[269]

For a school to qualify to receive funds under the Montana program, it must divorce itself from any religious affiliation.[270] As was the case in *Trinity Lutheran*, such a condition inevitably discourages the exercise of First Amendment rights. This contrasts with *Locke* where Washington State placed narrow conditions on which courses of study could be pursued with the scholarship fund in question.[271] Moreover, unlike the Montana program, the Washington higher education scholarship program allowed funds to be used at religious schools.[272]

Finally, the Court noted that there is no historical tradition that supports the blanket disqualification of religious schools from receiving government aid.[273] Indeed, as has been shown in this article, many states supported private, even denominational schools, well into the twentieth century.[274] *Espinoza* makes it clear that laws that deny participation in otherwise neutral programs based on the religious status of the would-be participant do not pass constitutional muster.[275] The remaining question is raised in Justice Gorsuch's concurrence in *Trinity Lutheran*, the determination of whether the status-use line is a distinction without a difference.[276]

4. *Carson v. Makin*

Carson forces the question about whether a public benefit (a student aid program), one that is tethered to a state's constitutional obligation, can be denied to families who choose to use the benefit

267. *Id.* at 2255–56.
268. *Id.* at 2253.
269. *Id.* at 2255, 2257–58.
270. *Id.* at 2256.
271. *Id.* at 2257.
272. *Id.*
273. *Id.* at 2258.
274. *Id.*
275. *Id.* at 2260.
276. *Id.* at 2257.

at schools that provide religious or sectarian instruction.[277] In states with and without Blaine Amendments, this is one of the last remaining barriers to families using state and local funds to select from a full range of educational options for their children.[278]

At issue in *Carson* is the "town tuitioning program" that Maine uses to meet its constitutional obligation to support and maintain public schools.[279] Because parts of the state are sparsely populated, not all districts operate their own secondary schools.[280] Instead, districts have a number of options for ensuring access for secondary schools for their residents.[281] Some districts work directly with nearby public and private schools.[282] Other districts allow families to select the public or private school of their choice, paying a portion of their tuition.[283] However, in the case of private schools, the state only allows payments to go to schools that are non-sectarian, that is, those that do not provide religious instruction.[284]

Prior to 1980, parents in Maine could choose sectarian schools, and hundreds of students attended them annually under the program.[285] In 1980, the Maine Attorney General opined that including sectarian schools violated the federal Establishment Clause.[286] The state legislature codified this opinion, providing that

277. Carson v. Makin, 979 F.3d 21, 26 (1st Cir. 2020).

278. Rachel Laser, *Do Taxpayers Have to Fund Religious Education? The Supreme Court May Say Yes.*, WASH. POST (Dec. 5, 2021, 8:00 AM), https://www.washingtonpost.com/opinions/2021/12/05/carson-v-makin-supreme-court-religious-education.

279. ME. CONST. art. VIII, pt. I, § 1.

280. Carson v. Makin, 979 F.3d 21, 43 (1st Cir. 2020) ("Given that Maine is 'still largely rural' and that so many of its [school administrative units] do not operate public secondary schools . . . Maine has long relied on private academies to fill gaps were public secondary school education is not accessible.").

281. *Id.*

282. ME. DEP'T OF EDUC., SCHOOL ENROLLMENT ATTENDANCE AND ELIGIBILITY (2020), https://www.maine.gov/doe/schools/schoolops/enrollment.

283. *Id.*

284. Amy Howe, *Conservative Justices Scoff at Maine's Exclusion of Religious Schools from Tuition-Assistance Program*, SCOTUSBLOG (Dec. 8, 2021, 4:42 PM), https://www.scotusblog.com/2021/12/conservative-justices-scoff-at-maines-exclusion-of-religious-schools-from-tuition-assistance-program.

285. Mark Walsh, *Can Public Money Go to Religious Schools? A Divisive Supreme Court Case Awaits*, EDUC. WEEK (Nov. 18, 2021), https://www.edweek.org/policy-politics/can-public-money-go-to-religious-schools-a-divisive-supreme-court-case-awaits/2021/11.

286. *Id.*

a chosen school must be "a nonsectarian school in accordance with the First Amendment of the United States Constitution."[287]

The key difference between the programs in Montana (*Espinoza)* and Maine (*Carson*) is that in the former, programmatic funds are barred from transferring to schools affiliated with a religious institution, i.e., their status is religious.[288] In Maine, association or affiliation with a faith, church, or religious institution does not, in itself, render a school ineligible.[289] Rather, state department of education employees make determinations about a school's activities and curriculum and decide whether a school's practices are secular.[290] The effect is that a family cannot even seek out a school that aligns with its sincerely held religious beliefs.[291]

Arguing for the parents seeking to use Maine's tuition assistance program to send their children to schools that aligned with their faith, Michael Bindas argued that in *Espinoza* the Court held that parents have a right to direct the religious upbringing of their children, and they may exercise that right by sending their children to religious schools.[292] In *Carson*, some of the petitioners, the Nelsons, seek to send their son to Temple Academy.[293] Temple Academy is fully accredited and is recognized by the Maine Department of Education as "providing equivalent instruction" in satisfaction of Maine's compulsory education law.[294] Temple is however, deemed "sectarian" as it operates from "a thoroughly Christian and Biblical world view," providing a "biblically-integrated education."[295] Maine's program in effect punishes the Nelsons for finding a school that is aligned with their own beliefs.

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287. ME. STAT ANN. tit. 20-A § 2951 (West 2021).

288. *Compare* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2251 (2020) ("The Court relied on the 'no-aid' provision of the State Constitution, which prohibits any aid to a school controlled by a 'church, sect, or denomination.'"); *with* Carson v. Makin, 979 F.3d 21, 25–26 (1st Cir. 2020) ("[A] private school must be 'nonsectarian in accordance with the *First Amendment*' and comply with certain separate reporting requirements.").

289. *See Carson*, 979 F.3d at 38 ("While affiliation or association with a church or religious institution is one potential indicator of a sectarian school, it is not dispositive.").

290. Brief for Petitioner, Carson v. Makin, No. 20-1088 (2021), WL 4081075 at *5.

291. *Id.* at *5–6.

292. Transcript of Oral Argument, *supra* note 161, at 27.

293. Brief for Petitioner, Carson v. Makin, No. 20-1088 (U.S. Feb. 4, 2021), WL 4081075 at *6.

294. *Id.*

295. *Id.* at *7.

Maine argued that by barring sectarian teaching, this policy promotes religious neutrality.[296] The program allows any school, religious or not, to participate in the program as long as students are not taught through the "lens of faith."[297] In this manner the state attempts to ensure that all students receive an education that is roughly equivalent to that provided in a government-run school.[298] During oral argument, several Justices probed the state about how to identify an education that is "roughly equivalent" to that in a public school.[299] It stands to reason that if the only way to block a non-equivalent education is by identifying schools that teach through the "lens of faith," the state is engaging in unconstitutional discrimination.[300] Recognizing this trap, the State was forced to claim that elite private schools such as Exeter, Andover, and Miss Porter's are equivalent to Maine's government run high schools.[301] Those three schools have an average day school tuition of $49,116 and an average tuition for boarders of $62,355.[302] It is simply laughable to think that the educational experience at any of these three schools is equivalent to that of a public high school in Bangor, Maine. Fundamentally, what makes Phillips, Exeter, and Bangor Public High School (per pupil expenditure of $13,539 per year) more similar than Bangor High School and John Bapst Memorial High School (day school tuition of $9,950/yr.) is that they are "not inculcating religion."[303]

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296. Brief of Respondent, Carson v. Makin, No. 20-1088 (U.S. Oct. 22, 2021), WL 4993533 at *28–29.

297. *Id.* at *20.

298. *Id.* at *44.

299. Transcript of Oral Argument, *supra* note 161, at 51–54, 67–68, 87.

300. *See generally* Brief for Petitioner, *supra* note 293, at *1, 32–33.

301. Transcript of Oral Argument, *supra* note 161, at 54–55.

302. *Tuition and Fees for the 2021-2022 School Year*, MISS PORTER'S SCH., https://www.porters.org/affordability (last visited Feb. 1, 2022) (showing $66,825 for boarding tuition and $53,810 for day tuition); *Tuition and Financial Aid*, PHILLIPS ACAD. ANDOVER, https://www.andover.edu/admission/tuition-and-financial-aid (last visited Feb. 1, 2022) (showing $61,950 for boarding tuition and $48,020 for day tuition); *Tuition & Payment Options*, PHILLIPS EXETER ACAD., https://www.exeter.edu/admissions-and-financial-aid/tuition-financial-aid/payment-options (last visited Feb. 1, 2022) (showing $58,714 for boarding tuition and $45,859 for day tuition).

303. *Bangor Public Schools*, U.S. NEWS & WORLD REP., https://www.usnews.com/education/k12/maine/districts/bangor-public-schools-103905 (last visited Feb. 1, 2022) (showing per pupil cost of $13,539 per year); *Day Student Tuition and Fees*, JOHN BAPST MEMORIAL HIGH SCH., https://www.johnbapst.org/admission/day-student-tuition-and-fees (last visited Feb. 1, 2022) (showing tuition of $9,950); Transcript of Oral Argument, *supra* note 161, at 56 (discussing that while Bangor Public High School may be different from

Two additional lines of questioning are worth exploring. The first line of questioning came from Justice Gorsuch and was directed at the attorney for Respondent's amicus curiae, the Department of Justice for the United States.[304] The Department of Justice asserted that the question presented is whether the government must subsidize religious practice.[305] Justice Gorsuch immediately recognized and cut off this spurious argument.[306] He noted that this case is not about whether there is an obligation to create a program, but once a program is created, as is the case in Maine, to suggest that a devout person can satisfy their religious obligations outside of the program while operating in a purely secular manner within the program, suggests favoritism towards religions whose practices require less of their adherents.[307] "So," Justice Gorsuch asked, "to the Orthodox Jewish family, it is a burden, and to the Protestant family, it may not be?"[308]

The second line, from Justice Thomas, centered around whether a tuition assistance program should be considered a subsidy given the compulsory nature of school attendance in Maine.[309] In addressing the attorney for the State of Maine, Justice Thomas offered an important insight about K-12 education in the U.S.[310]

Justice Thomas:	So, if you—you require them to go and you don't have schools available and you make provisions for them to comply with that compulsory law, then how can you say that going to a particular school is a subsidy?
Mr. Taub:	How can we say that going to a particular school is a subsidy?

Andover, Phillips, or Exeter in many ways, what they all share in common "is that they are not inculcating religion").

304. Transcript of Oral Argument, *supra* note 161, at 97.

305. *Id.*

306. *Id.*

307. *Id.* at 97–98.

308. *Id.* at 98.

309. *Id.* at 50.

310. *Id.* at 50–51.

> Justice Thomas: Yes. You say—you require them to go to schools to do something that you haven't provided for[.][311]

All fifty states have compulsory education laws.[312] At the same time, no state can claim to provide a satisfactory education to all students within its borders.[313]

Fusing the Gorsuch and Thomas lines of argument offers a glimpse of what may be possible to future litigants. All states require attendance in schools, for students with and without religious beliefs.[314] All states make provisions for education via their constitution.[315] Compulsion is present, as are programmatic resources.[316] Nevertheless, many families do not have their needs met by the existing, public school system.[317] A court needs only to extend Justice Gorsuch's reasoning a small step forward to find that in a state that has made the decision to require and provide education, withholding the program's funds from a family whose sincerely held beliefs cannot be satisfied by attendance in the public schools would be discriminatory.

As Justice Kavanaugh said during the *Carson* hearing, the parent petitioners are seeking equal treatment, not special treatment.[318] In this instance, equal treatment looks like fulfilling their legal obligation of compulsory school attendance in a manner that aligns with their beliefs and doing so with the same resources afforded to families who choose schools that align with the non-sectarian worldview of the Department of Education.

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311. *Id.*

312. State Educ. Prac., *Table 1.2. Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Free Education by State: 2017*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/statereform/tab1_2-2020.asp (last visited Feb. 9, 2022).

313. Laura Adler-Greene, *Every Student Succeeds Act: Are Schools Making Sure Every Student Succeeds?*, 35 TOURO L. REV. 11, 15, 22–23 (2019).

314. State Educ. Prac., *supra* note 312.

315. SCOTT DALMAN & ANUSHA NATH, EDUCATION CLAUSES IN STATE CONSTITUTIONS ACROSS THE UNITED STATES 1 (2020).

316. *Id.* at 6–7.

317. Kristin Kaput, *Evidence for Student Centered Learning*, EDUC. EVOLVING, January 2018, at 14.

318. Transcript of Oral Argument, *supra* note 161, at 119.

IV. COURT INITIATED SCHOOL CHOICE – A SOLUTION FIFTY YEARS IN THE MAKING

This article asserts that American courts are poised to engage in the next wave of education litigation in a series that began nearly fifty years ago in *San Antonio v. Rodriguez*.[319] What might be deemed a "fourth wave" will see the decoupling of single-payer financing from the aspirational educational outcomes sought by plaintiffs. Specific causes of action could take different forms, such as a parents' bill of rights, parent-teacher compacts, and private choice litigation. This activity will occur predominantly at the state level, but federal cases like *Espinoza* and *Carson* add to the atmospheric changes that make far-reaching state-level reform possible. Adding energy to this moment are state-based, K-12 school choice policies, the number of which has exploded in recent years.[320] At its core, school choice affirms the right of each individual child to access the educational setting that best meets his or her needs.[321] The educational settings may differ—homeschool, zoned public schools, public charters, private schools, micro schools, and learning pods—but all have a role to play in a country as rich in diversity as the United States. To date, legislatures have enacted school choice laws; however, based on the analysis in this article, future plaintiffs may develop causes of action that encourage courts to demand choice-based legislative action.

Continued judicial engagement in education is appropriate given the limitations of the adequacy lawsuits that became fashionable during the "third wave" of school finance litigation.[322] Adequacy cases have significant limitations, not the least of which is the difficulty in defining educational inputs and outcomes.[323] Education is particularly fraught given the number of variables.[324] When faced with questions of educational adequacy in *City of*

319. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 3 (1973).

320. Sean P. Corcoran et al., *Leveling the Playing Field For High School Choice: Results from a Field Experiment of Informational Interventions*, NAT'L BUREAU OF ECON. RSCH., Mar. 2018, at 39.

321. Stuart Biegal, *School Choice Policy and Title VI: Maximizing Equal Access for K-12 Students in a Substantially Deregulated Educational Environment*, 46 HASTINGS L.J. 1533, 1539 (1995).

322. Roellke et al., *supra* note 17, at 130.

323. Reed, *supra* note 21, at 178.

324. *Id.*

Pawtucket v. Sundlun, the Rhode Island Supreme Court refrained from ruling in part because of the difficulty in defining a beneficial, system-wide outcome.[325] The court determined that the proper forum for this matter was the legislature.[326] North Carolina Chief Justice Mitchell cautioned that courts should not fully cede responsibility of enunciating state constitutional rights to their respective legislatures.[327] "I don't think standards are necessarily determinative [of the constitutional issue]. If they are set too low, I think there is still a place for the courts to step in and say we have to do better than that."[328]

Rather than abdicating responsibility, modern courts can initiate parent choice programs without being overly prescriptive and usurping the role of the legislature. Courts need not specify the precise mechanism by which educational choice occurs, but broadly speaking, a court should feel free to press a legislature into ensuring that every parent in the state has meaningful access to an educational setting that works for their child. This article has attempted to detail explanations for this shift. First, history warns against the over-reliance on funding formula revision.[329] Second, the concept of the school district as the most efficient conduit for education reform is, at best, a relic.[330] Third, the myth of the public school system as the value-neutral developer of young minds has been shattered.[331] And finally, the High Court has ruled that the Free Exercise Clause affords families the ability to use public dollars in ways that align with their beliefs.[332] The time has come for courts to acknowledge the party who is best suited to determine the efficacy of the education being provided—parents. One must assume that over the past fifty years, judgements issued by state courts in these important cases were made in good faith and with the hope that outcomes would improve in the not-too-distant

325. Pawtucket v. Sundlun, 662 A.2d 40, 57 (R.I. 1995).

326. *Id.* at 59.

327. Tico A. Almeida, *Refocusing School Finance Litigation on At-Risk Children:* Leandro v. State of North Carolina, 22 YALE L. & POL'Y REV. 525, 546 (2004).

328. *Id.*

329. Dalman & Nath, *supra* note 315, at 4–5.

330. Heinrich Mintrop & Gail L. Sunderman, *Predictable Failure of Federal Sanctions-Driven Accountability for School Improvement—And Why We May Retain It Anyway*, 38 EDUC. RSCH. 353, 359 (2009).

331. *Id.*

332. *See* Locke v. Davey, 540 U.S. 712, 726 (2004).

future. The fatal conceit was the assumption that the way to bolster a state-based right to a high-quality education was to pour resources into systems rather than students (or their parents by proxy). Today's courts should consider requiring participation from the plaintiff and amici when crafting a remedy. This will increase the likelihood that the outcome will satisfy the parties. By incorporating the plaintiffs and amici, hammer-wielding courts can avoid the temptation of viewing every problem as a nail—reflexively ordering more money without regard to how it is spent and whether the children at issue would experience greater benefit from a different remedy.[333]

It is still up to a state legislature to create a program that it deems most workable for students within the state.[334] Options might include voucher plans, education savings accounts, tax credit scholarships, and K-12 529 accounts. Each of these school choice programs affords parents the opportunity to use public dollars to customize an educational experience for their child.

In 1990, Wisconsin policymakers, including Republican Governor Tommy Thompson and a bipartisan group of legislators, agreed that they must do better by the low-income children of Milwaukee.[335] They ushered in the first modern school choice program, a voucher program, which allowed parents to direct funds to the private school of their choice.[336] Legislators asked then, and litigants should continue to ask: can we make it possible for parents to customize their children's education through a broad array of voluntary associations with education service providers?[337] One recent innovation in school choice policy is the Education Savings Account ("ESA").[338] In ESA programs, a portion of the dollars that are regularly appropriated for education according to a state's

333. Note, *supra* note 45, at 1087.

334. *See generally* Stuart Biegal, *School Choice Policy and Title VI: Maximizing Equal Access for K-12 Students in a Substantially Deregulated Educational Environment*, 46 HASTINGS L.J. 1533 (1995).

335. *Milwaukee School Choice*, INST. FOR JUST., https://ij.org/case/jackson-v-benson (last visited Feb. 7, 2022).

336. LADNER, *supra* note 62, at 7–8.

337. MATTHEW LADNER, LIBERTY, EFFICIENCY, AND EQUITY 148 (Michael McShane et al. eds., 2015).

338. Laurie Todd-Smith, *School Choice Empowers Families and Creates Greater Student Outcomes*, AM. FIRST POL'Y INST. (June 15, 2021), https://americafirstpolicy.com/latest/school-choice-empowers-families-and-creates-greater-student-outcomes.

funding formula are deposited into an account for limited use for a single student.[339] Parents may use ESA funds for a wide range of education-related services and materials including tuition, textbooks, educational therapies, tutoring, technology, exam fees, and even higher education costs.[340] Nearly 30,000 students participated in ESA programs in five states during the 2020-2021 school year.[341] Six more ESA programs have been enacted but have yet to enroll students as of this article's writing.[342] The largest ESA program is Florida's Gardiner Scholarship Program, which provides ESAs to eligible students with disabilities.[343] The average scholarship amount was approximately $10,267 per student during the 2020-21 school year.[344] Fifty-four percent of the funds dispersed by parents in the Gardiner Program went to tuition and fees.[345] Another 30% went to curriculum and materials.[346] Eight percent went to therapist services, 5% to tutoring, and the final 3% went to other expense categories.[347] This program gives parents the flexibility to make state appropriated education dollars work more efficiently than could have been imagined during the school finance cases litigated last century.

Today, parents can log into their ESA account to check balances, make educational purchases, and search for service providers.[348] To say the world has changed since *San Antonio* is an understatement. Meanwhile, most school districts and state departments of education function at best like twentieth century factories.[349] To borrow another analogy, in a world where Amazon Prime is ubiquitous, public education is the Sears & Roebuck catalogue.

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339. *Id.*

340. *Id.*

341. *Id.*

342. AM. FED'N FOR CHILD. GROWTH FUND, *supra* note 205, at 5, 12.

343. *Gardiner Scholarship Program Fact Sheet*, FL DEP'T OF EDUC., https://www.fldoe.org/core/fileparse.php/5606/urlt/Gardiner.pdf (last visited Feb. 11, 2022).

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *See generally* Douglas Reed, *Twenty-Five Years after Rodriguez: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 L. & SOC'Y REV. 175 (1998).

349. *Id.*

In Zelman, the Court was asked whether a state law with a valid secular purpose impermissibly advanced religion when independent parent spending included funds to religious schools.[350]

"No."[351]

In *Trinity Lutheran*, it was asked whether a neutral state aid program can exclude religious organizations from receiving grants because of their religious beliefs.[352]

"No."[353]

In *Espinoza* the Court was asked whether a state aid program can prevent funding from being used at schools because of their religious *status*.[354]

"Again, no."[355]

In *Carson*, the Court has been asked whether the State can deny parents' ability to participate in a state aid program because of a chosen school's religious instruction.[356]

If the answer to this question is another "no," parents and policymakers across the country may ask one final question: Are there any state or federal barriers remaining that prevent courts from insisting that states allow parents to take control of their child's education by accessing public funds designated for the provision of compulsory education?

Sooner rather than later, the answer may well be "No."

350. Zelman v. Simmons-Harris, 536 U.S. 639, 640 (2002).

351. *Id.* at 644–45.

352. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2020 (2017).

353. *Id.*

354. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2254 (2020).

355. *Id.* at 2275–76.

356. Transcript of Oral Argument, *supra* note 161, at 27.