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Why School Choice Is Necessary for Religious Liberty and Freedom of Belief

Richard F. Duncan

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Richard F. Duncan†

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Introduction

I am delighted to participate in this symposium on education and the First Amendment, and I thank the editors of the *Case Western Reserve Law Review* for inviting me to participate together with so many distinguished First Amendment scholars. I have decided to write on what I believe is the most urgent fundamental rights issue of our present time, the issue of school choice, by which I mean equal funding of all K–12 students to attend a public, private secular, or private religious school of their choice.

Education is not value-free; indeed, it is value-laden. And in a country as divided as ours, we no longer share common values and common truths. We have competing versions of what is good, what is true, what is fair, what is just, what is morally good, and what is beautiful. Moreover, we are at odds over the most important question

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in life—whether God exists and whether His Word is relevant to a quality education.[1] And a one-size-fits-all K–12 curriculum cannot possibly serve all these competing versions of the good life.

Although I think competition is always good for the quality and efficiency of any product or service, my argument in this Article is not about higher standardized test scores or better mastery of subjects and skills. My perspective is based on First Amendment values of freedom of religion, thought, and belief formation. In other words, I believe that school choice is necessary for religious liberty and for freedom of thought and belief. If religious and intellectual autonomy are to survive and thrive in a deeply divided, pluralistic nation such as ours, parents must be free to choose an appropriate education for their children, without having to sacrifice the benefit of public funding of education. To put it succinctly, educational funds should be directed to children and their parents, not to strictly secular government schools.

I. LIVED EXPERIENCE: AN INTRODUCTORY NARRATIVE

I have a progressive colleague who tells me that lived experience is not debatable. I concur in part and dissent in part. I believe that lived experience, although always debatable, often sheds valuable light on important issues of law and social justice. And school choice—the funding of students and their families rather than government school systems—is one such issue of fundamental importance in contemporary America. So allow me to share, by way of introduction to this Article, some of my lived experience—as a person of faith and a father of five—concerning educating our children in an increasingly secular nation.

I have told this story before,[2] but like most good stories, it needs to be told again and again. A number of years ago, I was asked to speak to a large "young parents" Sunday school class at an evangelical Christian church in Lincoln, Nebraska. The pastor who invited me wanted me to help these Christian parents think through their options for educating their children: public schools or private Christian schools. On the scheduled date, I walked into the room and explained that since I am a law professor, I ask questions rather than answer them. So I asked several questions.

My first question went like this: "How many of you young Christian parents wish to educate your children in a curriculum that reflects the

1. The late Professor Phillip Johnson said it best: "If God really does exist, then to lead a rational life a person has to take account of God and his purposes. A person or a society that ignores the Creator is ignoring the most important part of reality, and to ignore reality is to be irrational." PHILLIP E. JOHNSON, REASON IN THE BALANCE: THE CASE AGAINST NATURALISM IN SCIENCE, LAW & EDUCATION 7 (1995).

2. Richard F. Duncan, *Why I Am a Libertarian in Secular America*, 8 CHRISTIAN L. 6, 6 (2012).

mind of Christ?"[3] How many of these parents do you think raised their hand? Of course, every one of these loving parents quickly raised his or her hand.

Then I asked my second question: "How many of you believe that the public school curriculum reflects the mind of Christ?" Now how many do you think raised their hand? Of course, not one hand was raised in response to this question.

For my third question, I pretended to be confused by their answers and proceeded to cut to the quick: "Why did you invite me here to help you think through this decision," I asked, "if you have already decided that the public schools are not appropriate for the education of your children?" In frustration, several of these young Christian parents exclaimed, "But we cannot afford to send our children to private religious schools!"

Ah, there's the rub. We hear a lot about systemic inequality lately, but there is no greater systemic inequality than an educational funding system that provides a K–12 education only for those who wish for a progressive secular education in the public schools. The selective funding of education in secular government schools guarantees religious inequality in America. It imposes on religious parents what even supporters of public schools call a "brutal bargain."[4] This funding monopoly for K–12 education creates a coercive system that commandeers a captive audience of impressionable children for inculcation of secular ideas, beliefs, and values concerning matters of truth, moral character, culture, and the good life. The harsh choice imposed on parents by selective funding requires them to choose

3. *See* 1 *Corinthians* 2:16 (ESV). What would a curriculum look like if it reflected the "mind of Christ," if it sought to teach students about God's world from the perspective of God's word? Maybe the Apostle Paul provides a clue as to the values that might be the foundation for such a curriculum: "Finally, brothers, whatever is true, whatever is honorable, whatever is just, whatever is pure, whatever is lovely, whatever is commendable, if there is any excellence, if there is anything worthy of praise, think about these things." *Philippians* 4:8 (ESV). Or, as Princeton University's sixth president, John Witherspoon, put it so clearly when writing about education as "a precious gift" from God: "Accursed be all learning which sets itself in opposition to the cross of Christ! Accursed be all that learning which disguises or is ashamed of the cross of Christ." JOHN WITHERSPOON, PRACTICAL DISCOURSES ON THE LEADING TRUTHS OF THE GOSPEL 189, 190 (2d ed. 1792). Either the God of scripture exists, or He does not exist; either His Word is true, or it is not true. If He does exist, and if His Word is true, it is the height of irrationality to ignore Him and His Word. This is why Lincoln Christian School, the school my children attended—and the school my grandchildren will be attending soon—defines its mission as "[l]earning about God's world in light of God's Word." *See About*, LINCOLN CHRISTIAN, https://lincolnchristian.org/about/ [https://perma.cc/Q8Y7-ZWXG] (last visited Oct. 9, 2023).

4. Peter Beinart, *Degree of Separation*, NEW REPUBLIC, Nov. 3, 1997, at 6 (quoting Norman Podhoretz).

between the single largest benefit most families receive from state and local governments and educating their children in a curriculum that is consistent with the preferred educative speech of the parents. To choose the latter is to sacrifice hundreds of thousands of dollars of tax-funded support for K–12 education.

In my lived experience, the government school monopoly on public funding of K–12 education is a brutal bargain indeed. It was a brutal hit for my family's finances, and I have been blessed with a law professor's income. How much more brutal is it for parents trying to raise large families on a low or working-class income?

Here is the math for someone like me, a Christian father of five children for whom a secular progressive curriculum is inappropriate for my children because it undermines much of what my wife and I believe about things in life that matter a great deal. In my home state of Nebraska, the average per-pupil funding for K–12 education is a little under $13,000 per year.[5] $13,000 times five children times thirteen years equals $845,000! That is the penalty someone like me would pay for educating their children in private religious schools. If you send them to government schools, you get $845,000 for your children's K–12 education. If you enroll your children in private religious schools, you lose every penny. Yet you still pay a lifetime of taxes to fund government schools. This is indeed a most brutal—take it or leave it—Hobson's choice indeed.

The combination of mandatory attendance laws plus the educational funding monopoly for government schools guarantees a captive audience for the "common" values and knowledge selected by state legislatures, local school boards, and other government administrators and officials.[6] Moreover, the Supreme Court's Establishment Clause jurisprudence strictly forbids any curriculum in the public schools that encourages or endorses religious ideas or values.[7] Thus, the public school system is not—and cannot be—a neutral system

5. *See* Melanie Hanson, *U.S. Public Education Spending Statistics*, EDUCATIONDATA.ORG, https://educationdata.org/public-education-spending-statistics#nebraska [https://perma.cc/QY8Y-V7GH] (June 15, 2022) ("Nebraska K–12 schools spend $12,741 per pupil for a total of $4,160,210,000 annually.").

6. Philip Hamburger, *Is the Public School System Constitutional?*, WALL ST. J. (Oct. 22, 2021), https://www.wsj.com/articles/public-school-system-constitutional-private-mcauliffe-free-speech-11634928722? [https://perma.cc/N2BQ-ZP46].

7. *See* Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1023 (1991). As the Court said in *Wallace v. Jaffree*: "[W]henever the State itself speaks on a religious subject, one of the questions that we must ask is 'whether the government intends to convey a message of endorsement or disapproval of religion.'" 472 U.S. 38, 60–61 (1985) (quoting Lynch v. Donnelly, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring)).

for those who believe religious knowledge and moral truths are a necessary part of an appropriate K–12 education for children.

I have a kind of school choice, but it comes with a draconian price tag.[8] But what is a very substantial burden on my ability to train up my children in the way they should go[9] is an insurmountable burden on a family with a low or moderate income. Under the government school monopoly, marginalized and underserved families have no educational choice, no right to control the belief formation of their impressionable and precious children.

The purpose of this Article is to survey the Supreme Court's First Amendment jurisprudence about the right of parents to control the education of their children. This right sounds in both religious liberty and freedom of thought, belief formation, and speech. Although equal funding for all reasonable educational choices is not yet a fully realized right, I believe that the arc of this body of law bends toward justice—toward recognition that equality of religious liberty and freedom of thought demands real school choice for every family and every child.

II. THE GOVERNMENT SCHOOL MONOPOLY AND "DESPOTISM" OVER THE MINDS OF IMPRESSIONABLE CHILDREN

By necessity, the "common values" taught today in the public school curriculum will reflect those of political majorities (or, more likely, those of powerful political elites in teachers' unions and universities) and often will be inconsistent with the values and ideals of many families with school-age children. Moreover, the government school monopoly of public funding for K–12 education creates a captive audience of impressionable children to be inculcated in the secular values and worldviews taught in government schools.[10]

Perhaps no one has understood this reality concerning the government school monopoly more clearly than John Stuart Mill, who put it this way in 1859:

> All that has been said of the importance of individuality of character, and diversity in opinions and modes of conduct,

8. As discussed above, for me to choose to educate my five children in a private religious school, I must pay a penalty of roughly $845,000 in lost public funding for K–12 education. *See supra* note 5 and accompanying text.

9. *See Proverbs* 22:6 (ESV), which provides: "Train up a child in the way he should go; even when he is old he will not depart from it."

10. As Professor Philip Hamburger observes, the captive audience created by the government school monopoly creates "a means by which some Americans force their beliefs on others. That's why they are still a source of discord. The temptation to indoctrinate the children of others—to impose a common culture by coercion—is an obstacle to working out a genuine common culture." Hamburger, *supra* note 6.

> involves, as of the same unspeakable importance, *diversity of education*. A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation, in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body.[11]

In 1903, Thomas Bencliff, a nativist author, made a prophet out of Mill by describing the "American school system" as:

> a great paper mill, into which are cast rags of all kinds and colors; but which lose their special identity and come out white paper, having a common identity. So we want the children of the state, of whatever nationality, color or religion, to pass through this great moral, intellectual and patriotic mill, or transforming process . . . .[12]

Recently, Professor Philip Hamburger also expressed concern about the sorry state of our K–12 educational system in very thoughtful *Wall Street Journal* opinion piece: "The public school system weighs on parents. It burdens them not simply with poor teaching and discipline, but with political bias, hostility toward religion, and now even sexual and racial indoctrination. Schools often seek openly to shape the very identity of children. What can parents do about it?"[13]

What indeed can parents do about it? Mill's remedy was school choice, a program that would "leave to parents" the right to choose an education for their children "where and how they pleased" with the role of the state being to provide funding for the education chosen by parents.[14] This is the path of educational diversity and pluralism, the path of religious liberty and freedom of belief formation, and the path of limited government. How do we get there?

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11. John Stuart Mill, On Liberty 106 (1859) (Stefan Collini ed., 1989) (emphasis added).

12. Thomas Bencliff, His American Birthright and Other Stories 183 (1903); *see also* Hamburger, *supra* note 6.

13. Hamburger, *supra* note 6.

14. Mill, *supra* note 11, at 106. As Mill observes, public funding of school choice would go a long way toward eliminating the war fought by "sects and parties" over "what the State should teach" by allowing each family to choose an education that is appropriate for their children. *Id.* at 105–06.

III. The Constitutional Intersectionality of K–12 Educational Funding Equity

I am no Pollyanna. I am not here to argue that existing constitutional law requires public funding of school choice for families who choose to avoid educating their children in government schools. Indeed, as recently as June 2022, the Supreme Court made clear that the states are under no obligation to subsidize private schools.[15] The Court also made clear that states are free to "provide a strictly secular education in [the] public schools."[16] My purpose here is simply to point out that, if we take seriously the constitutional ideal of parental rights and neutral pluralism of religion and belief under the First Amendment, the case for equitable funding of school choice for all children is compelling.

A one-size-fits-all curriculum cannot possibly be neutral among competing ideas of the good life. Which Supreme Court Justice should be studied and celebrated as a role model for young women: Ruth Bader Ginsburg or Amy Coney Barrett? Should Clarence Thomas be viewed as a positive role model for African American students? Should we celebrate or cancel Founding Fathers such as Thomas Jefferson and George Washington?[17] Should we celebrate June as LGBT Pride Month or as Pro-Life Month, recognizing June 24, 2022, as the date *Roe v. Wade*[18] was finally overruled?[19] Should we celebrate Jim Obergefell as a hero of marriage equality?[20] Or Jack Phillips, the owner of Masterpiece Cakeshop, as a champion of religious liberty and freedom of speech?[21] Are state equality in the Senate and electoral votes for the presidency bad because they undermine national democracy? Or are they critically important features of federalism and national

15. Carson v. Makin, 142 S. Ct. 1987, 2000 (2022).

16. *Id.*

17. The San Francisco Board of Education recently voted "to rename a third of the city's public schools, including ones honoring Washington, Jefferson and Lincoln." Jenny Gross and Azi Paybarah, *San Francisco Schools Will Keep Jefferson, Lincoln and Washington Names*, N.Y. Times (April 7, 2021), https://www.nytimes.com/2021/04/07/us/san-francisco-schools-names.html [https://perma.cc/G2HK-K7L3]. "The schools had been identified by a panel of community leaders as requiring name changes because they honored historical figures who inhibited societal progress, oppressed women or had slaves." *Id.* However, "after the plan drew a scathing response from parents and the city's mayor," the Board voted to rescind the renaming plan. *Id.*

18. 410 U.S. 113 (1973).

19. *See* Dobbs v. Jackson Women's Health Org., 142 U.S. 2228, 2279 (2022).

20. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015).

21. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1748 (2018).

government by consensus?[22] Is abortion health care or murder? Are there two genders or dozens? Was America founded on slavery in 1619,[23] or on self-evident life, liberty, and equality in 1776?[24] Is America systemically racist, or a great country constantly working to correct its faults while striving for a more perfect union?

Is "a strictly secular education in the public schools"[25] neutral both among religions and between religious and secular worldviews? Or did Professor Michael McConnell capture the hopelessness of religious parents when he observed: "A secular school does not necessarily produce atheists, but it produces young adults who inevitably think of religion as extraneous to the real world of intellectual inquiry, if they think of religion at all."[26] McConnell goes on to demonstrate how the public school monopoly is particularly unfair to families with religious views:

> We do not know whether to teach virtue or not, and we do not know what virtues to teach. Love, faithfulness, and obedience? Or autonomy and self-assertion? Which is immoral: homosexuality or the belief that homosexuality is immoral?
>
> The answer, in modern liberal America, is that these issues will be fought out in the political and professional arenas and the dominant factions will win—except that religiously oriented viewpoints are excluded from the outset. In the marketplace of ideas, only those tainted by religion are, from the outset, denied a place.[27]

Even liberal legal scholars, such as Professor Sandy Levinson, agree that the public schools "regularly articulate, clothed in the full symbolic and actual authority of the state, highly contestable—and completely

22. *See generally* Richard F. Duncan, *Electoral Votes, the Senate, and Article V: How the Architecture of the Constitution Promotes Federalism and Government by Consensus*, 96 NEB. L. REV. 799, 801–02 (2017).

23. NIKOLE HANNAH-JONES, THE 1619 PROJECT: A NEW ORIGIN STORY, at xix (2021).

24. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) provides:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .

25. Carson v. Makin, 142 S. Ct. 1987, 2000 (2022).

26. Michael W. McConnell, *"God Is Dead and We Have Killed Him!": Freedom of Religion in the Post-modern Age*, 1993 BYU L. REV. 163, 181.

27. *Id.* at 180.

unneutral—views on important political and cultural matters."[28] Levinson also acknowledges that competing versions of the truth are thus "drowned out" by the "superior resources of the state."[29] And he concludes that it is "quite naïve" to believe that government schools are neutral.[30]

So if government schools are inherently non-neutral with respect to fundamentally important ideas, beliefs, and values concerning truth, moral character, and the good life, how does the government school monopoly for the funding of K–12 education square with the letter and spirit of the U.S. Constitution? To answer this question, one must look at the intersections of parental rights under the Due Process Clause of the Fourteenth Amendment and the freedoms of religion, belief, thought, and speech under the First Amendment. In other words, the right to equitable school funding is intersectional and touches upon several ideals: religious neutrality, viewpoint neutrality, and children acquiring an education deemed appropriate by their parents. In short, with respect to equity in the matter of K–12 educational funding, the spirit of the Constitution requires what Professor John Inazu has termed "confident pluralism"—a recognition that, in a deeply divided nation, our shared existence requires educational choice in order to allow us to "live together in our 'many-ness.'"[31]

A. Fundamental Right of Parents to Educate Their Children

In the years following World War I, a wave of nativism and anti-Catholicism swept through the nation[32] in support of employing the public schools to Americanize impressionable schoolchildren and ween them away from their "sectarian" faith and "peculiar church doctrines."[33] As Mills had warned, this was a movement by the majority to "mould" children by eradicating "ideological and ethnic pluralism in

28. SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 79 (1998).

29. *Id.* at 79–80.

30. *Id.* at 79.

31. JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE 6 (2016). "We can embrace pluralism precisely because we are confident in our own beliefs, and in the groups and institutions that sustain them." *Id.* at 7.

32. *See* David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 AM. HIST. REV. 74, 74–75 (1968).

33. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 418 (2002) (quoting W.A. Goodwin, *Why School Bill Fought: Private Schools Declared Trying to Teach Own Doctrine*, MORNING OREGONIAN, Nov. 5, 1922, at 9).

the interests of 100 per cent Americanism."[34] This shameful historical movement met its match, however, when the Supreme Court of the United States decided two landmark cases, *Meyer v. Nebraska*[35] and *Pierce v. Society of Sisters*.[36]

In *Meyer*, a Nebraska law prohibited the teaching "in any private, denominational, parochial or public school" of "any subject to any person in any language other than the English language."[37] The Court held that, under the Due Process Clause of the Fourteenth Amendment, parents have a fundamental substantive due process right to control and direct the upbringing and education of their children.[38] This fundamental right[39] is violated whenever the state interferes "with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education" of their children.[40] Thus, the Nebraska English-only law was unconstitutional and could not "be coerced by methods which conflict with the Constitution."[41]

Although *Pierce v. Society of Sisters* did not involve the government school monopoly over funding for K–12 education, it did involve an Oregon criminal law creating an even more direct and coercive monopoly—it required parents of all school-age children to enroll them in the public schools.[42] The Supreme Court held that under

34. Tyack, *supra* note 32, at 75. This anti-Catholic effort was led, in no small part, by the Ku Klux Klan and the Masons. *See id.* at 74; *see also* HAMBURGER, *supra* note 33, at 408–22.

35. 262 U.S. 390 (1923).

36. 268 U.S. 510 (1925).

37. *Meyer*, 262 U.S. at 397.

38. U.S. CONST. amend. XIV, § 1 provides, in pertinent part, that "[n]o State. . . shall deprive any person of life, liberty, or property, without due process of law." The Supreme Court has decided that this clause provides substantive protection to certain "fundamental" liberty interests. In *Meyer*, the Court held that "the liberty thus guaranteed" includes

> the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

262 U.S. at 399, 401.

39. *Meyer*, 262 U.S. at 401 (this right is a "fundamental right[] which must be respected" by the government).

40. *Id.*

41. *Id.* at 401, 403.

42. 268 U.S. at 530. The law applied to children between the ages of eight and sixteen. *Id.* This compulsory public education law was enacted, with the support of the Oregon Ku Klux Klan, as an initiative by the voters of

the doctrine of *Meyer*, the Oregon law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[43] The Court explained its reasoning with an iconic defense of pluralism and freedom of belief formation that resonates more than ever today:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[44]

To the extent that *Meyer* and *Pierce* are substantive due process decisions, they remain valid today under *Dobbs v. Jackson Women's Health Organization*,[45] in which the Court made clear that its decision overruling its precedents creating the abortion liberty should in no way "be understood to cast doubt on precedents that do not concern abortion."[46] In any event, as Justice Douglas declared in his opinion for the Court in *Griswold v. Connecticut*,[47] the right of parents to educate a child outside the public schools, "in a school of the parents' choice," is perhaps best understood as arising under the First Amendment.[48] As Douglas put it, "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."[49] In other words, the First Amendment guarantees the right of parents to

Oregon in November 1922. *See* Tyack, *supra* note 32, at 76–77. "According to the Klan, in public schools, unlike in Catholic institutions, the young would 'be taught *how to think*, *not* what to think.'" HAMBURGER, *supra* note 33, at 414 (quoting The Ku Klux Klan Presents Its View of the Public Free School 2 (c. early 1920s)).

43. *Pierce*, 268 U.S. at 534–35.

44. *Id.* at 535.

45. 142 S. Ct. 2228 (2022).

46. *Id.* at 2277. *Dobbs*, of course, overruled both *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and in doing so held that "the Constitution does not prohibit the citizens of each state from regulating or prohibiting abortion." *Dobbs*, 142 S. Ct. at 2284. *Meyer* and *Pierce*, however, remain alive as landmark decisions protecting the fundamental right of parents to control the education of their children.

47. 381 U.S. 479 (1965).

48. *Id.* at 482.

49. *Id.*

protect their children's right to freedom of thought and belief formation from being standardized by laws restricting these rights.[50]

B. School Choice and Freedom of Speech, Thought, and Belief Formation

Justice Douglas was onto something very significant in *Griswold* when he described *Meyer* and *Pierce* as protecting the right of parents to choose educative speech for their children. The right of free speech includes "not only the right to utter" words and ideas, but also "the right to receive" and to "read" educative speech, as well as freedom of thought and belief formation.[51] Since K–12 education is primarily about educative speech and character and belief formation, parents should be recognized as having "a constitutional right to choose the speech with which their children will be educated."[52] If, like Justice Douglas, we follow both the letter and the spirit of the First Amendment, the Constitution should protect parents from being "compelled, or even pressured, to make their children a captive audience" for a one-size-fits-all secular education provided by the government in the public schools.[53]

Although some consider public tax support of education to be the funding of public schools as institutions, it is far better to think of this as financial support for families and school-age children.[54] If no child is to be left behind when it comes to education, then *no child* should be left behind.[55] Thus, we should view K–12 educational funding as a kind of metaphysical forum for educational speech—a pool of money that is designed to facilitate the education of all school-age children.[56]

Thus, rather than think of K–12 school funding strictly as a benefit for families who wish to enroll their children in public schools, it is more accurate to view the government school funding monopoly as coercive content- and viewpoint-based discrimination regarding government support for private speech of fundamental importance: the educative speech of impressionable children. The combination of mandatory attendance laws and the monopoly of funding for secular public education imposes draconian pressure on parents to enroll their children

50. *Id.*

51. *Id. See generally* Philip Hamburger, *Education Is Speech: Parental Free Speech in Education*, 101 TEX. L. REV. 415, 415 (2022).

52. Hamburger, *supra* note 6.

53. *Id.*

54. *See* Richard W. Garnett, *The Right Questions About School Choice: Education, Religious Freedom, and the Common Good*, 23 CARDOZO L. REV. 1281, 1285–86 (2002).

55. *See id.* at 1298 ("Certainly, the overriding consideration should be what is best for *children*, not what is best for teachers and schools.").

56. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995).

in public schools that "substitute government educational speech for their own."[57] What is worse, "[t]he poorer the parents, the more profound the pressure"[58] to substitute the content and viewpoint of the public school curriculum for their own; if they opt out of the government schools and are unable to afford private schooling for their children, they are guilty of crimes under the mandatory attendance laws.[59] Parents who prefer a secular public education for their children are fully funded; parents who prefer a traditional religious education for their children—or a secular education different in content or viewpoint from that offered in the public schools—are denied tens of thousands of dollars of public benefits for their children's education. Over thirteen years of K–12 education, the penalty for choosing to exit from the public schools amounts to hundreds of thousands of dollars for a typical dissenting family.[60] The brutal bargain realistically facing low- and moderate-income parents is this: enroll your children in government schools or go to jail.

Under settled Supreme Court jurisprudence, a law that abridges the freedom of speech on the basis of content is a grievous First Amendment wrong;[61] moreover, laws that abridge speech on the basis of viewpoint are much worse—viewpoint discrimination is poison to the First Amendment and is a "more blatant" and "egregious form of

57. Hamburger, *supra* note 6.

58. *Id.*

59. The combination of mandatory attendance laws and "[s]elective funding can therefore be seen as a weaker version of compulsory public schooling. Parents may refuse to send their children to public schools, but the penalty for refusing is heavy, oftentimes unaffordable." Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 1025 (1996). The financial burden is brutal, and "the poorer the parents, the greater the coercive effect." Hamburger, *supra* note 51, at 433. Thus "the scandalous reality of American education is that states pressure parents, especially poor and middle-class parents, into government education." *Id.* at 467.

60. As I discussed above, when a large family opts out of public education it can result in a penalty of hundreds of thousands of dollars over thirteen years of K–12 schooling. Professor Gilles calls this "a major viewpoint-based license fee that that dissenting parents must pay to engage in educative speech within the sphere of formal schooling." Gilles, *supra* note 59. For a discussion of the large penalty suffered by someone in my particular circumstances, see *supra* note 5 and accompanying text.

61. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015). Thus, under the First Amendment, the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 2226 (quoting Police Dept. of Chi. v. Mosley, 408 U.S. 92, 95 (1972)); *see* Richard F. Duncan, *Viewpoint Compulsions*, 61 WASHBURN L.J. 251, 251–52 (2022).

content discrimination."[62] Justice Kennedy has defined the test for viewpoint discrimination as "whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed."[63]

The government school monopoly for funding education involves viewpoint discrimination for two reasons. First, because the public school curriculum is required to be strictly secular. Thus, secular ideas and viewpoints on history, government, justice, sexuality, gender identity, and many other topics can be endorsed in the public schools; however, religious ideas and viewpoints on these and other topics cannot be endorsed. Second, even without considering the absence of religious viewpoints from public education, the public schools can endorse controversial secular viewpoints favored by government and denounce secular ideas disfavored by government. For example, a public school can endorse progressive secular views about race and gender identity and denounce conservative secular views about race and gender identity. Thus, the school funding monopoly favors parents who prefer the secular viewpoints taught in government schools and strongly disfavors dissenting parents who wish their children to be taught from religious or competing secular points of view. Realistically, because most dissenting parents cannot afford to educate their children outside the public school system, the funding monopoly results in creating a captive audience of impressionable children to have their minds molded by the preferred viewpoints of government officials who control the strictly secular public school curriculum.[64] It is difficult to understand the K–12 school funding monopoly as anything other than egregious viewpoint-based discrimination against the educative speech of dissenting families with children. The school funding monopoly is inconsistent with the spirit of freedom of speech and belief formation because it coerces parents "to abandon their own educational speech choices and instead adopt the government's."[65] Although the Supreme Court is not there yet, the time is ripe to begin making freedom of speech and belief formation arguments when advocating for universal school funding for each student to attend a school of his or her family's choice.

62. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828–29 (2017); *see also* Duncan, *supra* note 61, at 252.

63. Matal v. Tam, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment) (noting racially disparaging trademarks are protected by the Free Speech Clause).

64. As Mill said, laws creating a captive audience for the government's idea of the good life are authoritarian and result in a kind of "despotism over the mind." MILL, *supra* note 11, at 106.

65. Hamburger, *supra* note 6.

C. How the Government School Monopoly Is Destructive of Religious Liberty in a Pluralistic Society

In a landmark 2017 religious liberty decision, *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[66] Chief Justice Roberts reminded us about the odious nature of religious exclusion from the common benefits provided by government.[67] Such discriminatory treatment is religious persecution, he reasoned,[68] and the more important the benefit—and the greater its replacement cost—the more odious the persecution.

What should be the role of government in the modern Welfare State, a state in which we all suffer a heavy burden of taxation in exchange for a buffet of cradle-to-grave benefits and subsidies for our family's health, education, and welfare? Should the First Amendment be interpreted as requiring "no-aid separationism," in which benefits would be selective and would often exclude religious beneficiaries such as parents wishing to educate their children in private religious schools?[69] Or should the Religion Clauses seek "to minimize the government's interference with or influence on religion, and to leave each American free to exercise or reject religion in his or her own way, neither encouraged by the government nor discouraged or penalized by the government"?[70] The difference between these polarities is the difference between a government that operates as an engine of secularization by discriminating against the lifeways of religious citizens and one that celebrates pluralism and equal citizenship among all citizens, whether secular or religious.

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66. 137 S. Ct. 2012 (2017).

67. The Chief Justice quoted a Maryland legislator who spoke to urge "the Maryland Assembly to adopt a bill that would end the State's disqualification of Jews from public office." The legislator spoke against religious persecution and said this:

> If, on account of my religious faith, I am subjected to disqualifications, from which others are free, . . . I cannot but consider myself a persecuted man. . . . An odious exclusion from *any of the benefits common to the rest of my fellow-citizens*, is a persecution, differing only in degree, but of a nature equally unjustifiable with that, whose instruments are chains and torture.

Id. at 2024 (emphasis added) (quoting H.M. Brackenridge, Speech Delivered in the House of Delegates of Maryland on the Jew Bill (1829), *in* H. BRACKENRIDGE, W.G.D. WORTHINGTON & JOHN S. TYSON, SPEECHES ON THE JEW BILL IN THE HOUSE OF DELEGATES OF MARYLAND 64 (1829)).

68. *See id.* at 2025 (stating that even minor religious exclusions from public benefits are "odious to our Constitution all the same, and cannot stand").

69. Thomas C. Berg & Douglas Laycock, Espinoza*, Government Funding, and Religious Choice*, 35 J.L. & RELIGION 361, 361–62 (2020).

70. *Id.* at 361.

During the last fifty years or so, we have witnessed a civil rights revolution concerning religious liberty under the First Amendment. The jurisprudence of the Supreme Court has progressed from the anti-religious, strict no-aid separationism of the 1970s[71] to the confident pluralism and equal treatment of today.[72] Although we still have some distance to go to ensure that religious citizens are not deprived of equal participation in the many benefits of the modern Welfare State, we have come a long way on the arc of justice.

The Establishment Clause and Free Exercise Clause complement each other and were designed to protect religious liberty from government proscriptions and unequal treatment.[73] Although at one time a neutral school choice program including private religious schools would have been struck down under the Establishment Clause,[74] today it is abundantly clear that a neutral school choice program, funding both secular and religious private schools, is valid under the

71. *See* JOHN WITTE, JR., JOEL A. NICHOLS & RICHARD W. GARNETT, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 255 (5th ed. 2022). Importantly, during this period of discrimination against religious citizens, the Court's decisions "called for strict separation between religious schools and the state, including a ban on government aid to religious schools, students, teachers, and parents." *Id.* This period of hostility toward religious schools and families who choose religious schools marked the era of *Lemon v. Kurtzman*, 403 U.S. 602 (1973), under which "the Court adopted a firm policy against government aid to religious schools." WITTE ET AL., *supra*, at 261.

72. WITTE ET AL., *supra* note 71, at 255. From 1986 onward, the Court has moved in the direction of equal treatment and religious liberty, and perhaps currently stands on the threshold of requiring states to provide equal K–12 educational benefits to all families, regardless of whether they choose public or private education for their children. *Id.* at 255, 267; *see, e.g.*, Witters v. Wash. Dept. of Servs. for the Blind, 474 U.S. 481, 488–89 (1986); Zelman v. Simmons-Harris, 536 U.S. 639, 643–44, 662–63 (2002); Espinoza v. Mont. Dept. of Revenue, 140 S. Ct. 2246, 2060–61 (2020); Carson v. Makin, 142 S. Ct. 1987, 1997–98 (2022). Moreover, in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Court overruled *Lemon v. Kurtzman* and held that the Establishment Clause must be interpreted under a test that looks to "historical practices and understandings." *Id.* at 2427–28 (citation omitted). In her dissenting opinion in *Kennedy*, Justice Sotomayor stated: "The Court overrules *Lemon v. Kurtzman* . . . and calls into question decades of subsequent precedents that it deems 'offshoot[s]' of that decision." *Id.* (Sotomayor, J., dissenting) (citation omitted).

73. *See* WITTE ET AL., *supra* note 71, at 305.

74. *See id.* at 261. Under the Court's doctrine in *Lemon v. Kurtzman*, "the Court adopted a firm policy against governmental aid to religious schools." In subsequent cases, the Court struck down state laws providing subsidies to low-income parents for some of the costs of choosing private religious schools for their children. *Id.* at 263; *see, e.g.*, Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756, 794 (1973) (striking down reimbursements and tax deductions for parents for the costs of private schools).

Establishment Clause.[75] In other words, states *may* fund private school choice programs if they wish to do so. The more difficult question today is whether the Free Exercise Clause *requires* states to treat religious educational choices equally.

In 2017, the Court decided the first of three landmark cases,[76] holding that under the Free Exercise Clause it is "odious to the Constitution" for the states to discriminate against religious institutions and religious families with respect to the many benefits of the Welfare State.[77] Although these three cases stop short of requiring states to replace the government school monopoly with school choice for all K–12 children, the spirit of these cases suggests that the government school monopoly is inconsistent with religious liberty and equality in the Welfare State.

Each of these recent landmark decisions by the Supreme Court features a majority opinion authored by Chief Justice Roberts; together, these cases drive a stake into the heart of the Court's earlier no-aid separationism decisions.[78] Moreover, these recent decisions protecting equal citizenship "do a far better job than no-aid separationism of separating the religious choices and commitments of the American people from the coercive power of the government."[79] Importantly, these cases advance equity and justice by making clear that "the ultimate concern of the Religion Clauses . . . [is] to minimize the government's interference with or influence on religion, and to leave each American free to exercise or reject religion in his or her own way, neither encouraged by the government nor discouraged or penalized by the government."[80] In other words, true separationism under the First Amendment forbids government from structuring its massive power over governmental benefits in a way that disadvantages religion by forcing religious citizens to choose between their faith and their fair share of public benefits.

75. *See* WITTE ET AL., *supra* note 71, at 267–73. The landmark case, of course, is *Zelman v. Simmons-Harris*, in which the Court voted to uphold school voucher programs that involve "true private choice" and provide neutral "educational assistance directly to a broad class of individuals defined without reference to religion." 536 U.S. 639, 653 (2002).

76. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024–25 (2017); *Espinoza*, 140 S. Ct. at 2262–63; *Carson*, 142 S. Ct. at 1996–97, 2002.

77. *Trinity Lutheran*, 137 S. Ct. at 2025.

78. Berg & Laycock, *supra* note 69, at 361–62.

79. *Id.* at 362.

80. *Id.*

1. *Trinity Lutheran*

In *Trinity Lutheran*, the Missouri Department of Natural Resources had a program that sought to do two things—it wanted to make playgrounds safer for children and it wanted to find a useful purpose for scrap tires.[81] Thus, the Department created a grant program that reimbursed nonprofit organizations for the costs of resurfacing playgrounds with rubber products made from recycled tires.[82] However, the Department "categorically disqualify[ied] churches and other religious organizations from receiving grants" under this program.[83] When Trinity Lutheran Church was denied a grant for its preschool and daycare center because it is a church, it sued in federal court under the Free Exercise Clause. The Supreme Court held that under the Free Exercise Clause "the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution . . . and cannot stand."[84] Perhaps uncharacteristically, the language employed by Chief Justice Roberts in *Trinity Lutheran* is the language of "bold colors," not "pale pastels."[85] Religious parents, of course, pay their fair share of taxes to support public benefit programs, and it is indeed odious under the First Amendment for the government to deny their children the benefit of playground safety programs solely because they attend a daycare center operated by a church.

2. *Espinoza*

In June of 2020, the second of the three landmark public benefits cases, *Espinoza v. Montana Department of Revenue*,[86] was decided by the Supreme Court. Chief Justice Roberts, again writing for the majority, summed up the issue succinctly:

> The Montana Legislature established a program to provide tuition assistance to parents who send their children to private schools. The program grants a tax credit to anyone who donates

81. *Trinity Lutheran*, 137 S. Ct. at 2017.

82. *Id.*

83. *Id.* The Department believed that "under Article I, Section 7 of the Missouri Constitution . . . [it] could not provide financial assistance directly to a church." *Id.* at 2018.

84. *Id.* at 2025.

85. The contrast between bold colors and pale pastels harkens back to the words of President Ronald Reagan: "[W]e raised a banner of bold colors—no pale pastels." *Remarks Accepting the Presidential Nomination at the Republican National Convention in Dallas, Texas*, AM. PRES. PROJECT, http://www.presidency.ucsb.edu/documents/remarks-accepting-the-presidential-nomination-the-republican-national-convention-dallas [https://perma.cc/Q64L-M9SW] (last visited Mar. 23, 2023).

86. 140 S. Ct. 2446 (2020).

> to certain organizations that in turn award scholarships to selected students attending such schools. When petitioners sought to use the scholarships at a religious school, the Montana Supreme Court struck down the program. 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." The question presented is whether the Free Exercise Clause of the United States Constitution barred that application of the no-aid provision.[87]

"The suit was brought by three mothers [of] children attend[ing] Stillwater Christian School in northwestern Montana" who had been prevented from using scholarship funds at the school of their choice.[88] In a 5–4 decision, the Court held that although a state is not required to subsidize private schools, "once [it] decides to do so, it cannot disqualify some private schools solely because they are religious."[89]

Although the Court declared that the states are not required to fund private schools, Chief Justice Roberts made clear that the First Amendment "condemns discrimination against religious schools and the families whose children attend them," stating, "They are 'member[s] of the community too,' and their exclusion from the scholarship program here is 'odious to our Constitution' and 'cannot stand.'"[90] Of course, the government school monopoly also discriminates against families who choose a religious K–12 education for their children, and one might well conclude that *Espinoza*'s principles of neutrality and equal citizenship similarly render the funding monopoly odious to the spirit of the First Amendment.

3. *Carson*

Maine is the most rural state in America.[91] Many of Maine's rural areas are too small to operate a public high school. Thus, Maine law provides that in such rural areas, local government shall pay the tuition at "the approved private school of the parent's choice."[92] Parents may choose any private school, whether "inside or outside the State."[93] However, there is a catch: tuition assistance payments may only be directed to "nonsectarian" schools.[94] Alan and Judy Gillis of rural

87. *Id.* at 2251.

88. *Id.* at 2251–52.

89. *Id.* at 2261.

90. *Id.* at 2262–63 (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2022, 2025 (2017)).

91. Carson v. Makin, 142 S. Ct. 1987, 1993 (2022).

92. *Id.* at 1993.

93. *Id.* at 1994.

94. *Id.*

Orrington, Maine, explained how it feels to be excluded from educational benefits because you choose to educate your children in a private religious school: "We feel discriminated against because of our religious convictions[.] . . . If our neighbors have the freedom to choose a private school and receive tuition from our town, why are we denied this same benefit just because we desire a religious education for our daughter?"[95]

In *Carson v. Makin*,[96] the Supreme Court agreed that there was "nothing neutral about Maine's" discriminatory program:

> The State pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against religion. A State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise.[97]

Moreover, the Court dismissed Maine's argument that the purpose of the tuition assistance program was to fund the rough equivalent of a secular public school education for students who live in rural districts with no actual public school.[98] Chief Justice Roberts, writing for a 6–3 majority, rejected Maine's "public school equivalent" argument as a semantic attempt to avoid the holding in *Espinoza*, which "turned on the substance of free exercise protections, not on the presence or absence of magic words."[99] The holding in *Carson* is clear: "As we held in *Espinoza*, a 'State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.'"[100]

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95. Andrew Wimer, *Maine Parents Challenge Law Excluding Religious Schools from the State's Tuition Program,* INST. FOR JUST. (Aug. 21, 2018), https://ij.org/press-release/maine-parents-challenge-law-excluding-religious-schools-from-the-states-tuition-program/ [https://perma.cc/5MMR-XXRD].

96. 142 S. Ct. 1987 (2022).

97. *Id.* at 1998.

98. Basically, Maine argued that since a public school education "cannot include sectarian instruction," a program designed to pay for a roughly equivalent education must also be strictly secular. *Id.*

99. *Id.*; *see also id.* at 1999 ("Saying that Maine offers a benefit limited to private secular education is just another way of saying that Maine does not extend tuition assistance payments to parents who choose to educate their children at religious schools."). And, as in *Trinity Lutheran* and *Espinoza*, such discrimination is "odious to our Constitution" and cannot stand. *Id.* at 1996 (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025 (2017)); *see also* Espinoza v. Mont. Dept. of Revenue, 140 S. Ct. 2246, 2255 (2020).

100. *Carson*, 142 S. Ct. at 2000 (quoting *Espinoza*, 140 S. Ct. at 2261).

Although dicta in *Carson* makes clear that a state "may provide a strictly secular education in its public schools"[101] and no state is required to fund private education,[102] the facts of this case and the Court's expansive free exercise reasoning hint at the argument that the Free Exercise Clause can be read as requiring states to fund school choice for all K–12 students. Indeed, in his dissent, Justice Breyer predicted that the arc of *Carson* may require states to fund school choice for all families:

> We have never previously held what the Court holds today, namely, that a State *must* (not *may*) use state funds to pay for religious education as part of a tuition program designed to ensure the provision of free statewide public school education.
>
> What happens once "may" becomes "must"? Does that transformation mean that a school district that pays for public schools must pay equivalent funds to parents who wish to send their children to religious schools? Does it mean that school districts that give vouchers for use at charter schools must pay equivalent funds to parents who wish to give their children a religious education?[103]

Although I don't share Justice Breyer's fear of religious equality for all K–12 students, I agree with his reading of the spirit of free exercise emanating from *Trinity Lutheran*, *Espinoza*, and *Carson*. That magnificent spirit of equality makes clear that religious families are entitled to their fair share of the benefits of the Welfare State and should not be forced to choose between their faith and the single largest benefit most families receive from state and local governments. Most certainly, such discrimination is odious to the First Amendment and should not be allowed to stand.

Some would argue that school choice results in nonbelievers being taxed to fund religious education for believers, and that somehow this is unfair to nonbelievers. Is that true? Is equal funding for every child's education somehow preferential funding of religion?

Unlike public schools, which as we have seen are most definitely not neutral between religion and non-religion, school choice for each child is strictly neutral, because everyone, regardless of their religious or nonreligious views, gets equal K–12 funding. Indeed, Michael McConnell and Judge Richard Posner take the position that equal funding of school choice is necessary for neutrality and systematic equality. They explain the economic impact of school choice this way:

101. *Id.*

102. *Id.*

103. *Id.* at 2006 (Breyer, J., dissenting).

> No one is taxed to support the religious education of another; rather, each person pays one lifetime's worth of taxes earmarked for education and in return receives (in advance) one education. Of course, things would not work out as neatly in practice as they do in this very abstract model. There would still be a subsidy from rich to poor . . . . But there would be no systematic transfer of wealth from individuals who attend religious schools to those who do not. On the contrary, to force individuals to pay education taxes but deny them education financing because they have chosen a religious school brings about a systematic transfer of wealth from the religious to the nonreligious.[104]

Rather than focus on parents paying school taxes, the focus should be on each child—each child gets one free K–12 education in a public or private school (much like a school loan), and each child pays a lifetime of taxes to repay that loan. Everyone gets one, everyone pays for one. Secular citizens do not subsidize religious citizens, and religious citizens do not subsidize secular citizens.

IV. BEYOND THE FIRST AMENDMENT: FEDERALISM AND FOOT VOTING

As this Article has demonstrated, the government school monopoly of funding for K–12 education is inconsistent with the spirit of the Free Speech Clause and the Free Exercise Clause. It discriminates on the basis of viewpoint by coercing parents to accept the educative speech preferences of the government in place of their own on many issues that matter a great deal.[105] Moreover, government schools are an engine of secularization, and religious parents are forced to choose between their religious beliefs about the education of their children and the single largest benefit most families receive from the government.[106] In effect, the government school monopoly commandeers a captive audience of

104. Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 18 (1989).

105. As the Cato Institute put it in its amicus brief in *Carson*:

> Public schools are . . . anything but religiously neutral. Maine cannot cleanly separate public education from religion; it has merely elevated the secular above the religious. Indeed, secularism in public schools has become akin to a state-established religion: the secular values that the state promotes conflict with deeply and sincerely held religious beliefs, so classroom conflicts often arise. Maine unjustly alienates religious individuals, treating them as second-class citizens in the context of school tuitioning for merely living as their faith demands.

Brief of the Cato Institute as Amicus Curiae Supporting Petitioners at 2, Carson v. Makin, 142 S. Ct. 1987 (2022) (No. 20-1088).

106. *See id.*

impressionable children for inculcation in the secular beliefs, values, and ideological preferences of government officials who control the curriculum of public schools. Although affluent parents can afford to opt out of public schools, poor families, working-class families, and even most middle-class families cannot afford the brutal bargain required to educate their children in the schools of their choice.[107] These families are members of the community too, and the public school monopoly is odious to the spirit of the First Amendment.

However, as recently as June of 2022, in *Carson*, the Supreme Court asserted in dicta that the government may adopt a "strictly secular" curriculum for the public schools and has no obligation to fund private K–12 schools.[108] So the spirit of the First Amendment may be willing, but its flesh is weak.[109] What are supporters of universal school choice to do?

We must continue to argue—whether in conferences, in law reviews, or in the courts—that the government school monopoly violates both the spirit and the letter of the First Amendment. It may take years or even generations to convince the Court, but our grandchildren and great-grandchildren will thank us for our faithfulness.

That is the long-term strategy. But in the short term we can look to federalism and foot voting to achieve school choice in the present. It is clear that each of the fifty states is free to enact a neutral school choice program.[110] Some educational scholars have called 2021 "the year of educational choice, with new or expanded programs in 18 states."[111]

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107. Although the affluent have the means to escape the government school monopoly of educative speech by paying to privately educate their children, the "non-rich are presently denied this medium of expression." *See* John E. Coons, *School Choice as Simple Justice*, FIRST THINGS (April 1992), https://www.firstthings.com/article/1992/04/school-choice-as-simple-justice#print [https://perma.cc/KAA2-VVLZ]. Indeed, as discussed earlier, "[u]nder the government school monopoly, marginalized and underserved families have no educational choice, no right to control the belief formation of their impressionable and precious children." *See supra* Part I.

108. 142 S. Ct. at 2000.

109. *See Matthew* 26:41 (ESV) ("The spirit indeed is willing, but the flesh is weak.").

110. As Chief Justice Roberts made clear in *Carson*, "[A] neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." 142 S. Ct. at 1997.

111. Colleen Hroncich & Solomon Chen, Carson v. Makin*: Another Win for Education Freedom*, CATO INST.: CATO AT LIBERTY (June 21, 2022, 2:57 PM), https://www.cato.org/blog/carson-v-makin-another-win-education-freedom [https://perma.cc/58VG-67W6]; *see also* Jason Bedrick & Ed Tarnowski, *How Big Was the Year of Educational Choice?*, EDUC. NEXT, https://www.educationnext.org/how-big-was-the-year-of-educational-choice/ [https://perma.cc/9ULX-BAWA] (Aug. 19, 2021) (providing statistics).

What is more, in the summer of 2022, Arizona passed H.B. 2853, which "allows any of the state's more than a million K–12 students to be eligible for more than $6,000 for education expenses, including private school tuition and curricular materials."[112] In the announcement of his signing the bill into law, Arizona Governor Doug Ducey exclaimed:

> With this legislation, Arizona cements itself as the top state for school choice and as the first state in the nation to offer all families the option to choose the school setting that works best for them. Every family in Arizona should have access to a high-quality education with dedicated teachers. This is truly a win for all K–12 students.[113]

Federalism is a beautiful thing; it allows each state to enact laws that work best for the people of that state. It promotes liberty in many ways. First and foremost, it protects the democratic liberty to be governed closer to home, in the state in which you live and where every member of the government is a fellow citizen of your state. America is an extremely divided, coast-to-coast nation, but we can often reach political consensus closer to home, in our respective states.

Federalism also creates a free market for the government in which every citizen has fifty different arrangements of taxes, benefits, regulations, and liberties to choose from. Thus, federalism allows each of us to vote with our feet, the most effective form of voting.[114] If I am a father of five children and wish to educate my children in a private religious school, what should I do if my state does not fund school choice? I can vote in elections and hope to elect a legislature that will

112. Editorial Board, *School Choice Blooms in the Desert*, WALL ST. J. (June 27, 2022, 6:39 PM), https://www.wsj.com/articles/school-choice-blooms-in-the-desert-arizona-education-savings-account-scholarships-11656368155? [https://perma.cc/Q2MR-CFZD].

113. Tom Joyce, *Arizona Becomes First Universal School Choice State*, CTR. SQUARE (July 7, 2022), https://www.thecentersquare.com/arizona/arizona-becomes-first-universal-school-choice-state/article_e12bd6cc-fe58-11ec-9097-ebc31b1859fc.html [https://perma.cc/23ZJ-C744]. Arizona House Majority Leader Ben Toma chimed in: "In Arizona, we fund students, not systems, because we know one size does not fit all students." *Id.*

114. As Professor Richard A. Epstein observed:

> The great virtue of federalism is that it introduces an important measure of competition between governments. Federalism works best where it is possible to vote with your feet. The state that exploits its productive individuals runs the risk that they will take their business elsewhere. The exit threat therefore enforces the competitive regime.

Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 150 (1992). In short: "[f]ederalism protects the freedom that comes from having choices." MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 6 (1999).

enact school choice legislation. But in many states that effort would be futile. Alternatively, my family can pack up our belongings and move to a state like Arizona that funds school choice. That is foot voting, and it immediately and effectively provides my family the K–12 educational benefits we need.[115] As Professor Seth Kreimer has put it so lucidly:

> A final basis for the claimed linkage between federalism and freedom . . . relies on an analytically unimpeachable claim: state-by-state variation leaves open the possibility to each individual of choosing to avoid repression by leaving the repressive jurisdiction. A nationally applicable norm is unavoidable short of exile; a state law can be avoided with a moving van.[116]

This is not to say that one should move whenever he disagrees with any law enacted in his state. But some laws are more important than others, and some rights or benefits are worth moving to obtain. We live in a mobile society, and we move from one state to another for a multitude of reasons. For many families, equal funding of their educational choices may be worth voting with their feet, or, at the very least, taking into account when deciding which job offer to accept.[117]

Moreover, in states that choose to fund both public and private education, school choice may provide a path of peace to end the wars that are taking place across the country over the curriculum and books in the public schools. If children are held captive in government schools, many parents will engage in political battles over the curriculum, books, and values taught in their local public school. However, if they have school choice, rather than wage political war, many parents will exit public schools in favor of a private school that better meets each family's educational preferences.

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115. *See* Ilya Somin, *Foot Voting and the Future of Liberty*, *in* THE CAMBRIDGE HANDBOOK OF CLASSICAL LIBERAL THOUGHT 83–84 (Todd M. Henderson ed., 2018) ("The key attribute of foot voting that differentiates it from conventional ballot box voting is not movement, as such, but rather the ability to make an individually decisive choice.").

116. Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. (SPECIAL ISSUE: SUP. CT.'S FEDERALISM: REAL OR IMAGINED?) 66, 71 (2001).

117. Most recently, millions of Americans moved to avoid the hardships of the Covid-19 pandemic. According to the Pew Research Center, "[A]round one-in-five U.S. adults (22%) say they either changed their residence due to the pandemic or know someone who did." D'Vera Cohn, *About a Fifth of U.S. Adults Moved Due to COVID-19 or Know Someone Who Did,* PEW RSCH. CTR. (July 6, 2020), https://www.pewresearch.org/fact-tank/2020/07/06/about-a-fifth-of-u-s-adults-moved-due-to-covid-19-or-know-someone-who-did/ [https://perma.cc/5MMR-XXRD].

Conclusion

The government school monopoly for funding K–12 education creates a coercive system that commandeers a captive audience of impressionable children for inculcation in secular ideas, beliefs, and values concerning matters of truth, moral character, culture, and the good life. The brutal bargain imposed on parents by this monopoly requires them to choose between the single largest benefit most families receive from state and local governments and educating their children in a curriculum that is consistent with the preferred educative speech of the parents. To choose the latter is to sacrifice hundreds of thousands of dollars of tax-funded support for K–12 education.

This coercive, take-it-or-leave-it system of funding education is inconsistent with both the letter and the spirit of the Free Speech Clause and the Free Exercise Clause. As John Stuart Mill observed, it results in a despotism over the hearts and minds of our precious offspring and eradicates the right of parents to control the education of their children.[118] It violates the spirit of freedom of speech by forcing parents to substitute the preferred viewpoints of government officials for their own concerning fundamentally important ideas about history, government, justice, sexuality, gender identity, and many other topics arising in the course of K–12 education. Moreover, because the government school curriculum is strictly secular, this funding monopoly inherently forces religious parents to choose between their faith and their ability to afford to educate their children. Such religious discrimination is odious to both the letter and spirit of the Free Exercise Clause.

However, the Supreme Court has made clear that the government may adopt a "strictly secular" curriculum in the public schools and has no obligation to fund private K–12 schools.[119] So, at least for the foreseeable future, the Court's First Amendment jurisprudence will not relieve parents of the brutal bargain imposed on them by the government school monopoly. Thus, in the short term, parents must look to federalism and foot voting to achieve at least some degree of school choice. Many states have begun to enact at least some financial assistance supporting educational choice. What is more, one state—Arizona—has enacted legislation funding educational choice for every family in the state.[120]

As support for the school choice movement grows in many states, families who live in these states will have access to the support they need to help pay the cost of educating their children in schools of their choice. Importantly, many families may choose to vote with their feet

118. *See supra* notes 10–14 and accompanying text.

119. *See supra* notes 103–04 and accompanying text.

120. *See supra* notes 105–08 and accompanying text.

by relocating from monopoly states to states that support educational choice. We live in a very mobile society, and people move from one state to another for many reasons. For many families, moving to states that support school choice may be the best reason of all to vote with their feet. At the very least, it should be one important factor when families decide which job offers to accept and which to reject. The hearts, souls, and minds of our children matter a great deal, and parents should always do what they believe is best to train up their children in the way they should go.

To end this Article where it began, the letter and spirit of the First Amendment deeply values freedom of religion, thought, and belief formation. If these values are to survive in our deeply divided, pluralistic Nation, parents must be free to choose an appropriate education for their children, without having to sacrifice the benefit of public funding of education. To put it succinctly, educational funds should be directed to children and their parents, not to strictly secular government schools. School choice is the civil rights and civil liberties issue of this present age, and one way or another—either in the courts or in the states—we need to get there.