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A Call for State Legislators to Reconsider Their Stance on School Choice and School Funding

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INTRODUCTION

The confluence of two major events in 2020 led to the need for state legislators to reevaluate the stance their states have previously taken on school choice and the public funding of private religious education. The first event is the COVID-19 pandemic that has killed millions and left others in a state of uncertainty. One significant consequence of the pandemic that should concern state legislators is its effect on education. In the pandemic, educators and schools were faced with extremely difficult questions with seemingly impossible answers.[1] Notably, the impact was not limited to public schools. In fact, private schools, particularly private religious schools, were greatly hurt by the COVID-19 pandemic.[2] Many schools closed because of the economic toll that took place as a result of a decline in donations and enrollment.[3] In a joint statement, many high-ranking Catholic officials expressed that "[b]ecause of economic loss and uncertainty, many families are confronting the wrenching decision to pull their children out of Catholic schools."[4] This effect on religious education is a cause of concern for many,[5] but the pandemic's impact on religious

1. For an idea of some of the ways that schools, educators, and parents have been impacted by the pandemic see, for example, Youki Terada, *Covid-19's Impact on Students' Academic and Mental Well-Being*, EDUTOPIA (June 23, 2020), https://www.edutopia.org/article/covid-19s-impact-students-academic-and-mental-well-being; Michelle Fox, *Coronavirus has Upended School Plans. It Will Also Worsen Racial and Economic Inequalities, Experts Warn,* CNBC (Aug. 12, 2020, 12:28 PM), https://www.cnbc.com/2020/08/12/impact-of-covid-19-on-schools-will-worsen-racial-inequity-experts-say.html; Mark Hansen, *33 Questions Every School Should Answer as You Prepare to Reopen*, FRONTLINE EDUCATION (Jun. 23, 2020), https://www.frontlineeducation.com/blog/33-questions-schools-answer-before-reopening/.

2. Jeanne Allen, *Why Saving Catholic Schools from Covid's Impact is a National Imperative*, FORBES (Jul. 31, 2020, 5:27 PM), https://www.forbes.com/sites/jeanneallen/2020/07/31/why-saving-catholic-schools-from-covids-impact-is-a-national-imperative/?sh=3fc2ba8f2d83.

3. CATO Institute, *COVID-19 Permanent Private School Closures*, https://www.cato.org/covid-19-permanent-private-closures (last updated July 2021).

4. David Crary, *Amid Pandemic, Future of Many Catholic Schools is in Doubt*, ABC NEWS (Aug. 9, 2020, 11:21 AM), https://abcnews.go.com/US/wireStory/amid-pandemic-future-catholic-schools-doubt-72266550.

5. *See, e.g.*, Giulia McDonnell Neito del Rio, *A Growing Number of Catholic Schools are Shutting Down Forever*, N.Y. TIMES (Sept. 9, 2020), https://www.nytimes.com/2020/09/05/us/catholic-school-closings.html; Ray Domanico & Nora Kenney, *Revivifying Catholic Education in the Era of School Choice*, UNIV. NOTRE DAME CHURCH LIFE J. (Aug. 19, 2020),

private schools should also concern state legislators because of the value these schools provide to students in their states.

The second event is the 2020 Supreme Court decision *Espinoza v. Montana Department of Revenue*.[6] This decision impacts the previous legal and constitutional arguments that have been cited in the past to oppose school choice and religious school funding. The case centered on a Montana scholarship program that aimed "to provide parental and student choice in education."[7] After the program was in place, the Montana Department of Revenue, citing the No-Aid provision in the state Constitution,[8] determined that the scholarship program could not be used to help students attending religious schools.[9] This decision forced parents hoping to send their children to Christian schools to sue because they felt discriminated against because of their religion.[10] The case went to the Supreme Court where the Court, in a 5-4 decision,[11] determined that "[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."[12]

This landmark decision changed the legal and constitutional understanding of school choice and public funding of religious schools. Therefore, previous legal arguments against school choice are no longer persuasive nor applicable, giving state legislators the power to change the educational landscape, in a time when a change could help save many of the struggling private religious schools because of the COVID-19 pandemic. As a result, state legislators should now reevaluate their understanding of school choice and school funding and work to implement different school funding programs in their state.

Part I begins by examining the idea of school choice and why state legislators need to understand it. In Part II, the constitutional concerns and legal history of school choice are given, including the development of state Blaine Amendments and the key cases that have shaped the legal

https://churchlifejournal.nd.edu/articles/revivifying-catholic-education-in-the-era-of-school-choice/?fbclid=IwAR3iXewTdujk0lzC-daPdvGaMlxwjuA5qULqBIReUyo8fqlMTquZ933yg2I.

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

7. *Id.* at 2251 (quoting 2015 Mont. Laws p. 2168, § 7).

8. *See* MONT. CONST., art. X, § 6(1).

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

10. *Id.*

11. *Id.* at 2246. This case was even more divided than the 5-4 split made it seem. Seven different opinions were written for this case: the opinion written by Chief Justice Roberts; three concurring opinions written by Justices Thomas, Gorsuch, and Alito; and three dissenting opinions written by Justices Ginsburg, Breyer, and Sotomayor.

12. *Id.* at 2261.

considerations for school choice and made the previous legal and constitutional arguments against school choice pretextual. Part III discusses how states used Blaine Amendments before the *Espinoza* decision and what is left of them post-*Espinoza*. Next, Part IV outlines what educational choice programs have been implemented in different states, how they work, and why they are good options for state legislators to consider. While this Comment focuses on the legal arguments behind school choice and school choice programs, Part V notes, but does not argue for in full, some of the social benefits school choice programs give to students, schools, and communities. And, finally, Part VI explains why state legislators should consider the various school choice programs and implement them in their states now that the legal arguments against them are no longer persuasive.

I. WHAT IS SCHOOL CHOICE?

Typically, when a child reaches school age, the decision of what school to attend has already been made for that child—they must go to their geographically assigned public school.[13] No other consideration is given in the decision. School choice advocates, however, seek a better way to make that decision. They explain that "[e]ducational choice is based on the idea that parents [should be] in control of where their child goes to school."[14] Because a parent and a student understand the individual needs of that student best, they deserve the right to find and attend the school that best caters towards that student's needs.

Those who promote school choice also seek ways for the government to subsidize the cost of the other school choice options, specifically private schools. Tax-credit options, voucher programs, or scholarship opportunities are ways that states legislators have provided those funds to families in the past. But critics of school choice argue against these government subsidies for many reasons.[15] What is most at issue in this

13. Jonathan D. Boyer, *Education Tax Credits: School Choice Initiatives Capable of Surmounting Blaine Amendments,* 43 COLUM. J.L. & SOC. PROBS. 117, 119 (2009).

14. AJ Willingham, *How to Make Sense of the School Choice* Debate, CNN (May 24, 2007, 2:41 PM), https://www.cnn.com/2017/05/24/us/school-choice-debate-betsy-devos/index.html.

15. These criticisms include the claims that school choice programs will take money away from the public-school system, that the programs will limit diversity within schools, and that parents should not or cannot make the best choice for their children. *See, e.g.*, Bayliss Fiddiman & Jessica Yin, *The Danger Private School Voucher Programs Pose to Civil Rights*, CTR. FOR AM. PROGRESS (May 13, 2019, 5:00 AM), https://www.americanprogress.org/issues/education-k-12/reports/2019/05/13/469610/danger-private-school-voucher-programs-pose-civil-rights/; Natalie Wexler, *Six Reasons Why School Choice Won't Save Us*, FORBES (Apr. 29, 2018, 3:20 PM),

Comment is the criticism that, based on the Federal Free Exercise and Establishment Clauses and state Blaine Amendments, it is unconstitutional for a state legislature to provide funding for religious schools.[16] In order to promote school choice, proponents and state legislatures must face legal and constitutional questions concerning the funding of religious schools, which is described in the next part.

II. LEGAL HISTORY

The legal history and constitutionality of school choice and religious school funding is long and ever-changing. The history, however, is important to help state legislators to appreciate the significance of *Espinoza* and the need for reconsideration of their understanding of the issues.

A. Constitutional Concerns for School Choice

The story of the constitutionality of school choice and religious funding begins with the twin religion clauses of the First Amendment of the Federal Constitution. The Establishment Clause states that "Congress shall make no law respecting an establishment of religion . . . ."[17] The Free Exercise Clause quickly follows: "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ."[18] The Establishment Clause, which applies to the states through the Fourteenth Amendment,[19] is interpreted to mean that "the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."[20] While the Free Exercise Clause, which also applies to the states through the Fourteenth Amendment,[21] "protect[s] religious observers against unequal treatment" through "laws that target the religious for 'special disabilities' based on their 'religious status.'"[22] While these

https://www.forbes.com/sites/nataliewexler/2018/04/29/six-reasons-why-school-choice-wont-save-us/?sh=21af0e4f142e. Another major criticism is that these programs will have harmful effects on the school system as a whole. *See* Boyer, *supra* note 13, at 120.

16. *See* discussion *infra* Section II.A.

17. U.S. CONST. amend. I, § 1.

18. *Id.*

19. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

20. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993).

21. *See Cantwell*, 310 U.S. at 303.

22. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017) (quoting *Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 533). Decades before this, the Supreme Court had explained that because of the Free Exercise Clause a state "cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans,

clauses seem straight-forward, an issue occurs when these two clauses interact with each other.[23] The Supreme Court described this by saying, "there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels."[24]

The constitutional analysis also includes the Blaine Amendments in many state constitutions. These state amendments came from a failed amendment to the U.S. Constitution, proposed by Congressman James G. Blaine in 1875.[25] He proposed an amendment that forbade any "money raised by taxation in any State for the support of public schools" to be used by "any religious sect."[26] Blaine's proposal was in response to the number of Catholics who were immigrating into the country.[27] Catholics worried about the Protestant influence in the public school system and wanted to teach their religion in separate schools, which led to the development of the Catholic school system.[28] Ultimately, this amendment failed to pass in the Senate, despite passing in the House.[29]

Even though the amendment failed, many states enacted their own version of the Blaine Amendment to their state's constitution.[30] Additionally, states who entered the Union during this time were generally "required to implement a modified version of the Blaine amendment as a condition of joining the Union."[31] Today, thirty-seven states have a Blaine Amendment in their state constitution.[32] And they are often used to stop government programs that give funding to religious schools and their students.[33] The wording of these amendments, however, varies amongst the states. Some states have strict restrictions—Michigan's amendment,

Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (emphasis added).

23. *See* Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970).

24. *Trinity Lutheran Church*, 137 S. Ct. at 2019 (quoting Locke v. Davey, 540 U.S. 712, 718 (2004)).

25. Boyer, *supra* note 13, at 130.

26. H.R.J. Res. 1, 44th Cong. Rec. 205 (1875).

27. *See* Edward J. Larson, *The "Blaine Amendment" in State Constitutions, in* THE SCHOOL-CHOICE CONTROVERSY: WHAT IS CONSTITUTIONAL? 35, 38 (James W. Skillen ed., 1993).

28. *See id.* at 37; *see also* ROSEMARY C. SALOMONE, VISIONS OF SCHOOLING: CONSCIENCE, COMMUNITY, AND COMMON EDUCATION 18–22 (2000) (describing the development of the Catholic school system amidst strong prejudice against it throughout the development of the more Protestant-friendly public school system).

29. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2269 (2020) (Alito, J., concurring).

30. Larson, *supra* note 27, at 40.

31. *Id.*

32. Boyer, *supra* note 13, at 131.

33. This is the premise of the *Zelman* and *Espinoza* cases, among others that are discussed below. *See* discussion *infra* Sections II.C.1, II.C.4.

for example, prohibits the state from "directly or indirectly" giving aid to "any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school."[34] Other states' amendments are more flexible. For instance, South Carolina's amendment only prohibits state funds from being used "for the *direct* benefit of any religious or other private educational institution."[35]

Historically, to ensure the constitutionality of any funding program that a state enacts, it must be consistent with the religious clauses of the Federal Constitution and the Blaine Amendment in the state constitution, if there is one.

B. Early Jurisprudence of State Aid to Religious Schools

The history of the jurisprudence on whether public funds can be provided to religious schools or help students attending religious schools has been a long and confusing road. The Supreme Court has dramatically changed its understanding of the constitutional provisions through the years. For example, in 1947, it wanted to maintain a separation between church and state but still accommodate programs that were neutral and general towards religion. In *Everson v. Board of Education*, the Court answered whether a school board could subsidize school bus transportation for children attending private religious schools.[36] The Court recognized that while there was a "high and impregnable" wall between church and state, there are possible exceptions.[37] And because the bus program was "general" and "neutral in its relations with groups of religious believers and non-believers" an exception could be made, and the program was allowed.[38] This early accommodationist interpretation continued for a few years.[39]

In 1971, the Court changed course and established a stricter "wall of separation" between church and state. In a case about whether a state can

34. MICH. CONST. art. VIII, § 2. *See also* MICH. CONST. art. I, § 4. Massachusetts's Constitution is similarly strict in its wording, saying "No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any . . . primary or secondary school . . . which is not publicly owned and under the exclusive control, order and supervision of . . . the commonwealth." MASS. CONST. Amend. art. XVIII, § 2.

35. S.C. CONST. Ann. art. XI, § 4 (emphasis added).

36. Everson v. Bd. of Educ., 330 U.S. 1, 3–4 (1947).

37. *Id.* at 18.

38. *Id.*

39. *See* Bd. of Educ. v. Allen, 392 U.S. 236 (1968) (holding that a program which loaned textbooks to students attending parochial schools was constitutional because it did not favor one religion over another and the benefit went to the students, not the schools).

provide salary help for teachers at religious schools that met certain criteria,[40] the Supreme Court established the now infamous "Lemon Test."[41] The three-prong test says that for a program to not violate the Establishment Clause the program must 1) "have a secular legislative purpose," 2) have a "principal or primary effect . . . that neither advances nor inhibits religion," and 3) "not foster 'an excessive government entanglement with religion.'"[42] This test was used to block this and many other programs, which resulted in a stricter separation between church and state for many years.[43]

C. A Trend to Break Down the "Wall of Separation"

Eventually the Supreme Court began to return to its early accommodationist ideals and permitted more programs that had both neutrality and private choice aspects.[44] This trend continued until the early 2000s when big strides were made in the fight for government funding and school choice. A few major Supreme Court cases from this time are explained below.

40. Lemon v. Kurtzman, 403 U.S. 602, 607–08 (1971).

41. The Lemon Test has faced a lot of criticism throughout the years, particularly because it has been used inconsistently in the courts. For example, Justice Scalia said, "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again . . . ." Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

42. *Lemon*, 403 U.S. at 612–13.

43. *Id.* at 625. Other cases where the Lemon Test was used include Tilton v. Richardson, 403 U.S. 672 (1971) (denying grants to church-related colleges and universities to build academic buildings); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (denying programs that provided money for maintenance and repair of religious schools and tuition reimbursement for low-income students attending nonpublic schools); Meek v. Pittenger, 421 U.S. 349 (1975) (striking down a program that loaned equipment to religious schools because the equipment could be used to further religious purposes); Aguilar v. Felton, 473 U.S. 402 (1985) (invalidating a program that sent teachers into religious schools to provide instruction for students who were falling behind).

44. *See* Mueller v. Allen, 463 U.S. 388 (1983) (allowing an education tax deduction program because the deduction was based solely on the parent's private choice); Witters v. Wash. Dep't of Services for the Blind, 474 U.S. 481 (1986) (striking down a challenge to a scholarship program that provided aid to a student studying at a religious institution because the money reached the school as a result of the student's private choice); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (approving a program that provided sign-language interpreters for deaf children in religious schools because the aid was going to the students, rather than the schools).

1. Zelman v. Simmons-Harris

The first landmark case in support of school choice came in 2002 from Ohio.[45] This case addressed the Pilot Project Scholarship Program that was enacted to help a failing Cleveland school district and to give "educational choices to families with children who reside" in that district.[46] The program gave different types of aid to students, but at issue here was the "tuition aid" it provided to students to attend "a participating public or private school of their parent's choosing."[47] The program was challenged under the Establishment Clause,[48] because "[a]ny private school, whether religious or nonreligious, may participate in the program and accept program students . . . ."[49] And the majority of the private schools participating in the program were religious private schools.[50]

The Court's opinion emphasized both the neutrality and private choice aspects of the program. While the Establishment Clause forbids laws that have the "'purpose' or 'effect' of advancing or inhibiting religion,"[51] the program here "was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system."[52] And the program's religious neutrality was "wholly as a result of [a person's] own genuine and independent private choice" of where to go to school.[53] Thus, any "incidental advancement of a religious mission, or the perceived endorsement of a religious message" belongs to "the individual recipient, not to the government, whose role ends with the disbursement of benefits."[54] The Court held that because the program provided "true private choice" to the families and was "neutral in all respects toward religion," it was constitutional.[55]

While the majority opinion recognized there might be other concerns, such as whether the program gave the appearance of promoting religion or

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

46. *Id.* at 643–44.

47. *Id.* at 645.

48. *Id.* at 648. Ohio does not have a Blaine Amendment in its state constitution, so the Federal Constitution was the only constitutional roadblock the program had to clear.

49. *Id.* at 645.

50. *Id.* at 647.

51. *Id.* at 648–49 (quoting Agostini v. Felton, 521 U.S. 203, 222–23 (1997).

52. *Id.* at 649.

53. *Id.* at 652. These decisions were based on the Supreme Court precedent of *Mueller*, *Witters*, and *Zobrest* which had previously moved the Court away from the strict separationist ideology of *Lemon*. *See supra* note 44.

54. *Zelman,* 536 U.S. at 652.

55. *Id.* at 653, 662–63.

whether the majority of those who use the program are religious, the Court decided those concerns do not matter.[56] Ultimately, the question came down to whether the program was "coercing parents into sending their children to religious schools," and that was not happening here. [57] There was no financial incentive given to choose a religious school over another type of school; in fact, it was the opposite.[58]

This case was a breakthrough for school choice proponents. But these programs were slow to develop because this program did not have to contend with a state Blaine Amendment, which would prove harder to do. As such, more litigation was needed to give states a go-ahead in implementing school choice programs.

2. Locke v. Davey

Two years after *Zelman*, another school funding and school choice case reached the Supreme Court. In *Locke v. Davey* the state of Washington began the Promise Scholarship Program that "assist[ed] academically gifted students with postsecondary education expenses."[59] In this program, graduating high school students that met "academic, income, and enrollment requirements" could receive money for education expenses for postsecondary education in Washington.[60] This program's issue was that it barred students who wanted to "pursue a degree in theology" from receiving money.[61] This restriction was added because of the "State's constitutional prohibition" on providing funds to support religious education or schools.[62] A student hoping to "double major in pastoral ministries and business management/administration" tried to use this program but was denied access.[63] He brought this case, claiming his Free Exercise Constitutional Rights were violated.[64] The case made it to the Supreme Court, which struck down the student's claim.

56. *See generally id*. at 654–63.

57. *Id.* at 655–56.

58. *Id.* at 654.

59. Locke v. Davey, 540 U.S. 712, 715 (2004); *See also* WASH. ADMIN. CODE § 150-80-010 to -100 (2003).

60. *Locke*, 540 U.S. at 716; *See also* WASH. ADMIN. CODE § 250-80-020(12) (2003).

61. *Locke*, 540 U.S. at 716*; See also* WASH. ADMIN. CODE § 250-80-020(12)(f) to (g) (2003).

62. *Locke*, 540 U.S. at 716; *See* WASH. CONST., art. I, § 11 ("No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."); WASH. CONST. art. IX, § 4 ("All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.").

63. *Locke*, 540 U.S. at 717.

64. *Id.* at 717–18.

The Court argued that, even though the *Zelman* precedent meant this program did not break the Establishment Clause,[65] "there [was] room for play in the joints" because "some state actions permitted by the Establishment Clause [are] not required by the Free Exercise Clause."[66] This case asked whether this program could, without violating the Free Exercise Clause, use the Washington State Constitution's Blaine Amendment to deny a person the use of this program solely because that person wanted to use it to pursue a degree in theology.[67]

The Court's decision outlined the country's history of not using public money to fund the education of ministers, and Washington had used that history to keep a separation between public funds and churches.[68] It acknowledged, however, that the program does not deny people the right to participate in the "political affairs of the community" because of their religion, nor does it force people to choose "between their religious beliefs and receiving a government benefit."[69] Washington had simply decided "not to fund a distinct category of instruction."[70] Ultimately, the Court recognized that the program had pro-religion aspects, meaning it was not hostile towards religion.[71] And because the state Constitution's history and text is not hostile toward religion, the "denial of funding for vocational religious instruction alone" is constitutional.[72]

The decision of *Locke* seemed at odds with the Court's previous decision in *Zelman*, as the Court took a step back in its willingness to approve school choice and school funding programs. However, moving forward, the Court distinguished many programs from *Locke*, and, ultimately, the case has not stopped the progression of school choice programs.

3. Trinity Lutheran Church of Columbia, Inc. v. Comer

A 2017 Supreme Court case, *Trinity Lutheran v. Comer*, while not an obvious school choice case, has foreseeable ramifications for the question of school funding.[73] The case focuses on a Missouri program that provided

65. *Id.* at 719.
66. *Id.* at 718–19.
67. *Id.* at 719.
68. *See id.* at 722.
69. *Id.* at 720.
70. *Id.* at 721.
71. *Id.* at 724–25.
72. *Id.* at 725.
73. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

money to schools and daycare centers to "purchase rubber playground surfaces made from recycled tires."[74] The program seemed neutral on its face, but because of Missouri's Blaine Amendment,[75] the program "had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity."[76] When Trinity Lutheran Church Child Learning Center was denied the money despite being fifth in line to receive it, the church sued, claiming their application's denial violated their Free Exercise rights.[77] The lower courts denied these claims, finding that this case was "nearly indistinguishable from *Locke*" because, while the program did not violate the Establishment Clause, the Free Exercise Clause did not *compel* them to fund religious entities, especially considering the state's own constitution.[78] The Supreme Court granted certiorari and reversed the lower court's decision.[79]

While this case falls into the joints between the twin clauses, the Court decided that the Free Exercise Clause should control in cases like this.[80] The Free Exercise Clause is violated when "a generally available benefit" is denied "solely on account of religious identity."[81] The only exception is a denial based only on "a state interest 'of the highest order.'"[82] The programs that have been upheld, rejecting the Free Exercise challenges, are "neutral and generally applicable without regard to religion," and do not "single out the religious for disfavored treatment."[83] A program may not make a church, school, or person choose between either receiving the public benefit or continuing their religious affiliation.[84] If it does, then it is denying that church, school, or person its constitutional right to exercise

74. *Id*. at 2017.

75. *Id.*; *See* MO. CONST. art. I, § 7 ("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. . ."); MO. CONST. art. IX, § 8 ("Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, . . . to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever.").

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

77. *Id.*

78. *Id.*

79. *Id.* at 2019, 2025.

80. *Id.* at 2019.

81. *Id.*

82. *Id*. (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978)).

83. *Id.* at 2020.

84. *Id.* at 2021–22.

its religion.[85] The challenged program did just that and thus was unconstitutional.[86]

Despite the similarities between the two cases, the Court distinguished *Trinity Lutheran* from *Locke* for two reasons.[87] First, there is a difference between denying claims based on religious use, like the program in *Locke* did, and denying claims based on religious status, like the program in *Trinity Lutheran* did.[88] The denial in *Locke* came because he wanted to use the money to prepare for a job in the ministry, while the denial in *Trinity Lutheran* was "simply because of what it [was]—a church."[89] Second, the church in *Trinity Lutheran* was expressly forced between choosing the public benefit or choosing their religion, but that choice was not required in *Locke*, where a student could exercise religion and participate in the program.[90] The *Trinity Lutheran* program forced the school to make such a choice and was a key reason why the program was held unconstitutional.[91]

While this case appeared to be a big win for school funding and school choice advocates, the majority opinion made it clear that this case and the Court's consideration only "involves express discrimination based on religious identity with respect to playground resurfacing."[92] No other religious uses of funding were considered. That would have to wait a few years.

4. Espinoza v. Montana Department of Revenue

The latest development in the school choice and religious school funding jurisprudence is *Espinoza v. Montana Department of Revenue*.[93] The program at issue gave tax credits to those who donated money to a scholarship program for students to use for private school tuition.[94] The program originally allowed money to be used for tuition at any school that

85. *Id.*

86. *Id.* at 2022.

87. *Id.* at 2023.

88. *Id.*; In a concurrence, Justice Gorsuch, with Justice Thomas joining, states that he has "doubts about the stability of such a line" between "religious *status* and religious *use*." *Id.* at 2025 (Gorsuch J., concurring). He further explains that the Free Exercise Clause "guarantees the free exercise of religion, not just the right to inward belief (or status)." *Id.* at 2026 (Gorsuch J., concurring).

89. *Id.* at 2023.

90. *Id.*

91. *Id.* at 2023–24.

92. *Id.* at 2024 n.3.

93. 140 S. Ct. 2246 (2020).

94. *Id.* at 2251.

met certain standards, but the Montana Department of Revenue eventually used the Montana Constitution to exclude any school "owned or controlled in whole or in part by any church, religious sect, or denomination" from being able to participate in the program.[95] Three mothers whose children attended a Christian private school brought a lawsuit after their children were denied a scholarship.[96] The suit made it to the Montana Supreme Court, which held that the program could not be used to fund religious schools and so invalidated the program altogether to ensure that no discrimination took place.[97] The Supreme Court granted certiorari.

The Court explained that this case was not based on the Establishment Clause, but rather was a question of "whether excluding religious schools and affected families from that program was consistent with the [Free Exercise Clause.]"[98] While the state tried to justify the discrimination with the Blaine Amendment, the Court explained that, similar to the issue in *Trinity Lutheran*, discrimination here is not permitted because it prevents a person from receiving a public benefit solely because of religious status.[99] It forces a choice between following religious beliefs or receiving a public benefit—it is impossible to have both.[100]

Again, the Court felt the need to distinguish this case from *Locke*. First, the student in *Locke* was denied the scholarship because of how he intended to use the money, but how the students intended to use the money was not the basis for the discrimination in this case.[101] The scholarship was denied because of the school's religious status.[102] Second, unlike in *Locke* where there was a "'historic and substantial' state interest in not funding the training of clergy" that justified the denial of money, in *Espinoza* there was no historical precedent for disallowing the funding of religious schools.[103] The Court rejected the argument that the proposed federal Blaine Amendment and the large number of state Blaine Amendments established a historical precedent to prohibit the funding today.[104] This

95. *Id*. at 2252. Interestingly, after the Department of Revenue made this change, the Montana Attorney General sent a letter to the department saying that the Montana Constitution did not require this change, and making it would "very likely" discriminate against those seeking to attend religious schools and violate the federal Constitution. *Id.*

96. *Id.*

97. *Id.* at 2253.

98. *Id.* at 2254.

99. *Id.* at 2255.

100. *Id.* at 2256.

101. *Id.* at 2257.

102. *Id.*

103. *Id.* at 2257–58.

104. *Id.* at 2258–59.

history is different because these amendments have a history of bigotry towards the Catholic Church and are used to single out religious schools in a discriminatory way.[105]

Ultimately, the Court decided that the scholarship program could not be used to discriminate against those who seek to use the program to pay for their attendance in religious private schools. "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."[106] This decision guaranteed that scholarship programs like this are constitutionally approved.[107]

III. WHAT IS LEFT OF A STATE'S BLAINE AMENDMENT?

After *Espinoza*, one question remained: what power do the thirty-seven state Blaine Amendments now have?[108] The answer to this question is important for state legislators to understand because their work is greatly impacted by the answer. Their need to reevaluate their understanding of the legal and constitutional arguments of school choice is based on the power their state Blaine Amendment has. As such, that question will be discussed in this Part.

A. Blaine Amendments Before Espinoza

At the time of the *Espinoza* ruling in June 2020, thirty-seven states had Blaine Amendments in their Constitutions.[109] State legislators and courts have interpreted their respective Blaine Amendments to either allow all, some, or no types of school choice and school funding programs. This Part will look at these different interpretations before explaining why state legislators must reevaluate their previous stance because of the *Espinoza* decision.

105. *Id.* at 2259. The Court's decision, while not explicitly declaring the Blaine Amendments unconstitutional or repealing them altogether, does severely limit the amount of power they have to restrict government funding to private religious schools. *See* discussion *infra* Section III.B.

106. *Espinoza*, 140 S. Ct. at 2261.

107. *Id.* at 2262–63.

108. Leslie Hiner, *What the Espinoza Ruling Means for Blaine Amendments and School Choice*, EDCHOICE (July 22, 2020), https://www.edchoice.org/engage/what-the-espinoza-ruling-means-for-blaine-amendments-and-school-choice/; Steven Green, *Symposium: RIP state "Blaine Amendments"*—Espinoza *and the "no-aid" Principle*, SCOTUSBLOG (June 30, 2020, 3:47 PM), https://www.scotusblog.com/2020/06/symposium-rip-state-blaine-amendments-espinoza-and-the-no-aid-principle/.

109. Boyer, *supra* note 13, at 131.

1. An interpretation that is open to all types of school choice programs

Multiple states have been open to all types of school funding programs, despite their Blaine Amendment. For example, Illinois's Blaine Amendment says:

Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever . . .[110]

But Illinois state legislators have understood that public aid given to schools by government programs is a benefit for the students themselves rather than for the schools. For instance, when a state program provided free transportation to all students, both at public and private schools, the program's constitutionality was challenged.[111] The Supreme Court of Illinois decided that even though a benefit might reach religious schools, those benefits were "incidental."[112] The program "was enacted for the secular purpose of protecting the health and safety of children traveling to and from nonpublic schools" and that "neither advances nor inhibits religion."[113] This ruling continued a pattern where Illinois courts respected the decision of state legislators and allowed funding of religious schools despite the Blaine Amendment.[114] Before *Espinoza*, there were two educational choice programs in Illinois despite the Blaine Amendment.[115]

2. An interpretation that is open to some, but not all, types of school choice programs

In other states, state legislators have interpreted their Blaine Amendment in a way that allowed some types of school choice programs,

110. ILL. CONST. art. X, § 3.

111. Board of Ed., School Dist. No 142 v. Bakalis, 299 N.E.2d 737, 739 (Ill. 1973).

112. *Id.* at 743.

113. *Id.*

114. *See* Cecrle v. Illinois Educational Facilities Authority, 288 N.E.2d 399 (Ill. 1972) (holding that tax-exempt bonds could be made available to private religious institutions despite the state constitution).

115. *See* Illinois' Tax Credits for Educational Expenses is a Tax Credit Program for Educational Expenses, 35 ILL. COMP. STAT. 5/201(m); Illinois' Invest in Kids Tax-Credit Scholarship Program, 35 ILL. COMP. STAT. 40 et. seq.

but not all. Arizona, for example, has a Blaine Amendment that states: "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."[116] Arizona state legislators used this provision to allow some types of educational choice programs. Since 1999, state legislators in Arizona have created tax credit programs that provide a tax break to those who donate money to scholarship organizations for students attending private schools.[117] One such program was challenged in an Arizona court for violating both the Federal Establishment Clause and the Arizona Constitution.[118] But the court determined that while there are educational provisions in the state Constitution, there was also a fundamental desire of state legislators and others to bolster schools and students and no desire to "divorce completely any hint of religion from all conceivably state-related functions . . . ."[119] And doing so is not "realistically attainable in today's world."[120] The program, the court decided, was neutral to religion and provided no direct aid to schools, but gave tax breaks to people for their individual choice. This meant that the program both promoted schools and did not promote direct aid to religious schools—the goals of the educational provisions of the Arizona Constitution.[121]

After tax credit programs were allowed, state legislators tried to establish two voucher programs to give more school choice options.[122] These programs were challenged, and the joined case made its way to the Arizona Supreme Court. This time, however, these programs were held unconstitutional because they were not aligned with the educational provisions of the state constitution.[123] The program's proponents claimed that, like the tax credit programs, the funds in the voucher programs were not directly aiding schools, but the students were the "true beneficiary," making the programs permissible under the Blaine Amendment.[124] The court rejected this argument, however, saying that there is no difference between giving money to parents and families who use the money to pay

116. ARIZ. CONST. art. IX. § 10; *see also* ARIZ. CONST. art. II, § 12.

117. *See* Individual Tax Credit Scholarships, ARIZ. REV. STAT. § 43-1089 to 43-1089.02.

118. *See* Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999).

119. *Id.* at 623.

120. *Id.*

121. *Id.* at 625.

122. Arizona Scholarships for Pupils with Disabilities Program, ARIZ. REV. STAT. §§15-891 to 15-891.06 (2008); Arizona Displaces Pupils Choice Grant Program, ARIZ. REV. STAT. §§ 15-817 to §§ 15-817.07 (2008).

123. Cain v. Horne, 202 P.3d 1178, 1185 (Ariz. 2009).

124. *Id*. at 1183.

the schools and giving money directly to the schools, which is "flatly prohibit[ed]."[125] The voucher programs were declared unconstitutional and so are not allowed in Arizona.[126]

3. An interpretation that is not open to any types of school choice programs

At the time of *Espinoza* many states, like Wyoming, Texas, and California, had Blaine Amendments and no educational choice programs. This is possibly because state legislators had not tried to enact school funding programs, or they had tried and failed. Thus, there is little to no jurisprudence that shows how the Blaine Amendment would have been interpreted before *Espinoza*. But the lack of educational funding programs altogether, however, could show that state legislators were not willing to push against the state Blaine Amendment, meaning the Blaine Amendment would be strictly interpreted to not allow any educational choice programs.

In addition, Massachusetts and Michigan have explicitly interpreted their Blaine Amendment strictly to not allow any educational choice programs. Their Blaine Amendments forbid funding to schools that are not publicly owned,[127] meaning no private schools can receive public funds, regardless of whether the schools are religious or not. Thus, no educational funding programs have been implemented in these states, and that is likely to be the case until the amendment is either changed or repealed.

4. States without Blaine Amendments

Thirteen states do not have Blaine Amendments in their constitutions, making one fewer constitutional barriers state legislators would have to cross when implementing a school funding program. Even without a Blaine Amendment, there is a variety in how the states have approached educational choice programs. Three states—Connecticut, New Jersey, and West Virginia—do not have these programs despite not having the extra constitutional hurdles to contend with. Alternatively, the ten other states have current educational choice programs, but within those states there is

125. *Id*. at 1184.

126. *Id*. at 1185.

127. *See supra* note 34 and accompanying text; *Opinion of Justices to Senate*, 514 N.E.2d 353 (Mass. 1987); Traverse City Sch. Dist. v. Att'y Gen., 185 N.W.2d 9, 29–31 (Mich. 1971).

a varying number of programs. For instance, Ohio[128] and Louisiana[129] have multiple programs, while other states, like Arkansas,[130] Maryland,[131] and Vermont[132] have only one each.

B. Blaine Amendments After Espinoza

One question that remains for state legislators after *Espinoza* is the power a Blaine Amendment now has to restrict the funding of religious schools.[133] While the *Espinoza* decision did not explicitly repeal Montana's Blaine Amendment or declare it unconstitutional, the decision was clear that using a Blaine Amendment to discriminate against religion and religious schools "is 'odious to our Constitution' and 'cannot stand.'"[134] *Espinoza* outlined how a Blaine Amendment must not be used to stop or limit an educational funding program. First, a Blaine Amendment cannot be used to "exclude religious schools . . . solely on religious status," meaning a program must be neutral with respect to religion.[135] Second, a Blaine Amendment cannot put schools or families in a position where they must "divorce [themselves] from any religious control or affiliation" to receive a public benefit.[136] Even "indirect coercion" with the Blaine Amendment is against the Free Exercise Clause.[137] The *Espinoza* Court stated that using a Blaine Amendment in these ways severely limits religious freedom for both religious schools and those families because they are cut off "from otherwise available benefits if they choose a religious private school rather than a secular one."[138]

128. Income-Based Scholarship Program, OHIO REV. CODE ANN. § 3310.032 (West 2021); Jon Peterson Special Needs Scholarship Program, OHIO REV. CODE ANN. §§ 3310.51 to 64 (West 2021); Educational Choice Scholarship Program, OHIO REV. CODE ANN. §§ 3310.01 to 17 (West 2013); Autism Scholarship Program, OHIO REV. CODE ANN. §§ 3310.41 to 43 (West 2021); Cleveland Scholarship Program, OHIO REV. CODE ANN. §§ 3313.974 to 979 (West 2021).

129. School Choice Program for Certain Students with Exceptionalities, LA. STAT. ANN. § 17:4031; Louisiana Scholarship Program, LA. STAT. ANN.17:4011 to 4025; Tuition Donation Credit Program, LA. STAT. ANN. 47:6301; Elementary and Secondary School Tuition Deduction, LA. STAT. ANN.47:293(9)(a)(xiv) and 297.10.

130. Succeed Scholarship Program, ARK. CODE ANN. §§ 6-41-901 to 907 (2021).

131. Broadening Options and Opportunities for Students Today Program, Fiscal 2020 Budget Bill § R00A03.04.

132. Town Tuitioning Program, VT. STAT. ANN. 16 § 821–36 (2012).

133. *See* Hiner, *supra* note 108; Green, *supra* note 108.

134. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2263 (2020) (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025 (2017)).

135. *Espinoza*, 140 S. Ct. at 2256.

136. *Id.*

137. *Id.* (quoting *Trinity Lutheran*, 137 U.S. at 2015).

138. *Id.* at 2261.

Because of these changes to the power of Blaine Amendments, *Espinoza* has cleared out many legal and constitutional obstacles that stood in the way of educational choice programs.[139] Consequently, state legislators should examine these programs and how they could be implemented in their state. State legislators should then begin to establish these programs which provide needed funds to students so they can have access to the education that they need and deserve. The next Part outlines what types of programs are available and why state legislators should work to enact those programs, especially in response to the COVID-19 pandemic.

IV. DIFFERENT EDUCATIONAL FUNDING PROGRAMS

There are four different education funding programs that are most commonly used by different states: voucher programs, tax-credit scholarships, individual tax credits, and education savings accounts. In their efforts to reevaluate their understanding of these issues, state legislators should understand these programs and how they are used in other states. This Part will go through these different programs, describing what they are and how they are used.

A. Voucher Programs

Voucher programs are generally seen as the "most highly profiled educational reform being considered today."[140] With twenty-nine voucher programs in sixteen states, Washington D.C., and Puerto Rico, voucher programs are the most common type of school funding in the country.[141]

Voucher programs are often described as coupons for education. An example is the program that was challenged in *Zelman v. Simmons-Harris*. The Cleveland Scholarship Program[142] was designed to "provide for a

139. "As a result of *Espinoza*, nearly every state is now free to enact programs that will empower parents to choose the educational environment that works best for their own children, whether those options are public, private or religious . . . . [T]his momentous decision clears the way for robust educational choice programs with the ability to spur the creation of a greater number of educational opportunities for students." John Kramer, *IJ Releases New Educational Choice Guide to State Constitutions After Espinoza*, INSTITUTE FOR JUSTICE (July 7, 2020), https://ij.org/press-release/ij-releases-new-educational-choice-guide-to-state-constitutions-after-espinoza/.

140. Toby J. Heytens, *School Choice and State Constitutions*, 86 VA. L.R. 117, 119 (2000).

141. For a list of the voucher programs currently enacted see *School Choice: School Choice in America Dashboard*, EDCHOICE, https://www.edchoice.org/school-choice/types-of-school-choice/what-are-school-vouchers-2/ (last visited Mar. 15, 2022).

142. OHIO REV. CODE ANN. §§ 3313.974–979.

number of students . . . to attend alternative schools."[143] In this program, students who are geographically assigned to a failing school district requiring supervision by the state may receive a voucher for money that can be used at an accredited school, whether that be a public or private school, including a religious one.[144] Priority is given to students who need financial assistance.[145] In this program, the money goes directly from the state to the students' parents who then pay the money to the school.[146]

While these programs have resulted in extensive litigation, *Zelman* and *Espinoza* work together to hold that these programs are constitutional and permitted in most states.[147] Because of this, these programs are a good option for state legislators to consider.

B. Tax-Credit Scholarships

Currently, there are twenty-six different tax-credit scholarship programs in twenty-one states, making these programs the second most common education choice program in the country.[148] These programs developed as state legislators saw them as the best option to comply with their state's Blaine Amendment pre-*Espinoza* when voucher programs were not allowed.[149]

A tax-credit scholarship program was the program at issue in *Espinoza*.[150] The Montana program[151] was enacted in 2015 to "provide parental and student choice in education with private donations through tax replacement programs."[152] To receive a tax credit, a person or organization donates money to an approved Student Scholarship Organization, which in turn uses the money to help students pay for their

143. OHIO REV. CODE ANN. § 3313.975(A).

144. OHIO REV. CODE ANN. § 3313.975.

145. OHIO REV. CODE ANN. § 3313.977(A)(1).

146. OHIO REV. CODE ANN. § 3313.979.

147. Both Massachusetts and Michigan, however, would still not be able to have programs like this in their state because of their strict Blaine Amendments. *See supra* notes 34, 127 and accompanying discussion. A few other states would possibly have a hard time enacting voucher programs in their state despite *Espinoza*. For instance, Kentucky's Constitution requires that for a publicly funded educational financing program to be approved it must be submitted and approved by the voters of the state. *See* KY. CONST. § 184.

148. For a list of the tax-credit scholarship programs currently enacted see *School Choice: School Choice in America Dashboard*, EDCHOICE, https://www.edchoice.org/school-choice/types-of-school-choice/tax-credit-scholarship/ (last visited Mar. 15, 2022).

149. *See generally* Boyer, *supra* note 13 at 122.

150. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020). *See also* discussion *supra* Section II.C.4.

151. MONT. CODE ANN. §§15-30-3101 to 3114 (2019).

152. MONT. CODE ANN. § 15-30-3101 (2019).

tuition at their chosen "qualified education provider."[153] The money is paid directly from the Scholarship Organization to the schools, meaning no money goes directly from the state to the parents or to the school.[154]

After the *Espinoza* decision, using these programs to provide funding to schools, especially when those schools are religious, is constitutional even if the state has a Blaine Amendment.[155] State legislators should therefore consider these programs for their state to give students and families the educational choice opportunities they need.

C. Individual Tax Credit Program

The third type of program, Individual Tax Credit Programs, are less common but have been in place for some time. Currently, there are eleven programs in nine states.[156]

An example of this type of program is the Minnesota K-12 Education Deduction and Credit program that was enacted in 1955.[157] In this program, a parent receives state income tax credit on any K–12 education-related expenses.[158] These expenses, including tuition, could be for either a private, including religious, or public school.[159] After being in place for decades, this program was eventually litigated for violating the Establishment Clause.[160] The case made it to the federal Supreme Court which held that the program was neutral to religion and provided support to the families, not the schools directly and so was constitutional.[161] As a result, these programs are constitutionally allowed, regardless of whether there is a Blaine Amendment or not, making them valuable tools that state legislators should consider for their state.

153. MONT. CODE ANN. § 15-30-3104 (2019).

154. *Id.*

155. *See Espinoza*, 140 S. Ct. at 2262.

156. For a list of the individual tax-credit programs currently enacted see EdChoice, *School Choice: School Choice in America Dashboard*, EDCHOICE, https://www.edchoice.org/school-choice/types-of-school-choice/how-do-k-12-education-tax-credits-deductions-work/ (last visited Mar. 15, 2022).

157. MINN. STAT. § 290.0674; *See also* Nina Manzi & Joel Michael, *Income Tax Deductions and Credits for Public and Nonpublic Education in Minnesota*, MINN. HOUSE RSCH. DEP'T (June 2017) https://www.house.leg.state.mn.us/hrd/pubs/educcred.pdf.

158. MINN. STAT. § 290.0674 Subdivision 1 (1) to (4).

159. MINN. STAT. § 290.0674 Subdivision 1 (1) to (2).

160. Mueller v. Allen, 463 U.S. 388, 391–92 (1983).

161. *Id.* at 399–400.

D. Educational Savings Account

The newest type of educational funding program is the educational savings account. Currently, there are nine of these programs in eight states.[162]

The first of these programs, enacted in Arizona in 2012, is the Arizona Empowerment Scholarship Account.[163] The program's purpose is to "provide options for the education of students in [Arizona]."[164] In this program qualifying students apply for and receive money in their scholarship fund to be used for tuition or other educational fees at any qualified school, which could be public, private (including religious), or home schools.[165] This program is narrower than others because not every interested student can receive funds. Only students who fit certain qualifications, such as having a disability, attending a D or F rated public school, and others, may receive the money.[166] Despite these limitations, this program gives students who need extra educational help more options to receive the help they need. The program, however, has faced resistance from parents and other educational groups, including a state-wide vote rejecting a proposed expansion to the program.[167]

While these school choice programs are still relatively untested in the courts, state legislators should still consider them for their states because, based on the *Espinoza* decision and other precedent, any constitutional arguments that could previously be used against them would no longer be persuasive.

V. BENEFITS OF SCHOOL CHOICE AND RELIGIOUS PRIVATE SCHOOLS

While this Comment has focused on the legal and constitutional reasons why school choice and the funding of religious schools is now appropriate, it is important to note that the previous legal and

162. For a list of education savings account programs currently enacted see EdChoice, *School Choice: School Choice in America Dashboard*, EDCHOICE, https://www.edchoice.org/school-choice/types-of-school-choice/education-savings-account/ (last visited Mar. 15, 2022).

163. ARIZ. REV. STAT. §§ 15-2401 to 2404 (LexisNexis 2021).

164. ARIZ. REV. STAT. § 15-2402(A) (LexisNexis 2021).

165. ARIZ. REV. STAT. § 15-2402(B)(4) (LexisNexis 2021).

166. ARIZ. REV. STAT. § 15-2401(7) (LexisNexis 2021).

167. *See* Rob O'Dell & Yvonne Wingett Sanchez, *Group Will Ask Arizona Voters to Ban Expansion of State's School Voucher Program*, AZCENTRAL (Feb. 26, 2020, 11:28 AM), https://www.azcentral.com/story/news/politics/arizona-education/2020/02/26/save-our-schools-arizona-ask-voters-ban-expansion-empowerment-scholarship-account-esa-program/4862496002/.

constitutional arguments against school choice are not the only arguments against it. There are multiple policy arguments against school choice and religious funding of school choice.[168] But there are also valid policy arguments for why school choice and funding of religious schools should be instituted. This Part, while not exhaustive or extremely in depth, provides state legislators with an outline of benefits that school choice and religious private schools provide to students, schools, and communities.

A. Benefits for Students

Every student is different in his or her personality, living and family situation, and learning style. While perhaps an obvious statement, this fact plays a key role in education. Because of this, students have diverging needs, talents, challenges, and goals that teachers and schools are expected to meet.[169] School choice options, such as public schools, charter schools, magnet schools, and private schools, give parents and their children the opportunity to choose the school that works best for the individual child to give them the best education possible. This is especially true for students who struggle with a physical, mental, or learning disability and who might not have their needs met by a public school.[170]

Religious private schools also provide benefits for students. While these schools provide a secular education, they also provide a religious education that is deeply important to many parents and their children. Such religious needs are met by private religious schools that encourage the growth and development of their students.[171]

Additionally, even if the motive for attending these schools is not religious in nature, religious schools are a good and important option for some of "the most vulnerable students" to receive "a high quality education."[172] Studies have shown that "Catholic school students—

168. *See supra* note 15.

169. *See, e.g.*, Holli M. Levy, *Meeting the Needs of all Students Through Differentiated Instruction: Helping Every Child Reach and Exceed Standards*, 81 CLEARING HOUSE 161 (2008).

170. While more school choice options can ensure that there are better schools which are more equipped to help students with all types of disabilities, because of the added legal issues that are involved with students with disabilities, there are a different set of issues that need to be considered when schools, parents, and students are working together to help these students. *See generally* Laura F. Rothstein, *School Choice and Students with Disabilities, in* SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW 332 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999).

171. Domanico & Kenney, *supra* note 5.

172. Margaret F. Brinig & Nicole Stelle Garnett, *Catholic Schools, Urban Neighborhoods, and Education Reform*, 85 NOTRE DAME L. REV. 887, 901 (2010) [hereinafter *Catholic Schools]*; *See also*

especially poor, minority students—tend to outperform their public school counterparts."[173] "The best religious schools have a vision of the worth of each human life that guides their response to these differences, allowing them to hold children to high standards while also affirming their dignity and unique gifts."[174] Religious private schools can provide a more equitable education for those students who need extra care, which is important to helping those students succeed.

B. Benefits for Schools

It is not uncommon for school choice programs to develop in areas where the public school system is underperforming. The voucher school program in *Zelman*, for example, was enacted in response to Cleveland's failing public school system.[175]

Not only is this important because it gives those students a chance for success and education when the public school system cannot provide that for the students, but the different school choice options can provide "healthy competition among schools."[176] Based on economic theory, school choice allows for "students to allocate their public education funds as their parents see fit, including by spending these public funds in a private school because the inject of competition would improve overall academic performance."[177] Where there are no other options for schooling, the public school system can be seen as a "monopoly" that is resistant to change and unable to allow competition to initiate change within the system.[178] If more schools and options are given to parents and children, then competition and specialization increases forcing schools to improve to better serve the students.[179] While this improvement process could be slow, there are still immediate benefits to the public school system when families have access to the school option they feel like is the best for their students. As students can more freely leave the public schools, a burden will be taken off the teachers, counselors, and administrators in those

Nicole Stelle Garnett, *Are Charters Enough Choice? School Choice and the Future of Catholic Schools*, 87 NOTRE DAME L. REV. 1891, 1908 (2012) [hereinafter *Are Charters Enough*].

173. *Are Charters Enough*, *supra* note 172, at 1907.

174. Domanico & Kenney, *supra* note 5.

175. Zelman v. Simmons-Harris, 536 U.S. 639, 644 (2002).

176. Boyer, *supra* note 13, at 120.

177. *Are Charters Enough*, *supra* note 172, at 1904.

178. JOHN MERRIFIELD, SCHOOL CHOICE: TRUE AND FALSE 3–11 (2002).

179. *Id.* at 59.

public schools, and they can focus their attention on the students who remain.

Some argue that when public funds are given to private schools, it takes money away from the public schools, which causes a detrimental effect on the public school system.[180] But it is important to note that there are some states that have clauses within their constitution that say that educational choice programs cannot use the money that is already allocated for public schools. Meaning, these programs are simply adding money into the market, rather than taking it from a place that needs it.[181] Whether the funding for religious schools comes from the public school system or elsewhere, these religious schools can improve the status and performance of the overall school system.

C. Benefits for Communities

The availability of different school options has a beneficial impact on the community of which they are a part. One benefit is an increase in the parental network and social capital that happens in a community from those schools. In a strictly public-school system, parents and students mainly interact with the other parents and students in the same geographical area, which tend to be people of the same socioeconomic and racial backgrounds. But as students are allowed to attend other schools, the students and parents have exposure to others and can build relationships and learn from more people than a strict public school system allows.[182]

Religious schools, however, provide an even greater impact on the communities in which they serve. In the Project on Human Development in Chicago Neighborhoods study, researchers worked to identify the impact that closures of Catholic schools had on Chicago neighborhoods.[183] The conclusion of the study found that "a [Catholic] school closing in a neighborhood is strongly predictive of increased levels of disorder and suppressed levels of social cohesion and collective efficacy" within the community where the school once was.[184] The results of the study[185]

180. JAMES G. DWYER, VOUCHERS WITHIN REASON: A CHILD-CENTERED APPROACH TO EDUCATION REFORM 78–79 (2002).

181. *See e.g.*, TEX. CONST. art. VII, § 5(c); ARK. CONST. art. XIV, § 2; DEL. CONST. art X, § 4.

182. *Catholic Schools*, *supra* note 172, at 947–49.

183. *Id.* at 902.

184. *Id.* at 910.

185. *See id.* at 910–28 (explaining that the study's findings tell us about the impact that religious schools have on urban neighborhoods).

indicate "that Catholic schools are important, stabilizing forces in urban neighborhoods" and when those schools shut down the community is "less socially cohesive" and "more disorderly."[186]

Ultimately, different school choice options are beneficial to more than just the students and the schools themselves. There is a quantifiable difference felt in the community when private religious schools are available to students.

While this Part has not been comprehensive, it is important that state legislators have a basic understanding of the benefits that school choice and school funding programs provide to students, schools, and communities. This understanding will allow them to have a greater motivation to reconsider their understanding of these issues in light of the recent legal and constitutional developments.

VI. STATE LEGISLATORS SHOULD REEVALUATE THEIR PREVIOUS STANCE ON SCHOOL CHOICE AND SCHOOL FUNDING PROGRAMS IN A POST-COVID WORLD

One study reports that after the first full school year during the COVID-19 pandemic in the United States, 144 private schools closed their doors for good.[187] Out of those schools, all but seventeen were religiously affiliated.[188] It is estimated that over 22,000 students were affected by the closures and lost access to the school they felt was the appropriate fit for their education.[189] Other reports have been more dire in the number of private religious schools that have closed.[190]

State legislators and others who are tirelessly working to promote better schools and give more educational opportunities to all students should see these closures as devastating, especially in light of the already existing trend of private school closures that has occurred for decades.[191] There is a strong government and public interest to improve schools and education.[192] A society will not be able to continue to thrive if those who are coming up to take the place of the leaders are not trained and able to

186. *Id.* at 928.

187. Cato's Center for Educational Freedom, *COVID-19 Permanent Private School Closures*, CATO INSTITUTE (July 2021), https://www.cato.org/covid-19-permanent-private-closures.

188. *Id.*

189. *Id.*

190. *See supra* notes 2–5 and accompanying text.

191. *Catholic Schools*, *supra* note 172, at 889.

192. *Expanding Educational Opportunity Through School Choice: Hearing Before the Committee on Education and the Workforce*, 114th Cong. 2 (2016) (statement of Hon. John Kline, Chairman, Committee on Education and the Workforce).

do so. And that training takes place in schools of all types. As has been mentioned in this Comment, there are many benefits that come from school choice options. Specifically, this Comment has outlined some of the ways that religious private schools provide value to students, to school systems, and to communities. If religious schools are permanently closed, then those benefits will permanently be gone.

This underlying motivation for improving schools should be bolstered by the recent *Espinoza* decision, which has broken down the constitutional and legal roadblocks that were previously in place to stop school choice programs. The religion clauses of the Federal Constitution and state Blaine Amendments have been used to legally block these programs or dissuade state legislators from trying to implement them. But throughout the years these arguments have lost validity and persuasiveness as the Supreme Court's understanding of these issues has changed. The latest step in clearing out these roadblocks took place in *Espinoza*, where the Court has outlined how these programs can be implemented and used in different states, even if there is a Blaine Amendment. Now, after this development, there are no legitimate legal or constitutional arguments against these types of programs.

This is a new opportunity for state legislators that they should not pass up. State legislators have the chance to reconsider their understanding of these programs and how they can be used to help the education system in their states. Voucher programs, tax credit systems, educational savings accounts are all valuable options to help provide better school options to students, which will in turn give religious schools the money and ability to stay open. State legislatures must take the time to look at these programs and work to implement them into their state's education system as needed. These programs will allow religious private schools to get the help they need to recover after the pandemic and help the overall educational system within a state become stronger. This will ultimately allow for all students to be better educated, which is a goal that we all should be striving for.

VII. CONCLUSION

The Supreme Court ruling in *Espinoza v. Montana Department of Revenue* has taken away the constitutional hurdles that have prevented many states from implementing educational choice programs. Now that these hurdles have been taken away, state legislators can establish these programs in their states. They should consider these programs and the needs of their state, especially during and post-COVID-19 pandemic, and implement them as needed. This will be beneficial for students now and in

the future. These programs have the potential to help many struggling religious private schools stay open past the COVID-19 pandemic. And while the problems that have been created will not easily or quickly be solved, the different educational choice programs that have been outlined in this Comment should be considered as a way to ease the problems that are in place. A wide variety of voucher, tax-credit, and educational scholarship account programs should be implemented and made available to all students. These programs will then allow more benefits to be received by the students themselves, the educational system, and communities that the schools serve.

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