

THE CASE FOR SCHOOL CHOICE GIVEN THE ABSENCE OF A FUNDAMENTAL RIGHT TO EDUCATION: LEARNING FROM THE EUROPEAN EXPERIENCE

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I. INTRODUCTION

There is little doubt that quality education and level of educational attainment contribute to individual and societal success. For instance, according to the National Center for Education Statistics, “in 2018, the poverty rate for children under 18 was highest for those in households where no parent had completed high school and lowest for those in households where the highest level of education attained by either parent was a bachelor’s degree or higher, both overall (46 vs. 4 percent) and within all racial/ethnic groups.”¹ Despite recognizing the importance of education, the United States Supreme Court, in *San Antonio Independent School District v. Rodriguez*, stated that education “is not among the rights afforded explicit protection under our Federal Constitution” and failed to infer and affirm implicit protection of education in the Constitution.² Contrastingly, Article 14 of the Charter of Fundamental Rights of the European Union explicitly recognizes a right to education by providing:

The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical, and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.³

Considering the different legal treatment afforded to education in the United States and European Union, this Note will compare the explicit right to education afforded by the European Charter of Fundamental rights with America’s failure to provide the same.

Looking to a select group of European countries, this Note will also promote the expansion of school choice programs as a means of acknowledging the importance of education globally while considering the absence of a Constitutional right to education in the United States. Rather than argue for establishing a fundamental right to education, this Note will seek to address educational disparities within the United States by promoting school choice

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1. U.S. DEP’T OF ED. INST. OF ED. SCIENCES NAT’L CENTER FOR ED. STATS., CHARACTERISTICS OF CHILDREN’S FAMILIES 4 (May 2020), <https://nces.ed.gov/programs/coe/indicator/cee> [<https://perma.cc/GJP8-ZP74>].

2. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

3. Charter of Fundamental Rights of the European Union art. 14 (3), 2012 O.J. (C 326) 398.

programs as a means of improving education and avoiding inappropriately entangling the courts in complex cases hinging upon a myriad of factors, such as student outcomes, state funding, and social and demographic concerns. Essential to this analysis will be how both the United States and Europe treat parental involvement and recognize a right for parents to dictate the upbringing of their children. Given the importance of education, school choice programs in the United States should be expanded to promote quality education and empower parents and students, especially given the detrimental effect of COVID-19 response measures on student learning.

As used in this Note, “school choice” broadly refers to the provision of public funds directly to students who may use the funding at the school of their choice, including private schools.⁴ Many students are able to exercise “traditional school choice,” which refers to a child’s ability to attend a private school or a particular public school due to their family’s own financial means, whether that be through funding private school tuition or moving to an area with high-quality public schools. “School choice programs” refer to the means by which that funding and ability are provided, including voucher programs, educational savings accounts, tax credit scholarships, individual tax credits and deductions, and inter-district transfers—all of which will be explained in greater detail throughout this Note.⁵

II. HISTORY AND BACKGROUND

A. *Education in the United States*

Education in early America was not an essential component of the country’s founding. The largely agrarian economy did not demand much in the way of formal education; “in general, though, schooling was not required in the colonies, and only about 10% of children, usually just the wealthiest, went to school. . . .”⁶ It was not until the mid-1800s that the push for compulsory education began in order to provide education to the broader population and attempt to foster nationalism and assimilate immigrant children.⁷ Thus, at the time the United States Constitution was promulgated, education was neither prioritized nor was it available to most children, which speaks to why education was not enshrined as a fundamental Constitutional right. Nonetheless, as the economy evolved and the need for an educated citizenry became more apparent, states passed

4. *What is School Choice?*, EDCHOICE, <https://www.edchoice.org/school-choice/what-is-school-choice/> [https://perma.cc/F23H-86SY].

5. *See Types of School Choice*, EDCHOICE, <https://www.edchoice.org/school-choice/types-of-school-choice/> [https://perma.cc/8QXU-CYP6] (providing additional information on each type of school choice program).

6. UNIVERSITY OF MINNESOTA, *A Brief History of Education in the United States*, in INTRODUCTION TO SOCIOLOGY: UNDERSTANDING AND CHANGING THE SOCIAL WORLD (Howard Community College ed.) (2010) <https://pressbooks.howardcc.edu/soci101/chapter/16-1-a-brief-history-of-education-in-the-united-states/> [https://perma.cc/DAY7-TFFV].

7. *Id.*

compulsory education laws requiring younger children to attend school at little to no cost. Today, all fifty states have an established system to provide public education and a compulsory education law, with most states requiring school attendance for children ages six to eighteen.⁸ Children are assigned to a public school in the school district in which they reside, rendering a family's area of residence critical to their child's education.⁹ Parents also have the option of enrolling children in a private school or in homeschool, with specific laws and school choice programs further enabling or hindering such options varying depending upon the state. The federal government, or the U.S. Department of Education, serves to fill in funding gaps within state education systems.¹⁰

1. The Lack of a Fundamental Right to Education

The United States Supreme Court has affirmed the importance of education on several occasions, perhaps most notably in *Brown v. Board of Education*, the landmark civil rights decision requiring school desegregation. Holding that racial segregation in public schools “deprive[s] the minority group of equal educational opportunities,” the *Brown* court asserted that:

Today, education is perhaps the most important function of state and local government. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. . . . Such an opportunity, *where the state has undertaken to provide it*, is a right which must be available to all on equal terms.¹¹

Here, the Court affirmed both the importance of education and clarified that equality in education is required when the State sought to provide education, implying that the provision of education is a state option to be exercised by the legislative branch rather than a right guaranteed under the Constitution.

In its most explicit rejection of a federal Constitutional right to education, the Supreme Court held in *San Antonio Independent School District v. Rodriguez* that education is not a protected right afforded either explicitly or implicitly in the Constitution. The Court reasoned that although the ability to communicate effectively is required to exercise First Amendment freedoms and the right to vote, the courts do not have the power “or the authority to guarantee to the

8. U.S. DEP'T OF ED INST. OF ED. SCIENCES NAT'L CENTER FOR ED. STATS., STATE EDUCATION REFORMS, Table 5.1 Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education by State: 2017 [<https://perma.cc/3W4H-H4NS>].

9. *The Federal Role in Education*, U.S. DEP'T. OF ED., (last modified May 25, 2017), <https://www2.ed.gov/about/overview/fed/role.html> [<https://perma.cc/3HTM-DF4T>].

10. *Id.*

11. *Brown v. Brd. of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 493 (1954) (emphasis added).

citizenry the most effective speech or the most informed electoral choice.”¹² The Court’s position demonstrates that the judiciary is intended to safeguard against government infringement upon fundamental rights rather than serve as a means of ensuring that all possess the highest capacity to exercise those rights. Despite this ruling, the Court left the door open for an argument to be made in especially egregious cases whereby the State’s failure to educate is so severe as to render other protected rights such as freedom of speech and the right to vote ineffectual. The *Rodriguez* court stated that “even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [freedom of speech or the right to vote], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short.”¹³

The Sixth Circuit Court of Appeals latched onto the Supreme Court’s slight indication of a minimal right to education by asserting the Supreme Court has never actually decided whether a fundamental right to a basic education exists.¹⁴ In *Gary B. v. Whitmer*, the Sixth Circuit Court of Appeals found that conditions and student outcomes in five Detroit, Michigan public schools were so deplorable as to hold that the State violated the students’ fundamental right to access to literacy.¹⁵ The case highlighted that “achievement data reveal that in Plaintiffs’ schools, illiteracy is the norm. The proficiency rates in Plaintiffs’ schools hover near zero in nearly all subject areas.”¹⁶ In fact, “in 2017, only 7% of Detroit public school eighth graders performed at or above the proficient level in reading, according to the National Assessment of Educational Progress. The percentage of Detroit students who performed at or above the NAEP proficient level in 2019 was 6%.”¹⁷ Additionally, plaintiffs complained of a lack of usable, grade-level appropriate textbooks as well as deteriorating school buildings without appropriate air conditioning or heat.¹⁸ Given these conditions and dismal student outcomes, the Court asserted, “where, as Plaintiffs allege here, a group of children is relegated to a school system that does not provide even a plausible chance to attain literacy, we hold that the Constitution provides them with a remedy.”¹⁹

The Court established the right to a fundamental minimum education in rejecting the plaintiffs’ equal protection and due process claims, noting that the “Constitution cannot guarantee educational outcomes.”²⁰ Regarding the plaintiffs’

12. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

13. *Id.* at 36-37.

14. *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir. 2020).

15. *Id.*

16. *Id.* at 627.

17. Corey Williams, *Michigan Settles Suit After Landmark Right to Read Ruling*, A. P. (May 14, 2020), <https://apnews.com/article/94dd6a192aac9008563c895bd38e387> [https://perma.cc/N9H3-JLY2].

18. *Gary B.*, 957 F.3d at 626.

19. *Id.* at 662.

20. *Id.* at 635.

Equal Protection claim, the Court held that “while performance outcome data provides some insight into access to education, the differences in these numbers are not supported by additional allegations suggesting, for example that Defendants provided different levels of financial resources to other schools across the state.”²¹ Moreover, plaintiffs failed to “identify the actions taken or policies implemented by Defendants that treated their schools differently from others in the state and caused the disparities at issue in this case.”²² Thus, the Sixth Circuit upheld the District Court’s dismissal of plaintiffs’ equal protection claim.²³

For plaintiffs’ due process claim, “plaintiffs argue that by detaining them at ‘schools in name only,’ the state has failed to meet this burden [the right to freedom of movement and freedom from state custody in light of compulsory education laws], rendering the detention arbitrary and violating their substantive due process rights.”²⁴ It appears the Court is amenable to this argument, stating, “it seems beyond debate that confining students to a ‘school’ that provides no education at all would be an arbitrary detention, prohibited by the common law’s understanding of due process tracing back to the Magna Carta.”²⁵ However, the Sixth Circuit upheld the dismissal of this claim because plaintiffs failed to “provide notice that they were pursuing a claim based on Michigan’s compulsory attendance requirement and fail[ed] to allege sufficient facts for the Court to address its plausibility.”²⁶ Additionally, the Supreme Court has recognized that the state typically has the power to compel school attendance given its weighty interest in educating the citizenry.²⁷

While it is unclear whether similarly situated plaintiffs could prevail on a due process claim asserting unconstitutional restriction on the freedom of movement, these facts illustrate how students attending schools that fail to provide basic access to education deserve better, regardless of whether the State’s failure to educate, yet require that students attend school, violates due process rights. According to the majority, “compulsory school attendance laws are a restraint on Plaintiffs’ freedom of movement, and thus implicate the core protections of the Due Process Clause [I]f compulsory school attendance is constitutional, it must be because the relevant state interest outweighs any deprivation of liberty.”²⁸

This assertion raises the question of what plaintiffs’ remedy would be had they demonstrated their schools truly were not providing any education and consequently prevailed on their due process claim. Surely, absolving these pupils of the obligation to attend school would serve neither their best interest nor the State’s. Given that the State would have to fail to educate so severely in order for

21. *Id.*

22. *Id.* at 637.

23. *Id.*

24. *Id.* at 638.

25. *Id.*

26. *Id.*

27. *Id.* at 640.

28. *Id.* at 640.

plaintiffs to prevail under substantive due process claims, such an unreachable standard should not be the avenue for plaintiffs to address failures of the public school system. Rather, students should be afforded the ability to attend their school of choice. A school choice program could even be utilized as a remedy in the face of violations of students' due process rights to ensure that students are not arbitrarily detained by compulsory attendance laws to schools in name only.

Rather than place the defendant's failure to educate within the context of violating plaintiffs' due process or equal protection rights, the Sixth Circuit held that “the Constitution provides a fundamental right to a basic minimum education” largely because literacy is quintessential to participating in democracy.²⁹ The court asserted that precedent like *San Antonio v. Rodriguez* provided “guidance but no answers” as to whether a basic minimum education is a fundamental right.³⁰ The court thus went through analyzing whether the right is fundamental using the framework established in *Glucksberg v. Washington*: determine whether “the right to a basic minimum education is ‘deeply rooted in this Nation’s history and tradition’” and determine whether it is “implicit in the concept of ordered liberty.”³¹

In conducting this analysis, the court largely relied upon the fact that education is essential to democracy, that states require compulsory education, and that the 1787 Northwest Ordinance asserted that “schools and the means of education shall forever be encouraged.”³² Turning to the second prong of the *Glucksberg* test, the Sixth Circuit reasoned that while illiteracy is a significant societal handicap, literacy itself is not a fundamental right; however, “a basic minimum education—meaning one that plausibly provides access to literacy—is fundamental because it is necessary for even the most limited participation in our country’s democracy.”³³

Nonetheless, the court’s determination that a fundamental right to a basic education does exist and that the State had violated plaintiffs’ right was rendered moot when, just a few weeks later, the full Sixth Circuit voted to hear the case *en banc*, thus vacating the opinion pending a rehearing.³⁴ “A decision to grant rehearing *en banc* vacates the previous opinion and judgment of the court, stays the mandate, and restores the case on the docket as a pending appeal.”³⁵ The decision to vacate left future plaintiffs significantly in the lurch without an established right to a basic education to rely on. This decision thereby imprisoned students who do not have the means to attend better schools to failing schools. Although a future federal court may look more favorably upon a case alleging that a fundamental right to a basic education exists, students trapped in “schools in name only” deserve an appropriate remedy, if not only in the meantime.

29. *Id.* at 642.

30. *Id.* at 648.

31. *Id.* at 649 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)).

32. *Id.*

33. *Id.* at 652.

34. *Gary B. v. Whitmer*, 958 F.3d 1216 (2020) (Mem.).

35. *Id.*

Consistent with prior precedent establishing a fundamental liberty interest in a parent's ability to direct their children's upbringing, school choice programs serve to empower parents who otherwise could not enroll their child elsewhere. School choice programs thereby strengthen parental liberty and give students the opportunity to succeed by attending better schools. Several European countries, such as Belgium and Denmark, have integrated school choice into the fabric of their country's education systems and may serve as models for the United States.

2. Parental Liberty in the United States

The United States has a robust judicial history upholding a parent's right to raise their own child. In *Meyer v. Nebraska*, the Supreme Court affirmed that parents have the liberty under the Fourteenth Amendment to rear their children as they see fit.³⁶ Thus, the Court struck down a state law prohibiting foreign language instruction in schools.³⁷ In *Pierce v. Society of Sisters*, the Court specifically held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control."³⁸ Additionally, in 2000, the Supreme Court held unconstitutional a Washington state statute that allowed any person to petition for visitation with a child to be granted if the court found it to be in the child's best interest because it violated the plaintiff's "due process right to make decisions concerning the care, custody, and control of her daughters."³⁹ Most recently, in a case upholding the constitutionality of Montana's school choice voucher program, the Supreme Court extended this liberty interest to parental decisions "to direct 'the religious upbringing of their children.'"⁴⁰

3. School Choice in the United States

The landmark Supreme Court decision, *Brown v. Board of Education*, requiring schools to racially integrate, gave rise to legislation, primarily in southern states, to allow families to choose where their children attended school.⁴¹ These laws were an unsavory attempt to thwart desegregation and designed "to keep black and white families in the same schools they attended before *Brown*."⁴² Despite this unfortunate history, school choice has been championed by some African American activists as a means of achieving equity amongst racial groups.

36. See *Meyer v. Nebraska*, 262 U.S. 390 (1923).

37. *Id.*

38. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925)).

39. *Troxel*, 530 U.S. at 58.

40. *Espinoza v. Montana Dep't. of Rev.*, 140 S. Ct. 2246, 2261 (2020) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972)).

41. Tim Abram, *The History of School Choice*, EXCELINED: EDUCATION SPACE (Jan. 27, 2020), <https://excelined.org/2020/01/27/the-history-of-school-choice/> [<https://perma.cc/5JTM-849M>]. See also *Brown v. Bd. of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483 (1954).

42. Abram, *supra* note 41.

While Milton Friedman in 1955 made an economist's case for school choice, his pro-competition argument did not serve as the rationale behind the modern school choice program.⁴³ Rather, in 1989, Wisconsin Democratic legislator Polly Williams, an African American female who envisioned school choice as a means of providing equity in education for children of color by empowering parents, proposed the Milwaukee Parental Choice Program (MPCP).⁴⁴ Upon enactment, this program became the first modern school choice program in U.S. history.⁴⁵ The MPCP provides educational vouchers to low-income students in Milwaukee, enabling them to attend their school of choice, whether that be a charter school or a private school.⁴⁶ Wisconsin has since expanded school choice statewide while also maintaining the MPCP.⁴⁷

Today, 34 states have some form of school choice, with some states even having multiple school choice programs.⁴⁸ Vouchers, the provision of public money directly to students to be used at private schools, are the most common form of school choice, closely followed by scholarship tax credit programs which “allow individuals and corporations to allocate a portion of their owed state taxes to private, nonprofit scholarship-granting organizations that issue scholarships to K-12 students.”⁴⁹ Qualifying students may then use the scholarships at any school approved by the scholarship-granting organization, including private schools and some out-of-district public schools.⁵⁰ Alabama, Iowa, Illinois, Indiana, Louisiana, Minnesota, South Carolina, and Wisconsin have also enacted individual tax credits, which, depending on the program, cover educational expenses, tuition, and private school or homeschooling.⁵¹ Lastly, five states, beginning with Arizona in 2011, have enacted education savings accounts, providing families with public funds (often on a debit card) to use for private school tuition and

43. Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST*, reprinted in *COLLECTED WORKS OF MILTON FRIEDMAN PROJECT*, 123-44. (Robert A Solo ed., 1955); Abram, *supra* note 40.

44. Robin Harris, *For Maverick Polly Williams, The Mother of School Choice, The Point Was Always to Empower Parents and Improve Education for Black Children*, *THE 74* (Jan. 28, 2020), <https://www.the74million.org/article/for-maverick-polly-williams-the-mother-of-school-choice-the-point-was-always-to-empower-parents-and-improve-education-for-black-children/> [<https://perma.cc/JJK8-GPVX>].

45. *Id.*

46. *Wisconsin—Milwaukee Parental Choice Program*, EDCHOICE, <https://www.edchoice.org/school-choice/programs/wisconsin-milwaukee-parental-choice-program/> [<https://perma.cc/XFQ5-68GC>].

47. *School Choice in America Dashboard*, EDCHOICE (last modified Feb. 4, 2020), <https://www.edchoice.org/school-choice/school-choice-in-america/#filter-table>, [<https://perma.cc/938Y-XJTU>] [hereinafter *School Choice Dashboard*].

48. *Id.*

49. *Scholarship Tax Credits*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/education/school-choice-scholarship-tax-credits> [<https://perma.cc/254K-WDX4>].

50. *Id.*

51. *School Choice Dashboard*, *supra* note 47.

other educational expenses.⁵²

Given that all of the discussed forms of school choice have the potential to be used by students at religiously affiliated schools, the United States' separation of church and state framework has produced legal challenges to school choice programs, in contrast to many European countries. While more expansive, accepted, and constitutionally permissible in European countries such as Belgium, the ability for students to use public funds to attend religious schools is more narrowly allowed in the United States and often challenged in the courts. In 2020, the U.S. Supreme Court delivered a favorable ruling for school choice in *Espinoza v. Montana Dep't. of Rev.* The Court deemed unconstitutional a Montana Department of Revenue rule that did not allow students to use a state-funded voucher program to attend religiously affiliated schools.⁵³ Primarily at issue in *Espinoza* was the State of Montana's constitutional provision providing that no state aid could go to religious institutions, referred to as a Blaine Amendment.⁵⁴ Now no longer in effect, Art. 10, Sect. 6 of the Montana Constitution stated:

The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.⁵⁵

The Court held 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.”⁵⁶ Thus, the Free Exercise Clause barred the State’s “application of the no-aid provision”⁵⁷ as it “discriminated against religious schools and the families whose children attend or hope to attend them.”⁵⁸

Interestingly, the Supreme Court noted that “in the founding era and the early 19th Century, governments provided financial support to private schools, including denominational ones. ‘Far from prohibiting such support, the early state constitutions and statutes actively encouraged this policy.’”⁵⁹ It was not until the 1870s when a federal Constitutional amendment seeking to prohibit federal funds from going to “sectarian” schools failed that States adopted their own similar

52. *Types of School Choice: What is an Education Savings Account?*, EDCHOICE, [https://www.edchoice.org/school-choice/types-of-school-choice/education-savings-account/#~:text=Education%20savings%20accounts%20\(ESAs\)%20allow,restricted%2C%20but%20multiple%2C%20uses](https://www.edchoice.org/school-choice/types-of-school-choice/education-savings-account/#~:text=Education%20savings%20accounts%20(ESAs)%20allow,restricted%2C%20but%20multiple%2C%20uses) [https://perma.cc/GKD6-QTQN].

53. *Espinoza v. Montana Dep't. of Rev.*, 140 S. Ct. 2246 (2020).

54. *Id.*

55. N.M. CONST. art. IV, §7.

56. *Espinoza*, 140 S. Ct. at 2261 (2020).

57. *Id.* at 2249.

58. *Id.* at 2248.

59. *Id.* at 2258.

constitutional amendments, known as Blaine Amendments, after the Speaker of the House who pushed for the no-aid amendment to the U.S. Constitution.⁶⁰ “The Blaine Amendment was ‘born of bigotry’ and ‘arose at a time of pervasive hostility to the Catholic Church and to Catholics in general.’”⁶¹ Rejecting the proffering of Blaine Amendments as a bar to school choice, the Court held that “the no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause.”⁶² Thus, the Court indicated that even if states seek to separate church and state “‘more fiercely’ than the Federal Constitution” using Blaine Amendments, that interest is not compelling when coupled with infringement of free exercise.⁶³

Although 38 states have no-aid provisions similar to what was seen in Montana, some states have upheld the constitutionality of their school choice programs despite them. For instance, the Indiana Supreme Court maneuvered around the state’s Blaine Amendment by providing that, rather than directly providing a benefit to religious institutions, the state’s school voucher program provided a direct benefit to parents and students who used the voucher to provide an indirect, albeit substantial, benefit to religious schools, thereby not violating the Indiana Constitution.⁶⁴ Additionally, Wisconsin’s landmark MPCP also faced a state constitutional challenge when the program was expanded to allow vouchers to be used at religious schools.⁶⁵ The Wisconsin Supreme Court held that the program did not violate the state constitution’s Blaine Amendment.⁶⁶

Given these precedents, school choice programs that provide benefits to religious schools are often constitutionally permissible and are an acceptable educational option for states to pursue as they build upon the United States’ history of safeguarding parental liberty. States with Blaine Amendments that disallow voucher programs because of their potential to be used at religious schools should consider amending their constitutions to eliminate this barrier to school choice, especially given the unsavory history of Blaine Amendments.

B. Education in the European Union – School Choice as a Matter of Right

Similar to the liberty enjoyed by U.S. parents, “in all Member States of the European Union . . . parents individually have either a natural right or even in some cases a statutory obligation to educate their children.”⁶⁷ School choice is also common practice in many European countries, as “parents also have freedom of choice of the kind of school they desire for their child, whether public or

60. *Id.*

61. *Id.* at 2259.

62. *Id.*

63. *Id.* at 2260.

64. *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013).

65. *R. Harris*, *supra* note 44.

66. *Jackson v. Benson*, 578 N.W.2d 602, 621 (Wis. 1995).

67. EURYDICE, THE ROLE OF PARENTS IN THE EDUCATION SYSTEMS OF THE EUROPEAN UNION 9 (1997) [<https://perma.cc/6A78-NV2J>].

private.”⁶⁸ The same can be said nominally of the ability for parents to choose a public or a private school in the United States; however, the United States differs from some European countries by requiring parents to finance their child’s private-school education. In some European countries, like Denmark, private schools are funded similarly to public schools, with parents free to enroll their child in either.⁶⁹ Additionally, in Belgium, parents are “free to enroll their child in the publicly funded school of their choice.”⁷⁰ Furthermore, Sweden and the United Kingdom publicly fund private school attendance, “subject however to the school’s having sufficient places for the child to be admitted.”⁷¹

Taking one of the most pro-parental liberty approaches to education, Belgium’s educational framework consists of schools administered by local communities as well as “‘free schools’ that can be religiously affiliated and are ‘established under private law’ yet still supported by the government financially.”⁷² Most importantly, parents’ right to freedom of choice in terms of a school for their child is enshrined in the country’s Constitution.⁷³ Article 24 of Belgium’s Constitution “stipulates that ‘Education is free; all preventative measures are prohibited; . . . The Community protects parents’ freedom of choice.’ Parents thus have a free choice of schools. If their request for admission to a school is refused, they have the right to bring the matter before the courts.”⁷⁴ Enacted in 2002, the Decree on Equal Educational Opportunities further safeguards the constitutional right to school choice by providing that a school can only deny a student’s enrollment request on narrow grounds, including if the school is at capacity and accepting the child would pose a safety risk, or if “the student has been excluded permanently for disciplinary reasons.”⁷⁵ By putting all schools on an equal playing field in terms of students’ ability to attend, Belgium maximizes parental liberty. Although not addressing any logistical issues such as transportation, the foundation of Belgium’s educational system is to afford families the *capacity* to decide the best educational option for them, thereby prioritizing freedom. Ensuring that parents may choose where to send their children for schooling and providing a judicial remedy if a school denies them requires schools to compete for students, arguably improving the quality of education in the country. At 58 percent, Belgium has one of the highest

68. *Id.*

69. KURT HOULBERG ET AL., COUNTRY BACKGROUND REPORT—DENMARK 58 (2016) https://www.oecd.org/education/school/10932_OECD%20Country%20Background%20Report%20Denmark.pdf.

70. *Id.*

71. *Id.*

72. *Id.* at 21.

73. *Id.*

74. *Id.* (internal citation omitted).

75. DEBORAH NUSCHE ET AL., OECD REVIEWS OF SCHOOL RESOURCES: FLEMISH COMMUNITY OF BELGIUM 104 (2015), <https://www.oecd-ilibrary.org/docserver/9789264247598-7-en.pdf?expires=1611085810&id=id&accname=guest&checksum=0AF0D93E18FD065AC568A26327EC2B41>, [<https://perma.cc/2LMU-VG4L>].

proportions of students in government-funded non-governmental schools.⁷⁶

Denmark is similar to Belgium in terms of educational choice in the sense that “parents have the right to free choice of a school” and are “entitled to have their child enrolled in a school outside the district” in which the child resides so long as “the school in question consents to enroll the child” and has a vacancy.⁷⁷ Parents can “appeal to the municipal council if the school they have chosen does not consent to enroll their child.”⁷⁸ Likewise, in the United Kingdom, “parents have the right to express a preference as to which school they would like their child to attend. If there is space in the school, the child must be admitted, but if the school is oversubscribed, admission is generally dependent on the individual school’s published admission criteria.”⁷⁹ These options became available thanks to the Education Act of 1980 and the Education Reform Act of 1988. As a result of the 1980 Education Act, “[f]rom 1982, parents were given the right to ‘express a preference’ for a school, and the LEA [local education authority] was obliged to take this preference into account.”⁸⁰ However, expressing a preference did not equate to a guarantee to account for the fact that some schools may be more sought after than others. Thus,

the act still gave LEAs considerable powers so that they could manage falling school rolls and plan the overall provision of school places in their areas. It allowed the benefits of the community as a whole to override the benefits to individual parents by giving LEAs the right to refuse parents’ preferences if this would lead to some less-popular schools having unviable numbers.⁸¹

Recognizing that this system propped up less favorable schools at the expense of students, the 1988 Education Reform Act adopted a school funding scheme whereby funding correlates to the number of students enrolled, as “popular schools gain extra funding as they attract more pupils . . . and less popular schools lose funding as their numbers decline.”⁸² On the whole, “the major thrust of the act was designed to increase competition between schools and to encourage parents to make choices between schools.”⁸³

76. *How Does School Choice Work in Other Countries*, EDCHOICE, <https://www.edchoice.org/engage/faqs/how-does-school-choice-work-in-other-countries/#:~:text=In%20Germany%2C%20the%20Netherlands%2C%20England,schools%20with%20a%20religious%20character.%E2%80%9D&text=In%20several%20European%20countries%2C%20such,choice%20is%20a%20constitutional%20right> [https://perma.cc/G75Q-RM9W].

77. EURYDICE, *THE ROLE OF PARENTS IN THE EDUCATION SYSTEMS OF THE EUROPEAN UNION* 27 (1997) [https://perma.cc/6A78-NV2J]. See also Houlberg et al., *supra* note 69.

78. *Id.*

79. *Id.* at 97.

80. DAVID PLANK AND GARY SYKES, *CHOOSING CHOICE: SCHOOL CHOICE IN INTERNATIONAL PERSPECTIVE* 72 (David N. Plank & Gary Sykes eds., 2003).

81. *Id.*

82. *Id.* at 74.

83. *Id.* at 72.

Expanding school choice further, the 1993 Education Act allowed religious schools to apply for state grant funding, contingent upon the school finding “at least 15% of the funding for buildings and land” on its own and adhering to the state-school requirements.⁸⁴ Now, the United Kingdom demonstrates a preference toward religious private schools versus non-religious private schools, as “almost no funding is made available for non-governmental non-faith schools.”⁸⁵ In the United Kingdom specifically, state schools are financed almost in the same way as state-provided or municipal schools, but the church has retained considerable influence on the way these schools are run and continues to be represented on their boards.⁸⁶

One since refuted primary critique of the United Kingdom's 1988 Education Reform Act was the perceived potential for increasing school choice options to segregate students by class. Allocating funding to schools based on the number of pupils and opening the education market so students could attend the school of their choice, the Education Reform Act was thought to separate students of similar classes into the same schools.⁸⁷ Several studies highlighted links between different social classes and particular schools, as well as evidence that parents from the middle class would all choose the same schools, while working-class families would be left to attend less desirable schools.⁸⁸ Studies conducted in the early 2000s, however, refuted these hypotheses, finding that the open enrollment policies enacted in 1988 did not result in segregation by class when analyzing the percentage of students in a representative sample of schools in England and Wales receiving free school lunch.⁸⁹ In fact, “in many areas, levels of between-school segregation had fallen,” speaking to the capacity for open enrollment policies to integrate students of lower socioeconomic classes into schools that they otherwise would be unable to attend.⁹⁰

Without strict legal parameters separating religion and government, European educational systems, overall, provide more support to religiously affiliated private schools than possible in the United States. Some scholars have divided European countries into categories based on level of support to private schools: “countries in which non-governmental education is more or less on the same footing as state-provided education;”⁹¹ “countries where faith schools receive a more favorable treatment than other schools in the non-governmental sector;”⁹² countries that

84. *Id.* at 76.

85. Jaap Dronkers & Silvia Avram, *What can international comparisons teach us about school choice and non-governmental schools in Europe?* 51 *COMPAR. ED.* 118, 122 (2014).

86. *Id.* at 123.

87. See generally Chris Taylor, *Choice, Competition, and Segregation in a United Kingdom Urban Education Market*, 115 *AM. J. OF ED.* 549 (2009).

88. *Id.* at 557-60.

89. *Id.* at 550.

90. *Id.*

91. Dronkers & Avram, *supra* note 85, at 122. (Countries in this category include Denmark, Finland, Ireland, the Netherlands, Poland, Slovakia, Spain, and Sweden.)

92. *Id.* (Countries in this category include Austria, Malta, Portugal, and the United Kingdom.)

provide some support to non-governmental schools but not more support than to public schools;⁹³ and “countries that fail to make any public funding directly available to non-governmental” schools.⁹⁴

Denmark is one of the countries in which private education is provided for nearly the same as public education. Private schools in Denmark receive public funding at the municipal level in the amount of 71 percent of the average expenditure per student per year in the local school district, or Folkesole, and municipalities containing private schools are required to bear the transportation costs for students living “more than 2.5km from the Folkesole in which he/she is enrolled.”⁹⁵ Although the countries in the final category—Bulgaria, Cyprus, Greece, and Romania—seem to be the most anti-religion, their policy of not providing public funds to private schools is borne out of a connection between public schools and a particular religion, as each country in that category is Eastern Orthodox. Foundational pillars in some European countries,

Orthodox Churches have tended to be national churches and, as such, developed a special relationship with the state. Rather than running a parallel educational network, the Orthodox Church has made its influence felt in state-provided education through the state. . . . As a result, no tradition of separate faith schools developed in these countries.⁹⁶

Thus, even in the countries with seemingly extremely secular approaches to education funding, religion is nonetheless a part of state education.

Overall, education in Europe provides significant deference to parents in terms of directing their children’s schooling, and faith-based education is frequently supported by the state, demonstrating a commitment to the advancement of individual views and preferences and, in some cases, the importance of religion within the countries’ public institutions. Many European countries, particularly Belgium, Denmark, and the United Kingdom, seem to prioritize freedom of educational choice above all else. Rather than subjecting the principle to intense scrutiny as in the United States, school choice is ingrained within these countries’ educational systems, enabling families to decide which school works best for their children rather than entrapping students in schools assigned by zip code. Significant funding to religious schools is also a central component of the educational systems of these countries. Given the separation of church and state approach in the United States, direct funding of religious organizations is not wholly possible. However, significant headway has been made in terms of allowing the government to be tied to religious schools in order to empower families to choose the school that is right for them.

93. *Id.* (Countries in this category include Belgium, Estonia, France, Germany, Italy, Latvia, Lithuania, Luxembourg, and Slovenia.)

94. *Id.*

95. HOULBERG ET AL., *supra* note 69.

96. *Id.*

III. ANALYSIS

A. An Unfeasible Judicially Managed Right to Education and School Choice Programs as a Better Alternative

The American public education system is defunct in many areas of the country, including Detroit, Michigan, as displayed in *Gary B. v. Whitmer*. Despite the failure of Detroit public schools to provide its students with minimally adequate education, there is no legally established fundamental right to education in the United States. Establishing such a right would entangle the judicial branch in complex cases without a proven remedy. Thus, a solution outside of the judicial system is needed to rectify failing public schools and the absence of a fundamental right to education. School choice programs provide a solution to low-income students who are trapped by virtue of their zip code in failing public school systems. The analysis portion of this Note explains why school choice programs are worthy of pursuing in light of the absence of a fundamental right to education and details why a judicial remedy is impracticable.

1. Separation of Powers

As a result of the Sixth Circuit's initial decision in *Gary B. v. Whitmer*, the State of Michigan settled with plaintiffs, with the Governor agreeing to ask the state legislature to appropriate nearly \$95 million to Detroit public schools.⁹⁷ Additionally, the seven specific plaintiffs in the lawsuit received \$280,000 to share and to "be used for a high-quality literacy program or other ways to further their education."⁹⁸ Currently, however, the Michigan Department of Education reports that per-pupil funding for students attending Detroit Public Schools, five of which were at issue in *Gary B. v. Whitmer*, was at \$14,744 when looking at aggregate local, state, and federal funding.⁹⁹ In comparison, the statewide average per-pupil funding was only \$10,487, indicating that pushing more money into struggling schools may not be the best remedy in terms of improving student outcomes.¹⁰⁰ At the least, the funding demonstrates that the *Gary B.* settlement needs to be properly managed and targeted at student performance in order to make a significant difference.

Although public school funding should be safeguarded and spent wisely, funding without concrete action on behalf of the school district prevents the funds from tangibly benefitting students. Additionally, the fact that Detroit Public Schools receive more funding, on average than other Michigan schools, indicates the complexity of the factors that result in student outcomes for better or worse.

97. Corey Williams, *Michigan Settles Suit After Landmark Right to Read Ruling*, A.P. (May 14, 2020), <https://apnews.com/94dd6a192aac9008563c895bd38e387> [<https://perma.cc/25BV-YHYR>].

98. *Id.*

99. MICH. DEP'T OF ED., 2018-19 BULLETIN 1014: MICH. PUB. SCHOOL DISTRICTS RANKED BY SELECTED FINANCIAL DATA 47 (Feb. 2020) [<https://perma.cc/MNQ9-VDM2>].

100. *Id.* at 9.

For instance, studies have shown that high poverty in a given area correlates to poor student outcomes. One such study out of Iowa found that “as the percentage of students eligible for FRL [free and reduced lunch] goes down, average scores go up.”¹⁰¹ These varying contributing factors to student performance demonstrate the impracticality of requiring judges to adjudicate cases that purport to determine whether the State is the cause of failing to provide students with the right to a basic education. Courts would need to become experts in weighing the various contributing factors, including the level of parental involvement, individual student motivation, socioeconomic factors, quality of teachers, and state funding. While the adversarial process “works well in resolving discrete legal disputes and finding the truth in most cases,” it does not work well “in school adequacy cases where there is no consensus about the answers to complicated empirical and policy questions about improving education.”¹⁰² Attorney Rocco Testani states:

These limitations are exacerbated by the fact that in most cases, all the players who could plausibly affect school quality and student outcomes—for example, the state legislatures, local school boards, and teachers’ unions that influence factors such as the amount and allocation of resources; the content of what is being taught; the staffing of schools; and the accountability for poor performance—are not even parties to the lawsuit.¹⁰³

Furthermore, providing courts the final say on questions of policy blurs the line of the court’s intended role as interpreter of the law, as Judge Murphy discussed in his dissent in *Gary B. v. Whitmer*, noting that establishing a fundamental right to education “would entangle courts in policy controversies well outside their authority ‘to say what the law is.’”¹⁰⁴ Further, Judge Murphy mused that given the reality that state budgets must appropriately fund education in addition to several other essential state functions, such as healthcare, establishing a right to education could result in giving “federal judges the power to direct states to increase their taxes to provide the required education” or cut spending from other areas to fund education in higher amounts, constituting a separation of powers issue.¹⁰⁵ Questions of policy this substantial, especially as they relate to state budgets, should be left within the province of state legislatures, which are directly accountable to the people they represent by virtue of frequent elections. Leaving policy questions like those proffered by Judge Murphy to state legislatures and to Congress ensures that the will of the people is carried out

101. IOWA DEP’T. OF ED., DISTRICT CHARACTERISTICS: WHAT FACTORS IMPACT STUDENT ACHIEVEMENT? 3 (2007) [<https://perma.cc/3TQE-NWVH>].

102. Rocco E. Testani, *A Short-Lived Constitutional Right to Education*, ED. NEXT (May 21, 2020), <https://www.educationnext.org/short-lived-constitutional-right-to-education-sixth-circuit-rehear-gary-b-whitmer/> [<https://perma.cc/ZRC9-KJT5>].

103. *Id.*

104. *Gary B. v. Whitmer*, 957 F.3d 616, 670 (6th Cir. 2020).

105. *Id.*

rather than replaced by the will of activist judges.¹⁰⁶

A judicially managed basic right to a minimum education would not only be impractical and usurp traditional notions of federalism and separation of powers, but the constitutional basis of such a right is shaky. Allowing the Due Process Clause to be construed as providing positive rights, such as an affirmative right to education or access to literacy, would upset longstanding precedent recognizing that the Due Process Clause safeguards against government deprivation of life, liberty, or property, as “this language is ‘phrased in the negative.’”¹⁰⁷ “The text would be a poor choice of words if the clauses’ Framers meant to compel a state to protect its people’s lives, to promote their liberties, or to provide them with property[;]”¹⁰⁸ rather, “the Due Process Clause is rightly construed as a limit on the states’ power to intrude on private rights.”¹⁰⁹

Rather than entangle the courts in an inextricable web of student achievement factors, parents and students should be allowed to recognize when a school is not meeting their needs and seek schooling elsewhere, whether that be at a private school or another public school. The State should be decreasing barriers to school choice to advance socioeconomic equality and level the playing field, allowing lower-income students to attend the expensive preparatory schools of their well-off peers who are financially privileged to exercise school choice on their own.

IV. RECOMMENDATION

Although not a panacea for eradicating inequality and poor student outcomes, school choice programs have the capacity to promote equity amongst those who can afford to choose the best schools for their children by living in areas with high-quality schools simply by providing the means to low-income families to do the same.¹¹⁰ Left without a constitutional remedy and few alternative educational options, students attending inadequate public schools are essentially doomed to fail, oftentimes perpetuating racial disparities, as inner-city schools and rural schools across the board perform worse than the schools of suburbia.¹¹¹ One study illustrating such disparities found that “reading and test scores [were] lowest in urban schools and nearly as low in rural schools.”¹¹² Additionally, students in urban and rural schools are less likely to have the financial means to move to

106. Judge Murphy asked, “How old may textbooks be before they become constitutionally outdated? What minimum amount of training must teachers receive? Which HVAC systems must public schools use? Our judicial commissions give us no special insights into these ‘difficult questions of educational policy.’” *Id.* at 663.

107. *Id.* at 665-66 (internal citation omitted).

108. *Id.* at 666.

109. *Id.*

110. Lisa Barrow et al., *School Vouchers: Recent Findings and Unanswered Questions*, 32 *ECON. PERSPECTIVES, FED. RES. BANK OF CHI.* 12 (2008) [<https://perma.cc/4ZCC-RAQG>].

111. John R. Logan and Julia Burdick-Will, *School Segregation and Disparities in Urban, Suburban, and Rural Areas*, 674 *ANN. AM. ACAD. POL. SOC. SCI.* 199 (2017).

112. *Id.*

better school districts, as 63 percent of urban students and 58 percent of rural students were eligible for free or reduced lunch as compared to only 43 percent of suburban students.¹¹³

Unfortunately, “low-income and minority households are the most likely to be prevented from making reasonably optimal investments in their children’s schooling. The ability of these households may be severely constrained by their budgets or by discrimination.”¹¹⁴ One such investment is enrolling children in private schools. With public schools being funded by tax dollars, parents who send their children to private schools doubly pay for their children’s education in the form of tuition and taxes.¹¹⁵ “Partly as a result, private schools tend to enroll fewer than 15% of American elementary and secondary students.”¹¹⁶ School choice programs level the playing field by allowing low-income students to attend private schools. With the current social climate largely promoting equity amongst racial groups, school choice serves as a means of accomplishing that goal by providing equal opportunities for all students, particularly those who otherwise could not afford it, to attend the school of their choice.

Moreover, evidence shows that school choice programs can, in some instances, advance student outcomes in addition to serving as an equalizer amongst privileged and underprivileged groups. The United States Department of Education evaluated the District of Columbia’s Opportunity Scholarship Program, which provides vouchers to students, and found that participants in the program graduated at higher rates in comparison to their peers.¹¹⁷ Moreover, private researchers found that D.C.’s Opportunity Scholarship Program produced better student outcomes in reading.¹¹⁸

Additionally, parental satisfaction with their child’s school is high for a myriad of school choice programs. Looking at 30 studies of parental satisfaction amongst various school choice programs, including educational savings accounts, voucher programs, tax-credit scholarships, and privately funded scholarship programs across 12 states, 29 studies indicated some positive effect of school choice programs on parental satisfaction.¹¹⁹ For instance, “[p]arents of students [in D.C.] offered a voucher reported a significantly lower level of perceived

113. *Id.*

114. Caroline M. Hoxby, *What Do America’s ‘Traditional’ Forms of School Choice Teach Us About School Choice Reforms?* 4 *ECON. POL’Y REV.* 47, 48 (1998).

115. *Id.*

116. *Id.*

117. *See* U.S. DEP’T. OF ED., *EVALUATION OF THE D.C. OPPORTUNITY SCHOLARSHIP PROGRAM*, (2010) (finding that “the offer of an OSP scholarship raised students’ probability of completing high school by 12 percentage points overall.”).

118. *The 123s of School Choice*, EDCHOICE (Apr. 15, 2020) <https://www.edchoice.org/research/the-123s-of-school-choice/> [<https://perma.cc/C8Y2-XEBY>] (citing Patrick J. Wolf, et al., *School Vouchers and Student Outcomes: Experimental Evidence from Washington, DC*, 32 *J. OF POL’Y ANALYSIS AND MGMT.* (2013)).

119. *The 123s of School Choice*, *supra* note 118.

school danger than parents of students not offered a voucher.”¹²⁰ In a study of Florida’s educational savings account program for students with documented disabilities, parental satisfaction with their child’s school increased with the importance the parents placed on religious instruction. This demonstrates that, although controversial, many families desire a faith-based education for their children and that a religiously-affiliated school can be a selling point for parents.¹²¹ Overall, “voucher parents report being more satisfied with their current schooling than do non-voucher parents,” so there is a social welfare argument to be made for school choice in addition to a student outcome argument.¹²² With compulsory education laws in every state, parental satisfaction is an important factor, as government-mandated participation in any system should be expected to produce beneficial, worthwhile results.

Additionally, there is evidence that “increased competitive pressure can generate some improvements in public schools,”¹²³ demonstrating that even students who do not exercise school choice and remain in their assigned public school have the capacity to benefit from school choice programs.¹²⁴ This rationale behind school choice can be traced to Milton Friedman, who saw the potential for public school gains as a result of increased market pressure.¹²⁵ Although it is difficult to measure whether the introduction of a school choice program causes public school improvements, one analysis of Florida’s educational savings account program, the McKay Scholarship Program for Students with Disabilities, found “statistically significant increases in the test scores of students with disabilities who remained in the public system as more private schools entered the McKay program.”¹²⁶ These results indicate that when students have more options,

120. Barrow et al., *supra* note 110, at 11.

121. *The 123s of School Choice*, *supra* note 118 (citing David B. Black, *School Choice and Florida’s McKay Scholarship Program for Students with Disabilities: An Analysis of Parental Satisfaction* (Doctoral dissertation), FLA. ATL. UNIV., http://fau.digital.flvc.org/islandora/object/fau:31570/datastream/OBJ/view/School_choice_and_Florida___s_McKay_scholarship_program_for_students_with_disabilities__an_analysis_of_parental_satisfaction.pdf%0D [<https://perma.cc/32EX-DNRP>]).

122. Barrow et al., *supra* note 110.

123. *Id.*

124. Caroline Hoxby, *School Choice and School Productivity. Could School Choice Be a Tide that Lifts All Boats?*, in *THE ECONOMICS OF SCHOOL CHOICE* 288 (2003), (finding that the introduction of charter schools, and thus market competition, in Michigan, Arizona, and Wisconsin produced statistically significant student achievement gains amongst traditional public schools). See also David Figlio and Cassandra M. D. Hart, *Does Competition Improve Public Schools?* ED. NEXT (last updated Nov. 17, 2010), <https://www.educationnext.org/does-competition-improve-public-schools/> [<https://perma.cc/T4NN-2GKZ>] (finding that Florida’s tax credit scholarship program caused public schools which were faced with the threat of losing students to private schools to improve their test scores).

125. Friedman, *supra* note 43.

126. Lindsey Burke, *The Value of Parental Choice in Education: A Look at the Research*, THE HERITAGE FOUND. (Mar. 18, 2014), <https://www.heritage.org/education/report/the-value-parental->

their public schools of residence seek to perform better in order to retain and attract students.

School choice also serves as a means of increasing parental involvement and parental influence over their children's schools. One study examining the effect of school choice programs on parental involvement found that participation in Milwaukee, Wisconsin's school choice program equated to greater parental involvement,¹²⁷ suggesting that when parents are more invested in selecting their child's school, they will remain involved as the child's education progresses. Furthermore, increasing choices amongst public schools provide parents with more input over school resource allocation:

Any given school district budget, for instance, is allocated more according to parents' preferences (than, say, according to the preferences of school staff or the state department of education) when parents have more choice among districts. This is true simply because when parents have more choices, school budgets are more elastic with respect to parents' preferences. Therefore, policy is more responsive to those preferences.¹²⁸

Thus, school choice ensures that schools are held more accountable by the families they serve, in addition to being subject to increased market pressure to excel.

A. Non-Traditional Public-School Choice

In addition to school choice programs such as vouchers, one option for school choice exists entirely within the public education system—inter-district transfer. Rather than confine students to the school assigned to them based on their home address, the option of inter-district transfer allows students to apply at public schools outside of their school district of residence. These policies have the potential to break down racial and socioeconomic barriers that have segregated classes and ethnicities largely between urban and suburban areas. For instance, 98 percent of the students attending Detroit Public Schools are nonwhite.¹²⁹ By allowing students trapped in failing schools alternate schooling options, like inter-district transfer, state policy can effectively advance racial equality. Currently, 44 states allow for some level of inter-district student transfers, as “some states require their districts to participate in open enrollment . . . while others leave that

choice-education-look-the-research#_ftn4 [https://perma.cc/JLF5-8WNV].

127. See Philip Vassallo, *More Than Grades How Choice Boosts Parental Involvement and Benefits Children*, CATO INST. (Oct. 26, 2000), <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa383.pdf> [https://perma.cc/WFU9-L8D2].

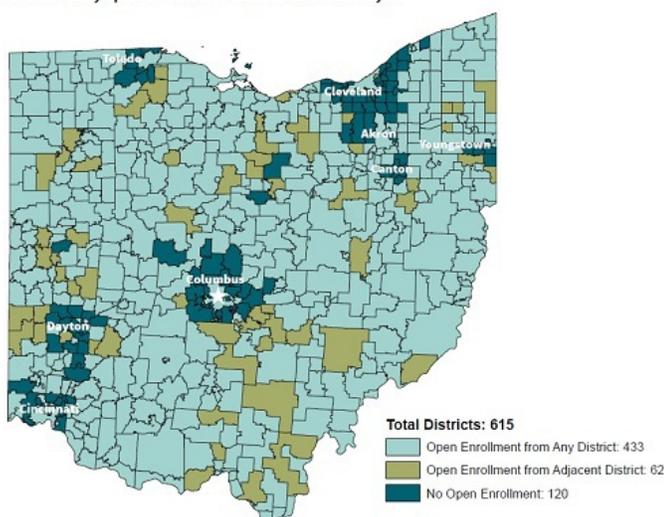
128. Hoxby, *supra* note 114, at 49.

129. *Dismissed: America's Most Divisive School District Borders*, ED BUILD 1 (July 2019), <https://s3.amazonaws.com/edbuild.org/public/projects/dismissed/report/EdBuild+Divisive+Borders+2019.pdf> [https://perma.cc/W6AN-QHHH].

decision to local districts.”¹³⁰

In an analysis of Ohio’s voluntary open enrollment policy, which allows over 70,000 students to attend a public school outside of their geographically assigned district, one report found that “consistent open enrollment is associated with zero to modestly positive academic gains,” meaning that students who consistently attended a school outside of their home district had the potential to experience positive educational outcomes.¹³¹ The positive results were even more prevalent amongst African American consistent enrollees, who, although comprising only six percent of the students studied, achieved “test score gains of about ten percentiles” compared to their non-open enrolling peers.¹³² Unfortunately, despite these positive results, “urban, minority students—those whom data indicate benefit the most from open enrollment—have the fewest open enrollment options” near them, as the below map demonstrates.¹³³

Ohio school districts by open-enrollment status: 2013-14 school year



This system denies the opportunity of thousands of students who are proven to benefit from open enrollment policies to attend well-regarded schools of the suburbs. If Ohio mandated the acceptance of non-district resident students—as has been done in Denmark, Belgium, and the United Kingdom—thus opening up the ability for families to choose where to attain an education, these barriers

130. Deven Carlson and Stéphane Lavertu, *Interdistrict Open Enrollment in Ohio: Participation and Student Outcomes*, THOMAS B. FORDHAM INST. 1 (June 2017), https://fordhaminstitute.org/sites/default/files/publication/pdfs/FORDHAM-Open-Enrollment-Report_Online-final_0.pdf [<https://perma.cc/R52K-FHNA>].

131. *Id.* at 2.

132. *Id.*

133. *Id.* at 3.

would cease to exist, and students would have the capability to transcend their zip codes even when physically moving into the desired district is not feasible.

Despite the racial segregation that some school district lines and the lack of open enrollment policies in the suburbs of Ohio create, the United States Supreme Court in *Milliken v. Bradley* provided no remedy to a class of plaintiffs in Detroit, Michigan, who argued that the state's drawing of school district lines was in effect, racial segregation contrary to *Brown v. Board of Education* and violative of the Equal Protection Clause.¹³⁴ Stressing the nation's history of local control over schools, the Court held that a state's school district lines could only be judicially mandated to change if they "were established with purpose of fostering racial segregation," even in the face of practical segregation as was the case in the Detroit Public Schools at issue.¹³⁵

Today, the effects of the *Milliken* decision can be felt in hundreds of school districts across the United States.¹³⁶ With the ability to challenge district lines on Equal Protection grounds significantly diminished, inter-district transfers in the form of open enrollment policies constitute one concrete way to begin to rectify often discriminatory boundaries that disadvantage minority students. Although simply allowing inter-district transfers does not take into account hurdles to attendance that families may face when seeking to enroll their children in an out-of-district school, establishing open enrollment as a statewide policy is a necessary first step. Furthermore, since an inter-district transfer is a school choice option housed entirely within the public-school system, critics of vouchers and other programs providing state funding to private schools may be more inclined to support open public-school enrollment, as it does not produce any separation of church and state issues and ensures that public dollars remain in public-school classrooms.

Overall, although relatively little data exists regarding the effect of inter-district transfer availability or utilization and student outcomes, the core argument for these programs is not that they are guaranteed to produce higher student outcomes, but rather that they afford equity to students who could not afford to reside in the district whose schools they wish to attend. While not addressing prior or current policies that result in racial or socioeconomic segregation in the first place, school choice programs, on the whole, provide the means for disadvantaged students to challenge the status quo and upend systemic inequality by rejecting the traditional system.

Overall, providing parents and students with the ability to attend the school of their choice serves as a viable means of advancing quality education. State governments should shift their education funding toward providing either the funding or means (via inter-district transfers) to families to choose their own educational paths.

134. *Milliken v. Bradley*, 418 U.S. 717 (1974).

135. *Id.*

136. See EDBUILD *supra* note 129, at 5 (noting "there is a \$23 billion gap between the resources of predominantly white and predominantly nonwhite school districts in the United States").

B. Counterarguments

Several practical disadvantages to school choice programs do exist, namely inadequate transportation to schools outside of school bus transportation boundaries and the importance of parental motivation in the effective utilization of school choice programs. However, lack of transportation could be partially overcome as a significant barrier by requiring municipalities to provide transportation for children attending schools outside of their assigned district, as is the case in Denmark.¹³⁷ Regional bus systems could be developed to provide children with free transportation to schools within the region in which they reside. Recognizing the costs and planning difficulties of expanding bus routes, such transportation could not feasibly cover entire states; however, expanding public transportation options could ensure that families have the ability to seek a school outside of their geographic district. Given financial constraints on local governments, transportation would likely still constitute a barrier, but at least families could exercise the option to enroll their students at out-of-district schools and be given the opportunity to try to make it work.

In terms of parental motivation, critics note that “[d]espite the fact that charter schools are often billed as a way to expand options for disadvantaged students, parents must gather information and take the initiative to seek out a charter school, actions that are easier for college-educated parents than for those with limited education.”¹³⁸ Although knowledge of the existence of school voucher programs is paramount to getting students enrolled, the fact that parents and students must be aware of voucher programs and other school choice programs in order to utilize them should not discount the programs as a valid option to provide equity in choice for parents and students of all socioeconomic backgrounds. Evidence shows that school choice can engender increased parental investment in education. In a study of D.C.’s Opportunity Scholarship Program (OSP), researchers noted that providing eligible families (those with an income below 185 percent of the federal poverty level) with schooling options for their children resulted in most parents “moving from the margins to the center of their children’s academic development,” by taking the time to review and evaluate the available schooling options similarly to purchasing a home or car, even though “the average family in the OSP does not own a home or car.”¹³⁹ Thus, this study demonstrates that simply providing options where there previously were none aside from the assigned public school can result in parental motivation to take an active role in education.

137. HOULBERG ET AL., *supra* note 69, at 59.

138. Neubia L. Harris, *Adequate Education: The Disregarded Fundamental Right and the Resurgence of Segregation of Public Schools*, 45 MITCHELL HAMLINE L. REV. 237, 255 (2019).

139. Burke, *supra* note 126 (citing Thomas Stewart, et al., *Family Reflections on the District of Columbia Opportunity Scholarship Program*, UNI. OF ARK., (Jan. 2009), http://www.uaedreform.org/wp-content/uploads/2009/01/Family_Reflections_DCOSP_2009_Final.pdf [<https://perma.cc/J8CX-NFTU>]).

Nonetheless, it is important to note that advancing school choice programs as a way to ensure that all students receive a quality education admittedly does not account for the reality that many children do not have parents who are invested enough in their educational attainment to seek out an alternate education for them. In an ideal world, in which parents were fully equipped with the knowledge, skills, and resources to take an active role in their child's development and education, school choice could serve as an incredible equalizer amongst socioeconomic classes. However, in reality, public education is a lifeline for many students who cannot rely on their parents to meet all of their needs. As a result, school choice programs should be a supplement to, and not a replacement for, a robust public-school system to ensure that students without a strong support system at home still have the opportunity to succeed.

Additional studies have attacked the validity of school choice programs on the basis of student outcomes.

Long-term studies have also revealed that voucher programs have no advantage in improving academic achievement for students attending private schools on vouchers. For example, of the 158 private voucher schools reporting in Florida, only eighteen achieved statistically significant increases in reading and math from 2011 to 2014. In fact, thirty-one of those schools reported statistically significant losses in both subjects over the same period of time.¹⁴⁰

Several additional studies of school choice programs have also indicated no positive academic outcome results as well as negative academic outcome results.¹⁴¹ Rather than serving as evidence upon which to condemn school choice programs as a whole, these findings demonstrate the complexity of improving student outcomes and the fact that the same intervention that works for one child may not work for a different child. One literature review noted that while students in private schools traditionally perform better, it is difficult to say that vouchers would improve student achievement for all given the "difficulty in identifying the impact of schools on student achievement."¹⁴² Parents who care about their child's educational progress should nonetheless have the choice to send their child to a private school on a voucher rather than accept the conditions of a public school assigned by zip code. School choice programs are not the only solution; however, they can afford some disadvantaged students the ability to succeed by providing a different learning environment.

C. COVID-19 and Education

The need for school choice has become magnified by the coronavirus pandemic as schools have been shuttered and instruction has gone virtual. While the need for school choice existed prior to the pandemic in order to provide equal

140. N. Harris, *supra* note 138, at 258.

141. *The 123s of School Choice*, *supra* note 118.

142. Barrow et al., *supra* note 110, at 3.

opportunity to disadvantaged students, the coronavirus pandemic has made this need more acute. Shifting from in-person instruction to virtual education, a policy advanced in the name of public health, has only served to exacerbate inequality between racial groups as well as urban and rural students versus suburban students.¹⁴³

On the whole, students are struggling. One study seeking to ascertain COVID-19-caused learning loss estimates that, amongst the 17 states studied, “the average student lost between 57 to 183 days of learning in reading and from 136 to 232 days of learning in math.”¹⁴⁴ In Indiana, the range between the number of days of learning lost is especially significant, with reading learning loss at an estimated four to 332 days and math learning loss at an estimated 112 to 406 days.¹⁴⁵ Students on the high end of each range will be struggling to catch up for years, potentially requiring them to repeat grade levels, as the number of days lost surpasses the 180 days in each school year.¹⁴⁶ The estimates also demonstrate inequality in education in terms of the quality of a school, involvement of parents, and resources available.¹⁴⁷ With education an essential component to success, filling some of these gaps by providing students who have fallen severely behind with the resources necessary to advance is paramount. Additional educational options and resources are desperately needed for struggling students. With such a range in learning loss in Indiana, as well as across the country, each state should be advancing policies like school choice that are targeted at providing each child with the education necessary to not only recuperate their losses but to succeed.

Allowing students increased ability to choose their school affords them the capacity to tailor their learning better to suit their needs. Governor Henry McMaster of South Carolina attempted to provide more students such an opportunity by allocating \$32 million of federal coronavirus aid to funding vouchers for students to use at private schools.¹⁴⁸ According to the learning loss study, South Carolina’s students have experienced the highest reading learning loss of every state studied as well as the second-highest math learning loss, showing just how dire the need for quality education is for South Carolina’s

143. Elaine S. Povich, *Virtual Learning Means Unequal Learning*, STATELINE, (July 29, 2020) <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/29/virtual-learning-means-unequal-learning> [https://perma.cc/WRZ3-PDKL].

144. Eric Weddle, *Study: Pandemic Learning Loss ‘Chilling’ for Indiana, Other States*, WFYI INDIANAPOLIS (Oct. 2020), <https://www.wfyi.org/news/articles/study-pandemic-learning-loss-chilling-for-indiana-other-states#:~:text=An%20average%20student%20in%20Indiana,coronavirus%20impact%20on%20student%20academics> [https://perma.cc/4QVB-RVZE].

145. *Id.*

146. *Id.*

147. *Id.*

148. Maayan Schechter, *Judge Temporarily Blocks McMaster’s \$32M Spending Plan for Private School Vouchers*, THE STATE (Jul. 22, 2020), <https://www.thestate.com/news/local/crime/article244407467.html> [https://perma.cc/Y8QW-J3XX].

students.¹⁴⁹ However, a South Carolina state court enjoined Governor McMaster from executing his voucher spending plan, finding that it unconstitutionally provides public aid to religious institutions.¹⁵⁰ The Court's decision illustrates the harmful effect of Blaine amendments on voucher programs, constituting a barrier to empowering economically disadvantaged families.¹⁵¹ Given that the South Carolina Supreme Court held in 1971 that providing public funds to children to attend private schools violated the state constitution's Blaine Amendment, it would take a redefinition of the Blaine Amendment's direct benefit test (as was the case in Indiana) or a repeal of the provision entirely in order for South Carolina to establish a voucher program.¹⁵² Since "[m]any smaller private schools with large campuses or big buildings have the ability and resources to spread students out in classrooms," allowing more students to enroll in private school amidst the pandemic could have benefitted both voucher-awarded students as well as public school students, who possibly could have returned to in-person learning with fewer classmates.¹⁵³ States without legal hindrances to vouchers should prioritize student health, safety, and learning outcomes by enabling their use to combat the devastating effects of COVID-19.

Survey data indicates that public opinion of school choice programs is higher than in years past, a fact that could be partially attributable to the coronavirus pandemic and bodes well for states seeking to enact such policies.¹⁵⁴ The survey reveals public support for educational savings accounts at 81 percent.¹⁵⁵ One of the most flexible forms of school choice, educational savings accounts allow parents to use public funds for multiple educational purposes in addition to private school tuition, such as tutoring, therapies for students with special needs, textbooks, and other instructional materials.¹⁵⁶ Virtual instruction can present unique challenges, and some parents have been able to fill in educational gaps by virtue of their financial means, leaving those without such options behind. For instance, of the parents surveyed, 19 percent reported having a child in a learning

149. *Estimates of Learning Loss in the 2019-2020 School Year*, THE CENTER FOR RESEARCH ON EDUCATION OUTCOMES, STANFORD UNIVERSITY, https://credo.stanford.edu/sites/g/files/sbiybj6481/f/short_brief_on_learning_loss_final_v.3.pdf [<https://perma.cc/U7JA-32GL>].

150. Schechter, *supra* note 148; *See Adams v. McMaster*, 851 S.E.2d 703 (S.C. 2020).

151. *See Espinoza v. Montana Dep't. of Rev.*, 140 S. Ct. 2246 (2020).

152. *See Hartness v. Patterson*, 179 S.E.2d 907 (S.C. 1971); *see Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013).

153. *See Povich*, *supra* note 143.

154. *2020 Schooling in America Series: Changing Perception on Schools and Record Support for School Choice*, EDCHOICE (Dec. 15, 2020), <https://www.edchoice.org/engage/2020-schooling-in-america-series-changing-perception-on-schools-and-record-support-for-school-choice/> [<https://perma.cc/DSP6-M3ZT>].

155. *Id.*

156. *Public Opinion on K-12 Education During the COVID-19 Pandemic: 2020 Schooling in America Wave 2*, EDCHOICE (Oct. 20, 2020), <https://www.edchoice.org/wp-content/uploads/2020/12/2020-SIA-Wave-2-Final.pdf> [<https://perma.cc/759C-43TU>] [hereinafter "*Schooling in America Wave 2*"].

pod, which means “small groups of children, organized by parents gathering to learn together” and assisted by either parents or a hired teacher.¹⁵⁷ Unsurprisingly, “higher-income parents are roughly three times as likely to indicate participation [in a learning pod] compared to lower and middle-income households.”¹⁵⁸ Moreover, “higher income parents are much more likely to seek out tutoring for their child this school year, compared to lower or middle-income parents.”¹⁵⁹ Educational savings accounts could serve as a means of bridging socioeconomic gaps by enabling families who cannot afford to hire a private tutor or participate in a learning pod.

In contrast to support for school choice, the survey shows greater disfavor with K-12 education than in the past several years, with “more than three out of five Americans (63%) say[ing] K-12 is on the wrong track.”¹⁶⁰ Despite this disfavor, both support *and opposition* for voucher programs were reported as higher than ever before, which indicates an ideological split among the public regarding where best to invest state resources.¹⁶¹ Of the 73 percent of respondents who expressed support for vouchers, it is likely that many of them believe that educational diversification is the answer to improving student outcomes and responding to the pandemic.¹⁶² On the other hand, the coronavirus has demonstrated the importance of public school investment and attendance to be sure that disparities amongst racial groups and socioeconomic classes do not grow wider. Based primarily upon providing families with additional resources and options as well as the evidence indicating that school choice can improve area public schools, expanding school choice programs merits exploring, especially as students begin to recuperate learning lost during the 2019-2020 school year and beyond.

V. CONCLUSION

Rather than advocate for the establishment of a fundamental right to education in the U.S., as is the case in Europe, the U.S. should promote school choice programs as a way to empower families to determine the course of their child’s education when they otherwise could not afford to. This approach to advancing quality education is preferable to establishing a judicially managed right to education because of the policy considerations that go into state education budgets as well as the difficulties that federal courts would have in determining the root causes of poor student performance and any subsequent infringement of

157. *Id.* See also Povich, *supra* note 143.

158. *Schooling in America Wave 2*, *supra* note 156.

159. *Id.*

160. *Id.*

161. *2020 Schooling in America Series: Changing Perception on Schools and Record Support for School Choice*, EDCHOICE (Dec. 15, 2020), <https://www.edchoice.org/engage/2020-schooling-in-america-series-changing-perception-on-schools-and-record-support-for-school-choice/> [<https://perma.cc/DSP6-M3ZT>].

162. *Schooling in America Wave 2*, *supra* note 156.

the government on students' fundamental right to education. Rather than address failure to educate after the fact, when students are subject to languishing in failing schools due to compulsory attendance laws and inability to seek education elsewhere, school choice ensures that students are not trapped by virtue of their financial situation in schools that are not properly educating them. The U.S. should look to European countries such as Belgium, Denmark, and the United Kingdom for guidance on establishing an education system that prioritizes the fundamental right of parents to direct the upbringing and education of their children in the form of enabling highly available school choice programs.

Highlighting educational disparities amongst geographic areas and socioeconomic classes, the U.S. educational system should allow for increased school choice in the form of inter-district school transfers or open enrollment, as well as the ability for disadvantaged students to use public funds in furtherance of their education as they and their parent(s) deem fit. Those who can independently afford to send their children to a private school or move to an area with higher quality public schools should not be the only families who have the privilege of choosing a different education for their children aside from that which is available through their geographically assigned public school. With high levels of poverty corresponding to low levels of educational attainment, achieving the level of financial success required for parents to send their children to private schools or moving to more expensive areas can be unattainable, creating a generational cycle of poverty. Empowering families with school choice can serve to remove barriers to achievement and put families of lower means on the same playing field as wealthier families.

Despite its benefits, both as a matter of principle and as a way to support student learning, school choice is not a perfect, one-size-fits-all solution given logistical barriers such as transportation and lack of parental capacity or motivation to seek out other educational options for their children. However, increased educational options and resources are especially needed in light of the coronavirus pandemic. With virtual instruction becoming ubiquitous across the country in the spring of 2020, inequalities amongst races and socioeconomic classes have become more apparent, and governments should step up to fill in these gaps so that already disadvantaged students do not fall further behind.