SCHOOL CHOICE IS RACIST (& OTHER MYTHS)

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INTRODUCTION

For most of the last three decades, the legal arguments against vouchers and other types of private school (or educational) choice programs turned largely on religion.[1] Opponents of these programs maintained that they contravened the federal Establishment Clause, as well

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1. Such programs, which can include vouchers, education savings accounts, tax credit scholarships, and personal tax credits, are often called "school choice" programs. "Educational choice" is a more accurate descriptor because some programs may be used on educational expenses beyond those associated with attendance at a private school (for example, tutoring services, private online learning programs, or curricular materials for homeschooling).

as state constitutional restrictions on public funding of religious institutions. But over the course of two decades, from 2002's *Zelman v. Simmons-Harris*[2] through 2022's *Carson v. Makin*,[3] the U.S. Supreme Court roundly rejected those claims, finally taking the "religion" question off the table.

Undeterred, school choice opponents have settled on a new line of attack—one that turns not on religion, but on race. The public school establishment and others hostile to parental choice in education now insist that school choice is racist in its origins, segregative in its effects, and, thus, constitutionally proscribed. As Randi Weingarten, president of the American Federation of Teachers, famously declared, vouchers are just the "slightly more polite cousin of segregation."[4]

This Article takes a critical look at this new "school choice is racist" argument. Part I surveys the development of the argument in the court of public opinion (Part I.A) and the court of law (Part I.B). This part also distills the key premises of the argument: (1) that modern choice programs are racist in their DNA, descendants of voucher schemes used by Southern states in the wake of *Brown v Board of Education*[5] to circumvent the Supreme Court's decision in that case; and (2) that modern choice programs are racially segregative in their effects.

Part II tests those premises. Specifically, Part II.A explores the historical origins of the school choice movement, including its roots in the classical liberal thought of Smith, Paine, and Mill; its adoption in the 19th century as a means of providing for the education of students in areas *without* public schools, rather than as a means of avoiding integration *of* public schools; and its embrace by white progressives and black activists in the 20th century. Part II.B. meanwhile,

2. Zelman v. Simmons-Harris, 536 U.S. 639, 643 (2002) (rejecting Establishment Clause challenge to the inclusion of religious options in a voucher program for children in the Cleveland City School District); *see also* Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 129 (2011) (holding taxpayers lacked standing for Establishment Clause challenge to scholarship program funded by tax-credit-incentivized donations).

3. Carson v. Makin, 596 U.S. 767, 789 (2022) (holding the exclusion, from a Maine voucher program, of schools that provide religious instruction violated the Free Exercise Clause); *see also* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020) (holding the exclusion of schools from a Montana tax credit scholarship program solely because of their religious status violated the Free Exercise Clause).

4. Valerie Richardson, *Randi Weingarten, Union Leader, Blasts School-Choice Reforms as 'Polite Cousins of Segregation'*, WASH. TIMES (July 21, 2017), https://www.washingtontimes.com/news/2017/jul/21/Randi-Weingarten-blasts-school-choice-segregation/.

5. Brown v Board of Education, 347 U.S. 483 (1954).

examines the empirical studies of the effects of choice programs on the racial composition of public and private schools. This literature reveals that the effects on students who participate in choice programs and those who remain in the public school system are largely integrative, not segregative. Thus, contrary to the narrative of its opponents, educational choice, in both its purpose and its effects, expands access to education rather than restricts it.

With the premises of the "choice is racist" argument thoroughly examined, Part III of the Article assesses the viability of the argument as a legal one. Part III.A explains what even opponents of choice appear to recognize: that insofar as the argument is brought through the most obvious vehicle for a race-based claim, the Equal Protection Clause, it is doomed to fail. Part III.B, in turn, explores the argument's legal viability if pursued under the education clauses of state constitutions, which is the strategy on which opponents of choice appear to be settling. In addition to exploring the weaknesses of such a claim, this part explains how the judicial remedy sought—invalidation of choice programs because of their alleged upsetting of racial balances in the public schools—would itself violate the Equal Protection Clause.

I. EVOLUTION OF THE "SCHOOL CHOICE IS RACIST" ARGUMENT

In the early 1990s, when the modern educational choice movement was in its infancy,[6] the National Education Association and other opponents of parental choice in education settled on religion as the turf on which they would wage their legal war against choice programs.[7] Weaponizing federal and state constitutional provisions regarding religion, they filed numerous lawsuits aimed at enjoining these programs and denying children the alternatives to the public school monopoly that they offered.

Over the next few decades, however, this strategy backfired. Rather than securing a body of precedent invalidating choice programs because of their supposed unconstitutional funding of religious schools, the lawsuits produced a body of precedent recognizing the

6. The first modern educational-choice program was the Milwaukee Parental Choice Program, a voucher program adopted by the Wisconsin legislature in 1990.

7. *See* Michael Bindas, *The Once and Future Promise of Religious Schools for Poor and Minority Students*, 132 YALE L.J. F. 529, 547–54 (2022) [hereinafter Bindas, *Once and Future Promise*] (discussing involvement and leadership of the NEA, National School Boards Association, and Committee for Public Education and Religious Liberty in separationist legal challenges from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to *Zelman*, 536 U.S. 639).

permissibility of including religious schools in choice programs[8] and, ultimately, the impermissibility of excluding them.[9]

Yet surrender was not an option for opponents of choice. As it became increasingly clear that they would not win on the religion issue, they required a new weapon to continue waging their war. That weapon would be race.

A. The Argument in the Court of Public Opinion

The turn to race was not entirely new. Even as they had been leading with the religion issue in courts throughout the country, opponents of choice had occasionally argued that voucher programs would have segregative effects on students and schools. But this argument had never been in the forefront of their legal challenges, and, with one exception, it had never been a legal claim in its own right.[10] It was usually, at most, a point made in the occasional amicus brief, typically by the NAACP.[11]

But the focus on race increased considerably beginning in 2017. In July of that year, the Center for American Progress published a report titled *The Racist Origins of Private School Vouchers*.[12] The report

8. *See, e.g.*, *Zelman*, 536 U.S. 639; Schwartz v. Lopez, 382 P.3d 886, 899 (Nev. 2016); Magee v. Boyd, 175 So. 3d 79, 135 (Ala. 2015); Meredith v. Pence, 984 N.E.2d 1213, 1225–29 (Ind. 2013); Simmons-Harris v. Goff, 711 N.E.2d 203, 211–12 (Ohio 1999); Jackson v. Benson, 578 N.W.2d 602, 621, 623 (Wis. 1998); Niehaus v. Huppenthal, 233 Ariz. 195, 197–99 (Ariz. Ct. App. 2013); Toney v. Bower, 744 N.E.2d 351, 362 (Ill. App. Ct. 2001).

9. *See Carson*, 596 U.S. 767; *Espinoza*, 140 S. Ct. 2246.

10. The exception was *Jackson v. Benson*, in which the Wisconsin Supreme Court rejected race-based equal protection claims (along with five other claims) in a challenge to the Milwaukee Parental Choice Program. *Jackson*, 578 N.W.2d at 630–32.

11. *E.g.*, Brief of NAACP Legal Defense and Education Fund, Inc. and NAACP as Amici Curiae in Support of Respondents, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779), 2001 WL 1638648, at *13 (arguing that "voucher program may . . . provide a vehicle for resegregating schooling in the Cleveland area along racial lines"); Brief of North Carolina Conference of the NAACP as Amicus Curiae Supporting Plaintiff-Appellees, Hart v. State, 774 S.E.2d 281 (N.C. 2015) (No. 372A14), 2015 WL 570789, at *2–12 (discussing history of segregation academies in North Carolina and supposedly segregative effects of educational choice programs); *see also Hart*, 774 S.E.2d at 304 (Beasley, J., dissenting) (citing North Carolina Conference of the NAACP amicus brief for the proposition that "[w]ithout systemic and cultural adjustments to address social inequalities, the further cruel illusion of the Opportunity Scholarship Program is that it stands to exacerbate, rather than alleviate, educational, class, and racial divides").

12. CHRIS FORD ET AL., CTR. FOR AM. PROGRESS, THE RACIST ORIGINS OF PRIVATE SCHOOL VOUCHERS (July 12, 2017), https://www.americanprogress.org/wp-content/uploads/sites/2/2017/07/VoucherSegregation-brief2.pdf.

detailed efforts that Southern states undertook, as part of the "massive resistance"[13] to *Brown v. Board of Education* and its progeny, to avoid integration of public schools. It explained how the Virginia legislature had provided for the revocation of funds from, or the closure of, public schools and school districts that integrated, and it noted that state-ordered closures of individual schools had occurred in Charlottesville, Norfolk, and Warren County.[14] The report also recounted the more drastic measures that officials in Prince Edward County took to avoid integration, including shuttering its entire public school system after being ordered by the U.S. Court of Appeals for the Fourth Circuit, in September 1959, to take "immediate steps" toward integrating it.[15]

Meanwhile, the report continued, the Virginia legislature adopted a "tuition grant program" that students of closed public schools could use to attend nonsectarian private schools or public schools in other districts.[16] The law also allowed municipalities to adopt their own grant programs, which Prince Edward County did.[17] White students in the county used these grants to attend the newly created Prince Edward Academy, which, as a private school, was not bound by the integration mandate of *Brown*.[18] As the Center for American Progress report noted, this "'segregation academy' . . . would serve as a model for other communities in the South."[19] Indeed, the report noted that "[b]y 1969, more than 200 private segregation academies were set up in states across the South,"[20] and that "[s]even of those states—Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, and Louisiana—maintained tuition grant programs that offered vouchers

13. The "massive resistance" movement, initially spearheaded by Senator Harry Byrd of Virginia and later replicated in other states, owes its name to a February 24, 1956, speech in which Byrd declared, "If we can organize the Southern States for massive resistance to this order, I think that in time the rest of the country will realize that racial integration is not going to be accepted in the South." *Byrd Calls for 'Massive' Resistance to Integration*, NEWPORT NEWS DAILY PRESS, Feb. 26, 1956.

14. FORD, *supra* note 12, at 2, 3.

15. *Id.* at 3; *see also* Allen v. Cnty. Sch. Bd., 266 F.2d 507, 511 (4th Cir. 1959) (per curiam).

16. FORD, *supra* note 12, at 3.

17. *Id.* at 4; *see also* Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 222–23, 233 (1964).

18. FORD, *supra*, note 12, at 3. Prince Edward Academy was founded by the Prince Edward School Foundation, a "private group . . . formed to operate private schools for white children." *Griffin*, 377 U.S. at 223. Not until the Supreme Court's decision in Runyon v. McCrary, 427 U.S. 160 (1976), were all private schools prohibited from segregating or otherwise discriminating based on race.

19. FORD, *supra* note 12, at 3.

20. *Id.* at 5.

to students in an effort to incentivize white students to leave desegregated public school districts."[21]

After recounting this supposed origin story of school vouchers and the educational choice movement, the report pivoted to discuss choice programs in their modern incarnation. Relying on reports from the Century Foundation and National Public Radio, as well as articles concerning voucher-like programs in Chile and Sweden, the report suggested that today's programs have the same segregative effects as their forebears in the post-*Brown* South, even if there is "no indication of racial motivation" in their adoption.[22]

The report concluded by insisting that "[p]olicymakers must consider the origins of vouchers and their impact on segregation and support for public education."[23] "No matter how well intentioned," it insisted, "widespread voucher programs risk exacerbating segregation in schools and leaving the most vulnerable students and the public schools they attend behind."[24]

The sordid history of voucher use in the post-*Brown* South was not new information that the Center for American Progress report brought to light. The U.S. Supreme Court, after all, had squarely confronted this history in *Griffin v. County School Board*, when it held that Prince Edward County's public-school-closure-and-voucher scheme violated the Equal Protection Clause.[25] So, too, had other federal courts in invalidating or otherwise enjoining similar schemes in Southern states.[26] And academics had long studied the lengths to

21. *Id.*

22. *Id.* at 8.

23. *Id.* at 9.

24. FORD, *supra* note 12, at 9.

25. *Griffin v. Cnty. Sch. Bd.*, 377 U.S. at 232. The Court did not hold that vouchers in and of themselves are unconstitutional. Rather, it held that their use, in conjunction with public school closures, to avoid integration was unconstitutional. *Id.* ("[C]losing the Prince Edward schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws."); *id.* at 233 ("The injunction against paying tuition grants . . . while public schools remain closed is appropriate and necessary since those grants . . . have been essential parts of the county's program, successful thus far, to deprive petitioners of the same advantages of a public school education enjoyed by children in every other part of Virginia.").

26. *E.g.*, Coffey v. Educ. Fin. Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969); Griffin v. Bd. of Educ., 296 F. Supp. 1178 (E.D. Va. 1969); Poindexter v. La. Fin. Assistance Comm'n, 296 F. Supp. 686 (E.D. La. 1968); Brown v. Bd. of Educ., 296 F. Supp. 199 (D.S.C. 1968), *aff'd,* 393 U.S. 222 (1968) (per curiam); Poindexter v. La. Fin. Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1968), *aff'd,* 389 U.S. 571 (1968) (per curiam); Lee v. Bd. of Educ., 267 F. Supp. 458 (M.D. Ala. 1967); Hawkins v. Bd. of Educ., 11 Race Rel. L. Rep. 745 (W.D.N.C. 1966); Griffin v. Bd. of

which Southern states had gone to avoid integration of public schools.[27]

But this history, as well as the argument that modern-day choice programs have impacts similar to those of the post-*Brown* schemes, had little place in the public consciousness before the 2017 report, and it had played little role in educational choice litigation up to that point. That was about to change.

Just a week after the report's publication, Randi Weingarten, the president of the American Federation of Teachers, delivered a highly publicized speech to the union's summer conference that seized on the report's themes. She declared that the word "choice" was "used to cloak overt racism by segregationist politicians like Harry Byrd, who launched the massive opposition to the *Brown v. Board of Education* Supreme Court decision," and she insisted that modern educational choice measures are "only slightly more polite cousins of segregation."[28] Her remarks generated a quick backlash among educational choice supporters, including calls for her resignation. Weingarten responded, "Are you really calling on me to resign because I pointed out the segregationist history of private school choice[?]"[29] "Make no mistake," she doubled down, "[t]he 'real pioneers' of school choice were white politicians who resisted school integration."[30]

Educ., 239 F. Supp. 560 (E.D. Va. 1965); Lee v. Bd. of Educ., 231 F. Supp. 743 (E.D. Ala. 1964); Pettaway v. Cnty. Sch. Bd., 230 F. Supp. 480 (E.D. Va. 1964), *aff'd,* 339 F. 2d 486 (4th Cir. 1964); Hall v. St. Helena Parish Sch. Bd., 197 F. Supp. 649 (E.D. La. 1961), *aff'd,* 368 U.S. 515 (1962) (per curiam); Aaron v. McKinley, 173 F. Supp. 944 (E.D. Ark. 1959), *aff'd sub nom.* Faubus v. Aaron, 361 U.S. 197 (1959) (per curiam).

27. *E.g.*, Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436 (1973) (exploring the "segregation academy" movement and arguing that the organization and operation of some such schools involved state action); Michael W. Fuquay, *Civil Rights and the Private School Movement in Mississippi, 1964-1971*, 42 *HIST. EDUC. Q.* 159 (2002) (exploring the shift in 1960s Mississippi segregationist strategy from one of attempting to block integration of public schools to the creation of an all-white private school system); Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 821–24 (2011) (exploring how the concept of educational choice was used as a form of resistance to racial desegregation in the 1950s and 1960s); Mark A. Gooden et al., *Race and School Vouchers: Legal, Historical, and Political Contexts*, 91 PEABODY J. EDUC. 522, 524 (2016) (arguing that "[f]rom their inception, vouchers were not race-neutral instruments").

28. Richardson, *supra* note 4.

29. Randi Weingarten @rweingarten, TWITTER (July 20, 2017, 8:33 PM), https://twitter.com/rweingarten/status/888195166477185025.

30. *Id.* (July 20, 2017, 5:25 PM).

The timing of the Center for American Progress report and Weingarten's speech was curious. They came just a few weeks after the Supreme Court issued its decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[31] which, although not an educational choice case, invalidated an application of the Missouri Constitution's "Blaine Amendment."[32] Blaine Amendments, or "no-aid" clauses, are found in some thirty-seven state constitutions and, generally speaking, bar public funding of religious schools and institutions.[33] They had been the favored legal weapon of educational choice opponents ever since the Supreme Court removed the federal Establishment Clause from their arsenal in *Zelman v. Simmons-Harris* in 2002.[34] In its defanging of Missouri's Blaine Amendment, *Trinity Lutheran* was widely regarded as the writing on the wall for Blaine-based attacks on educational choice: they were doomed to fail.[35] The report and Weingarten's speech appeared to be a real-time reaction to this new reality, the declaration of a new strategy.

And, indeed, they were. Opponents of educational choice programs began bandying about the "school choice is racist" argument in news outlets, blogs, and even books.[36] Academic commentators

31. Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017).

32. *Id.* at 446.

33. *See* Michael Bindas, *Using My Religion: Carson v. Makin and the Status/Use (Non)Distinction*, CATO SUP. CT. REV. 163, 169, n. 29 (2022).

34. *See* Michael Bindas, *The Status of Use-Based Exclusions & Educational Choice After* Espinoza, 21 FEDERALIST SOC'Y REV. 204, 204 (2020).

35. They finally met their doom in *Espinoza* and *Carson*. *See Espinoza*, 140 S. Ct. at 2261 (holding the Montana Supreme Court's application of that state's Blaine Amendment to bar religious schools from an educational choice program violated the Free Exercise Clause); *see also Carson*, 596 U.S. at 780 (holding a statutory prohibition on "sectarian" schools in a Maine educational choice program violated the Free Exercise Clause, in part because it had the "same" "effect" as Montana's Blaine Amendment).

36. *E.g.*, Kathryn J. Edin et al., *Segregation Academies Show Us the Ugly Side of Vouchers*, DAILY BEAST (Nov. 24, 2023, 11:30 PM), https://www.thedailybeast.com/segregation-academies-show-us-the-ugly-side-of-vouchers ("Even today, the link between vouchers and resistance to integration in the South is not a subtle one."); Nancy MacLean, *'School Choice' Developed as a Way to Protect Segregation and Abolish Public Schools*, WASH. POST (Sept. 27, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/09/27/school-choice-developed-way-protect-segregation-abolish-public-schools/ ("[T]he history behind vouchers reveals that the rhetoric of 'choice' and 'freedom' stands in stark contrast to the real goals sought by conservative and libertarian advocates. The system they dream of would produce staggering inequalities, far more severe than the disparities that already exist today."); Raymond Pierce, *The Racist History of "School Choice,"* FORBES (May 6, 2021, 2:41 PM), https://www.forbes.com/sites/raymondpierce/2021/05/06/the-racist-history-of-school-choice/?sh=e4e8f216795d (arguing that educational choice programs "have

brazenly declared that "[t]he origins of school choice" lie in "resistance to the *Brown* decision,"[37] that the "Southern states' first plan for defeating court-ordered desegregation . . . is exactly what today's advocates and supporters of vouchers seek to implement,"[38] and that today's push for educational choice is part of a white "Christian nationalist" movement.[39] Even government education officials began parroting the argument. The Washington State Superintendent of Public Instruction, for example, declared that recent outrage over public schools "was being pumped hard . . . to justify segregation vouchers for religious schools and for-profit providers."[40]

B. The Argument in the Court of Law

Having seeded the court of public opinion with the "choice is racist" argument, opponents of choice—especially the National Education Association (NEA), American Federation of Teachers (AFT), and state teachers' unions—began aggressively advancing the argument in the court of law as well. They filed amicus briefs in federal and state educational choice cases discussing the "segregation academy"

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their roots in a history of racism and school segregation," and that "they remain a lever for supporting segregated schools and worsen the problem of de facto segregation"); Andre Perry, *Defund the Private Schools*, HECHINGER REPORT (July 7, 2020), https://hechingerreport.org/defund-the-private-schools/ ("White Americans who wave the banner of choice are promoting racism and getting in the way of real educational reform."); Adora Obi Nweze, *School Vouchers Foster Segregation, Fail to Expand Opportunities*, SUN-SENTINEL (Apr. 18, 2019, 7:19 PM), https://www.sun-sentinel.com/2019/04/18/school-vouchers-foster-segregation-fail-to-expand-opportunities-opinion/ (arguing that the "regrettable history" of post-*Brown* segregation efforts "has been resurrected" in modern educational choice programs); *see generally* STEVE SUITTS, OVERTURING BROWN: THE SEGREGATIONIST LEGACY OF THE MODERN SCHOOL CHOICE MOVEMENT (2020) (discussing the supposed connections between use of vouchers in the post-*Brown* South and the modern choice movement).

37. Diane Ravitch, *The Founders Wanted Public Schools, Not Charter Schools or Vouchers*, DianeRavitch.net (May 10, 2022), https://dianeravitch.net/2022/05/10/reader-the-founders-wanted-public schools/.

38. Steve Suitts, *Segregationists, Libertarians, and the Modern "School Choice" Movement*, SOUTHERN SPACES (June 4, 2019), https://southernspaces.org/2019/segregationists-libertarians-and-modern-school-choice-movement/.

39. Isabelle M. Canaan, *Original Sin: The Use and Abuse of History in* Espinoza *and Beyond*, 22 RUTGERS J. L. & RELIGION 314, 329–31 (2022); *see also id.* at 334 ("[T]he vision of religious liberty endorsed in *Espinoza* was crafted by institutional actors and social movements, originally as one way to resist integration.").

40. Chris Reykdal (@chrisreykdal), TWITTER (Feb. 5, 2023, 5:11 PM), https://twitter.com/chrisreykdal/status/1622357386542616576.

history[41] and insisting that voucher programs "continue to foster school segregation."[42] Citing the Center for American Progress Report, they insisted that choice programs "diminish[] public schools' role as a foundation of our democracy, institutions in which children from all . . . races come together and form common bonds."[43] Separationist groups and public school advocacy organizations made similar arguments in their own friend-of-the-court filings.[44]

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41. *E.g.*, Amicus Curiae Brief of Tenn. Educ. Assoc. in Support of Respondents, Espinoza v. Mont. Dep't of Rev., 140 S. Ct. 2246 (2021) (No. 18-1195), 2019 WL 6169966, at *14 n.13 ("It is undeniable that in the South, court-ordered desegregation of public schools led to the development of 'segregation academies,' private schools that were intended to facilitate white flight from integrated public schools . . . It is perverse indeed to consider that vouchers or other comparable programs may be used to divert public funds from the public schools in order to prop up these academies."); *see also* Brief of Pub. Funds: Pub. Schs., Am. Fed'n of Teachers, Ky. Conference of the NAACP, Pastors for Children, Pastors for Ky. Children, and Southern Educ. Found. as Amici Curiae Supporting Appellees, Commonwealth ex rel. Cameron v. Johnson, 658 S.W.3d 25 (Ky. 2022) (Nos. 2021-SC-0518, 2021-SC-0519, 2021-SC-0520, 2021-SC-0522), 2022 WL 7597294, at *5 & n.14 [hereinafter Brief of Public Funds: Public Schools] ("The uncomfortable truth is that today's private school voucher programs 'have their roots in a history of racism and school segregation' as 'school vouchers became a popular tool for perpetuating the segregation the Court had ruled unconstitutional.'" (quoting Raymond Pierce, *The Racist History of "School Choice,"* FORBES (May 6, 2021, 2:41 PM), https://www.forbes.com/sites/raymondpierce/2021/05/06/the-racist-history-of-school-choice/?sh=e4e8f216795d)).

42. Brief of Pub. Funds: Pub. Schs., *supra* note 41, at *5; *see also id.* ("While today's voucher proponents no longer espouse segregationist goals or intent, these programs continue to have significant segregative effects.").

43. Brief of National Educ. Assoc. et al. as Amici Curiae in Support of Respondent, Carson v. Makin, 596 U.S 767 (2022) (No. 20-1088), 2021 WL 5098229, at *16 & n.8.

44. *E.g.*, Brief of Amici Curiae Freedom from Religion Found. and Center for Inquiry in Support of Respondents, Carson v. Makin, 596 U.S. 767 (2022) (No. 20-1088), 2021 WL 5107466, at *12–13 (arguing that "voucher programs are themselves born of bigotry and segregation" and that "racial discrimination . . . fueled the modern wave of private schools and the voucher schemes that now support them"); Brief of Amici Curiae Advancement Project et al., Carson v. Makin, 596 U.S. 767 (2022) (No. 20-1088), 2021 WL 5107474, at *18 (discussing segregation academies and arguing that "[t]he rise of private schools in the United States, including many private religious schools, was directly tied to the desegregation of public schools"); Brief of Amici Curiae Pub. Funds Pub. Schs. et al. in Support of Respondents and Affirmance, Educ. Freedom PAC v. Rogers, 516 P.3d 675 (Nev. 2022) (No. 84735), 2022 WL 4483732, at *19 ("The DOE further fails to address the segregative impacts of a proposed voucher program. Following *Brown v. Board of Education*, . . . southern states passed dozens of laws attempting to stifle racial integration, with private school voucher plans featuring prominently in this anti-integration legislation. Although today's voucher proponents no longer espouse a segregationist intent, voucher programs often have a segregative effect." (footnotes omitted)); Amici Curiae Brief of McEwen Plaintiffs in Support of Appellees, Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ., 2020 WL 5807636, No. M2020-

But opponents of choice did not stop at including these arguments as supplemental points, or to provide historical context, in amicus briefs. They also began framing legal claims that *turned on* the supposedly racist history and segregative effects of choice. In other words, they started challenging educational choice programs on those very bases.

Although the Equal Protection Clause might seem the obvious vehicle for such race-based legal challenges, for reasons discussed in Part III below, choice opponents have not framed them as equal protection claims. Instead, they have relied on the education articles of state constitutions, which address a state's responsibilities regarding public education.

Unlike the U.S. Constitution, which "is silent on the subject of education," every state constitution includes language concerning the provision of public education.[45] "Some state constitutions only require that a free, public or a common system of education be established and maintained,"[46] while others "employ[] terms like 'uniform,' 'thorough and efficient,' or 'high quality' to describe the type of education to be provided."[47]

Choice opponents have long relied on these provisions in attacking educational choice programs, but historically, the argument was not tied to race in any way. Rather, they argued that state education clauses act as a sort of ceiling on the educational opportunity that a state may provide its resident children, not a floor on which the state may build. The argument has essentially been an application of the *expressio unius est exclusio alterius*[48] canon of statutory construction:

00683-COA-R9CV (Tenn. Ct. App. Sept. 29, 2020), *aff'd in part and rev'd in part*, 645 S.W.3d 141 (Tenn. 2022) (No. M2020-00683-SC-R11-CV), 2020 WL 5370786, at *18 (arguing that "[t]he history of the private school voucher movement reveals its roots in efforts to preserve racial segregation").

45. SCOTT DALLMAN & ANUSHA NATH, FED. RESERVE BANK OF MINNEAPOLIS, EDUCATION CLAUSES IN STATE CONSTITUTIONS ACROSS THE UNITED STATES 1 (Jan. 8, 2020), https://www.minneapolisfed.org/~/media/assets/articles/2020/education-clauses-in-state-constitutions-across-the-united-states/education-clauses-in-state-constitutions-across-the-united-states.pdf?la=en.

46. *Id.* at 2.

47. Clint Bolick, *Constitutional Parameters of School Choice*, 2008 B.Y.U. L. REV. 335, 346 & n.70.

48. *Justia Law Dictionary* (Mar. 3, 2024), https://dictionary.justia.com/expressio-unius-est-exclusio-alterius#:~:text=Definition%20of%20%22expressio%20unius%20est%20exclusio%20alterius%22%20A,then%20the%20law%20doesn%27t%20cover%20the%20omitted%20issues ("A rule of legal interpretation that implies if a law specifically mentions one or more issues, but omits others of the same category, then the law doesn't cover the omitted issues").

that because the state constitution imposes a specific obligation on the state to provide for a system of *public* schools, the state lacks authority to provide for *private* educational options. Although choice opponents still press this argument, it has been rejected at virtually every turn.[49]

Notwithstanding their previous setbacks under state education clauses, choice opponents now appear to have settled on them as the legal hook for their "choice is racist" argument. They maintain that the clauses require the state to provide for a public education system that is diverse and free of segregation. But because, they allege, a disproportionate number of white students use educational choice programs to attend private schools, the percentage of minority students remaining in the public schools increases disproportionately relative to the racial make-up of the local communities in which those schools are situated. The solution to this racial imbalance, they maintain, is to enjoin the programs and deny all children (minorities included) the alternatives to public schools that the programs provide. Doing so, they insist, will restore an appropriate racial balance in the public school system.[50]

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49. *See, e.g.*, Schwartz v. Lopez, 382 P.3d 886, 897 (Nev. 2016) (rejecting the argument that "the public school system is the *only* means by which the Legislature could encourage education in Nevada"); Hart v. State, 774 S.E.2d 281, 289 (N.C. 2015) ("Article IX, Section 6 does not, however, prohibit the General Assembly from appropriating general revenue to support other educational initiatives."); Meredith v. Pence, 984 N.E.2d 1213, 1223 (Ind. 2013) ("The school voucher program does not replace the public school system, which remains in place and available to all Indiana schoolchildren in accordance with the dictates of the Education Clause."); Simmons-Harris v. Goff, 711 N.E.2d 203, 212 (Ohio 1999) (rejecting the proposition that "implicit within [the 'thorough and efficient' clause] is a prohibition against the establishment of a system of uncommon (or nonpublic) schools" by families using scholarships); Jackson v. Benson, 578 N.W.2d 602, 628 (Wis. 1998) ("[A]rt. X, § 3 provides not a ceiling but a floor upon which the legislature can build additional opportunities for school children in Wisconsin . . . ."); Davis v. Grover, 480 N.W.2d 460, 474 (Wis. 1992) ("[T]he uniformity clause requires the legislature to provide . . . a free uniform basic education. . . . [E]xperimental attempts to improve upon that foundation in no way denies any student the opportunity to receive the basic education in the public school system."). The one exception is *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), in which the Florida Supreme Court held that the state's constitutional obligation to provide for "a uniform, efficient, safe, secure, and high quality system of free public schools," Fla. Const. art. IX, § 1(a), "does not . . . establish a 'floor' of what the state can do to provide for the education of Florida's children" and, thus, "does not authorize additional equivalent alternatives." *Bush*, 919 So. 2d at 408.

50. As discussed below, such argument has been advanced in recent litigation under the education clauses of the Ohio and West Virginia Constitutions. Although it did not concern a state education clause, the Fifth Circuit's 2015 decision in *Brumfield v. Louisiana State Board of Education*, 806 F.3d 289 (5th Cir. 2015), also bears mentioning. The case was originally filed in 1971 as an equal protection challenge

For example, an ongoing challenge to Ohio's EdChoice voucher program filed by a coalition of public school districts alleges that the program violates the state constitutional provision requiring the legislature to provide for "a thorough and efficient system of common schools throughout the State,"[51] because the program "causes or exacerbates class and race-based segregation in Ohio's public schools."[52] The plaintiffs are relying on the report of education policy scholar Joshua Cowan, who opines that "the statewide share of white EdChoice users has steadily grown since 2014 even as the statewide share of white district students has held steady or even slightly declined."[53] Citing the experience of a small handful of school districts, the plaintiffs claim that "[a]s a result" of this supposedly "disproportionate percentage of non-minority students [who] have used EdChoice vouchers," "the percentage of minority students in many of Ohio's public school districts has increased disproportionately relative to the communities where they reside."[54] Cowan even predicts that "the fact that white students are disproportionately the beneficiaries of EdChoice expansion will in the long run create a separate, publicly funded sector for those white students."[55]

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to state aid for racially discriminatory and segregated private schools, and the federal courts retained jurisdiction over it for more than four decades. *Id.* at 291, 298. After Louisiana enacted a voucher program in 2012, the U.S. Department of Justice filed a motion in the case seeking a judicially ordered monitoring process to determine whether the voucher program would "'imped[e] desegregation in public schools that [voucher] students might have been assigned to.'" *Id.* at 294. The district court granted the requested order, but the Fifth Circuit reversed, concluding that the order fell outside the jurisdiction of the original case. *Id.* at 304. In so holding, the Fifth Circuit stressed that the voucher program "provide[d] aid to *students* rather than to *private schools*" and that, in any event, "[t]he only evidence before the trial court show[ed] that there ha[d] been no negative effects on the desegregation of Louisiana's public schools." *Id.* at 299.

51. OHIO CONST. art. VI, § 2.

52. Suppl. Compl. ¶ 164, Columbus City Sch. Dist. v. State of Ohio, No. PM-22CV000067 (Franklin Cnty. Comm. Pleas May 26, 2022) [hereinafter *Columbus City* Suppl. Compl.]; *see also* Pls.' Combined Mem. in Opp'n to Defs.' Mot. to Dismiss and Intervenors' Mot. for J. on the Pleadings at 29, Columbus City Sch. Dist. v. State of Ohio, No. PM-22CV000067 (Franklin Cnty. Comm. Pleas July 1, 2022) [hereinafter *Columbus City* Resp. Br.] ("Defendants insist on funding, at ever-increasing levels, the EdChoice Program, which causes and worsens segregation in Ohio's public schools.").

53. Report of Dr. Joshua Cowan at 8, Columbus City Sch. Dist. v. State of Ohio, No. PM-22CV000067 (Franklin Cnty. Comm. Pleas Dec. 12, 2023) [hereinafter Cowan Report].

54. *Columbus City* Suppl. Compl. ¶¶ 156, 157; *see also id.* ¶¶ 158–60.

55. Cowan Report, *supra* note 53, at 8.

Because "[t]he [Ohio] framers envisioned racially and ethnically diverse public classrooms,"[56] the schools district plaintiffs maintain, the state constitutional provision mandating "thorough and efficient" public schools (Article VI, Section 2) requires that those schools "provide a universally-available education to a diverse population, without regard to wealth, religion, race, ethnicity, or other immutable characteristics."[57] "[A]ny system that causes or worsens segregation," they argue, "offends this constitutional provision."[58]

While seemingly acknowledging that the EdChoice program is race *neutral* and that there is no discriminatory state action at all involved in it, the school districts insist that "[t]he presence or absence of state action is wholly irrelevant to [the state's] obligations under Article VI, Section 2."[59] "[S]tate action," they maintain, "is not a required element of a constitutional claim under Article VI, Section 2," because that provision "does not limit state power."[60] "Instead, it explicitly imposes an *affirmative obligation* on the State to secure a thorough and efficient system of common schools."[61] And this "affirmative constitutional obligation" requires the state "to correct and eliminate systems that contribute to segregation."[62]

While the school districts in the Ohio case have not (yet) invoked the history of vouchers in the post-*Brown* South, their supportive amici have. For example, a group of advocacy and legal services organizations opposed to educational choice programs has filed a brief discussing this history and arguing that "[t]he private school voucher movement is rooted in a history of efforts to preserve racial segregation."[63] Like the plaintiffs, they insist that the race-neutrality of modern choice programs like Ohio's is utterly irrelevant, because "even apparently race-neutral voucher programs can have the impact of

56. *Columbus City* Resp. Br. at 29; *see also Columbus City* Suppl. Compl. ¶ 153 ("Student diversity was a central feature of the common schools ideology.").

57. *Columbus City* Suppl. Compl. at ¶ 152.

58. *Columbus City* Resp. Br. at 29; *see also id.* at 31 ("Because a segregated system of schools can never be thorough and efficient, the State's continued funding of the EdChoice Program, which causes and worsens segregation and re-segregation, is unconstitutional."); *Columbus City* Suppl. Compl. ¶ 155 (alleging that "the segregation of schoolchildren by race and economic status" is "antithetical" to the requirements of the thorough and efficient clause).

59. *Columbus City* Resp. Br. at 31.

60. *Id.*

61. *Id* (emphasis added).

62. *Id.* at 30.

63. Br. of Amicus Curiae Ohio Advocacy and Legal Servies Organizations at 10, Columbus City Sch. Dist. v. State of Ohio, No. PM-22CV000067 (Franklin Cnty. Comm. Pleas July 1, 2022).

perpetuating segregation in education programs today," and "the EdChoice Program exacerbates race-based segregation in Ohio's public schools."[64] An amicus brief filed by the state's public school teachers' unions agrees, arguing that "[t]he framers of the Ohio Constitution envisioned racially and ethnically diverse classrooms in mandating the establishment of a system of common schools," and that "[t]he EdChoice Program promotes and exacerbates segregation of students by race and class."[65]

As noted above, the Ohio case is ongoing. In December 2022, the trial court denied a motion for judgment on the pleadings filed by a group of families who participate in the EdChoice program and intervened in the case to defend it.[66] According to the trial court, "[t]he question of whether a program creating a decrease in diversity at public schools is a violation of the Thorough and Efficient Clause appears to be one of first impression."[67] Acknowledging that "no court has ever applied this clause in the segregation context," the court allowed the claim to proceed.[68]

Educational choice opponents made similar arguments in another lawsuit filed in 2022: a challenge to West Virginia's Hope Scholarship Program, which provides students with state-funded savings accounts that can be used on a variety of educational expenses, including private school tuition. Like the school district plaintiffs in Ohio, they challenged the program under, among other things, a provision in the education article of the West Virginia Constitution that, like Ohio's, requires the legislature to "provide . . . for a thorough and efficient system of free schools."[69] Represented by the Education Law Center, a public school advocacy organization, they alleged that "vouchers segregate the most vulnerable students in public schools without sufficient resources to meet their elevated needs."[70] Specifically, they

64. *Id.* at 11, 13.

65. Br. of Amicus Curiae Ohio Education Association and Ohio Federation of Teachers in Support of Plaintiffs at 7, Columbus City Sch. Dist. v. State of Ohio, No. PM-22CV000067 (Franklin Cnty. Comm. Pleas July 1, 2022).

66. Decision and Entry on Defs.' Mot. for J. on the Pleadings, Columbus City Sch. Dist. v. State of Ohio, No. PM-22CV000067 (Franklin Cnty. Comm. Pleas Dec. 16, 2022) [hereinafter *Columbus City* Decision on Mot. for J. on the Pleadings].

67. *Id.* at 7; *see also id.* (stating that "this question has never been answered").

68. *Id.*

69. W. VA. CONST. art. XII, § 1.

70. Mem. of Law in Support of Mot. for Prelim. Inj. at 19, Beaver v. Moore, Nos. 22-P-24, 22-P-26, (Kanawha Cnty. Cir. Ct. Mar. 30, 2022); *see id.* at 13–14 ("[T]his Voucher Law will concentrate the most vulnerable and costly to educate

argued that the program "incentivizes more affluent students and those without elevated needs to leave the public schools."[71] "[W]hen people are given the choice," the plaintiffs maintained, "many choose away from poverty and people of color," and the program thus "silos" poor and minority students in the public schools.[72] In this way, according to the plaintiffs, the program "frustrates" the constitutional mandate to provide for a thorough and efficient system of public schools.[73]

In support of a motion for preliminary injunction, they submitted an affidavit from Dr. Christopher Lubienski, a professor of education policy at Indiana University, opining that voucher programs "may allow[,] if not incentivize discrimination, effectively limit access to the most vulnerable populations, sort students by social and academic characteristics and exacerbate segregation."[74] According to Lubienski, "even in means-tested voucher programs targeted at disadvantaged populations we see evidence that participation is not equally or effectively distributed," and "it tends to be the least disadvantaged families that participate."[75] He pointed to Indiana by way of example, asserting that as that state's "means-tested voucher program . . . has grown, the participation has shifted . . . to serve fewer minority and more higher-income students, turning into a public subsidy for middle-class families."[76] Lubienski maintained that these supposed segregative effects of voucher programs should "not be surprising, given that vouchers were initially proposed as a way to subsidize 'White Flight' academies seeking to avoid desegregation efforts in southern states."[77] For this last proposition, he cites the 2017 report from the Center for American Progress.[78]

As in Ohio, the plaintiffs in West Virginia received amicus support from educational choice opponents, including the NEA and AFT.

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students in public schools without sufficient resources to meet their elevated needs . . . .").

71. Pls.' Omnibus Reply to (1) Defs.' Opp'n and (2) Potential Intervenors' Opp'n in Support of Pls.' Mot. for Prelim. Inj. at 9, Beaver v. Moore, Nos. 22-P-24, 22-P-26 (Kanawha Cnty. Cir. Ct. June 29, 2022).

72. *Id.* at 9–10; *see also id.* at 4 ("[T]he West Virginia Constitution . . . did *not* set up a framework that allows . . . the poor, marginalized, and special needs children to be siloed in the public schools. . . .").

73. *Id.* at 9; Compl. ¶¶ 63–67, Beaver v. Moore, Nos. 22-P-24, 22-P-26 (Kanawha Cnty. Cir. Ct. June 29, 2022).

74. Aff. Dr. Christopher Lubienski ¶ 16, Beaver v. Moore, Nos. 22-P-24, 22-P-26 (Kanawha Cnty. Cir. Ct. Mar. 30, 2022).

75. *Id.* ¶ 17.

76. *Id.* ¶ 17.

77. *Id.* ¶ 19.

78. *Id.* ¶ 19.

Echoing the arguments of the plaintiffs and Lubienski, they claimed that "numerous studies of large-scale voucher programs in other countries 'suggests [sic] a tendency toward increased stratification on the dimensions of race/ethnicity and socioeconomic status' throughout the education systems in which the programs are implemented."[79] "Based on this dismal track record," the NEA and AFT observed, "academics have posited that 'a universal voucher system would undoubtedly harm large numbers of disadvantaged students.'"[80]

In the end, the plaintiffs' arguments in West Virginia failed; after the trial court held the program unconstitutional under, among other things, the constitutional clause requiring a "thorough and efficient" system of public schools, the West Virginia Supreme Court of Appeals reversed and upheld the program.[81] The court did not expressly address the segregation-based arguments asserted by the plaintiffs, but it rejected the argument that the state may "fund . . . *only* a thorough and efficient system of free schools."[82] Nothing in the relevant constitutional language, the court held, "prohibit[s] the Legislature from enacting educational initiatives in addition to its duty to provide for a thorough and efficient system of free schools."[83] In fact, the court noted that the constitution's education article contained other language providing that "[t]he Legislature shall foster and encourage . . . intellectual . . . improvement" and "shall, whenever it may be practicable, make suitable provision . . . for the organization of such institutions of learning as the best interests of general education in the state may demand."[84] "Other jurisdictions," the court noted, "have interpreted similar constitutional provisions to support holdings that their legislatures had the ability to fund non-public educational initiatives."[85]

Notwithstanding the failure of the "choice is racist" argument in West Virginia, the school district plaintiffs in Ohio are plowing ahead with it. And challenges to the slew of new choice programs that have been enacted over the last few years, if filed, will almost certainly

79. Brief Amici Curiae of Pastors for Children at al., State v. Beaver, 887 S.E.2d 610 (W. Va. 2002) (No. 22-616), 2022 WL 6562608, at *12 (quoting BRIAN P. GILL ET AL., RHETORIC VERSUS REALITY: WHAT WE KNOW AND WHAT WE NEED TO KNOW ABOUT VOUCHERS AND CHARTER SCHOOLS 188–91 (RAND Corp. eds., 2d ed. 2007).

80. *Id.* at *12 (quoting Helen F. Ladd, *School Vouchers: A Critical View*, 16 J. ECON. PERSPECTIVES 3, 21 (2002)).

81. State v. Beaver, 887 S.E.2d 610, 619 (W. Va. 2022).

82. *Id.* at 624–27.

83. *Id.* at 628.

84. *Id.* at 628 n.20 (citing W. VA. CONST. art. XII, § 12).

85. *Id.* (citing *Meredith*, 984 N.E.2d at 1222; *Schwartz*, 382 P.3d at 898).

include the argument as well. As discussed in Part III of this Article, this new attempt to weaponize the public education provisions of state constitutions is likely to face significant obstacles—and the same fate—as earlier attempts to weaponize Blaine Amendments. To understand why that is so, however, it is first necessary to check the premises of the "choice is racist" argument discussed above: namely, that modern choice programs are (1) inextricably linked with post-*Brown* Southern racism and (2) racially segregative in their actual effects.

II. THE FALSE PREMISES OF THE ARGUMENT

"As Americans debate [the educational choice] issue on the national level," the Center for American Progress urged in its 2017 report, "they must consider both the historical context and the actual impact of voucher programs."[86] Indeed, and any honest consideration of the historical context and actual impact exposes the "choice is racist" argument as false. The historical record is clear that the educational choice movement is grounded in classical liberalism and its values of individual liberty and equality, not racism, and that the use of vouchers in the post-*Brown* South, along with public school closures, to thwart integration was a bastardization of the very concept of choice—indeed, it was a *denial* of choice. The available empirical evidence, meanwhile, demonstrates that educational choice programs have integrative, not segregative, effects on the students who use the programs, as well as those who remain in the public schools.

A. Choice is not Rooted in Racism

Charles Barzun has cited the argument that modern-day educational choice programs are suspect due to their (supposedly) discriminatory origins as an example of the so-called "genetic fallacy": the "offer[ing] [of] an account of the history of some practice or rule as an effort to 'debunk' its current status or prominence."[87] But even assuming there is a proper role for such "genetic inference" in legal reasoning,[88] it is necessary to get the genes right if one is to draw any inferences from them. And those who assert the "school choice is racist" argument get them wrong. They ignore the true origins of choice, as well as its evolution over two and half centuries, and focus instead on

86. FORD, *supra* note 12, at 1.

87. Charles L. Barzun, *The Genetic Fallacy and A Living Constitution*, 34 CONST. COMMENT. 429, 431(2019) (citing FORD, *supra* note 12).

88. *Id.* at 433–34 (believing there can be appropriate roles).

a mutation of the concept in the post-*Brown* South. As discussed below—and at risk of belaboring the genetic metaphor—it was a mutation so destructive that it hindered reproduction and thankfully was eliminated from the population nearly as quickly as it appeared.

1. The Philosophical Origins of Choice

Educational choice is rooted in liberal thought—not the post-*Brown* South.[89] Indeed, parental choice in education can be found as a policy prescription in the work of Adam Smith and Thomas Paine, two of the foremost classical liberal influences on America's founders, as well as John Stuart Mill, who is regarded by many as the father of modern constitutional liberalism.[90]

In the *Wealth of Nations*, Smith argued that schools and teachers would only improve if they were forced to confront competition and the risk of loss.[91] He criticized the funding of schools and colleges through "public endowments" that detached school revenue and teacher salaries from the effectiveness of their instruction.[92] Such means of funding, he maintained, "diminished . . . the necessity of application"—that is, the need for effort—in teachers because "their subsistence" was "derived from a fund altogether independent of their success and reputation in their particular professions."[93]

"Smith propose[d] to remedy this situation by introducing competition and risk of loss."[94] He maintained that "allowing students 'to chuse [sic] what college they liked best' and to take their money (including their tax payments) with them would introduce competition and generate the solicitousness and attention to service from teachers that risk of loss induces."[95]

89. *See generally* Phillip W. Magness, *Myth: School Choice Has Racist Origins*, *in* SCHOOL CHOICE MYTHS 21–22 (Corey A. DeAngelis & Neal P. McCluskey eds., 2020) (discussing historical origins of the voucher concept).

90. *See* John Lawrence Hill, *The Father of Modern Constitutional Liberalism*, 27 WM. & MARY BILL RTS. J. 431, 435 (2018) (arguing that "no other thinker has had such a broad influence on our modern constitutional rights tradition").

91. James R. Otteson, *Adam Smith on Public Provision of Education*, 45 J. HIST. ECON. THOUGHT 229, 238–40 (2023).

92. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS V, 535, 588 (1776); *see also id.* at 590 (lamenting that Oxford's endowment system "necessarily attach[ed] a certain number of students to certain colleges, independent altogether of the merit of those particular colleges").

93. *Id.* at 588.

94. Otteson, *supra* note 91, at 239.

95. *Id.*

To be clear, Smith did not specifically propose a voucher system for elementary education. In fact, he seems to have believed that private elementary schools, funded entirely by private tuition, would be more responsive than—and, thus, preferable to—a system of government-run-and-funded schools or private schools whose students were supported, in part, by government funding.[96] But perhaps recognizing that complete reliance on private schools, whose students pay their own way, was neither politically palatable nor a viable solution for the indigent, Smith advocated for something short of that: "partially subsidized primary schooling."[97] Specifically, Smith called for the establishment "in every parish or district a little school," in which the teacher was "partly, but not wholly, paid by the public, because, if he was wholly, or even principally, paid by it, he would soon learn to neglect his business."[98] As Professor Otteson explains, such a system, in Smith's view, would "discipline[] students to seek out the best educational return on the investment of their scarce resources," and it would "discipline[] educators to tailor their offerings to student needs and to look for innovations that enhance the effectiveness of their instruction."[99]

A decade and a half after Smith proposed these policies to inject competition into education in *The Wealth of Nations*, Thomas Paine proposed a true voucher policy in *Rights of Man*. First, Paine advocated that government pay poor families "four pounds a year for every child under fourteen years of age."[100] While this payment was meant

96. *See* SMITH, *supra* note 92, at 591 ("Those parts of education, it is to be observed, for the teaching of which there are no public institutions, are generally the best taught."); *id.* at 630–31 ("The expense of the institutions for education . . . is likewise, no doubt, beneficial to the whole society, and may, therefore, without injustice, be defrayed by the general contribution of the whole society. This expense, however, might perhaps with equal propriety, and even with some advantage, be defrayed altogether by those who receive the immediate benefit of such education and instruction, or by the voluntary contribution of those who think they have occasion for either the one or the other."); *see also* Otteson, *supra* note 91, at 244 ("Smith . . . raises several reasons to be wary of public provision of education, he repeatedly extols private provision, and both in the opening and at the closing of his treatment he expresses an all-things-considered preference for private over public provision.").

97. Otteson, *supra* note 91, at 241 (emphasis omitted).

98. SMITH, *supra* note 92, at 605; *see also* Otteson, *supra* note 91, at 241 ("The only way to get teachers to pay attention primarily to students, Smith thinks, is to have the students pay them—and to have the proportion of their pay coming from students exceed what they receive from other sources.").

99. Otteson, *supra* note 91, at 243.

100. THOMAS PAINE, *RIGHTS OF MAN pt. 2, ch. 5 126 (1792); see also* CARA FITZPATRICK, THE DEATH OF PUBLIC SCHOOL: HOW CONSERVATIVES WON THE WAR OVER EDUCATION IN AMERICA 6 (2023) (discussing Paine's proposal).

to provide for material needs of these children beyond just an education, Paine would "enjoin[] the parents of such children to send them to school, to learn reading, writing, and common arithmetic; the ministers of every parish, of every denomination, to certify jointly to an office, for that purpose, that this duty is performed."[101] "By adopting this method," he maintained, "not only the poverty of the parents will be relieved, but ignorance will be banished from the rising generation, and the number of poor will hereafter become less, because their abilities, by the aid of education, will be greater."[102]

"After all [these] cases are provided for," Paine continued, "there will still be a number of families who, though not properly of the class of poor, yet find it difficult to give education to their children."[103] To ensure that they also could obtain an education, Paine proposed "[t]o allow for each of these children ten shillings a year for the expense of schooling, for six years each, which will give them six months schooling each year, and half a crown for paper and spelling books."[104]

And how would these children be educated? By privately hired educators. "Education, to be useful to the poor," Paine maintained, "should be on the spot; and the best method, I believe, to accomplish this, is to enable the parents to pay the expence themselves."[105] Paine explained that "[t]here are always persons of both sexes to be found in every village . . . capable of such an undertaking[,]" and he maintained that his proposed per-child amount would be enough to encourage establishment of schools for these children.[106] In this light, Paine maintained that his proposal would "answer[] two purposes, to [children] it is education, to those who educate them it is a livelihood."[107]

Liberal calls for vouchers in education continued throughout the 19th century. For example, in 1847, leading English voluntaryist and nonconformist Edward Baines wrote that if government was to be involved in education, it should not be in the provision *of* education, but rather the provision *for* education—specifically, of the poor.[108] He asserted that "provision for the education of the pauper class" would best

101. PAINE, *supra* note 100, at 126.
102. *Id.* at 126–27.
103. *Id. at 131.*
104. *Id. at 132.*
105. *Id.*
106. PAINE, *supra* note 100, at *132.*
107. *Id.*
108. EDWARD BAINES, JR., LETTERS TO THE RIGHT HON. LORD JOHN RUSSELL, FIRST LORD OF THE TREASURY, ON STATE EDUCATION 14 (1847) (emphasis omitted).

be made through "a weekly parochial allowance to pauper families for the payment of school pence, leaving the parents at liberty to choose the schools."[109]

The following decade, John Stuart Mill expressed similar sentiments in *On Liberty*. In the essay, Mill set forth his views regarding the respective role of the state and parents in education. He asserted:

> Hardly any one indeed will deny that it is one of the most sacred duties of the parents (or, as law and usage now stand, the father), after summoning a human being into the world, to give to that being an education fitting him to perform his part well in life towards others and towards himself.[110]

Mill believed that "if the parent does not fulfil this obligation, the State ought to see it fulfilled, at the charge, as far as possible, of the parent."[111]

But Mill did not believe that the state should be involved in the *provision* of education,[112] "in part because of the difficulties" that inevitably arise "about what the State should teach, and how it should teach, which now convert the subject into a mere battlefield for sects and parties[.]"[113] "A general State education is a mere contrivance for moulding people to be exactly like one another[,]" he argued, "and as the mould in which it casts them is that which pleases the predominant power in the government, . . . it establishes a despotism over the mind, leading by natural tendency to one over the body."[114] Thus, for Mill, "[a]n education established and controlled by the State should only exist, if it exist at all, as one among many competing experiments."[115]

Indeed, Mill posited that "[i]f the government would make up its mind to require for every child a good education, it might save itself the trouble of *providing* one."[116] "It might leave to parents to obtain the education where and how they pleased, and content itself with helping to pay the school fees of the poorer classes of children, and defraying the entire school expenses of those who have no one else to pay for them."[117] Such a system, Mill maintained, would give rise to

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109. *Id.*

110. JOHN STUART MILL, ON LIBERTY 189 (3rd ed. 1864).

111. *Id.*

112. *Id.* at 190 ("That the whole or any large part of the education of the people should be in State hands, I go as far as any one in deprecating.").

113. *Id.* at 189–90.

114. *Id.* at 190–91.

115. MILL, *supra* note 110, at 191.

116. *Id.* at 190 (first emphasis omitted).

117. *Id.*

an ample supply and diversity of educational options, "under the assurance of remuneration afforded by a law rendering education compulsory, combined with State aid to those unable to defray the expense."[118]

Mill's views loomed large (even if they did not prove victorious) in the debates over the proper role of the state in education in late 19th century England. English nonconformist minister James Harrison Rigg, for example, maintained that Mill had established "the true doctrine on the subject"; the state, according to Rigg, has "the duty . . . to enforce universally a certain minimum of education," as well as taking measures to "test[] and facilitat[e] the supply of education . . . by voluntary agencies," but "the less Government has to do with providing education itself the better."[119] William Allen Whitworth, a mathematician and Anglican priest, similarly called it a "fallacy" to say that "[i]f education is compulsory, the State must provide the schools."[120] He proposed a bill that would require "the guardians of the poor [to] pay to the governors of a school selected by the parents or guardians . . . one farthing for every attendance made by such child."[121]

English professor Charles Henry Schaible, meanwhile, invoked Mill in arguing that "funds [should] be raised by the State and the Parish conjointly, in addition to voluntary contributions, out of which small pecuniary compensation might be granted to those poor parents who, by sending their children to school, are deprived of part of their scanty income."[122] And English scholar David Kay likewise invoked Mill to assert that although it is "incumbent upon the Government to see that every one of its subjects receives an education suited to his or her character and circumstances, we do not consider that it is, in every

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118. *Id.* at 191.

119. JAMES H. RIGG, NATIONAL EDUCATION 217–18 (1873); *see also id.* (recognizing that "it may be necessary, also, for the Government to step in itself and take direct action towards supplying education in cases of educational destitution which cannot otherwise be met"); James H. Rigg, *Free Education*, in IV PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON EDUCATION 169, 173–74 (1884) (Richard Cowper ed.) (address delivered Aug. 6, 1884) ("[Mill] teaches that the less Government has to do with providing education itself the better . . . . We cannot doubt that Mr. Mill has in these passages laid down in general the true principles on which the relation of the State to the education of the people should be regulated . . . .").

120. W. ALLEN WHITWORTH, NOTES ON NATIONAL EDUCATION WITH THE PRINCIPAL PROVISIONS OF A SUGGESTED BILL 3 (1870) (reprinted letter to the editor of the *Liverpool Leader*).

121. *Id.* at 6.

122. CHARLES HENRY SCHAIBLE, THE STATE AND EDUCATION: AN HISTORICAL AND CRITICAL ESSAY 58–59 (2d ed. 1884).

case, the duty of the State, or for the advantage of education, that this be directly supplied, or even strictly controlled, by the State."[123] State-controlled and -provided education, Kay maintained, has a "tendency . . . to sink the individual in the mass"; it "tak[es] little account of individual peculiarities," "produc[es] a uniformity of mediocrity," weakens the "the power [and] influence of the parents" by taking "the direction of their children's education . . . out of their hands," and, by "do[ing] away with all private effort in teaching, . . . afford[s] little or no place for that healthy rivalry which is at the root of all true progress and all real advancement."[124]

It was this liberal intellectual tradition—not racist defiance of the United States Supreme Court—from which libertarian economist and Nobel laureate Milton Friedman drew for his 1955 essay *The Role of Government Education*, which is widely regarded as the foundational document of the modern educational choice movement.[125] In it, Friedman posited a system under which government could require a minimum level of education, but which government would "finance by giving parents vouchers redeemable for a specified maximum sum per child per year if spent on 'approved' educational services . . . from an 'approved' institution of their own choice."[126] "The educational services," Friedman continued, "could be rendered by private enterprises

123. DAVID KAY, EDUCATION AND EDUCATORS 238 (1883).

124. *Id.* 238–39.

125. Milton Friedman, *The Role of Government in Education*, in ECONOMICS AND THE PUBLIC INTEREST 123 (Robert A. Solo ed. 1955). Two years before Friedman published his essay, libertarian economist Frank Chodorov published an essay in *Human Events* arguing that public schools should be "put . . . into competition with free enterprise schools . . . by the remission to parents of the taxes they are compelled to pay to support politically-controlled schools, in an amount comparable to what they pay for private schooling." Frank Chodorov, *A Solution for the Public School System*, 10 HUMAN EVENTS 2 (Dec. 2, 1953). Chodorov had previously advanced the argument in a pamphlet titled, *Private Schools: The Solution to America's Educational Problem*, published by the National Council for American Education, in which he maintained: "Whatever kind of education the children get is paid for by the parents. If the parents do not like what they are involuntarily buying, the only thing for them to do is demand that their share of the bill be remitted to them so that they can patronize schools to their liking. They should be permitted to make a choice." Frank Chodorov, *Private Schools: The Solution to America's Educational Problem, in* FUGITIVE ESSAYS 240, 246 (Charles H. Hamilton, ed. 1980); *see also* https://hgarchives.files.wordpress.com/2015/03/private-schools-the-solution-to-america_s-educational-problem-new-york-national-council-for-american-education.pdf (copy of pamphlet in original form). Although the exact date of the pamphlet's publication is unclear, it was referenced in a June 1953 essay by an NEA official. *See* Robert A. Skaife, *The Sound and the Fury*, 34 PHI DELTA KAPPAN 357, 361 & n.14 (June 1953).

126. Friedman, *supra* note 125, at 127.

operated for profit, or by non-profit institutions of various kinds," and the "[t]he role of the government would be limited to assuring that the schools met certain minimum standards."[127]

Friedman recognized, however, some of the practical arguments against government's complete exit from its public schooling role; in some "small communities and rural areas," for example, he conceded that "the number of children may be too small to justify more than one school of reasonable size, so that competition cannot be relied on to protect the interests of parents and children."[128] His answer was to allow government to "continue to administer some schools" but also require that "parents who chose to send their children to other schools . . . be paid a sum equal to the estimated cost of educating a child in a government school, provided that at least this sum was spent on education in an approved school."[129] "The interjection of competition," Friedman explained, "would do much to promote a healthy variety of schools" and "introduce flexibility into school systems."[130] Echoing Smith's discussion of education in *Wealth of Nations*, Friedman also noted that it would "make the salaries of school teachers responsive to market forces" and "thereby give governmental educational authorities an independent standard against which to judge salary scales and promote a more rapid adjustment to changes in conditions of demand or supply."[131]

While Friedman's argument in *The Role of Government Education* was squarely rooted in and motivated by classical liberal principles and values, one cannot overlook the fact that the essay was published at precisely the time when Southern segregationists were beginning to advocate vouchers as part of the "massive resistance" to *Brown* and its mandate to integrate. Indeed, Friedman himself did not overlook the fact; he directly confronted it. In a footnote added to the essay shortly before it went to print, when Friedman first learned about the segregationists' embrace of the voucher concept,[132] he explained that the segregationists' embrace made him extremely uneasy; he "deplore[d] segregation and racial prejudice," and he recognized that

127. *Id.*
128. *Id.* at 130.
129. *Id.*
130. *Id.*
131. Friedman, *supra* note 125, at 130–31.
132. *Id.* at 131 n.2 ("Essentially this proposal—public financing but private operation of education—has recently been suggested in several southern states as a means of evading the Supreme Court ruling against segregation. This fact came to my attention after this paper was essentially in its present form.").

"most readers" would view the segregationists' embrace of vouchers as "a particularly striking . . . defect" with his proposal.[133]

Friedman, however, did not believe it was "an appropriate function of the state to try to force individuals to act in accordance with my—or anyone else's—views, whether about racial prejudice or the party to vote for."[134] "The appropriate activity for those who oppose segregation and racial prejudice," he maintained, "is to try to persuade others of their views . . . . "[135] He therefore disfavored conditioning vouchers on parents' use of them at nonsegregated schools, just as he did at segregated schools. A virtue of his plan, according to Friedman, was that it "makes available a third alternative."[136] He added, however, that if his "only choice [wa]s between forced nonsegregation and forced segregation" and he had to "choose between these evils," he "would choose the former as the lesser."[137] Two decades later, in *Runyon v. McNary*,[138] the U.S. Supreme Court made the decision for him, holding that 42 U.S.C. § 1981 barred private schools from discriminating based on race. Shortly thereafter, Friedman and his wife Rose wrote that "[d]iscrimination under a voucher plan can be prevented at least as easily as in public schools by redeeming vouchers only from schools that do not discriminate."[139]

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133. *Id.*

134. *Id.*

135. *Id.*

136. Friedman, *supra* note 125, at 131 n.2; *see also* MILTON FRIEDMAN, *THERE'S NO SUCH THING AS A FREE LUNCH* 277 (1975) (arguing that vouchers would decrease "racial and class separation in schools," reduce "racial conflict," and lead to a more integrated society: "Integration has been most successful when it has been a matter of choice not coercion.").

137. Friedman, *supra* note 125, at 131 n.2; *see also* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 117 (40th anniversary ed. 2020) ("[S]chooling is, under present circumstances, primarily operated and administered by government. This means that government must make an explicit decision. It must either enforce segregation or enforce integration. Both seem to me bad solutions. Those of us who believe that color of skin is an irrelevant characteristic and that it is desirable for all to recognize this, yet who also believe in individual freedom, are therefore faced with a dilemma. If one must choose between the evils of enforced segregation or enforced integration, I myself would find it impossible not to choose integration . . . [T]he appropriate solution that permits the avoidance of both evils . . . is to eliminate government operation of the schools and permit parents to choose the kind of school they want their children to attend. In addition, of course, we should all of us, insofar as we possibly can, try by behavior and speech to foster the growth of attitudes and opinions that would lead mixed schools to become the rule and segregated schools the rare exception.").

138. *See* Runyon v. McNary, 427 U.S. 160, 186 (1976).

139. MILTON & ROSE FRIEDMAN, FREE TO CHOOSE 165 (1980). "A more difficult problem," they acknowledged, was "the possibility that voluntary choice with

Other contemporaneous calls for educational choice from the classical liberal perspective echoed Friedman's reasoning. For example, in 1960, Austrian School economist Friedrich Hayek proposed "giving . . . parents vouchers covering the cost of education of each child which they could hand over to schools of their choice."[140] Such a policy, Hayek observed, would "defray the costs of general education out of the public purse without" having to "maintain[] government schools."[141] Like Friedman, Hayek did not view vouchers as a means for maintaining segregation or skirting the U.S. Supreme Court. Rather, one of the benefits of increasing parental power over education for Hayek was the concomitant reduction in governmental power, and it was the governmental monopoly of education, he observed, that had led to the South's segregated education system in the first place. "[W]e must remember," Hayek warned, "that it is the provision of education by government which creates such problems as that of the segregation of Negroes in the United States."[142] Such problems, he insisted, "are bound to arise where government takes control of the chief instruments of transmitting culture."[143]

2. White Progressive & Black Embrace of Choice

Others who did not necessarily share Fredman's and Hayek's libertarian leanings nevertheless saw the same promise of vouchers for overcoming, rather than perpetuating, racial discrimination as the two economists did. James Forman, for example, has explored "the left's substantial—indeed, [he] would say leading—contribution to the

vouchers might increase racial and class separation in schools and thus exacerbate racial conflict and foster an increasingly segregated and hierarchical society." *Id.* On this question of the possibility of *de facto* discrimination, Milton and Rose maintained that a "voucher plan would have precisely the opposite effect; it would moderate racial conflict and promote a society in which blacks and whites cooperate in joint objectives, while respecting each other's separate rights and interests." *Id.*

140. F.A. Hayek, *The Constitution of Liberty* (1960), *in* THE COLLECTED WORKS OF F. A. HAYEK, THE CONSTITUTION OF LIBERTY: THE DEFINITIVE EDITION 504 (Ronald Hamowy ed. 2012).

141. *Id.* at 503–04. Like Friedman, Hayek recognized that "[i]t may still be desirable that government directly provide schools in a few isolated communities where the number of children is too small (and the average cost of education therefore too high) for privately run schools." *Id.* at 504. "But with respect to the great majority of the population," he maintained, "it would undoubtedly be possible to leave the organization and management of education entirely to private efforts, with the government providing merely the basic finance and ensuring a minimum standard for all schools where the vouchers could be spent." *Id.*

142. *Id.* at 502.

143. *Id.*

development of school choice."[144] He points to voucher proposals in the 1960s by sociologist and former *New Republic* editor Christopher Jencks, as well as Ted Sizer, dean of the Harvard Graduate School of Education, and then-student Phillip Whitten, all of whom were "clearly motivated by integrationist and equity concerns—the same impulses that had led to *Brown*."[145] Progressive Berkeley law professors John Coons and Stephen Sugarman likewise advocated—through scholarship,[146] public interest litigation,[147] and political advocacy[148]—for vouchers as a means of empowering black and other marginalized families and advancing the cause of integration. "Principal among" the reasons why such "progressives" endorsed vouchers, Forman observes, "was anger at how inner-city schools had failed black children."[149]

Forman notes that educational choice also has "roots" in black nationalism and the "community control" movement over public

144. James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287, 1288 (2005).

145. *Id.* at 1290–91; *see also id.* at 1309–12; FITZPATRICK, *supra* note 100, at 60–62, 70–71 (discussing Jencks and Sizer proposals). Jencks advocated for vouchers in outlets such as *Dissent*, *Public Interest*, and *New York Times Magazine*, and in 1969 he received a grant from the Johnson administration to design a voucher plan. *Id.* at 60–62, 75–76; Forman, *supra* note 144, at 1309, 1311–12. Sizer and Whitten made their proposal as part of a *"Poor Children's Bill of Rights"* published in *Psychology Today* in 1968. *Id.* at 1309–10 & n.127; FITZPATRICK, *supra* note 100, at 70–71 & n.19.

146. *See, e.g.*, JOHN E. COONS & STEPHEN D. SUGARMAN, EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL 109–30 (1978). For a collection of Coons's written advocacy for educational choice, *see* JOHN E. COONS, THE CASE FOR PARENTAL CHOICE (Nicole Stelle Garnett et al. eds. 2023).

147. Coons and Sugarman were instrumental in the *Serrano* line of cases, which challenged the constitutionality of California's public school funding scheme and proposed vouchers as one possible remedy. *See* Serrano v. Priest, 487 P.2d 1241,1266 (Cal. 1971) (reversing dismissal of challenge to California public school funding scheme under equal protection provisions of the U.S. and California Constitutions; noting the trial court had found "vouchers" to be one possible remedy for the constitutional deficiency); Serrano v. Priest, 557 P.2d 929, 957-958 (Cal. 1976) (invalidating funding scheme under equal protection provisions of the California Constitution); Serrano v. Priest, 569 P.2d 1303, 1317 (Cal. 1977) (affirming attorney fee award). Coons later recounted, regarding oral argument in the second case: "In the course of argument, defense counsel cited our 1971 book as evidence of our intent to introduce 'vouchers' to California. I conceded to the justices that the judicial modesty of fiscal neutrality would indeed allow such a legislative remedy. That was the point of it all—to open legislative creativity." John E. Coons*, Private Wealth and Public Schools*, 4 STAN. J. C.R. & C.L. 245, 262 n.48 (2008) (citation omitted).

148. *See* FITZPATRICK, *supra* note 100, at 86 (discussing Coons and Sugarman's effort to "put a measure on the 1980 ballot in California that would restructure public education with a voucher model").

149. Forman, *supra* note 144, at 1309.

schools in the late 1960s.[150] Cara Fitzpatrick, meanwhile, has demonstrated the significant role that black activists have played in advocating for educational choice from the 1960s through the present. For example, psychologist Kenneth Clark, on whose groundbreaking research the U.S. Supreme Court relied in *Brown v. Board of Education*, made a full-throttle argument for competition in education in a 1968 essay in the *Harvard Educational Review*: "As long as local school systems can be assured of state aid and increasing federal aid without the accountability which inevitably comes with aggressive competition," Clark maintained, "it would be sentimental, wishful thinking to expect any significant increase in the efficiency of our public schools."[151] "American industrial and material wealth was made possible through industrial competition," Clark added, and "America's educational health may be made possible through educational competition."[152] Although the precise means that Clark outlined in that essay for injecting competition might be viewed as more akin to today's charter schools than a conventional voucher plan, he seems to have supported the latter, as well.[153]

Many black activists and politicians, meanwhile, led advocacy efforts for vouchers as a solution to segregation and inadequate schooling of black children from the 1970s onward. Dr. Babette Edwards pushed for vouchers for students in Harlem and advocated the addition of educational choice to the national platforms of the Democratic and Republican parties in the 1970s.[154] In the late 1980s, Wisconsin legislator Polly Williams and activist (later superintendent of Milwaukee Public Schools) Dr. Howard Fuller led the push for the first modern voucher program, the Milwaukee Parental Choice Program, which was adopted in 1990 with the support of nearly all of Wisconsin's black legislators.[155]

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150. *Id.* at 1288, 1305–09 & nn.115, 116.

151. Kenneth B. Clark, *Alternative Public School Systems*, 38 HARV. EDUC. REV. 100, 111 (1968).

152. *Id.* at 113.

153. *See* Peter A. Jannsen, *Education Vouchers*, AM. EDUC., Dec. 1970, at 9 ("The voucher system is supported by . . . Kenneth Clark . . . ."); *Schools Make News*, SATURDAY REV., Jan. 24, 1970, at 65 ("The voucher plan has been advocated for some time by a variety of education critics, including . . . Kenneth Clark . . . .").

154. BRITTNEY LEWER, *Pursuing "Real Power to Parents": Babette Edwards's Activism from Community Control to Charter Schools*, *in* EDUCATING HARLEM: A CENTURY OF SCHOOLING AND RESISTANCE IN A BLACK COMMUNITY 276, 280, 282 (Ansley T. Erickson & Ernest Morrell eds., 2019).

155. *See* FITZPATRICK, *supra* note 100, at 98–118.

Cleveland City Council member Fannie Lewis championed adoption of the Cleveland Scholarship Program in the mid-1990s.[156] District of Columbia activist Virginia Walden Ford, Councilmember Kevin Chavous, Mayor Anthony Williams, and Board of Education President Peggy Cooper Cafritz were instrumental in convincing Congress to adopt the D.C. Opportunity Scholarship Program in 2004.[157]

This tradition continues today in the impassioned pleas of people like Pennsylvania Senator Anthony Williams and Nebraska Senator Justin Wayne, who are motivated in their advocacy by the (still) terrible state of education for black children in the public school system.[158]

To be sure, not all of these progressive and black champions of educational choice have been motivated in their advocacy by the classical liberal philosophy of Paine, Smith, and Mill. And not all—if any—of their proposals have mirrored that of Friedman in calling for universal eligibility and light regulatory touch.

But just as sure, not one of these advocates has been motivated by the racism of the public school and other government officials in the post-*Brown* South, and not one of their proposals has been a scheme to maintain a segregated school system, whether public or private. The insistence of today's public-school establishment that educational choice is rooted in bigotry is a slap in the face to these black advocates, who are horrified with the state of public education for black Americans. It is a slap in the face to the 20th-century progressives such as Jencks, Sizer, Whitten, Coons, and Sugarman, who advocated for choice out of an abiding concern for the disadvantaged. And it is a slap in the face to those who, for two and a half centuries, have championed choice out of a sincere commitment to the classical liberal principles that our nation at least professes to value—first among which is equality.[159]

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156. *Id.* at 168–71.

157. *Id.* at 249–52, 255.

158. *See, e.g.*, @PAcatholic, TWITTER (June 27, 2023, 4:19 PM), https://twitter.com/PAcatholic/status/1673788259766349827 (committee comments of Sen. Williams); @PAcatholic, TWITTER (June 29, 2023, 8:12 PM), https://twitter.com/PAcatholic/status/1674571639093067780 (speech of Sen. Williams); Corey A. DeAngelis, school choice evangelist (@DeAngelisCorey), TWITTER (Jan. 11, 2022, 3:27 PM), https://twitter.com/DeAngelisCorey/status/1480999937844330501 (floor speech of Sen. Wayne); Corey A. DeAngelis, school choice evangelist (@DeAngelisCorey), TWITTER (Apr. 28, 2021, 7:02 PM), https://twitter.com/DeAngelisCorey/status/1387542672911474688 (floor speech of Sen. Wayne).

159. Of course, supporters have come to the cause of choice for other reasons and from other perspectives not discussed above. Perhaps the most notable example is political scientist Father Virgil Blum, who began advocating for choice around the same time as Friedman primarily out of religious liberty concerns. *See* FITZPATRICK,

It is easy to cast judgment on Friedman, the widely recognized father of the modern choice movement, for not readily embracing non-segregation as a condition of his voucher proposal in 1955—just as easy as it is to cast judgment on the U.S. Supreme Court for not prohibiting racial discrimination in private schools for another two decades.[160] But to charge Friedman—or those who, today, advocate for educational choice based on the same liberal traditions that motivated him—with carrying the torch of the post-*Brown* South is appalling. No doubt, some of those post-*Brown* segregationists attempted to embrace Friedman as an ally in their cause. But Friedman never embraced them.

So, no, Randi Weingarten was not correct when she claimed that "[t]he 'real pioneers' of school choice were white politicians who resisted school integration."[161]

*3. Pre-*Brown *Choice Programs*

Were this two-and-a-half century tradition of educational choice as a *concept* not enough to refute the racist origin story peddled by opponents of choice today, then it is worth noting that choice programs actually *operated* in this country well before Southern segregationists hijacked the concept for devious ends in the wake of *Brown*.

In the founding era and throughout much of the 19th century, government at all levels—federal, state, and local—routinely "provided financial support to private schools" for the education of, among others, the poor, Native Americans, residents of the District of Columbia, and the freedmen.[162] That support often took the form of direct *institutional* assistance: either monetary appropriations or land grants to the schools themselves.[163]

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supra note 100, at 33–37. Blum, like Friedman, rejected Southern views on race. *Id.* at 37. In fact, the group he co-founded, Citizens for Educational Freedom, filed an amicus brief in the Supreme Court opposing Prince Edward County's public-school-closure-and-voucher scheme to circumvent *Brown*. The brief argued that "[n]o person in the United States should, on the ground of race, color, religion or national origin, be excluded from participation in, or denied the benefit of, any educational program providing government financial assistance." Brief of Citizens for Educational Freedom as Amicus Curiae 4–5, Griffin v. Cnty. Sch. Bd., 377 U.S. 218, p. 4–5 (1964) (No. 592), https://ia800801.us.archive.org/21/items/CitizensForEducationalFreedomAmicusCuriaeGriffin/Citizens_for_Educational_Freedom_amicus-curiae_griffin.pdf.

160. *See generally* Runyon v. McCrary, 427 U.S. 160 (1976).

161. Weingarten, *supra* note 29.

162. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2258 (2020).

163. *See* Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 U. PA. L. REV. 111, 150–69 (2020); *see generally*

But sometimes support was provided not for private schools, but for the children who attended them—that is, in a form functionally equivalent to modern educational choice programs. Aid was provided for the benefit of *students*, whose parents "in turn, direct[ed] [the] aid to [private] schools wholly as a result of their own genuine and independent private choice."[164]

For example, in 1802, the Pennsylvania legislature passed what has been described as likely "the country's first school voucher program."[165] The law charged the guardians or overseers of the poor in municipalities across the Commonwealth with "ascertain[ing] the names of all those children whose parents or guardians they shall judge to be unable to give them necessary education."[166] The guardians were required to notify such parents that "provision is made by law for the education of their children . . . and that they have a full and free right to subscribe, at the usual rates, and send them to any school in their neighborhood."[167] Schools, meanwhile, were required to notify the guardians of the number of such students they educated and the rate of tuition in order to receive payment.[168] And the municipalities, in turn, were required to levy taxes to pay for the "schooling, school books and stationary" of these students, "together with the sum of five per centum for [the schools'] trouble."[169]

In 1855, Texas Governor Elisha Pease, recognizing the failure of efforts to establish, as well as popular opposition to, a district system of public schools[170], called for the legislature to enact a voucher-like program:

> [I]n lieu of that part of the present law which requires a division of the counties into districts, let us declare all schools that may be kept in the State public schools, and allow the fund distributed to each county, to be distributed under the orders of

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RICHARD J. GABEL, PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS 147–262 (1937).

164. Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) (distinguishing individual aid programs in education from institutional aid programs).

165. Storslee, *supra* note 163, at 164.

166. Act of Mar. 1, 1802, ch. MMCCXLVII, § 1, 17 PA. STATUTES AT LARGE 81, 81 (1915).

167. *Id.*

168. *Id.*

169. *Id.* § 2.

170. *See* Message of Gov. E.M. Pease to Texas Legislature (Nov. 5, 1855), reproduced in *Education in Texas*, UNIV. OF TEX. BULLETIN EDUC SERIES NO. 2 280 (April 25, 1918) [hereinafter Message of Gov. Pease]; FREDERICK EBY, THE DEVELOPMENT OF EDUCATION IN TEXAS 120–21 (1925).

> the county court, to such teachers as the parents and guardians of the children may choose to employ for their education.[171]

In 1856, the Texas legislature did just that. It enacted a law appropriating to the counties of the state, "according to the number of scholastic population in each county," "the interest arising from all monies set aside for school purposes."[172] These funds were "for the use and benefit of the children of said counties, between the age of six and eighteen years," and the county courts were required to apportion them "among the children between the ages of six and eighteen years, who may attend *any school* in their respective counties."[173] Children whose parents could afford to pay their entire tuition, however, were not entitled to any money under the act. The law was amended in 1858 to more clearly prioritize the poor, orphans, and children of widows, with other students receiving a pro rata share of remaining funds.[174]

Dr. Frederick Eby, a professor of education at the University of Texas, later described this system as one of "educational individualism."[175] "Throughout the entire state and with but few exceptions," he noted, "the people resorted to the use of private schools."[176]

Later in the 19th century, the oldest voucher programs still in operation were adopted in Vermont and Maine. Confronted with the difficulty of establishing and sustaining public schools in sparsely populated rural communities, legislators in these states created what are commonly referred to as town "tuitioning" programs.[177]

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171. Message of Gov. Pease, *supra* note 170, at 280; *see also* GABEL, *supra* note 163, at 430–32 (discussing message).

172. 1856 Tex. Gen. Laws 107–08, §§ 1, 3 [hereinafter An Act Providing for the Support of Schools]. Another provision of the act made clear that the scholastic population to which the law applied included "free white children" only.

173. *Id.* §§ 1, 4 (emphasis added). Presumably because the state constitution required the legislature to "make suitable provision for the support and maintenance of public schools," TEX. CONST. OF 1845 art. X, § 1, every school that a child attended under the law was declared to be a "public school." An Act Providing for the Support of Schools, § 4; *see also* 1858 Tex. Gen. Laws 108–09, § 1 [hereinafter Act of Aug. 29, 1858].

174. Act of Aug. 29, 1858, § 1; *see also* GABEL, *supra* note 163, at 432 n.103. The prior act had included a prioritization in less clear language. *See* An Act Providing for the Support of Schools, § 8.

175. EBY, *supra* note 170, at 121.

176. *Id.* ("Any group of people anywhere were permitted to set up a school, large or small, and to employ a teacher at such a price and length of service as they pleased. They drew the state per capita for each child who attended the school.").

177. *See* John Maddaus & Denise A. Mirochnik, *Town Tuitioning in Maine: Parental Choice of Secondary Schools in Rural Communities*, 8 J. RSCH. RURAL EDUC. 27, 27–28 (1992).

The Vermont legislature enacted its law in 1869. It allowed school districts to, rather than operate a public high school, pay tuition for their resident students to attend private academies in the town or an adjoining town.[178] The law was changed in 1894 to allow for towns without a local schooling option to provide for education of high-school-aged students in *any* town, inside Vermont or not.[179] And by 1927, the legislature allowed towns to *both* maintain a public high school *and* pay tuition for students to attend "a high school or academy to be selected by the parents or guardian of the pupil, within or without the state."[180]

Next door in Maine, that state's legislature enacted a law in 1873 offering state funding to towns to encourage them to provide for the free secondary education of their residents.[181] Towns could do so by establishing their own public high schools or by "contract[ing] with and pay[ing] . . . any academy in said town, for the tuition of scholars within such town."[182] Because many small towns still lacked a free public high school by the turn of the 20th century, the legislature enacted a law in 1903 that guaranteed every child a free secondary education. Specifically, the law provided that if a student resided "in any town which does not support and maintain a free high school giving at least one four years' course," the student could "attend any school in the state which does have such a four years' course and to which he may gain entrance."[183] "In such case," the law provided, "the tuition of such youth, not to exceed thirty dollars annually . . . , shall be paid by the town in which he resides as aforesaid; and towns shall raise

178. Act 9 (An Act to Authorize School Districts to Send Scholars to Academies in Certain Cases Named therein), 1869 Vt. Acts & Resolves 13–14, § 1.

179. 1892 Vt. Acts & Resolves 18–19, § 1 (providing for education "in the high schools[,] academies[,] or seminaries of the town, and if no such schools exist in said town, . . . in those of some other town"); *see also* 1902 Vt. Acts & Resolves 39, § 3 ("When no high school or academy exists within the town, the board of school directors shall provide such instruction for such pupils in the high schools or academies of other towns within or without the state.").

180. 1927 Vt. Acts & Resolves 40, § 1 ("Each town district shall maintain a high school or furnish higher instruction, as hereinafter provided, for its advanced pupils at a high school or academy to be selected by the parents or guardian of the pupil, within or without the state, or said board may both maintain a high school and furnish higher instruction elsewhere as herein provided as in the judgment of the board of school directors may best serve the interests of the pupils . . . .").

181. An act in aid of free high schools, ch. 124, ACTS AND RESOLVES OF THE FIFTY-SECOND LEGISLATURE OF THE STATE OF MAINE 78–81 (Feb. 24, 1873) [hereinafter An act in aid of free high schools]; *see also* Maddaus & Mirochnik, *supra* note 177, at 31.

182. An act in aid of free high schools, § 1.

183. ME. REV. STAT. ANN. ch. 15, § 63 (1903).

annually, as other school moneys are raised, a sum sufficient to pay such tuition charges."[184]

These early laws form the basis for Vermont and Maine's current tuitioning, or voucher, programs, which encompass both elementary and secondary education.[185] In fact, it was the exclusion of religious options in Maine's program that the United States Supreme Court invalidated in *Carson v. Makin*.[186]

State legislatures continued to adopt choice programs in the first half of the 20th century. In 1930, for example, the Virginia legislature adopted a grant program for orphans of Virginia soldiers, sailors, and marines who had died in World War I.[187] Although it was at first limited to use for fees, room, board, books, and supplies at *state* high schools and colleges, it was gradually expanded to: (1) encompass World War II orphans; (2) allow use at "at any" high school or college, public or private, approved by the superintendent of public instruction; and (3) cover tuition.[188] It was this noble program that the state later bastardized into a scheme to avoid *Brown*.[189]

Fast-forward a couple of decades to 1955, the same year that Milton Friedman published *The Role of Government in Public Education*, his seminal essay advocating for a voucher policy. That year, Minnesota adopted a *universal* educational choice program. Although not a voucher program, it provided a tax deduction to any family in the state for tuition expenses incurred in the education of their children.[190]

These programs make clear that just as educational choice as a *concept* did not begin in the post-*Brown* South, nor did educational

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184. *Id.*

185. *See* ME. STAT. ANN. tit. 20-A, § 5204(4) (West 2024) (secondary tuitioning); ME. STAT. ANN. tit. 20-A, § 5203(4) (West 2024) (elementary tuitioning); VT. STAT. ANN. tit. 16, § 822(a)(1), (c)(1)(B) (West 2024) (secondary tuitioning); VT. STAT. ANN. tit. 16, § 821(a)(1), (d) (West 2024) (elementary tuitioning).

186. 596 U.S. 767, 789 (2022). Prior to 1981, sectarian schools were free to participate in the program, but the state began excluding them after Maine's attorney general opined that their inclusion violated the federal Establishment Clause. *Id.* at 774–75.

187. Almond v. Day, 89 S.E.2d 851, 853 (Va. 1955).

188. *Id.* at 852–54 & nn.1–3.

189. *See* Griffin v. Cnty. School Board, 377 U.S. 218, 221 n.1 (1964) (noting that the "tuition grants" used to avoid integration "originated in 1930 as aid to children who had lost their fathers in World War I").

190. MINN. LAWS 1955, ch. 741, § 1 ("The following deductions from gross income shall be allowed in computing net income: . . . (19) [t]he amount he has paid to others for tuition of each dependent and the cost of transportation of each dependent in attending an elementary or secondary school; provided that the deduction for each dependent shall not exceed $200.").

choice as a *practice*. The origin story of the "choice is racist" crowd, in other words, is false.

4. Southern Segregationists Bastardize the Choice Idea

One final point regarding the first premise of the "choice is racist" argument (that modern choice programs are rooted in post-*Brown* attempts to avoid integration) bears mentioning: the Southern schemes to which choice opponents try to link modern programs were not choice programs at all; they were bastardizations of the very idea of choice. In fact, they *denied* choice. They did this through the dual means of: (1) tuition grants for use at private schools that were legally permitted to, and did, discriminate based on race; and (2) *closure* of public schools that were legally prohibited from discriminating based on race. The effect was a denial of choice—*any* choice—for black students. As the U.S. Supreme Courts and lower courts that invalidated such schemes expressly recognized, the very purpose was to perpetuate the entrenched system of state-supported segregation by restricting—not expanding—educational options.[191]

For example, the Virginia legislature enacted a series of laws in the 1950s to defund public schools that integrated, grant the governor power to close such schools, and provide impacted students vouchers that could be used to attend segregated private schools.[192] Governor J. Lindsay Almond, Jr., in fact, ordered the closure of public schools in Front Royal, Warren County, Charlottesville, and Norfolk following judicial desegregation orders.[193] And, as noted in Part I above, Prince

191. *See, e.g.*, *Griffin*, 377 U.S. at 230–31 ("Closing Prince Edward's schools bears more heavily on Negro children in Prince Edward County since white children there have accredited private schools which they can attend, while colored children until very recently have had no available private schools, and even the school they now attend is a temporary expedient. . . . [T]he record . . . could not be clearer that [the] public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school."); Allen v. Cnty. Sch. Bd., 198 F. Supp. 497, 503 (E.D. Va. 1961) ("By closing the public schools, the Board of Supervisors have effectively deprived the citizens of Prince Edward County with a freedom of choice between public and private education. County tax funds have been appropriated (in the guise of tuition grants and tax credits) to aid segregated schooling in Prince Edward County. That, to say the least, is circumventing a constitutionally protected right.").

192. FITZPATRICK, *supra* note 100, at 27.

193. *Id.* at 32, 33, 38; *see also id.* at 51 (discussing decision of officials in Prince Edward County to shutter public schools following judicial desegregation order).

Edward County closed its *entire* public school system rather than integrate.[194]

Governor Orval Faubus of Arkansas likewise asked the state's legislature for—and received—emergency powers to close any public school under a federal desegregation order and provide grants for private school tuition to affected students.[195] He went on to use these powers in Little Rock after the U.S. Supreme Court, in *Cooper v. Aaron*,[196] required the immediate desegregation of a public high school in the city.[197]

Meanwhile, voters in South Carolina before *Brown*, and in Georgia immediately after the decision, approved state constitutional amendments to end the state's constitutional obligation to provide a public school system.[198] In fact, "[w]ithin four years of the *Brown* ruling, at least seven southern states had taken steps to abandon public schools if necessary" to avoid integration.[199]

What's more, oftentimes the shuttered public school buildings and resources were leased—or simply turned over—to the new, segregated "private" schools.[200] For example, the U.S. Supreme Court invalidated a Louisiana law that, in addition to providing vouchers for students to attend private schools, "provide[d] a means by which public schools under desegregation orders [could] be changed to 'private' schools operated in the same way, in the same buildings, with the same furnishings, with the same money, and under the same supervision as the public schools."[201] "[A]s part of the plan, the school board of the parish where the public schools ha[d] been 'closed' [was] charged

194. *See id.* at 27–28, 51.

195. *See generally* Orval Faubus, *Orval Faubus Speech, September 1958*, LEARNING FOR JUSTICE, https://www.learningforjustice.org/classroom-resources/texts/orval-faubus-speech-september-1958 (last visited Mar. 21, 2024).

196. 358 U.S. 1, 4 (1958).

197. *See* FITZPATRICK, *supra* note 100, at 31–32.

198. *See id.* at 18–20.

199. *Id.* at 24.

200. *See*, *e.g.*, 117 CONG. REC. 10,762 (Apr. 19, 1971) (statement of Sen. Mondale) ("There has been testimony that some schools have taken public property and given it away to segregated private academies."); *Segregation Academies and State Action*, *supra* note 27, at 1438 n.16, 1440, 1446 n.63; FITZPATRICK, *supra* note 100, at 17–18, 24, 46; *see also id.* at 51 (noting that after public schools in Prince Edward County were shut down in 1959, "[m]akeshift classes were funded with donations and furnished with items stripped from the shuttered public schools").

201. Hall v. St. Helena Par. Sch. Bd., 197 F. Supp. 649, 651 (E.D. La. 1961) (per curiam), *aff'd*, 368 U.S. 515 (1962).

with responsibility for furnishing free lunches, transportation, and grants-in-aid to the children attending the 'private' schools."[202]

Such support for the new, nominally private schools commonly came from public school officials themselves. As Cara Fitzpatrick recently explained:

> Some newly formed private schools . . . received under-the-table support from white officials at public school districts, benefiting from deeply discounted sales of books and furniture, even busses and buildings. Some of the new private schools were near replicas of the public schools white families fled, adopting the same mascots and school colors, only "leaving behind the shell of the building."[203]

Meanwhile, public school teachers and administrators left, often en masse, to staff the new, segregated private schools. In Prince Edward County, for example, "[a]ll but one of the principals and teachers in the white public schools agreed to work in the new private schools."[204] In fact, some states even allowed the staff of these nominally private schools to continue participating in their public school retirement plans.[205]

Of course, not *everyone* in the Southern public education establishment supported the public-school-closure-and-voucher schemes, and they became more controversial in the 1960s. But even those who opposed the policy often did so not because vouchers facilitated the *evasion* of integration; rather, they often opposed vouchers because vouchers might facilitate *integration itself*.

For example, Robert F. Williams, the head of the Virginia Education Association (VEA), the state's largest public teachers' union, opposed vouchers because they interfered with so-called "containment" measures (zoning regulations, enrollment caps, pupil assignment laws, etc.) designed to prevent "negro engulfment" of public schools that were still open.[206] Vouchers compromised these measures

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202. *Id.*

203. FITZPATRICK, *supra* note 100, at 64 (quoting DAVID NEVIN & ROBERT E. BILLS, THE SCHOOLS THAT FEAR BUILT: SEGREGATIONIST ACADEMIES IN THE SOUTH 14 (1976)).

204. *Id.* at 28.

205. *See Segregation Academies and State Action*, *supra* note 27, at 1438 n.16; FITZPATRICK, *supra* note 100, at 24.

206. Magness, *supra* note 89, at 35–36; *see also Segregation Academies and State Action*, *supra* note 27, at 1438–39 & n.19 (discussing use of pupil assignment laws to evade integration).

because a white student's use of a voucher to depart a public school might open up a seat for a black student at that school.

Although Williams and his union cronies certainly had financial motivations for opposing vouchers, "the union (which remained all-white until 1964) also made recurring segregationist appeals intended to limit the scope of [Virginia's voucher] program."[207] After the union failed in its efforts to limit the program to families seeking to avoid court-ordered integration, Williams called for a complete end to the program.[208] Why? In the V*irginia Journal of Education*—the official publication of the VEA—he maintained that vouchers were being "abused" by students who used them to attend *integrated* private schools.[209]

"Everyone knows," Williams observed, "that the intent of the General Assembly in establishing the scholarship program was to provide an escape for any pupil who might object, or whose parents object, to actually attending the same school with children of another race."[210] Yet, he decried, the program was now being "greatly abused as to increasingly defeat its original purpose."[211] Citing statistics from 1963-64, he observed that many "parents are using the grants to send their children to integrated schools, which the entire purpose of the legislation was to avoid."[212] According to Williams, "many superintendents, many school boards, many legislators and many local governing bodies are becoming less and less enchanted" with the program because of these "patent abuses."[213]

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207. Magness, *supra* note 89, at 35. The VEA's record on race was not all that different than that of its parent organization, the National Education Association. The NEA, for example, refused to support the litigation effort in *Brown*, even through the mere filing of an amicus brief in support of the black plaintiffs in the case, and it did not express official support for *Brown* until seven years after the decision was handed down. *See* Bindas, *Once and Future Promise*, *supra* note 7, at 542 n.71. In the 1960s, the NEA fought efforts by Congress to condition the receipt of federal public education funding on the integration efforts of school districts, and the union did not even fully desegregate its own state affiliates until 1969. *Id.*

208. *See* Phillip W. Magness, *Buchanon's position on vouchers and segregation*, https://philmagness.com/2017/10/buchanans-position-on-vouchers-and-segregation-the-documents-maclean-missed/ (last visited Mar. 3, 2024); *Education Journal Charges Tuition Grant Abuses*, S. SCH. NEWS., Dec. 1964, at 11.

209. FITZPATRICK, *supra* note 100, at 57.

210. *Education Journal Charges Tuition Grant Abuses*, *supra* note 208, at 11 (quoting Robert F. Williams, *Hardly a Surprise*, VA. J. EDUC., Nov. 1964).

211. *Id*.

212. *Id.*

213. *Id.*

Thus, while vouchers, coupled with public school closures, may initially have seemed like a promising means of maintaining segregation and denying educational opportunity to black children, by the 1960s, it was becoming increasingly clear that vouchers might instead be a vehicle for integration.[214] That was disturbing news for Williams and his cronies in the Southern public education establishment, but it was exciting for those who, like Friedman, saw the promise of vouchers to overcome racial and socio-economic divides.

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In short, the roots of educational choice lay firmly in two and a half centuries of classical liberal thought. And while it was this philosophy that motivated Milton Friedman's advocacy for choice policies in the mid-20th century, the concept was also embraced by others of varied ideological stripes, including white progressives and black scholars and activists, who recognized that the interests of their constituencies could be advanced by empowering parents to choose their children's schools.

Moreover, choice programs with noble purposes were implemented in this country well before the South's "massive resistance" to *Brown*. Of course, it would be a mistake to ignore the fact that, for a time in the mid-20th century, vouchers were embraced as part of that resistance. But it is just as much a mistake—indeed, a lie—for today's educational choice opponents to impute the same racist motivations to today's educational choice advocates.

B. Choice is Not Segregative in Effect

The second premise of the "choice is racist" argument is also false: choice is *not* racially segregative in effect. In arguing otherwise, choice opponents commonly cherry-pick and trumpet statistics that, they claim, show a higher usage of choice programs by white students compared to black students and an increasing percentage of white users over time.[215] While this trend is certainly true for some programs

214. *See* FITZPATRICK, *supra* note 100, at 56 (noting that some Southern families used vouchers "in unexpected ways," including to "move from segregated schools to integrated ones," to attend private schools in other states (including the North), or to simply attend schools closer to their homes).

215. *E.g.*, FORD, *supra* note 12, at 8 ("Recently, NPR reported that Indiana's statewide voucher program increasingly benefits white, suburban, middle-class families more than the low-income students in underperforming schools whom the program was originally intended to serve. Today, around 60 percent of voucher recipients come from white families, an increase of 14 percent since the program's inception in 2013. The percentage of black students receiving vouchers has dropped to 12 percent, down from 24 percent in 2013." (footnote omitted) (citing Cory Turner

(which is hardly surprising, given that eligibility criteria for choice programs commonly expand over time; a program initially limited to low-income families or those in failing school districts, for example, may be opened up to other families over time), it is also beside the point. The relative numbers of white and black students using choice programs is the wrong measure if the claim is that these programs increase segregation.

The correct measure is the impact on the racial composition of schools when children use choice programs: the schools they leave and the schools they choose to attend. This measure—the actual integrative or segregative effect of choice—is one that the "school choice is racist" crowd assiduously ignores. And the reason why is clear: the overwhelming majority of studies examining the impacts of choice programs on the racial composition of participating students' new schools find that the programs "increase[] racial integration for participating students"; and the studies of impacts on the public schools they leave, while few, show an integrative effect there as well.[216] In other words, the segregative effects premise of the "choice is racist" argument is, like the origin story, false.

In 2017, Dr. Elise Swanson surveyed the then-existing empirical studies of the effect of private educational choice programs on the integration of schools.[217] There were eight studies available at the time: one concerning the Louisiana Scholarship Program (now known as the Student Scholarships for Educational Excellence Program); one concerning the D.C. Opportunity Scholarship Program; two concerning the Cleveland Scholarship Program; and four concerning the Milwaukee Parental Choice Program.[218] Of the eight, only the Louisiana study examined effects on both public schools and the private schools

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et al., *The Promise and Peril of School Vouchers*, NPR (May 12, 2017), http://www.npr.org/sections/ed/2017/05/12/520111511/the-promiseand-peril-of-school-vouchers)); Lubienski, *supra* note 74, ¶ 16 ("[I]n Indiana, . . . a means-tested voucher program was launched purportedly to give disadvantaged families access to more choices. However, as the program has grown, the participation has shifted instead to serve fewer minority and more higher-income students, turning into a public subsidy for middle-class families, many of whom would have attended private schools at their own expense anyway, while also becoming a greater fiscal burden on state taxpayers than was projected." (footnotes omitted)).

216. *See* Elise Swanson, *Can We Have It All? A Review of the Impacts of School Choice on Racial Integration*, 11 J. SCH. CHOICE 507, 522–23 (2017).

217. *Id.* at 520–22 (collecting studies).

218. *Id.* at 521.

educating voucher students. The others examined the impact of choice on private schools only.[219]

The Louisiana study,[220] which concerned a statewide voucher program, "track[ed] individual student moves between [traditional public schools] and private schools" under the program.[221] It found that 83 percent of the transfers had an integrating effect on the public schools that students left with a voucher and 50 percent had an integrating effect on the private schools that students entered with a voucher.[222] It also found that black and Hispanic students "were more likely to make integrative moves than White students."[223] With expanded data, the authors subsequently found a similarly strong integrative impact on public schools but that only 45 percent of transfers increased integration in the student's new private school.[224]

Of the seven other studies discussed in Swanson's survey, six found that use of a voucher increased racial integration for participating students, and one found no effects.[225] Specifically, the Washington, D.C., study[226] found that while 80 percent of traditional public school students attended racially homogenous schools (those where 90 percent or more of students are of the same race), only 47 percent of voucher students did.[227] One of the Cleveland studies[228] found that while only 5 percent of traditional public school students attended schools considered integrated (similar demographically to the Cleveland area), 19 percent of voucher students did;[229] the other Cleveland study[230] found that "voucher-participating schools in Cleveland were

219. *Id.* at 520.

220. Anna J. Egalite & Jonathan N. Mills, *The Louisiana Scholarship Program*, 14 EDUC. NEXT 66 (2014).

221. Swanson, *supra* note 216, at 520.

222. *Id.*

223. *Id.*

224. Anna J. Egalite et al., *The Impact of Targeted School Vouchers on Racial Stratification in Louisiana Schools*, 49 EDUC. & URBAN SOC'Y 271, 273 (2017) [hereinafter Egalite, *Impact of Targeted School Vouchers*].

225. Swanson, *supra* note 216, at 522.

226. Jay P. Greene & Marcus A. Winters, *An Evaluation of the Effect of DC's Voucher Program on Public School Achievement and Racial Integration After One Year*, 11 J. CATH. EDUC. 83 (2007).

227. Swanson, *supra* note 216, at 520.

228. JAY P. GREENE, CHOICE AND COMMUNITY: THE RACIAL, ECONOMIC, AND RELIGIOUS CONTEXT OF PARENTAL CHOICE IN CLEVELAND (1999).

229. Swanson, *supra* note 216, at 520–22.

230. GREG FORSTER, SCHOOL CHOICE ISSUES IN THE STATE: SEGREGATION LEVELS IN CLEVELAND PUBLIC SCHOOLS AND THE CLEVELAND VOUCHER PROGRAM (2006).

more integrated than traditional public schools in the Cleveland metro area by 18 percentage points."[231] And of the four Milwaukee studies:

- one[232] found that a lower percentage of voucher students than traditional public school students attended schools that were racially isolated (*i.e.*, schools more than 90 percent white or 90 percent students of color)[233];
- another[234] found that a lower percentage of voucher students in religious schools, as compared to traditional public-school students, attended schools that were racially isolated (30 percent versus 50 percent)[235];
- another[236] found that "voucher-participating private schools in Milwaukee were more integrated than their [Milwaukee public school] counterparts by 13 percentage points"[237]; and

231. Swanson, *supra* note 216, at 522. Forster "compared school racial composition to the racial composition of all 5–19-year-olds in the Cleveland Census area while statistically controlling for school level and weighting by school size." *Id.*

232. HOWARD L. FULLER & DEOBRAH GREIVELDINGER, THE IMPACT OF SCHOOL CHOICE ON RACIAL INTEGRATION IN MILWAUKEE PRIVATE SCHOOLS (2002).

233. Swanson, *supra* note 216, at 522. Fuller and Greiveldinger "found that 54.4% of students in Milwaukee Public Schools (MPS) attended racially isolated schools while 49.8% of MPCP students attended racially isolated schools." *Id.* Racial isolation was lowest (41.8 percent) for voucher students attending religious schools and highest (75.5 percent) for voucher students attending non-religious private schools. *Id.* The high percentage for non-religious schools was due to the fact that, before the Milwaukee Parental Scholarship Program was enacted, a number of non-religious private schools specifically designed to serve black and Hispanic children had been established; it was not due to the "establishment of 'white flight' private schools." *Id.*

234. HOWARD L. FULLER & GEORGE A. MITCHELL, THE IMPACT OF SCHOOL CHOICE ON INTEGRATION IN MILWAUKEE (2000).

235. Swanson, *supra* note 216, at 522.

236. GREG FORSTER, SCHOOL CHOICE ISSUES IN THE STATE: SEGREGATION LEVELS IN MILWAUKEE PUBLIC SCHOOLS AND THE MILWAUKEE VOUCHER PROGRAM (Friedman Foundation 2006) [hereinafter Forster, *Segregation Levels in Milwaukee*].

237. Swanson, *supra* note 216, at 522. This study used a segregation index that "measure[d] the difference between the racial composition of a school and the racial composition of the school-age population in the greater metro area." Forster, *Segregation Levels in Milwaukee*, *supra* note 236, at 9.

- the final[238] found "no substantial differences in the level of integration between" voucher schools and Milwaukee public schools.[239]

Thus, of the eight studies available to Swanson in 2017 (including the expanded data for the Louisiana study), six found that voucher use increased racial integration for voucher students' new schools, one found no impact, and one—the Louisiana study—found slightly negative effects. At the same time, the Louisiana study, which was the only one to also measure effects on the public schools that students left with vouchers, found an overwhelmingly integrative effect on public schools: 83 percent of student moves from a public to a private school using a voucher increased integration (or reduced segregation) in the public school.[240]

Since Dr. Swanson's survey in 2017, there have been two more reports that bear on the subject. The first is a 2018 working paper concerning the D.C. Opportunity Scholarship program that analyzed data regarding minority levels in the private schools participating in the program and in D.C. public schools. It found lower levels of "racial/ethnic isolation" in the participating private schools than in traditional public schools.[241] Specifically, 84 percent of D.C. public school students attended schools with a minority enrollment of 90 percent or higher, as opposed to 68 percent of voucher students.[242]

The second is a 2022 study concerning the Ohio EdChoice program (which, as discussed in Part I, above, is currently being challenged by choice opponents). During the study period, the EdChoice program contained a performance-based component (providing vouchers to children who would be assigned to low-performing public schools) and an income-based component (providing vouchers based on family income).[243] The study examined the impact of performance-

238. JAY P. GREENE ET AL., SCH. CHOICE DEMONSTRATION PROJECT, DEP'T OF EDUC. REFORM, UNIV. OF ARK., THE MILWAUKEE PARENTAL CHOICE PROGRAM'S EFFECT ON SCHOOL INTEGRATION (2010).

239. Swanson, *supra* note 216, at 522.

240. *Id.* at 520.

241. Mary Levy, *Washington, D.C. Voucher Program: Civil Rights Implications* 19 (UCLA C.R. Project Working Paper 2018), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/washington-d.c.s-voucher-program-civil-rights-implications/Levy-DC-VOUCHER-PAPER-FINAL-TO-POST-030218C.pdf.

242. *Id.*

243. STÉPHANE LAVERTU & JOHN J. GREGG, THOMAS B. FORDHAM INSTITUTE, THE OHIO EDCHOICE PROGRAM'S IMPACT ON SCHOOL DISTRICT ENROLLMENTS, FINANCES, AND ACADEMICS 5, 7 (2022),

and income-based vouchers on racial and ethnic composition of district public schools. For the performance-based component, the study found that: (1) "the average student whose district was exposed to the program experienced a relative decline of approximately 13 percent in the district-wide share of students who identify as a racial or ethnic minority"; and (2) the program "led to a decline of 12 percent in the isolation of minority students."[244] Thus, "[r]acial and ethnic segregation was approximately 10-15 percent lower than it would have been had districts not been exposed" to the performance-based component, with black, Hispanic, and Native American students attending schools with a higher proportion of white and Asian American students.[245] As for the income-based component, the analysis was inconclusive, with unstable and statistically insignificant results for all segregation measures.[246] Thus, there was "no credible evidence" that the income-based component impacted segregation levels.[247]

These 2018 and 2022 developments are of a piece with the eight studies that Swanson surveyed in 2017. There is, in short, a large body of evidence that choice programs have integrative, not segregative, effects for both participating students and public schools. Only one study revealed a negative impact: a slight negative effect on integration for participating students (but a *positive* effect on integration in their former public schools).

The data thus contravenes the premise of choice opponents that choice programs increase segregation. This should not be surprising, considering how we typically assign students to public schools in this country: based on residential address. The racial, ethnic, and

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https://fordhaminstitute.org/sites/default/files/publication/pdfs/edchoice-impact-report-12-14-22-web-final.pdf (noting that for the time-period of the study, vouchers under the income-based component were only available to low-income families who did not qualify for the performance-based component); *see also* Ohio Dep't of Educ. & Workforce, *EdChoice Expansion Scholarship Program Fact Sheet for 2023-2024*, https://education.ohio.gov/getattachment/Topics/Other-Resources/Scholarships/EdChoice-Expansion/EdChoice-Expansion-Resources/Expansion-Fact-Sheet-2023.pdf.aspx?lang=en-US (reflecting that in 2023, the Ohio Legislature expanded the income-based component to make it available to children of families regardless of income level, although the specific voucher amount is tied to income).

244. LAVERTU & GREGG, *supra* note 243 at 17–18.

245. *Id.* at 5, 18.

246. *Id.* at 26, 28 ("The main estimate of minority isolation indicate[d] a relative decline in segregation, but . . . accounting for district-specific preprogram trends suggest[ed] a relative increase in the isolation of minority students across district schools.").

247. *Id.* at 28.

socioeconomic segregation resulting from residence-based public school assignment has been well-documented.[248] "Approximately eighty percent of public-school students in this country attend a school to which they are assigned based on residence," and the drawing (or gerrymandering) of these residential boundaries, "both between and within districts, often results in adjacent schools with wildly different racial and socioeconomic makeups—and wildly different qualities."[249] In fact, recent research has demonstrated a high correlation between many school boundary maps and the overtly and intentionally racist "redlining" maps drawn by the federal government during the FDR administration.[250] Regardless of whether there is a causal connection between the two, "[t]he practice of assigning children to schools based not on their needs but on their home addresses (read: wealth) relegates poor and often minority students to public schools that are far more likely to be underperforming or failing."[251]

Educational choice programs, however, sever the link between residence and school attendance, empowering parents, rather than government, to decide what schools their children attend. It should be no surprise that minority families would use these programs to escape highly segregated (and often poorly performing) public schools and send their children to more integrated (and often better performing) private schools. It should be no surprise, in other words, that educational choice programs are engines of integration, not segregation.

III. THE LEGAL NONVIABILITY OF THE ARGUMENT

In light of this more complete history of the origins and development of educational choice in this country, as well as the empirical evidence regarding the integrative effects of choice programs, it is time to assess the legal viability of the "choice is racist" argument as a legal one. As discussed below, the attempts of choice opponents to weaponize race, as they previously did religion, to challenge choice programs seems doomed to the same fate: failure.

A. Equal Protection: A Non-Starter

As an initial matter, it is important to recognize how choice opponents are *not* framing these new race-based legal challenges: as

248. *See* Bindas, *Once and Future Promise*, *supra* note 7, at 550–56.
249. *Id.* at 550.
250. *Id.* at 551–52.
251. *Id.* at 551.

equal protection claims. That may be surprising, as race-based constitutional challenges typically sound in equal protection. But there is a very clear reason why they are avoiding the Equal Protection Clause in these new race-based claims: a lack of a discriminatory governmental purpose.

Educational choice programs are race-neutral. They are open to children without regard to race, and participating schools are prohibited from discriminating based on race.[252] A law that is neutral with regard to race can violate the Equal Protection Clause only if it has discriminatory effects that "can be traced to a discriminatory purpose."[253] As the Supreme Court held in *Village of Arlington Heights*, "official action will not be held unconstitutional solely because it results in a racially disproportionate impact."[254] Rather, "[p]roof of

252. Typically, these non-discrimination requirements are written into the statutes governing the programs. *See, e.g.*, W. VA. CODE § 18-31-11(a)(4) ("To be eligible to accept payments from a Hope Scholarship account, an education service provider shall . . . [c]ertify that it will not discriminate on any basis prohibited by 42 U.S.C. 1981 . . . ."). Even if they are not, however, federal law prohibits all private schools from discriminating based on race, regardless of whether they participate in an educational choice program. *See* 42 U.S.C. § 1981 ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .").

253. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979); *see also* Washington v. Davis, 426 U.S. 229, 240 (1976) (discussing "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose"). While the Supreme Court has not squarely held that a discriminatory effect is required, in addition to a discriminatory purpose, to prove that a facially neutral law violates the Equal Protection Clause, it has repeatedly stated as much in dicta. *E.g.*, Wayte v. United States, 470 U.S. 598, 608 & n.10 (1985) (explaining that "ordinary equal protection standards" require a plaintiff to show "both that [the challenged action] had a discriminatory effect and that it was motivated by a discriminatory purpose," unless the challenged action or law involves "an overtly discriminatory classification," in which case "[a] showing of discriminatory intent is not necessary"); United States v. Armstrong, 517 U.S. 456, 465 (1996) (reiterating *Wayte* standard). As Professor Chemerinsky recently explained, "*Armstrong* is particularly important because of its express declaration that an equal protection challenge to a facially race neutral law requires showing both discriminatory purpose and discriminatory effect." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 787 (7th ed. 2023); *see also* Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 23-170, 2024 WL 674659, at *5 n.8 (U.S. Feb. 20, 2024) (Alito, J., dissenting from denial of certiorari) (noting that the First, Third, Fourth, and Fifth Circuits "consider[] disparate impact to be a necessary element of a successful challenge to a facially neutral policy").

254. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977).

racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[255]

The Supreme Court, moreover, has repeatedly stressed this requirement in the education context specifically. "[T]he Constitution is not violated by racial imbalance in the schools, without more," it has held.[256] And "in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns or affect the racial composition of the schools," judicial intervention is unwarranted.[257]

No one can credibly claim that modern educational choice programs "attempt[] to fix or alter demographic patterns or affect the racial composition of the schools."[258] Nor can anyone credibly claim that these race-neutral programs, which *prohibit* racial discrimination, have any other racially discriminatory purpose. As courts have recognized time and again, their purpose is the wholly valid one of expanding educational opportunity for children by providing them alternatives to the public schools.[259]

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255. *Id.* at 265. According to Justice Scalia's concurrence in the judgment in *Schuette v. BAMN*, "the plurality opinion" in that case "leaves ajar an effects-test escape hatch . . . suggesting that state action denies equal protection when it 'ha[s] the *serious risk,* if not purpose, of causing specific injuries on account of race,' or is either 'designed to be used, or . . . *likely to be used,* to encourage infliction of injury by reason of race.'" Schuette v. BAMN, 572 U.S. 291, 330 (2014) (Scalia, J., concurring in judgment) (emphasis in original) (quoting *Schuette*, 572 U.S. at 305, 314 (plurality op.)). Any such rule, Justice Scalia, would be "inconsistent" with the "long . . . line" of "exceptionless" cases requiring "discriminatory intent." *Id.* at 330. Even assuming the three-justice plurality in that case intended to "leave ajar" or "suggest[]" the possibility of some type of effects-only test, and even if a majority of the Supreme Court were one day to endorse such a test, opponents of educational choice programs still could not mount a viable equal protection challenge. Such programs pose no "serious risk" (or any risk) of "causing specific injuries on account of" (that is, *because* of) "race"; nor are they "likely to be used" to "encourage infliction of injury by reason of race."

256. Milliken v. Bradley, 433 U.S. 267, 280 n.14 (1977).

257. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 32 (1971).

258. *Id.*

259. *See, e.g.*, *Zelman*, 536 U.S. at 649 ("There is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system."); *Meredith*, 984 N.E.2d at 1229 ("As the plaintiffs acknowledge, the tuition costs required to attend a non-public school generally foreclose the option for lower-income families. The voucher program helps alleviate this barrier by providing lower-income Indiana families with the educational options generally available primarily to higher-income Indiana families. The result is a direct benefit to these lower-income families—the provision of a wider array of education options . . . ." (citation omitted)); *Jackson*, 578 N.W.2d at 612 ("The purpose of the program is to provide low-income

Thus, even if it *were* true (and the evidence discussed in Part II.B makes clear it is not) that choice programs negatively affect the racial composition of public schools, that effect would not be attributable to any discriminatory purpose or design of the program itself. It would be the "result of numerous, private choices of individual parents of school-age children," which bear "no imprimatur of state approval."[260] And where change in racial composition is "a product not of state action but of private choices, it does not have constitutional implications."[261]

In this light, it is hardly surprising that the one time a race-based equal protection challenge was mounted against an educational choice program (in the 1990s), it failed. In *Jackson v. Benson*,[262] the Wisconsin Supreme Court rejected a facial challenge, under both federal and state equal protection provisions, to the Milwaukee Parental Choice Program, the nation's first modern educational choice program.[263] The court began its analysis by stressing that, "on its face," the program "is race-neutral"; it "allows a group of students, chosen without regard to race, to attend schools of their choice."[264] The court then noted that the plaintiff, the NAACP, "ha[d] not alleged . . . that the State acted with an intent to discriminate on the basis of race when [it] enacted" the program, nor had it "allege[d] that the private schools participating" in the program "excluded students on the basis of race or . . . in any other way intentionally discriminated against students based on race."[265] In fact, the court observed, the program *prohibited* schools from discriminating based on race.[266] At the end of the day, the court

parents with an opportunity to have their children educated outside of the embattled Milwaukee Public School system.").

260. *Zelman*, 536 U.S. at 650 (internal quotation marks omitted) (quoting *Mueller v. Allen*, 463 U.S. 388, 399 (1983)).

261. Freeman v. Pitts, 503 U.S. 467, 495 (1992); *see also id.* ("It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts."); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 736 (2007) (plurality op.) (explaining that "central" to the Court's equal protection jurisprudence is "[t]he distinction between segregation by state action and racial imbalance caused by other factors"); *cf.* Zelman v. Simmons-Harris, 536 U.S. 639, 658 (2002) ("The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, . . . most recipients choose to use the aid at a religious school.").

262. Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998).

263. *Id.*

264. *Id.* at 631.

265. *Id.*

266. *Id.*

explained, the NAACP was "[r]elying solely on the racial makeup of the [Milwaukee public schools] and of the private schools likely to participate in" the voucher program to "allege[] that [the program's] likely effect will be to further segregate the [public schools]."[267] These were insufficient allegations of "the discriminatory intent necessary to establish an equal protection claim."[268]

Surprisingly, the NAACP in *Jackson* barely even alluded to the racist voucher schemes of the post-*Brown* South. In its brief in the Wisconsin Supreme Court, it cited two of the 1960s federal district court opinions that invalidated such schemes.[269] But the brief did not even mention the fact that those cases involved vouchers, and the NAACP only cited them for the general (and unremarkable) proposition that "[p]roviding taxpayer's [sic] funds to continue and expand a system of one race schools is unconstitutional."[270] Thus, the post-*Brown* Southern history did not factor at all in the Wisconsin Supreme Court's opinion.

That raises the question of whether opponents of choice might still use that sordid history as evidence of the racially discriminatory purpose needed to prevail on an equal protection claim. They can try, but they will fail.

It is certainly true that "legislative or administrative history," as well as "historical background," are "subjects of proper inquiry in determining whether racially discriminatory intent existed" in the adoption of a law.[271] But it is typically the legislative or administrative

267. Jackson, 578 N.W.2d at 631. The court noted that a discriminatory purpose can sometimes be inferred from "the totality of the relevant facts," including "the fact that a challenged law may, in effect, bear more heavily on one race than another." There was no basis for such an inference, however, in the NAACP's challenge.

268. *Id.*at 632. As noted above, the NAACP also brought a race-based claim under the equal protection provision of the Wisconsin Constitution. As is common (although not universal) among state courts of last resort, the Wisconsin Supreme Court interpreted the state provision as offering essentially the same protection as its federal counterpart and accordingly rejected the state claim as well. *Id.* at 630 (explaining that "there is no substantial difference" between the equal protection component of article I, § 1 of the Wisconsin Constitution "and that of the Fourteenth Amendment" (internal quotation marks omitted)).

269. Resp. Br. of Plaintiffs-Respondents, NAACP, et al., Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998) (No. 97-0270), 1997 WL 33624887, at *55 (citing Poindexter v. La. Fin. Assistance Comm'n, 296 F. Supp. 686, 687–88 (E.D. La.), *aff'd sub nom.* La. Educ. Comm'n for Needy Child. v. Poindexter, 393 U.S. 17 (1968); *Lee v. Macon Cnty. Bd. of Educ.*, 267 F. Supp. 458, 477 (M.D. Ala. 1967)).

270. *Id.* at *55.

271. *Vill. of Arlington Heights*, 429 U.S. at 267, 268.

history *of the challenged law* and the historical background leading up to its adoption that matter—not the history of purportedly similar laws adopted (and quickly rendered unenforceable) seven decades earlier.[272]

And while history of older enactments may be relevant where some continuity is evinced in a pattern of enactments or in reenactment,[273] there is no continuity or pattern linking modern educational choice programs to voucher schemes employed in the post-*Brown* South. Those schemes, as already noted, involved the use of vouchers (often coupled with public school closures) for the overtly racist purpose of maintaining segregated schooling. They aimed at *denying* choice and opportunity, and they were correctly invalidated for that reason.[274] They were an aberration, a bastardization of the very concept of choice as it has existed for two and a half centuries. They share no pattern or continuity with today's programs or those that came before them.

Thus, as hard as opponents may try to create a genealogy that links modern programs to an abhorrent episode in the post-*Brown* South, there is none. The argument that educational choice programs adopted in 2024 have a discriminatory purpose because some legislatures provided vouchers to circumvent *Brown* in the 1950s is the quintessential genetic fallacy. And while opponents of educational choice

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272. *See id.* at 267 ("The historical background *of the decision* is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." (emphasis added)); *id.* ("The specific sequence of events leading up *to the challenged decision* also may shed some light on the decisionmaker's purposes." (emphasis added)); *id.* at 268 ("The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members *of the decisionmaking body*, minutes of its meetings, or reports." (emphasis added)).

273. *See id.* at 267 (explaining that "historical background" is relevant "particularly if it reveals a series of official actions taken for invidious purposes"); *cf.* Ramos v. Louisiana, 140 S. Ct. 1390, 1394 (2020) (examining, in Sixth Amendment case, the discriminatory history of a race-neutral provision of the Louisiana constitution, originally adopted in the 1890s and readopted in the 1970s); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2273 (2020) (Alito, J., concurring) (examining, in free exercise case, the bigoted origins of Montana's Blaine Amendment, even though it was readopted for purportedly "non-bigoted reasons in Montana's 1972 constitutional convention").

274. Of course, the schemes typically effected a total denial of choice to black children, who faced both the closure of public schools and the nonexistence of private schools that would admit them. Some courts at the time, however, noted that the schemes also "effectively deprived" white children of the "freedom of choice between public and private education." *Allen*, 198 F. Supp. at 503.

are happy to—and commonly do—invoke that fallacy in both the court of public opinion and the court of law, even they appear to recognize that it cannot sustain an equal protection claim.

B. Another Vehicle? State Education Clauses

Of course, that has not stopped educational choice opponents from mounting their "choice is racist" argument in court. They have simply employed a different vehicle to carry the argument: the education clauses of state constitutions.

As noted in Part I.B, every state constitution includes language concerning education.[275] Typically, they include clauses that require the state's legislature to provide for a system of public schools, and they often contain language describing the nature of the system that must be provided (for example, "thorough and efficient" or "uniform").[276]

Determined to replace religion with race as the new basis for their attacks on choice, and recognizing that the Equal Protection Clause will not carry the day in that regard, choice opponents are now attempting to shoehorn the "choice is racist" argument into these provisions. The reasoning goes like this: choice programs contribute to, or exacerbate, segregation in public schools, and segregated public schools are antithetical to the type of public school system required by the state constitution.[277]

Assuming that a state constitutional provision that mandates maintenance of public schools also requires—by itself, without reference to federal (or state) equal protection requirements—that those schools not be segregated (which is not always clear[278]), there are still

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275. *See supra* p. 917. It is common for state constitutions to contain entire articles dedicated to education, not just single clauses. In discussing "education clauses," this essay refers to specific provisions that require the state to maintain a public school system.

276. *Id.*

277. *E.g.*, *Columbus City* Resp. Br. at 29–30 (arguing that Ohio's EdChoice program "causes" or "exacerbates" segregation in public schools and that "segregation is inherently antithetical—and always has been—to the thorough and efficient system of common schools enshrined in Article VI, Section 2" of the Ohio Constitution).

278. In Ohio, for example, "no court has ever applied" the constitutional provision requiring a "thorough and efficient system" of common schools, OHIO CONST. art. VI, § 2, "in the segregation context." *Columbus City* Decision on Mot. for J. on the Pleadings at 7. Sadly, the Ohio General Assembly enacted—and the Ohio Supreme Court enforced—a law providing for segregated public schools just two years

fundamental problems with this argument. One is the same lack of discriminatory purpose that dooms a federal equal protection argument: no one can credibly claim that modern choice programs, which are race-neutral and prohibit racial discrimination, are adopted to foster or promote segregation or discrimination.

Another problem is also alluded to in Part II.A: the fact that any fluctuation in the racial composition of public and, in turn, private schools that might result from a family's use of an educational choice program is attributable to the private choices of *that family* (whether to use the program and, if so, what school to attend)—not to any action of the state. The mere existence of a race-neutral educational choice program, after all, has no bearing on the racial composition of public (or private) schools. Any fluctuations are, as the Supreme Court said in a slightly different, but related, context, "reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits."[279]

Yet the lack of a discriminatory purpose and of any state action causing (alleged) racial imbalances are of no moment to educational choice opponents. They insist that, unlike the Equal Protection Clause, a state education clause may be violated even if the state has not acted with a discriminatory purpose—indeed, even if the state has not acted at all. The public school district plaintiffs in the current Ohio litigation,

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after the "thorough and efficient" clause was adopted. Van Camp v. Bd. of Educ., 9 Ohio St. 406 (1859); *see also* State ex rel. Garnes v. McCann, 21 Ohio St. 198 (1871) (holding that the same law violated neither the Fourteenth Amendment nor the Ohio Constitution). In New Jersey, by contrast, the courts have held that some level of "racial imbalance" in public schools may "unconstitutionally threaten[] or impede[] a thorough and efficient education" (as well as violate the separate equal protection and anti-segregation provisions of the New Jersey Constitution). Order Denying Partial Summ. J. and Granting in Part Summ. J. at 82, Latino Action Network v. State, No. L-1076-18 (Mercer Cnty. Super. Ct. Oct. 6, 2023); *see also* In re Pet. for Authorization to Conduct a Referendum on Withdrawal of N. Haledon Sch. Dist. from the Passaic Cnty. Manchester Reg'l High Sch., 854 A.2d 327, 336 (N.J. 2004) ("We consistently have held that racial imbalance resulting from *de facto* segregation is inimical to the constitutional guarantee of a thorough and efficient education.").

279. *Zelman*, 536 U.S. at 652 (holding that use of vouchers at religious schools did not violate the Establishment Clause because the voucher program was neutral toward religion and operated on private parental choice). Of course, the same might have been argued by defenders of voucher programs in the post-*Brown* South, but those programs were hardly race-neutral. They could only be used at racially discriminatory private schools, and they were typically accompanied by other measures (public school closures, race-based assignment plans, etc.), all of which aimed to maintain segregation.

for example, maintain that "state action is not a required element of a constitutional claim under" that state's education clause, because part of the "affirmative obligation on the State" to provide a public school system is "an affirmative obligation . . . to ensure that" the system is not segregated, as well as "an affirmative constitutional obligation to correct and eliminate systems that contribute to segregation."[280] "The presence or absence of state action"—let alone purposefully discriminatory state action—"is wholly irrelevant" under their view.[281]

Thus, they argue, if a state has failed in its obligation to "correct and eliminate systems that contribute to segregation,"[282] a court must step in. And if the "system" in question is an educational choice program—even one that (1) provides aid to all families who desire it, (2) does so without regard to race, and (3) prohibits racial discrimination in participating schools—then that program must go. It must go to maintain some constitutionally required (but undefined) level of racial balance in the public schools.

Such an interpretation of a state education clause raises many obvious—and thorny—questions. A few: What is the *correct* racial balance that must be maintained in the public schools? In how many schools must there be an imbalance before a court may invalidate a *statewide* educational choice program? How is a court to know whether the families that enroll their children in private schools, and

280. *Columbus City* Resp. Br. at 30.

281. *Id.* at 31; *see also id.* ("Article VI, Section 2 . . . explicitly imposes an affirmative obligation on the State to secure a thorough and efficient system of common schools. Thus, state action is not a required element of a constitutional claim under Article VI, Section 2.").

282. To be sure, state education clauses often impose affirmative obligations on states, even if just the obligation to establish a system of public schools. But there is a robust debate regarding the extent to which—indeed, even whether—they are judicially enforceable. *Compare McCleary v. State*, No. 84362-7, 2016 WL 11783312, at *3 (Wash. Oct. 6, 2016) ("As a result of the State's failure to purge its contempt by presenting a complete plan for full funding of basic education by 2018, the court on August 13, 2015, imposed a monetary sanction of $100,000 per day to be deposited into a segregated account for the benefit of public education."), *with Ex parte James*, 836 So. 2d 813, 815 (Ala. 2002) (per curiam) ("[B]ecause the duty to fund Alabama's public schools is a duty that—for over 125 years—the people of this State have rested squarely upon the shoulders of the Legislature, it is the Legislature, not the courts, from which any further redress should be sought."); Citizens of Decatur for Equal Educ. v. Lyons-Decatur Sch. Dist., 739 N.W.2d 742, 760 (Neb. 2007) ("[A]dequate funding of public schools is not a judicially enforceable right under the free instruction clause."). This Article will assume that they are judicially enforceable.

thus "upset" the racial balance of public schools, would not enroll their children in private schools in the absence of a choice program? And, with respect to the efficacy of the requested remedy—invalidation of the choice program—how is a court to know whether those children will return to public schools and, thus, restore the optimal racial balance?

More fundamental, however, is this question: Is a judicial remedy invalidating an educational choice program, under a state constitution's education clause, in order to maintain some optimal racial balance in the public schools permissible under the Equal Protection Clause?

Of course, action taken pursuant to a state constitution—even action *mandated* by a state constitution—must comport with the requirements of the federal Constitution. This is true even when the action in question is a judicial remedy. The Supremacy Clause, after all, provides that "the Judges in every State shall be bound" by the Federal Constitution, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[283] It thus creates "a rule of decision" that state courts "must not give effect to state laws that conflict with federal laws."[284]

Educational choice opponents learned this the hard way in *Espinoza v. Montana Department of Revenue*, when the U.S. Supreme Court held that the Montana Supreme Court's invalidation of an educational choice program under the Montana Constitution's "no-aid" clause (or Blaine Amendment) violated the Free Exercise Clause of the U.S. Constitution.[285] "Given the conflict between the Free Exercise Clause and the application of the no-aid provision," the U.S. Supreme Court held, "the Montana Supreme Court should have 'disregard[ed]' the no-aid provision and decided this case 'conformably to the [C]onstitution' of the United States."[286]

Here, the problem with the judicial remedy that choice opponents seek is not the Free Exercise Clause, but the Equal Protection Clause. Ironically, by trying to shoehorn race-based challenges to choice programs into state education clauses and thereby avoid the elements

283. U.S. CONST. art. VI, cl. 2.

284. Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 324 (2015).

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

286. *Id.* at 2262 (alteration in original) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803)); *see also id.*("When the [Montana Supreme] Court was called upon to apply a state law no-aid provision to exclude religious schools from the program, it was obligated by the Federal Constitution to reject the invitation.").

needed to prove a violation of the Equal Protection Clause, opponents of choice programs are walking into an equal protection violation of their own making.

As discussed above, choice opponents maintain that state education clauses mandate the invalidation of choice in order to maintain some optimal level of racial balance in the public schools. They insist that public schools must reflect the "diversity" of the communities of which they are a part.[287] Of course, the only way to ensure that public schools reflect the same racial composition of the communities of which they are a part is to hold children in those communities captive to the public schools. And that is precisely why opponents of choice insist that choice programs must be invalidated: parents who do not want their children held captive to the public schools for whatever reason (poor academics, low standards, unsafe conditions) may use choice programs to escape. And if too many non-minority students in relation to minority students do so, that will throw the desired racial balance out of whack.

As the Supreme Court reiterated only last year, however, "'[o]utright racial balancing' is 'patently unconstitutional.'"[288] "That is so," the Court explained, "because '[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial . . . class.'"[289] Thus, "[r]acial balance is not to be achieved for its own sake."[290]

Of course, opponents of choice may claim that their goal is not racial balance for racial balance's sake—that is, that racial balance "is

287. *E.g.*, *Columbus City* Suppl. Compl. ¶ 154 ("The framers of Ohio's Constitution specifically envisioned racially and ethnically diverse classrooms in mandating the establishment of a system of common schools."); *Columbus City* Resp. Br. at 29 ("The framers envisioned racially and ethnically diverse public classrooms . . . .").

288. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 223 (2023) (quoting Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 311 (2013)); Grutter v. Bollinger, 539 U.S. 306, 330 (2003) ("[O]utright racial balancing . . . is patently unconstitutional.").

289. *Students for Fair Admissions*, 600 U.S. at 223 (alteration in original) (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)).

290. Freeman v. Pitts, 503 U.S. 467, 494 (1992); *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 730 (2007) (plurality op.) ("Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society . . . .").

not [the] end in itself."[291] Rather, they might argue, the goal is maintaining "diverse" public school classrooms, which, in turn, will yield educational and social benefits for the students whom public schools serve.[292] "Racial balancing," however, "is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'"[293]

But even assuming that racial diversity *in furtherance of* educational or social benefits may be a sufficiently important governmental interest for equal protection purposes,[294] the legal theories of choice opponents—at least to date—have focused myopically on data concerning relative numbers of white and black students who use choice programs from a handful of cherrypicked school districts—and, in turn, data concerning the relative numbers of white and black students in those same public school districts. It is hard to see a legal theory

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291. *Parents Involved in Cmty. Schs*., 551 U.S. at 730 (plurality op.).

292. *See, e.g.*, *Columbus City* Suppl. Compl. ¶ 153 ("Student diversity was a central feature of the common schools ideology, because the framers of the Ohio Constitution expected that heterogeneity in class, creed, ethnicity, and background would result in the development of mutual respect and amity, which are critical to an informed and cohesive citizenry capable of self-governance."); *cf. Parents Involved in Cmty. Schs.*, 551 U.S. at 725–26 (2007) (plurality op.) ("Each school district argues that educational and broader socialization benefits flow from a racially diverse learning environment, and each contends that because the diversity they seek is racial diversity[,] . . . it makes sense to promote that interest directly by relying on race alone.").

293. *Parents Involved in Cmty. Schs.* 551 U.S. at 732 (plurality op.); *see also id.* at 733 ("[R]acial balance . . . itself cannot be the goal, whether labeled 'racial diversity' or anything else."); *Students for Fair Admissions*, 600 U.S. at 230 ("[T]he prohibition against racial discrimination is 'levelled at the thing, not the name.'" (quoting Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325 (1867))).

294. *Compare Parents Involved in Cmty. Schs.*, 551 U.S. at 726 (plurality op.) ("The debate is not one we need to resolve, . . . because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity."), *with id.* at 783 (Kennedy, J., concurring in part and concurring in the judgment) (opining that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue"), *and id.* at 797–98 (Kennedy, J., concurring in part and concurring in the judgment) (opining that "a district may consider it a compelling interest to achieve a diverse student population," and "[r]ace may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered"). At a minimum, questions would arise as to whether such educational and social goals are "sufficiently measurable" or, rather, too amorphous "to permit judicial [review]." *Students for Fair Admissions, Inc.*, 600 U.S. at 214 (alteration in original) (quoting *Fisher*, 579 U.S. at 381).

premised solely on relative numbers of white and black students as anything other than one aimed at advancing racial balance as an end in itself. As with the public-school assignment plans invalidated under the Equal Protection Clause in *Parents Involved in Community Schools*, "race is not considered as part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas, and viewpoints.'"[295] "It is not simply one factor weighed with others in reaching a decision . . . ."[296] Rather, "it is *the* factor."[297]

Moreover, even if an interest in racial balance, or diversity, for the educational and social benefits that accrue from such balance, or diversity, is sufficiently important, it is unclear how elimination of an educational choice program is narrowly, or at all, tailored to achieve such an interest. After all, there is no guarantee that eliminating the program will do *anything* in furtherance of it. Eliminating the program will not force children currently using the program back into public schools, nor will it prevent future students, at least those whose parents can afford it, from attending private schools. And even if it did, depending on the particular demographics of the public schools in a given district and the demographics of the students from that district who had been using the program, the program's invalidation might very well render the district's schools *less* diverse. It is not at all clear, in short, that "a blunt distinction between 'white' and 'non-white'" will further the purported goals at all.[298]

But, choice opponents might argue, the remedy they request—invalidation of the choice program—is itself race *neutral*. It is not as though they seek to eliminate the program for white children only; they wish to enjoin it for all children, without regard to race. Thus, the argument would go, no heightened scrutiny is required.

There would certainly be some irony in that argument, given the attempts of choice opponents to paint choice advocates with the brush of post-*Brown* Southern racism. After all, it is the same trick that Southern states resorted to in hopes of circumventing *Brown* and its progeny. Rather than open up public schools to all students, without

295. *Parents Involved in Cmty. Schs.*, 551 U.S. at 723 (majority op.) (quoting Grutter v. Bollinger, 539 U.S. 306, 330 (2003)).

296. *Id.* (majority op.).

297. *Id.* (majority op.).

298. *Id.* at 787 (Kennedy, J., concurring in part and concurring in the judgment); *see also id.* at 726–27 (plurality op.) ("The plans here are not tailored to achieving a degree of diversity necessary to realize the asserted educational benefits; instead the plans are tailored . . . '[to] attaining a level of diversity within the schools that approximates the district's overall demographics.'").

regard to race, they simply closed the schools and insisted that doing so was a permissible race-neutral measure. And, of course, the Supreme Court had none of it. In *Griffin v. County School Board*,[299] for example, the Court held that Prince Edward County could not close its public schools to all students in order to prevent the enrollment of black students: "Whatever nonracial grounds might support a State's allowing a county to abandon public schools," the Court held, "the object must be a constitutional one, and grounds of race . . . do not qualify as constitutional."[300] As the Supreme Court put it more recently in *Students for Fair Admissions,* "[w]hat cannot be done directly cannot be done indirectly."[301]

In fact, Montana employed the same type of neutral-remedy argument to justify the judicial invalidation of the educational choice program in *Espinoza*—and it met the same fate. There, the Montana Supreme Court had invalidated a choice program, which was open to religious and non-religious schools alike, because the state's no-aid clause prohibited the inclusion of religious options.[302] On appeal at the U.S. Supreme Court, the state insisted that this remedy was "neutral."[303] There was "no [federal] free exercise violation," the state argued, "because the Montana Supreme Court ultimately eliminated the scholarship program altogether," rather than barring its use for religious schools alone[304] "[N]ow that there is no program," the state maintained, "religious schools and adherents cannot complain that they are excluded from any generally available benefit."[305]

The U.S. Supreme Court flatly rejected that argument, looking not at the neutrality of the remedy, but rather the *reason for* the remedy. "The program was eliminated . . . not based on some innocuous principle of state law," the Court held.[306] "Rather, the Montana Supreme Court invalidated the program pursuant to a state law provision that expressly discriminates on the basis of religious status."[307] When

299. 377 U.S. 218, 232 (1964).

300. *Id.* at 231; *see also* Bush v. Sch. Bd., 187 F. Supp. 42 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961) (per curiam) (affirming injunction against Louisiana's closure of public schools under similar circumstances).

301. *Students for Fair Admissions*, 600 U.S. at 230 (quoting Cummings v. Missouri, 71 U.S. 277, 325 (1867)).

302. *Espinoza*, 140 S. Ct. at 2253.

303. *See id.* at 2262.

304. *Id.* at 2261.

305. *Id.* at 2261–62.

306. *Id.* at 2262.

307. *Espinoza*, 140 S. Ct. at 2262.

the state court was "called upon to apply [the] state law no-aid provision" and its bar to religious schools, "it was obligated by the Federal Constitution to reject the invitation."[308] And "[b]ecause the elimination of the program flowed directly from the Montana Supreme Court's failure to follow the dictates of federal law," the Court concluded, "it cannot be defended as a neutral policy decision, or as resting on adequate and independent state law grounds."[309]

So, too, with the supposedly race "neutral" remedy that opponents of choice programs seek. Although that remedy would, indeed, eliminate educational choice programs for all children, regardless of race, the remedy would issue pursuant to a state education clause that, by the opponents' interpretation, mandates racial balancing in the public schools, which is "patently unconstitutional" under the Equal Protection Clause.[310] That minority voucher students would suffer along with (perhaps even more than[311]) nonminority voucher students as a result of the remedy is utterly beside the point.

Finally, it is important to recognize that one of the very purposes of the Fourteenth Amendment was to provide a constitutional basis for the federal government to support, through the Freedmen's Bureau, private educational opportunities for children whom, because of race, public schools in the South would not serve.[312] It was in part President Johnson's hostility to these educational efforts that prompted him to twice veto, purportedly on constitutional grounds, bills to extend the Freedmen's Bureau in 1866.[313] "Before overriding the second veto,

308. *Id*.

309. *Id.*

310. *Students for Fair Admissions*, 600 U.S. at 223 (quoting *Fisher*, 570 U.S. at 311).

311. *See. e.g.*, David J. Fleming et al., *Similar Students, Different Choices: Who Uses a School Voucher in an Otherwise Similar Population of Students?*, 47 EDUC. & URBAN SOC'Y 785, 795 (2015) ("Compared with a random sample of public school students, [Milwaukee Parental Choice Program] students are more likely to be Black or Hispanic, while [Milwaukee public school] students are more likely to be White."); *id*. at 798 ("The results of the multivariate analyses support the previous findings. Compared with a random sample of [Milwaukee public school] students, voucher students were more likely to be female, Black, and Hispanic."); Yujie Sude & Patrick J. Wolf, *Do You Get Cream with Your Choice? Characteristics of Students Who Moved Into or Out of the Louisiana Scholarship Program* 35–36 (Univ. of Ark. EDRE Working Paper No. 2019-13 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3376237 (finding long-term participants in Louisiana voucher program were more likely to be low-income, African American, and female).

312. *See* Bindas, *Once and Future Promise*, *supra* note 7, at 536.

313. 8 MESSAGES AND PAPERS OF THE PRESIDENTS 3596, 3620 (1897).

Congress approved the Fourteenth Amendment,"[314] and the congressional debates make clear that one of its objects was to provide a constitutional basis for the Freedmen's Bureau Act of 1866 and the efforts of the Bureau itself.[315] In the light of this history, it is perverse to suggest that the Fourteenth Amendment would permit a state to deny, because of race, private educational opportunities for students who are not being well served by the public schools.

CONCLUSION

Once it had become clear that the Supreme Court was removing religion from their arsenal of weapons, educational choice opponents retrained their focus to race, determined to keep waging their war. Yet their "school choice is racist" argument is a canard. The historical evidence does not support the claim that today's educational choice programs are racist in purpose. The empirical evidence, meanwhile, does not support the argument that they are racially segregative in effect. In light of this dearth of evidence supporting their claims, as well the legal weaknesses at the heart of those claims, their weaponization of state education clauses to invalidate choice programs in the name of race is likely to meet the same fate as their weaponization of state Blaine Amendments to invalidate them in the name of religion: failure.

314. Bindas, *Once and Future Promise*, *supra* note 7, at 536.

315. "The one point upon which historians of the Fourteenth Amendment agree, and, indeed which the evidence places beyond cavil, is that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills . . . beyond doubt." JACOBUS TENBROEK, EQUAL UNDER LAW 201 (1965); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 1092 (1866) (statement of Rep. Bingham) (discussing opposition to the Freedmen's Bureau as evidence of the need for the amendment).