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SPEAKERS

Marie Miller, Michael Bindas, Rick Garnett, Nicole Garnett



Marie Miller 00:24

Hello and welcome to a special episode of Short Circuit. My name is Marie Miller and I am your host for today. We are here at the University of Notre Dame Law School for an event called Carson v. Makin, Parental Choice and Religious Liberty. This event centers around the timely release of Jack Coons' book, titled The Case for Parental Choice: God, Family, and Educational Liberty. Jack Coons has been championing family choice and education for more than 60 years. His book is a collection of essays examining the relationship between parental choice and individual autonomy; the implications of American educational policy for social justice, equality, and community; the impact of education policy on low-income families; and the religious implications of parental choice. We are privileged to be on the program of book launch events. And to have with us here two of the book's editors, Professors Nicole and Rick Garnett, as well as our very own Michael Bindas. Thank you to the University of Notre Dame Law School for providing us this space to record. Today's episode is essentially a crash course in parental choice for children's education. We will start by talking about what parental choice is and what parental choice programs look like. We'll then talk about some of the key themes in Jack Coons' book discussing policy arguments for and against parental choice programs. We'll next turn to challenges that these programs face in court. And at that time, we'll talk about four key Supreme Court cases on this topic. Finally, we will talk about current trends and what is coming next for parental choice programs. To enlighten us on these topics, we have three fabulous speakers. Nicole Garnett is Notre Dame Law School's Associate Dean for External Engagement, a Fellow of the Institute for Educational initiatives, and the sSenior Policy Advisor for the Alliance for Catholic Education. Her teaching and research have focused on education policy and topics related to land use and urban development policies. As I already mentioned, she is an editor of Jack Coons' timely new book on parental choice. She has authored two books and dozens of scholarly articles. And she is, to say the least, a leading expert on parental choice. We are proud to say that early in her career, she worked with us at the Institute for Justice on litigation that culminated in Zelman v. Simmons-Harris, a Supreme Court case that we'll talk about later in the program. Welcome, Nicole.



Nicole Garnett 02:04

 NICOLE Garnett 03:04

Thank you.

 Marie Miller 03:05

Rick Garnett is the founding director of Notre Dame Law School's Program on Church, State and Society. He is also a Fellow of the University's Institute for Educational Initiatives, and he served on the Notre Dame Task Force on Catholic Education. He also consults regularly with the Alliance for Catholic Education. His teaching and research focus on the freedoms of speech, association, and religion, and constitutional law more generally. He is a prolific writer and premier authority on the role of religious believers and beliefs in politics and society. Like Nicole, he is an editor of Jeff Coons' book on parental choice, which brings us here today. Thanks for being here, Rick.

 Rick Garnett 03:49

Thank you very much.

 Marie Miller 03:50

Finally, Michael Bindas is a senior attorney with the Institute for Justice, where he leads our educational choice team. In 2021, he argued for families at the U.S. Supreme Court in *Carson v. Makin*, a case that we will talk about later, and he was also part of IJ's Supreme Court litigation team in *Espinoza v. Montana Department of Revenue*, another Supreme Court case that we'll talk about later. Michael has led many successful defenses of educational choice programs from coast to coast. And his work includes helping policymakers nationwide design constitutionally defensible educational choice programs. So thank you, Michael, and all of you for being here with us today to share your expertise. Let's start off with some general information about parental choice programs. And for this, Michael, we'll turn to you with a few questions for us to start. What do the terms school choice and parental choice mean?

 Michael Bindas 04:53

Basically, they describe policies, legislatively adopted policies, that empower parents to make the decisions concerning their children's education. So, generally speaking, they are programs that provide financial assistance to parents that they can use if they want to opt out of the public school system and pursue an education for their children at a private school, or as I think we'll talk about, with other private providers, or in some cases, even homeschool expenses. But again, generally speaking, what they are are programs to empower parents to make the decisions concerning their children's education.

 Marie Miller 05:31

And how long have these programs existed? Are they a new thing or have they been around for a while?

M

Michael Bindas 05:37

I like to distinguish between the modern school choice movement and the kind of OG school choice movement. The first documented school choice program in the United States that I'm aware of goes back to 1802. It was adopted by the Pennsylvania legislature to empower parents in a particular neighborhood of Philadelphia to procure an education for their children at what were then all private schools. They provided funds to parents that the parents could in turn use to pay tuition to get an education for their children. Fast forward a little bit more in the 19th century, and some of the New England states adopted what were called tuitioning programs that operated the same way that a modern voucher program does, provided financial assistance to parents to again use to procure an education at what at the time were overwhelmingly private schools. So you had, you know, choice-like programs throughout the 19th century. But really, it was not until the 20th century and the thought many people attributed to Milton Friedman that really created the modern interest in school choice. He, Milton Friedman, the Nobel-winning economist, published an article in the 1950s that proposed school choice as a solution to some of the problems in the public school system at the time. And, as a policy proposal, that really started to take off in the 1990s. And that's what I would refer to as kind of a modern school choice movement, beginning with the program that the Wisconsin legislature adopted for children in the Milwaukee Public School District in 1990. Through the next four decades through today.

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Marie Miller 07:28

Talking about the modern type of school choice programs, what do those look like?

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Michael Bindas 07:33

Generally speaking, they fall into three categories. The one people are probably most familiar with is what are called voucher programs. They're nothing more than publicly funded scholarships, right? People are probably very familiar, a lot of listeners probably have received Pell Grant grants in college, maybe participated in the GI Bill. It's the same exact concept except rather than the higher ed level, it's at the K-12 level. The government provides a publicly funded scholarship that parents can use to send their children to a religious school. The second type of program is what are called tax credit scholarship programs. They're like vouchers, in that they provide scholarships to children. But unlike vouchers, they're not publicly funded. The government offers a tax credit for taxpayers to contribute to nonprofit scholarship organizations that in turn award the scholarships to children. So they're like vouchers, in that they provide scholarships that can be used for private school tuition. But they're not publicly funded. They're merely incentivized by a tax credit. They're entirely funded, though, by private donations to nonprofit scholarship organizations. And then the last category, which is really kind of the newest development in the school choice movement, are education savings accounts. These are government authorized savings accounts into which periodic payments are made. Parents can use these savings accounts on a whole host of educational expenses. So they can use them to pay tuition at a private school. But they can also use them for things like online learning homeschool curriculum, special education therapies, and they really empower parents to customize an education that will best meet their children's needs. They can be

publicly funded like vouchers; they can be tax credit generated, like tax credit scholarship programs. But in the end, they provide a great deal more flexibility than simply the ability to pay tuition at a private school.

M

Marie Miller 09:38

So there's these three types of modern school choice programs. How do they compare to those older types of programs? Do they resemble them? Or do they look completely different? Or do you know what those kind of original programs looked like?

M

Michael Bindas 09:53

I mean, they look a lot like modern-day voucher programs. They operate certainly the same way where the government provided funds to use to pay tuition for their children's education. So, you know, they don't look a lot like education savings accounts, because these kinds of other educational services didn't exist back then. But they look a lot like modern voucher programs.

M

Marie Miller 10:17

I'd like to turn now to some of the themes in Jack Coons' book and for this, I'd like to turn to Nicole and Rick at first, but let's open it up and just engage in a discussion. So Nicole and Rick,, why are parental choice programs important? Or in other words, why should we have them at all?

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Nicole Garnett 10:39

Well, so I guess I would say, I could start with Jack Coons' arguments, which I think are the most important ones. His argument is very focused on empowering parents, as we say here at Notre Dame, as a Catholic school, that parents are the first and best educators of their children. They have the right and sacred duty of forming them both spiritually and morally and educationally. And so I think Jack's arguments are primarily rooted in the primacy of parents, and secondarily, in the idea that parents have been systematically disenfranchised by what was until, you know, 30 years ago, a very monopolistic educational bureaucratic landscape, which for many parents is still the case. So your zip code determines where you go to school, and he would use the term conscription, it's sort of like you're conscripted by your zip code to attend a certain school. And not only could it be a school that failed the child, but it also took the power of the parent away to form their child in and make them into the person that the parent would like them to be. In an essay reproduced in the book called "School Choices, Simple Justice" -- it's a 1982 First Things essay. I really love the image. He says, children are the tapestry of their parents, they're the way that sometimes particularly poor parents speak is to form their children. If we take that away from them, we're depriving them of dignity. And I think that's the best argument for school choice. So there are others, I think both Rick and I agree that Jack has a better handle on is the Milton Friedman argument, which is by injecting competition into the marketplace, and by creating an educational marketplace, injecting competition into this public school monopoly, we would improve public school outcomes. And then there are others, you know, rescuing kids

from schools that fail them, increasing test scores, all of those things are important. The rescue mission is very deeply resonates with me. But I think at heart school choice is really about empowering parents.

R

Rick Garnett 12:49

And just a brief supplement to those points that Nicole was making. I mean, increasingly, I think there's an appreciation, especially in the current Supreme Court, for the fact that the decision to send your kid to a religious school is part of the religious exercise of parents. And of course, religious exercise is protected by the First Amendment of the Constitution. And so if you have state policies in place that are affirmatively discriminating against religious schools, then our First Amendment doctrine tells us that's impermissible. So I think the school choice debate recently has been kind of enriched and, you know, amped up a little bit by an appreciation for the fact that, you know, not only is that a question, many jurisdictions include religious schools and school choice programs, but probably given our constitutional commitments, they often have to because, again, our Constitution sets its face against anti-religious discrimination.

M

Michael Bindas 13:52

One other thought on this that I would add is that school choice is a solution to what I think is the kind of fundamental problem with education or how we do education in this country, which is assign children to public schools based on where they live. If they happen to be a wealthy family that can buy into a very high performing public school district, great. If they're not, they're stuck with the school that the government assigns them to, and no parent should be put in that position. The wealthy have always had school choice in this country, right? They can buy into a great school district or they can pay tuition at a private school. All parents should be empowered to make that choice.

R

Rick Garnett 14:38

And school choice is, among other things, it kind of puts into practice what I think as being a pretty commonsense claim, which is that if you think of public education correctly, it shouldn't mean education that necessarily takes place in a state-owned building or that is provided by public employees. That public education means education of the public, and we should all be committed to that. And then it's a second question, what's the best delivery mechanism for getting the public educated? And school choice is kind of a way of saying, let's be more creative. And let's be more respectful of the people who whom we're trying to benefit by providing these alternative, you know, multiplicity of delivery mechanisms for education.

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Nicole Garnett 14:40

I would also just add, I mean, if you think about...we have four children, they're all very different. And so one real benefit of school choice, or now more expansively parental choice, is that parents -- because they understand that their children have different needs -- there is no one school or school system that will serve perfectly the needs of every child or the needs of every family. And so school choice respects pluralism, both by empowering parents to make

decisions, deeply moral decisions about the way their children will be raised, but also respects pluralism by recognizing the plurality and reality of plural learning needs within communities, within families. And I think that is something that we have sometimes lost when we talk about parental choice as being about efficiency and increasing test scores. But rather than talking about the fact that even the best school systems, as Michael said, even the best school systems don't necessarily serve every child well.

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Marie Miller 16:29

Right. Every individual is different, every family is different. And there's a diversity of needs for each student that parental choice can accommodate. At this point, I'd like to turn to some of the counterarguments to parental choice programs. So what do you say to the argument that parental choice programs take money away from public schools, often public schools that have very little resources already?

R

Rick Garnett 16:58

Well, I think the first point is that if we think about public education correctly, the money doesn't belong to any particular institution. You know, there's a saying that's got a lot of purchase on Twitter, I think, justifiably so, which is fund students, not systems. So the whole framing of taking money away from public schools is the wrong framing. The money belongs to the goal of education. And that can happen in a lot of different places. That's sort of the first point. The second and I suppose related point is that, in practice, it simply really isn't the case that school choice programs take money away from a school, the school choice programs are currently set up. Generally speaking, the public schools are getting much more money on a per capita basis for a kid than the kids are getting if they go to a school choice program. But for me, anyway, that's a secondary point, the primary point is this conceptual one, that we shouldn't think of public education as existing for the benefit of a particular government institution called the public school. Public education exists for the benefit of the public, and the public is the parents and their children.

M

Michael Bindas 18:22

I can talk a little bit about the kind of second point that Rick mentioned, because while I think I agree with you, that should be the secondary point, it is really the kind of most important point in the litigation defending these programs. Because increasingly now that, as we'll talk about, the big kind of religion questions are off the table, school choice opponents are relying more and more on this argument that these programs supposedly divert money from the public school system and undermine the public school system. And as you mentioned, it's simply not true. First of all, many of these programs are funded by an annual appropriation from the general fund. So they're often not tied to the public school funding formula. So the the idea that they're diverting money from the public schools elsewhere is simply not true if they're not, in fact, tied to the public school funding mechanism. But school choice opponents say, Well, yeah, but every time a child leaves the public school system, the public school district is getting less money for that child. And therefore, the school district where the public school is is going to be worse off. Well, the fact of the matter is, yes, it's true that when a child leaves the public school system, the public school gets less money for that child. Number one, that's true, regardless of

why your child leaves, if they leave to take a voucher or an education savings account, or they move out of state or they just decide, you know, this school is not working for us. So there's that point. But when a child leaves a public school, the school still gets some portion of the state funding that it was getting because not all the state funding is enrollment driven. So they still get some of the state funding, they get all of the local funding still. Child leaves, they still get all of the local funding that they were getting to begin with. And they keep the overwhelming majority of federal money as well, because almost all of the federal money is not enrollment driven. So they're keeping much of the money, most of the money, for a child that they're no longer educating. And as Rick mentioned, on a per pupil basis, they're far better off when a child leaves, as strange as that sounds, but it's really the kind of only business for lack of a better word that is financially better off, the fewer customers it has. It's a strange way to think about this, but it's very, very true.

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Nicole Garnett 20:48

I would add, you know, I can get a little hot under the collar about this argument. And I think it's important, I think it's important not to make arguments about school choice, sort of us against them, or the private schools against the public schools. I would add a couple of things. You know, on just the nuts and bolts of the legislation, a lot of these big legislative victories in the parental choice movement have paired private school choice or parental choice with actually increasing subsidies for the public schools, particularly most recently in the form of teacher salary increases. So it's not a both and situation. And I think that's important to keep in mind. I also think it's important, to Rick's point about the systems thing, it's about kids, not system. So I don't like hostage arguments. So it seems wrong to me to say we can't let the child leave a school that is not serving the child well -- maybe serving other children well, maybe serving no children well -- because that will make the school worse off. So it just doesn't make sense to me, you don't get to keep them because you have a building with people in it, so sometimes I worry that these debates become more about the adults than about the kids, and they really should be about the children. So I don't like hostage arguments. The last thing I will say and I sort of mentioned that I think the parents rights, parents' liberty, dignity arguments are stronger, resonates more strongly with me. But Milton Friedman originally said that if you subjected public schools to competition, they would get better. And the one thing that we know, the one thing that we know, over and over again in every study, is it subjecting public schools to competition makes them better. So it is actually the case that market competition works. And when you have a private school choice program or charter schools, the rising tide lifts all boats. And public schools respond to those competitive pressures by improving. So empirical studies suggest it's simply not the case that the schools are worse off. Nor is it often said that the kids in schools that get left behind are worse off. That's just not what this the evidence suggests.

N

Nicole Garnett 20:58

There's another anti-school choice argument that's presented often, which is related to something that Nicole and Michael mentioned, and that is the so-called cream skimming argument, that Well, the problem with school choice is that, you know, really engaged and active parents will take their really high performing and talented children out of the public schools and put them somewhere else. And that'll make the public school worse off. Now, as Nicole said, that's kind of a hostage-taking argument, which we normally wouldn't find very

appealing in most contexts. But just in terms of the empirics on the ground, that's very often not the case. It's very often the case that engaged and informed parents with their high achieving engaged and participatory kids are pretty happy with their neighborhood public schools. And so they are perfectly happy to stay in that school. It's often the case that the kids who need to take advantage of the opportunities that school choice provides are kids who are struggling in their public schools.

R

Rick Garnett 23:04

Kind of launching off from that competition point, market competition. What about the argument that parental choice programs will lead to the proliferation of, for lack of a better word, these sham private schools that aren't really providing a quality education to students, but they're getting money that's been that's gone through the government in some some way?

N

Nicole Garnett 24:31

I don't think there's much evidence that...there will always be bad actors. And sometimes people will say, Oh, in the charter school context, that school charter school closed, and that's bad. I'm like, No, it's good. That's that's how markets work. So I really think that there's very little evidence that this is happening, the academic evidence the studies on how private school choice works and whether the test scores increase, you know, they do but marginally. But what we do know from these studies, including particularly work by Pat Wolf at the University of Arkansas, is that the kid's life outcomes change dramatically, even when their test scores don't. And we also know the parents really love their chosen schools. And so these things lead me to believe that that's it's just not true, except at the margins. And even at the margins, I will take the, you know, the storefront school in Florida and the tax credit program over most schools in inner city, you know, the Bronx. I mean, there's always as compared to what thing, right? So is it really the case that these schools are terrible and so much worse than the public alternatives? It's often not, and the study suggests that they really are transforming lives. So I think that's really important to keep in mind in in these discussions.

M

Michael Bindas 25:54

I think it's also important to look at some of the research on why parents opt into these programs and choose the schools they do. Oftentimes, it's not, you know, better test scores , better academics. For many families, many parents, in many parts of this country, the number one reason is safety. Their child, they don't feel safe sending their child to the government-assigned to public school. And no parent should be put in that situation, regardless of whether they're going to have better, you know, academic outcomes at the new school or not. They should be able to feel safe sending their child off to school each day. And so I think, oftentimes, we get caught up on comparisons. And I think the empirical research overwhelmingly supports the idea that choice improves academic outcomes, both for people who partake in the program, and children who remain in the public school system. But it's kind of a myopic view to only look at that. there are so many other factors, oftentimes far more important factors, that go into a parent's decision about what school is going to best serve their child.

N

Nicole Garnett 27:02

if you ask parents why they choose, academics are one reason but they're never the first. Safety, school culture, discipline, character formation, moral formation, religious formation, these are the things that parents care deeply about, particularly disadvantaged parents. And I think if you ask people why they care about that is because the parents are actually a lot wiser than we give them credit. They understand that those are the things that are going to really make a difference in the lives of their children. Now all that said, I will say one thing that I think is important for schools participating in choice programs, is that they do need to be transparent about who they are and how well they're doing. I think that's something that schools participating in parental choice programs will have to work on as we get more vibrant choice markets, because parents will want to ask questions, not just about test scores, but other things. And sometimes private schools have gotten away with kind of resting on their laurels and not being particularly transparent. So I'm all for transparency about school quality and transparency about what a school is about. But I think that is this is going to lead to a proliferation of horrible schools that don't do any good in the lives of kids? It's just not true. And and we haven't seen it and I don't think we will.

M

Marie Miller 28:03

Alright, let's turn to a final counter argument to parental choice programs. And that is that parental choice programs will promote communities that are self-isolating and more homogenized, and that this will create sharper divisions, cultural and ideological divisions, in what is already a very polarized society.

R

Rick Garnett 28:45

You know, it's long been part of the lore of America's kind of government-run schools that they served as this melting pot that brought together people from all kinds of contexts and help to break down divisions and so on. I'm not sure the history supports that. In fact, I'm confident that it doesn't. But again, looking at the evidence, my own colleague here at Notre Dame, David Sikkink, and also my colleague here, David Campbell, one's a sociologist -- one's a political scientist -- did some really interesting work, which showed that children attending a number of sort of religiously affiliated schools, the kinds of schools that are benefiting from a lot of these choice programs, actually tended using a bunch of the survey mechanisms that they use to be more other-regarding, more civically engaged, more politically tolerant, and so on. So the specter of school choice leads to narrow siloing and divisiveness. Again, it's a story that gets told but that's not borne out by the evidence. And then a slightly different point would be that going all the way back to our friend Jack Coons, parents do have a right, not only in terms of their dignity as parents, but also in terms of their religious freedom rights, they have a right to pick a school that is going to align with their goals for their child's formation, education and development. And I don't think we should frame that as a negative. Again, as Michael said earlier, you know, wealthy parents have always had the ability to sort of get the school that works well for them in terms of forming the kind of kids that they want to form. And I don't think we should paint in kind of negative terms, the ability of lower income parents to have that same kind of agency when it comes to giving their kids the sort of formation they want.

N

Nicole Garnett 30:54

more content...

Ashley Berner at a Johns Hopkins University has this great project on pluralism and education, wonderful work on international comparisons to the United States where we are really behind on having a pluralistic education system. She always says, you know, there is no such thing as a neutral education. And often, as Rick says, sometimes the supporters of parental choice...supporters of traditional public schools, district public schools will say, you know, we're just being neutral here, we're this, we're just like, forming good citizens in a neutral way. And it's just, you know, parents don't think that's true. It's just not true. Education requires choices. And as Rick said, some parents don't like the choices that are being made in public schools for a host of reasons. And they have a right and they ought to have the right to make different decisions about forming their kids. Those decisions, the evidence suggests, tend to result in well engaged, inclusive, democratically involved citizens, and that's great. But we shouldn't lose sight of the fact that we're not talking about value-neutral education versus, you know, scary privatizing education. Every choice that is made in every classroom every day is a choice about reinforcing one idea over another and parents should be permitted -- they don't get to say anything about what goes on inside the school -- they should be permitted to make those value decisions for themselves.

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Marie Miller 32:23

All right, from more analysis of policy arguments, you'll have to read Jack's book. But now I'd like to turn away from the policy arguments and toward the challenges that these programs face in court. And I'd like to focus on four key Supreme Court cases involving challenges to parental choice programs. And those are *Zelman v. Simmons-Harris*, *Trinity Lutheran Church of Columbia v. Comer*, *Espinoza v. Montana Department of Revenue* and *Carson v. Makin*. And, Michael, I'll direct this question to you. Can you help us understand what challenges to parental choice programs look like? And how those challenges are being treated in the courts?

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Michael Bindas 33:08

Sure. Specifically the cases you mentioned, and then perhaps we can talk about kind of, now that those issues are resolved, what's going on looking ahead. But those cases, starting with *Zelman*, when the modern school choice movement was in its infancy, the big unresolved question was whether school choice is compatible with the Establishment Clause. Opponents of school choice said, Well, if you allow parents to use these vouchers to send their children to religious schools, that's in effect state establishing religion in violation of the First Amendment. And the Supreme Court flatly rejected that argument in the first of the four Supreme Court cases that, you know, we've litigated involving choice. And the Court began by emphasizing the fact that these programs aren't designed to benefit schools religious or not, they're designed to benefit families. You know, no one would say food stamps are designed to benefit grocery stores, right? They're designed to enable people to meet their nutritional needs. School choice programs are designed to empower families to meet their educational needs. So that's the critical kind of point, I think, underlying *Zelman*. And then the Court says, so long as two criteria are satisfied, these programs are perfectly compatible with the Establishment Clause. They've got to be neutral toward religion, meaning religious and non-religious schools alike are free to participate. And they've got to operate on the private choice of parents so that it's a parent deciding rather than the government dictating what school a child will attend. And so long as those criteria are satisfied, no problem under the Establishment Clause. That was a great outcome. But the opponents of choice didn't just pack up and go home. At that point, they

retrain their focus to state constitutions, particularly provisions in state constitution. It's called Blaine Amendments, which, generally speaking, prohibit state funding of religious or sectarian schools. These provisions have a very, very sordid history rooted in 19th century nativism, anti-Catholicism specifically. You know, that's that's a whole other podcast but in the wake of Zelman, the opponent of choice kind of weaponized the Blaine Amendment and said it doesn't matter if these programs are okay under the federal Constitution, they still violate these state constitutional provisions called Blaine Amendments. And in a trio of cases, the Supreme Court put that argument to rest as well. The first of those cases was actually not a school choice case. *Trinity Lutheran Church of Columbia v. Comer* involved a playground resurfacing program so the state of Missouri would provide grants for schools and nonprofits to repave their playgrounds with like scrap tire material. And Trinity Lutheran Church, which operated a preschool, applied for one of these grants and it was excluded. The reason Missouri excluded it was its Blaine Amendment, said we can't provide these funds to Trinity Lutheran Church. To do so would violate the Blaine Amendment, and Trinity Lutheran files a Free Exercise challenge challenging that exclusion. And the Supreme Court holds that Missouri's Blaine Amendment, the application of Missouri's Blaine Amendment to exclude the church from this program, simply because it was a church, simply because it had a religious identity, violated the Free Exercise Clause of the U.S. Constitution. So great outcome, requires neutrality between religion and non-religion in this program. It seemed like it was going to be a decision that kind of really put to rest this whole idea that Blaine Amendments can be weaponized to exclude religion from school choice programs. The problem was that there was a footnote in *Trinity Lutheran* that was joined by four of the justices. And it said it really, in fact, what it said, was that the only thing we're addressing in this case was a program like this one that excludes recipients simply because of their religious status or identity, simply because in this case, the preschool was church-owned or church-operated. We're not deciding whether or not states can apply their Blaine Amendments to exclude people or institutions from public benefit programs because of the religious use to which they might put the aid. And so this idea that there might be some constitutionally meaningful distinction between religious status or identity on one hand and religious use on the other was kind of the hook that school choice opponents use to kind of wiggle out of *Trinity Lutheran* and continue attacking school choice programs. They said, Look, status use distinction, that's a green light to keep on applying Blaine Amendments to bar religious options from these programs. So in the third of these four cases, *Espinoza v. Montana Department of Revenue*, this one was a school choice case. It involved a program adopted in Montana that originally provided scholarships to children they could use at religious or non-religious private schools. The legislature did the right thing and made it religion neutral, as required by *Zelman*. But then the state agency that was charged with administering this program adopts a regulation that bars religious schools from the program. And the justification was Montana's Blaine Amendment, we've got to promulgate this regulation barring religious options, because we have a Blaine Amendment that prohibits public funding of religious schools. So we challenged that religious exclusion, and the Supreme Court in 2020, held that it, like the exclusion in *Trinity Lutheran*, violates the Free Exercise Clause. It was a great outcome. Now Montana had justified this exclusion and tried to distinguish *Trinity Lutheran* by saying, we're not excluding schools because they are religious. You know, that was *Trinity Lutheran*, we're doing this because the school that these these scholarships can be put to a religious use. But the Supreme Court kind of dodged that question, because as the Court interpreted the Montana Constitution and the lower court decisions, the state court decisions in the case, the court was convinced that really what was going on was schools were being excluded because of their religious status, not because of anything in particular that they were doing, curriculum activities, but because of their religious identity. And so the court says, we don't really need to, again, revisit, visit this issue of status versus use. So a great outcome, Montana's program was allowed to, you know, be implemented and provide opportunities in religious and non-religious

schools. But it didn't put to rest this argument that school choice, opponents were still making, which is we can still borrow religious options if the goal is to prohibit religious use of the scholarships. So finally, we get to Carson, it involves a case or a program in Maine, one of these early New England school choice programs that I mentioned earlier. If you live in a town that doesn't operate a public school -- Maine is a very rural state, oftentimes the population kind of doesn't justify operation of a public school -- then the town has two options, it can pay or it can contract with a school in a neighboring town to send all the resident children of that town to, or it can provide tuition for families in that town to use at the school of their choice. And it could be public, it could be private, it could be in state, it can be out of state, it can be out of the country. But the one thing it could not be was religious, the state had a complete prohibition on using these tuition funds at religious schools. There were many challenges to this religious exclusion going back to the 1990s. Nicole was in at the ground floor on this; she helped litigate the first challenge to the to this exclusion. But as the jurisprudence kept shifting, in a positive direction at the U.S. Supreme Court level. more and more friendly toward and protective of religious liberty, Maine kept shifting into justification and its explanation as to how this exclusion worked. You know, it used to be that they justified it based on, these the schools are religious, they have a religious status, and we're not going to find anything that has a religious status. When it became clear in Trinity Lutheran and Espinoza that you can't discriminate against schools, because of the religious status, Maine started saying, Well, really what we're concerned about is some kids are going to take, you know, these funds and go to schools that will put them to a religious use, namely, teaching religion. And so Maine basically said in the lower courts, you know, Trinity Lutheran, Espinoza have nothing to do with this, because this is all about use-based exclusion, that issue that the Supreme Court has not addressed. So anyway, we get the issue up to the U.S. Supreme Court. And finally, the Court puts this issue to rest once and for all. And it rejects the idea that there's a constitutionally meaningful distinction between

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Michael Bindas 42:44

discrimination based on religious status on one hand, as opposed to religious use on the other. And the Court really emphasizes two things, the first of which is teaching religion is what religious schools do, right? This is part and parcel of who they are. In the argument in the case, I tried to make the point in very simple terms, which is, you know, religious schools teach religion just like a soccer team plays soccer or a book club reads books, right? Yes, it's what they do, but it's also who they are. And the Supreme Court really, I think, picked up on that because they quote an earlier decision, Our Lady of Guadalupe, to really emphasize the fact that teaching religion, passing on the faith, is central to the mission of religious schools. So this idea that you can kind of bifurcate religious use and status is just silly. And then the second thing the Court stresses is that, were if otherwise, if we allowed bureaucrats, in this case in Augusta, Maine, to trawl through the, you know, the curriculum of schools and the activities that they engage in and determine, you know, who's sufficiently irreligious and an acceptable choice for parents and who's too religious and therefore an unacceptable choice for parents. That's going to run the risk of number one, excessive entanglement of the state in religion, which is prohibited by the Establishment Clause. But it's also going to inject the risk of these government bureaucrats who are making these judgment calls of, you know, engaging in kind of denominational preferences of, you know, letting some schools in and rejecting other schools based on their subjective feelings about you know, whether the school is an acceptable choice or not. And so, at the end of the day, the Court says, look, it doesn't matter what Maine is calling this exclusion, can call it status-based, can call it use-based. It's discrimination against religion either way, and it's prohibited by the Free Exercise Clause either way.

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Marie Miller 44:46

I just want to pause there for a minute and open things up a little bit. So Nicole, you are on the ground with the first challenges and it's been about some decades until we've gotten to where we are. I'm just interested in your thoughts about that progression where we had Zelman and then in the past few years, we suddenly have three cases moving quite a bit.

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Nicole Garnett 45:12

So, I joined the IJ merry band of libertarian litigators in 1996. And the first voucher programs to include religious schools had just been enacted in Cleveland and in Milwaukee, and it was not at all clear that they were constitutionally permissible. And that same year, maybe the next, is the first of these main challenges that I find that we filed at IJ. So, in 2002, we get Zelman, which says that's constitutionally permissible, but it takes another 20 years to get to from, as Justice Breyer would say, May means must. And so that's, you know, there was a lot of work that went into that. And a lot of people after Zelman just thought, It doesn't really matter; the state constitutions are going to block all this stuff. And so like just really fighting over and over and making the case. Interestingly, the case that was made in the trial court in Zelman was this case, that to exclude religious schools would violate the First Amendment and but this was made in that case, and it's a great, great victory. I cried when Zelman was decided, I cried when Espinoza, too, but I think there's also the thing about the how much work went to even getting to Zelman because in the 70s, there was lots of law on the books that suggested that the Constitution not only permitted hostility to religion, but required it. And sometimes I feel like the states are still and some advocates on either side are still stuck in the 70s. And when your opponent in Carson was way stuck in the 70s, the Becket Fund is referred to this as the shag carpet interpretation of the First Amendment. So, we need to update our view of what carpet is. But I think it took a long time. And it's very, it's really meaningful. I think, and this came up in a panel that I moderated with Michael and a few other people named Michael earlier today, that moving forward, that fight will continue for a number of reasons. And one of them is that courts will still try to find ways to justify religious discrimination. A second is that there are programs all over the country that still have the word sectarian, that have these non-sectarian prohibitions in them. And states have not read Carson and just said, oh, gosh, we gotta clean up the law and stop discriminating. They're full steam ahead. So I think that it's a great victory. But it's going to take a lot of hard work. And it's also interesting, I'm sure Michael knows more about this than me. But what I hear is in state legislatures debating new legislation, still people will say, but what about the Blaine Amendment and you have to keep reminding, like, that's, you can't use that anymore. So I think there's a lot of hard work ahead. It's a great victory. Carson's a great victory. It's awesome time to be a proponent of school choice. So much movement on the ground, but there's going to be a lot of fights to come in the courts and in the courts of public opinion.

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Michael Bindas 48:19

Yeah, yeah. One of the last points you made there about state legislators still not quite getting it. I think they've been told for decades upon decades, can't have school choice, don't do it, don't even consider it because we've got a Blaine Amendment. And they think, okay, I guess

we can't do it. And this idea that a state constitutional provision can be rendered unenforceable because it contravenes the federal constitution is really kind of a foreign concept to them. And that's a big part of what we're doing now, in trying to get new programs implemented, is convincing legislator, this provision, yes, it's in your constitution, but it's a dead letter, it's been rendered a dead letter by this string of decisions. And you can comfortably and constitutionally adopt one of these programs and not concern yourself with running afoul of this provision in your state constitution.

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Marie Miller 49:12

And we've seen a lot of new programs in the past year or two years. And I want to hear your thoughts about why that is, if COVID had something to do with it, or a lot to do with it, if the Supreme Court's decisions had a lot to do with it, or all these things combined, other factors. What are you seeing for what's driving this proliferation of school choice programs right now?

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Nicole Garnett 49:39

So I mean, I guess I'll go back to Jack Coons. I mean, I think there are two things, maybe two and a half, that have really driven it. One was COVID. So, 2021 is the biggest year in school choice history, with 20 programs enacted or improved or expanded this year. In the last year, we've seen six states embrace universal education savings accounts. And one part of the that I believe is frustration with prolonged school closures. The most recent scores on the National Assessment of Educational Progress, the nation's report card, showed that there was basically 30 years of learning loss during COVID. 30 years, which means the test scores are back where they were 30 years ago. Now, the private schools, like take the Catholic schools, which opened very early in 2020. If they were a state, they would have had the highest test scores on the nation's report card and lost nothing. And I'm not just like, I'm just using that as an example. I think parents saw, first of all, they had a window into the classroom. Second of all, they were frustrated that the schools wouldn't open. And then to say, 'Give us more money and don't let the parents choose,' it's stopped being a plausible argument for a lot of people. And the other thing, I think, and I think this is back to Jack Coons, I think advocates switched their argument a little bit from being like, "Let's save poor kids from bad schools," -- which resonates deeply with me; it's why I got into the game -- to, "Let's empower parents," because they are the first invest educators of their kids. And that has resonated deeply. I think the two things are related.

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Michael Bindas 51:16

Yeah. And throw into that, you know, I think the momentum that was generated by certainly the Espinoza decision, which kind of, when combined with the other factors that Nicole mentioned, I do think that kind of emboldened more legislators, which is why we had that banner year in 2021. And why I think we're gonna have another banner year this legislative session, probably not in terms of the numbers of new and expanded programs, but in terms of their breadth, this move toward universal school choice, as opposed to kind of historically, school choice programs that were targeted at particular groups, whether it's children in failing schools, low-income families, foster children. There's been a definite shift toward truly universal programs where every child in the state is eligible.

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Marie Miller 52:06

Okay, so that covers what kinds of programs we're going to be seeing coming up. But what about the challenges that those programs are going to face? What do you anticipate?

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Nicole Garnett 52:17

So I'll leave it to Mike to talk about the legal challenges, which I think will happen in some, but not all of these states, which are going to be state constitutional challenges, increasingly marginal silly ones. But that doesn't mean that you can't file, anyone can file a lawsuit. I actually would just like to say something about the challenges for the movement. And I just wrote a report for the Manhattan Institute on the implementation of school choice programs. And I made the point in this report, that school choice on the ground has fallen short of its transformational potential, in part because of program flaws, which are maybe getting fixed, but in part because advocates have kind of tended to declare victory and walk away. And so in a book event we just had for Jack Coons, Doug Tuthill, who runs Step Up for Students in Florida says that they expect 100,000 new kids in school choice programs next year, that's 100,000 parents that need to be informed, that may be more than empty seats in private schools. So really attending to making these programs work in the lives of families, taking all of the painstaking, not sexy, like webinars and seminars and going to parishes and schools and explaining to parents how to sign up, all of these things are going to be critically important. There's a great line, the story is, of course, that Benjamin Franklin, as he left the Constitutional Convention was asked by a lady, I can't remember her name, "What kind of government have you given us?" And he said, "A republic, if you could keep it." And I got to feel like we're at that moment in the choice movement. We've been given are lots of choice, loads of choice. And now it's up to us to keep it. Some of those battles will be legal battles, but a lot of them I just think are going to be like, do we have the will and the creativity to make this work? We've been praying for it, hoping for it, fighting for it, and now we get it. We can't screw it up. I'm gonna get the last word to Micahel. But I do want to say one thing about implementing these programs. And that it goes back to your your point about the fly-by-night schools that don't do any good. I would prefer 100,000 kids to be in 500 schools that are good, if the cost is one school that is bad. So we have to be careful that what we're doing in implementing the programs is not trying to root out every little terrible possible thing, but actually saying the point of this is to give parents choices and not put the accountability cart before the horse and make sure that we're focusing on increasing the options. And then let's do it. Every other program does in the world an audit, and then find the bad, you know, look for the weeds that way, rather than sort of like, you know, every single thing has to be triple checked and we squelch the programs. That's a fear that I have is that we're going to have overregulation too quickly of some of these programs.

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Michael Bindas 55:20

Those are great points. And we've certainly seen a lot of those implementation challenges. You know, particularly with respect to parents who, you know, haven't had this opportunity in the past. They have never been through the process of applying to attend, you know, for their children to attend a private school, much less, you know, the application process for a scholarship and just letting them know these programs are out there and helping them to navigate the process of applying for them and applying to the schools themselves, is important

work. And you're right, it's not the, you know, perhaps the most kind of high profile, it's not, you know, litigating the constitutional questions and resolving those, but it's just as important because once the programs are there, we want people to take advantage of them and to be empowered by them. So the implementation thing is certainly a big, big piece. But then, as I mentioned before, just as the opponents of choice didn't pack up and go home after Zelman, they're not going to pack up and go home now. They haven't. You know, famously, Robert Shannon, who was the General Counsel of the NEA, said in the wake of the NEA's loss in Zelman that school choice, opponents would rely on any, his words, "Mickey Mouse" state constitutional provisions as they could find to attack these programs. And we've seen them get mousier, right, we've seen them. Now that the religion questions are off the table, they're making these, you know, very kind of state centric arguments that oftentimes are, you know, should be dismissed out of hand. And they're focusing more on things like, you know, the funding mechanisms of these programs, where are the funds coming from, you know, to have the kinds of really common arguments we're seeing. One is this idea that state constitutions require the legislature to provide for a public school system or a common school system. And the argument goes, that the imposition of that obligation imposed implicitly prohibits the legislature from providing other educational opportunities, that the kind of expression of the one the, you know, operate a public school system is an exclusion of the others of any program that would provide opportunity outside the public school system. You know, that's a strange argument, but it's one we're defending against in a number of our cases right now. And the fact of the matter is, you know, unlike the federal government, which is one of, you know, limited and enumerated powers spelled out in the Constitution, state government has plenary police power. They don't need constitutional authority to adopt a school choice program, they can provide financial aid to families with or without an explicit charge to do so in the state constitution. So that's one one big argument we're seeing. And kind of relatedly, the other one is that this idea going back to the diversion counterargument that you made before, that these programs impermissibly divert money from public schools, and therefore, frustrate or undermine the legislature's ability to satisfy its obligation to provide for an adequate and efficient public school system. But for all of the arguments I mentioned before that argument, it just doesn't hold up when you look at what actually happens when a child uses a voucher or an education savings account. This supposed diversion and fiscal harm to the public schools. It just doesn't happen. And you know, I think a consequence, though, of our success with the religion issues, is that we're now having to fight off these types of attacks, which oftentimes, you know, just kind of in terms of what that means practically as a litigator. It means working with economists, other expert witnesses to talk the court through, you know, this is how public school funding works. This is how this choice program is funded. Here's what happens when a child leaves the public system. Here's what happens fiscally to the..., yeah. And it's definitely, as a school choice litigator, a shift in how we go about litigating these cases, but it's a good problem to have, because there's a reason those weren't the lead arguments for all these decades. Because they're bad arguments; the stronger arguments were the Establishment and the Blaine arguments, and those weren't even strong, but now that they have been resolved, and that it's unquestionably clear that choice with religious options, number one is permissible and that if you have a choice program, it is impermissible to exclude religious options. These arguments are all that the opponents have left and we'll keep fighting.

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Marie Miller 1:00:11

Well, I think that's a great note to end on. Thank you all for joining us and sharing your knowledge and insights. And I hope everyone listening just continues to learn more about parental choice and reads Jack Coons' book. So thank you so much. And we'll talk again another

time. Thanks so much.