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I. INTRODUCTION

Some politicians believe that market-based approaches to education will meaningfully reshape public education in the United States. Advocates of school choice¹ insist that competition for students will improve academic outcomes, drive innovation and improvement, and reduce political interference in the education system.² Critics believe that there is little empirical support for any of these claims and fear that school choice policies worsen the problem of educational inequality.³ Although consumer choice is appealing, making an informed choice requires parents to navigate complicated application processes and transportation requirements, which may prove insurmountable to low-income families.⁴ The net effect of this is that the poorest and most vulnerable children are left behind.⁵

The purpose of this Essay is not to rehash the topic of school choice, which has been exhaustively considered and debated by academia, think tanks, media sources, and the government. This is a thought piece intended to shine a light upon the problematic use of the Internal Revenue Code (Code) to support state and local school choice policy, or more specifically, a tax expenditure—the merits of which have not been exhaustively considered and

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¹ “School choice” means, for purposes of this Essay, programs or policies that allow families to use public dollars to pay tuition to access schools beyond their local public school.

² DAVID N. PLANK & GARY SYKES, FRAMING THE ISSUES IN THE SCHOOL CHOICE DEBATE: LESSONS AND QUESTIONS (2000).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

debated.⁶ Part I covers an overview of § 529 qualified tuition programs (529 Plans), with attention to the 2018 change to the § 529 structure slipped into the Tax Cuts and Jobs Act (TCJA) that has essentially turned 529 Plans into a government-subsidized school voucher scheme for the wealthy.⁷ Part III considers the problems inherent to subsidizing school choice through the federal tax system.

II. 529 PLANS, AN OVERVIEW

529 Plans are marketed as tax-advantaged savings vehicles that can be used by anyone, regardless of income, as a valuable tool to save for education expenses. A 529 Plan is an eponymous⁸ tax-advantaged investment account designed to encourage saving for future higher education expenses. These plans are administered on the state level throughout the United States.⁹ The Code authorizes two types of plans: a prepaid tuition program for in-state post-secondary schools and a state-administered tax-deferred investment account.¹⁰ This Essay focuses upon the latter.

The 529 Plan as a tax-deferred investment account is an extraordinarily simple and flexible savings account in which a taxpayer invests after-tax dollars that grow tax-free in the account.¹¹ Deposits into a 529 account are

⁶ For an important piece that does touch upon some of these ideas in the context of nonprofit charters schools, see Philip Hackney, *Public Good Through Charter Schools?*, 39 GEORGIA ST. L. REV. 695 (2023).

⁷ See, e.g., Georgina Tzanetos, *Is 529 Plan Loophole Too Beneficial for the Wealthy?*, GBR (Aug. 9, 2021), <https://www.gobankingrates.com/saving-money/education/is-529-plan-loophole-too-beneficial-for-the-wealthy/> (“These 529 loopholes are a great way to build generational ‘education’ wealth. By securing the amount of money needed into a 529 plan for a child, it can be passed down to them without taxes—but it doesn’t have to be.”).

⁸ The 529 plan is named for Section 529 of the Internal Revenue Code. See *Updated Investor Bulletin: An Introduction to 529 Plans*, U.S SEC. & EXCH. COMM’N (Aug. 31, 2023), <https://www.sec.gov/about/reports-publications/investor-publications/introduction-529-plans>.

⁹ *Id.*

¹⁰ See *id.*

¹¹ The IRS issues Publication 970 to set forth the expenses that are qualified. See *I.R.S. Pub. No. 970, Tax Benefits for Education* (2022). The expenses that can be covered by 529 plan funds generally include tuition, fees, books, supplies, and equipment required for enrollment or attendance at any eligible institution. *Id.* at 6. Room and board and internet access are also qualified expenses, provided that the student is enrolled at least 50% of the time. *Id.* at 40.

not tax deductible for federal tax purposes, though there may be a benefit on the state-tax level.¹² These plans are sponsored by states, state agencies, or educational institutions and offer a range of investment options such as mutual funds, exchange-traded funds, and money market funds.¹³ The funds invested in a 529 Plan grow tax-free, and when the time comes to pay for qualified education expenses, withdrawals are also tax-free.¹⁴ Withdrawals from the account that are not spent on qualified education expenses are subject to tax plus a 10% penalty¹⁵ (with the penalty being waived in a number of different circumstances).¹⁶

These plans are impressively flexible and designed to facilitate shifting and varying beneficiary needs. Account owners are permitted to change beneficiaries without penalty if the named beneficiary dies or is unable to use the account (subject to some, but not overly burdensome, limitations).¹⁷ If one child does not use all of the funds in their account, the beneficiary may be changed to another family member without penalty.¹⁸ Also, account owners may change their investment options twice per year without penalty.¹⁹ This allows account owners to respond to market conditions and adjust investment strategies. The tax benefits afforded by these accounts are also important. Except for the Roth IRA, no other investment vehicle allows

¹² Roughly thirty states allow some type of deduction against state taxes. See Keith T. Jones & Rebecca Hamm, *Look Before You Leap into a 529 Plan*, J. OF ACCT. (June 1, 2020), <https://www.journalofaccountancy.com/issues/2020/jun/funding-higher-education-529-plans-roth-ira.html>. Some states allow for an upfront deduction against state income tax for 529 plan contributions. See *id.*

¹³ It seems as though plan administrators largely invest 529 plan funds through mutual funds. Mercer E. Bullard, *The Visible Hand in Government-Sponsored Financial Services: Why States Should Not Be Allowed to Offer 529 Plans*, 74 U. CIN. L. REV. 1265, 1268 (2006).

¹⁴ See I.R.S. Pub. No. 970, Tax Benefits for Education 50–53 (2022).

¹⁵ I.R.C. § 529(c)(6); see also I.R.S., Exempt Organizations Technical Guide, *TG 44: Qualified Tuition Program—IRC Section 529*, <https://www.irs.gov/pub/irs-pdf/p5729.pdf> (last updated July 14, 2023) (citing the tax imposed by I.R.C. § 530(d)(4)).

¹⁶ See Kathryn Flynn, *The Truth About Scholarships and 529 Plans*, SAVING FOR COLL. (June 7, 2023), <http://www.savingforcollege.com/article/the-truth-about-scholarships-and-529-plans>.

¹⁷ I.R.C. § 529(c)(3)(C).

¹⁸ *Id.*

¹⁹ *Updated Investor Bulletin: An Introduction to 529 Plans*, U.S. SEC. & EXCHANGE COMM'N (Aug. 31, 2023), <https://www.sec.gov/about/reports-publications/investor-publications/introduction-529-plans>.

for both the deferral of taxes on gains earned and tax-free withdrawals. So long as the income generated in the 529 account is used for qualified educational expenses, it will *never* be subject to federal income tax.²⁰

A long list of educational expenses may be considered “qualified,” including tuition for trade schools, colleges, and universities, room and board, required textbooks, and computers and related equipment.²¹ Qualified expenses also include \$10,000 towards student loan payments.²² If the beneficiary receives a scholarship, he, she, or they may withdraw the amount of the scholarship from the 529 Plan, subject to state and federal taxes, but without the 10% federal tax penalty on non-qualified withdrawals.²³

Further, starting in tax year 2018, qualified education expenses are broadened to include \$10,000 per student, per year from a 529 Plan for K-12 public, private, or religious school tuition.²⁴ In other words, private school tuition became a qualified expense. This law does not apply to educational summer camps, sports camps, or other enrichment activities.²⁵

III. K-12 EDUCATION AND 529 PLANS

Senator Ted Cruz states on his website that school choice is the “civil rights issue of the Twenty-first Century,”²⁶ and so it is therefore unsurprising

²⁰ See Denise Kelly-Dohse, *College Saving: How Does a 529 Plan Compare to a Roth IRA*, CANANDAIGUA NAT’L BANK & TR. (2018), https://www.cnbank.com/Your_Bank/Education_and_Advice/CNBU_Articles/College_Saving_How_Does_a_529_Plan_Compare_to_a_Roth_IRA/#:~:text=Roth%20IRAs%20and%20529%20plans,or%20K%2D12%20education%20expenses.

²¹ See I.R.S. Pub. No. 970, Tax Benefits for Education 40 (2022).

²² *Id.* at 51.

²³ Tim Gorrell, *Scholarships and 529 Plans Work Together*, COLL. SAVINGS (May 16, 2016), <https://www.collegesavings.org/scholarships-and-529-plans-work-together/>.

²⁴ Elisabeth Leamy, *You Can Now Use a 529 to Pay for K-12 Tuition—So Should You?*, WASH. POST (Feb. 28, 2018, 9:00 AM), https://www.washingtonpost.com/lifestyle/on-parenting/you-can-now-use-a-529-to-pay-for-k-12-tuition--so-should-you/2018/02/27/885fb5a4-1aff-11e8-9de1-147dd2df3829_story.html.

²⁵ *Id.*

²⁶ Sen. Ted Cruz, *Education*, TED CRUZ: U.S. SENATOR FOR TEX., <https://www.cruz.senate.gov/about/issues/education> (last visited Nov. 25, 2023).

that he included this language in TCJA.²⁷ Senator Cruz believes that the expansion of 529 Plan benefits to include K-12 elementary and secondary school tuition is “an investment in our nation and our economic well-being” that is part of a “historic effort” that will allow “working class” and “middle income families” to save for private school, religious school, or homeschooling expenses.²⁸ In other words, the federal government²⁹ is now subsidizing a school voucher program.³⁰ Because the vehicle of delivery is § 529, however, it is a school voucher program for the wealthy.

Why does this K-12 expansion of the 529 Plan do little to nothing to assist the middle class? Assume that a \$5,000 contribution is made to a 529 account when a child is born. People under the age of 35 have an average *total* savings account balance of \$11,250, and so the \$5,000 in a 529 account for a middle-class family is not an insignificant dollar amount.³¹ By the time the child is ready to start kindergarten at a private school, there will be less than \$1,100 in earnings to access through the 529 account.³² Compare this to

²⁷ Sen. Ted Cruz, *Sen. Cruz Student Opportunity Amendment is Adopted into the Tax Cuts and Jobs Act*, TED CRUZ: U.S. SENATOR FOR TEX. (Dec. 2, 2017), <https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-student-opportunity-amendment-is-adopted-into-the-tax-cuts-and-jobs-act> “U.S. Sen. Ted Cruz (R-Texas) today filed an amendment to the Senate’s tax reform bill that seeks to expand 529 College Savings Plans to include K-12 elementary and secondary school tuition for public, private, and religious schools, including K-12 educational expenses for homeschool students. Vice President Mike Pence traveled to the Capitol to cast the tie breaking vote in the affirmative for the amendment, resulting in its adoption into the Senate’s tax reform bill, the Tax Cuts and Jobs Act.”

²⁸ *Id.*

²⁹ The provision allowing 529 plans to cover \$10,000 of K-12 education annually was “included in the original version of the House tax bill but only added to the Senate bill after an amendment offered by Sen. Ted Cruz, R-Texas . . .” Lauren Camera, *Tax Bill Could Hand Devos First Major School Choice Victory*, U.S. NEWS & WORLD REP. (Dec. 15, 2017), <https://www.usnews.com/news/education-news/articles/2017-12-15/tax-bill-could-hand-devos-first-major-school-choice-victory>.

³⁰ “Under such a program, funds typically spent by a school district would be allocated to a participating family in the form of a voucher to pay partial or full tuition for their child’s private school, including both religious and non-religious schools.” *School Vouchers*, EdCHOICE, <https://www.edchoice.org/school-choice/types-of-school-choice/what-are-school-vouchers-2/> (last visited May 30, 2022).

³¹ See Nathan Paulus, *Average Personal Savings of Americans*, MONEYGEEK, <https://www.moneygeek.com/financial-planning/analysis/average-american-savings-balance/#:~:text=Average%20Savings%20of%20Americans%20Over,2016%20median%20balance%20of%20%244%2C790> (last updated Sept. 7, 2023).

³² For more information, see Hypothetical 2 in *Dynasty 529 Plans and Structural Inequality*. Victoria J. Haneman, *Dynasty 529 Plans and Structural Inequality*, 61 WASHBURN L.J. 497, 503 (2022).

the family who “superfunds” their 529 account. Superfunding allows a donor to make a lump-sum 529 contribution of up to five times the annual gift tax exclusion of \$17,000 in 2023, or a superfunded amount of \$85,000 (\$170,000 if married and gift splitting), without incurring any gift tax liability.³³ Assuming a 5% rate of return, earnings in this 529 account available to pay for private school tuition will far exceed the \$10,000 annual limit.

Only a 529 account with a principal balance well in excess of \$100,000 will yield the type of earnings necessary to withdraw \$10,000 of income, year after year, to pay for the K-12 education of an account beneficiary. And, of course, the potential tax-free growth of the 529 account and the ability to easily change the account beneficiary make it increasingly attractive for affluent families to establish multiple 529 accounts that are managed under the umbrella of a Dynasty Education Trust.³⁴ If we contemplate the inequality of educational opportunity on a meta-level, it is fairly obvious that the tax subsidy for K-12 education saving is not being allocated to those taxpayers who would most benefit from a subsidy.

There are a myriad of obvious problems with indirect spending through the federal tax code to subsidize private school choice. The average cost of private elementary and high school tuition in 2023 is \$11,660 and \$16,144, respectively.³⁵ Neither state tax credits nor the federal subsidy delivered through 529 Plans assist with making private school tuition affordable and accessible. It also does nothing to assist with extra expenses on top of tuition (e.g., uniforms). Competition myths—or the belief that poorly performing schools will compete for funding and improve performance—perpetuate. These myths ignore the reality that money increases outcomes. Increasing funding to K-12 schools improves outcomes, and in the inverse, cutting funding hurts outcomes.³⁶ We also know that predominantly non-white

³³ Kate Dore, *Should you super fund a 529 college savings plan? Here's what experts say*, CNBC (Mar. 7, 2022, 1:10 PM), <https://www.cnbc.com/2022/03/07/should-you-super-fund-a-529-college-savings-plan-what-experts-say.html>.

³⁴ *Id.* at 498.

³⁵ *Average Private School Tuition Cost*, PRIV. SCH. REV. (2023), <https://www.privateschoolreview.com/tuition-stats/private-school-cost-by-state>.

³⁶ There is unquestionably a need to rethink educational finance in the United States, but providing high-quality instruction requires durable funding, with increased funding in high-poverty districts. Matt Barnum, *4 New Studies Bolster the Case: More Money for Schools Helps Low-Income Students*,

schools in the United States receive \$23 billion less each year than white schools.³⁷ Further, tax subsidies through the tax system are doled out without accompanying accountability regulation. This approach allows private schools and charter schools (some of which are for-profit) to operate with little to no oversight.³⁸ There is a lack of transparency, which allows for exorbitant administrative costs and the likelihood of outright fraud happening. And, importantly, private schools are able to discriminate and accept only the students that benefit them, which may not include children in need of accommodations, those with learning disabilities, or children who speak English as a second language.

It is important to remember that the school choice movement is not without a deeply troubling and racialized history. School choice is a resurgence of a strategy developed in the mid-50s to dismantle the public school system and circumvent law that required desegregation.³⁹ Southern states enacted legislation to set up voucher or grant programs that were used to close down public schools rather than desegregate.⁴⁰ Public schools in Prince Edward County, Virginia closed for five years, until the Supreme Court case *Griffin v. School Board of Prince Edward County*.⁴¹ In this case, the Court recognized that private school tuition assistance was being offered

CHALKBEAT (Aug. 13, 2019, 6:34 PM), <https://www.chalkbeat.org/2019/8/13/21055545/4-new-studies-bolster-the-case-more-money-for-schools-helps-low-income-students>.

³⁷ Sarah Mervosh, *How Much Wealthier Are White School Districts Than Nonwhite Ones? \$23 Billion, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/education/school-districts-funding-white-minorities.html#:~:text=white%2Dminorities.html-,How%20Much%20Wealthier%20Are%20White%20School%20Districts%20Than%20Nonwhite,%2423%20Billion%2C%20Report%20Says&text=School%20districts%20that%20predominantly%20serve,students%2C%20a%20new%20report%20found>.

³⁸ What testing is being used? Are teachers certified? What curriculum is being taught? What are the graduation requirements? These are all important oversight issues.

³⁹ 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/>.

⁴⁰ 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=48e8c7dd6795>.

⁴¹ *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 223 (1964).

under the guise of school choice—but was really intended to avoid desegregation.⁴²

IV. TOWARDS SOLUTIONS

Allies interested in racial justice need to think beyond “hashtag activism” to consider and dismantle structures that are not responsive to addressing inequality or further exacerbate existing inequality. An important place to start is K-12 educational structures, but problematically, most states that have passed “school choice” legislation do not track racial data. Further, enrollment in private schools seems to remain overwhelmingly white, even when there are vouchers or tax benefits.⁴³ Public schools in the United States serve a student population that is 51% white and 48.3% persons of color, as compared to private schools, where 3 out of 4 students are white.⁴⁴

For example, Pell grants and preschool vouchers are both school choice programs that seem to be effective at improving upward mobility of students.⁴⁵ There is reason to be concerned, however, that K-12 education responds differently. Some researchers believe that parents choose schools on the basis of racial and cultural similarity.⁴⁶ In doing so, school choice programs may unintentionally exacerbate racial stratification and inequality. Further, we know that school choice tends to isolate students with the least support at home.⁴⁷

⁴² *Id.* at 231.

⁴³ Pierce, *supra* note 40.

⁴⁴ *Id.*

⁴⁵ See Spiros Protopsaltis & Sharon Parrott, *Pell Grants—a Key Tool for Expanding College Access and Economic Opportunity—Need Strengthening, Not Cuts*, CTR. ON BUDGET AND POL’Y PRIORITIES (July 27, 2017) and Charles F. Manski, *Educational Choice (Vouchers) and Social Mobility*, 11 ECON. OF EDU. REV. 351, 353 (1992).

⁴⁶ See, e.g., Grover J. Whitehurst, *New Evidence on School Choice and Racially Segregated Schools*, BROOKINGS (Dec. 14, 2017), <https://www.brookings.edu/articles/new-evidence-on-school-choice-and-racially-segregated-schools/> (“we are becoming a nation of virtual and real gated communities in which people self-sort based on similarities in education, race, culture, and affluence.”).

⁴⁷ *Studies Show School Choice Widens Inequality: Popular Among Parents, But Little Evidence that Children Learn More*, HARVARD GRADUATE SCH. OF EDUC. (July 13, 1995), <https://www.gse.harvard.edu/ideas/news/95/07/studies-show-school-choice-widens-inequality-popular-among-parents-little-evidence>.

The establishment of the near-universal primary and secondary education system that occurred in the beginning of the Twentieth Century, when racially-based policies such as segregation and redlining came into existence, had a profound impact on the education finance system and resulted in (sometimes staggering) variance in school funding.⁴⁸ Community wealth disparities directly impact school funding. In 2023, two-thirds of minority students still attend public schools that have predominantly minority student bodies, often in urban areas with schools that receive far less funding than suburban (and predominantly white) schools.⁴⁹

Against this backdrop, it is important to recognize the almost villainous role that the tax system has already and will continue to play in the school choice movements that are gaining traction across the United States. State voucher tax credits have already been established in twenty-one states, with more states proposing implementation of these vouchers.⁵⁰ These tax vouchers essentially reimburse taxpayers for “donations” made to private K-12 schools that will allow for “scholarships”—free or reduced tuition—for low-income students.⁵¹ Many states provide large state tax credits for these donations, ranging from 50% to 100% of the amount contributed.⁵² Furthermore, a type of tax shelter was created,⁵³ because stacking federal tax

⁴⁸ Sonya Ramsey, *The Troubled History of American Education After the Brown Decision*, ORG. OF AM. HISTORIANS, <https://www.oah.org/tah/issues/2017/february/the-troubled-history-of-american-education-after-the-brown-decision/> (last visited May 31, 2023).

⁴⁹ Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS (Mar. 1, 1998), <https://www.brookings.edu/articles/unequal-opportunity-race-and-education/>.

⁵⁰ Carl Davis, *Tax Avoidance Continues to Fuel School Privatization Efforts*, INST. ON TAX'N AND ECON. POL'Y (Mar. 3, 2023), https://itep.org/tax-avoidance-fuels-school-vouchers-privatization-efforts/#_ednref6.

⁵¹ *Id.*

⁵² *Does Your State Offer Tax Credits for Private K-12 School Voucher Donations?*, INST. ON TAX'N AND ECON. POL'Y (June 10, 2019), <https://itep.org/does-your-state-offer-tax-credits-for-private-k-12-school-voucher-donations/>.

⁵³ One private school advertised that donors could “profit up to 29 percent on a donation.” Another private school advised prospective donors, on its website, “You actually stand to make money on this program.” Erica L. Green, *In Some States, Donating to Private Schools Can Earn You a Profit*, N.Y. TIMES (May 17, 2017), <https://www.nytimes.com/2017/05/17/us/politics/in-some-states-donating-to-private-schools-can-earn-you-a-profit.html>.

benefits⁵⁴ with these credits allows high-income taxpayers to receive more money back from the government than was donated under the guise of being philanthropic and generous.⁵⁵ Researchers estimate that tax credit programs in seventeen states sent more than \$1 billion a year to private schools through a “‘federally sanctioned voucher tax shelter’ for wealthy taxpayers.”⁵⁶ In 2019, the Internal Revenue Service finalized regulations curtailing the use of this approach, though significant workarounds for wealthy taxpayers remain.⁵⁷ In June 2022, the Educational Choice for Children Act was proposed by forty-three Republican lawmakers to “provide up to \$10 billion in annual tax credits against federal income and corporate taxes for individuals and business[es] donating to non-profit scholarship-granting organizations for [K]-12 education.”⁵⁸ And, of course, the subject of this Essay (the TCJA provision allowing \$10,000 of annual K-12 tuition to be tax-advantaged through the use of a 529 Plan), has been characterized as the “first major [federal] school choice victory.”⁵⁹

Scant attention has been paid to the use of the state and federal tax systems to leverage school choice victories. Tax expenditures are particularly vulnerable as an instrumentality of school choice because opponents believe that public tax revenue should not be spent on private schools, and most voters do not believe that backdoor (or indirect) spending through tax

⁵⁴ See, e.g., *id.* (“In South Carolina, if taxpayers make a \$20,000 donation to a scholarship organization, they not only get a \$20,000 state tax credit, but a federal tax deduction valued up to \$7,000. The donor could pay \$27,000 less in taxes based on a \$20,000 donation.”).

⁵⁵ *Does Your State Offer Tax Credits for Private K-12 School Voucher Donations?*, *supra* note 52.

⁵⁶ Green, *supra* note 53.

⁵⁷ Carl Davis provides an excellent example of how these regulations will operate. If a taxpayer donates \$100 to support a private school, and receives a \$90 tax credit from the relevant state, the taxpayer is not eligible to take \$100 charitable deduction on their federal return. Only \$10 remains eligible for the federal charitable deduction. Carl Davis, *Tax Avoidance Continues to Fuel School Privatization Efforts*, INST. ON TAX’N AND ECON. POL’Y (Mar. 3, 2023), https://itep.org/tax-avoidance-fuels-school-vouchers-privatization-efforts/#_ednref6.

⁵⁸ Nathan A. Benefield & Luke Messer, *States Can Expand Educational Freedom Through Federal Tax Credit*, NEWSWEEK OPINION (Jan. 24, 2023, 6:00 AM), <https://www.newsweek.com/states-can-expand-educational-freedom-through-federal-tax-credit-opinion-1775137>.

⁵⁹ Lauren Camera, *Tax Bill Could Hand DeVos First Major School Choice Victory*, U.S. NEWS & WORLD REP. (Dec. 15, 2017, 9:21 AM), <https://www.usnews.com/news/education-news/articles/2017-12-15/tax-bill-could-hand-devos-first-major-school-choice-victory>.

expenditures is spending at all.⁶⁰ Tax expenditures serve as a useful workaround and, given the inherent complexity, are relatively opaque—meaning it is unlikely that most voters know about or understand the advantages that flow to the wealthy.

The way in which school choice advocates are leveraging the tax code is an eerie example of mid-1950s history repeating itself,⁶¹ from the mechanism of the action down to the racially neutral justifications.⁶² If the outcome of democratic processes is that there should be an organic deconstruction and reconstruction of the public education system, it should be facilitated through a direct spending program rather than context-oblivious indirect spending. Utilizing tax expenditures to advance school choice should be eyed with suspicion.

V. CONCLUSION

Perhaps the biggest flaw in the existing system of education finance is that community wealth disparities serve to exacerbate racial and economic inequality through the public school system. There is no clearer example of this playing out than through a system where poor kids must attend public school, rich children can attend private school, and the federal government is providing a tax incentive to help out the rich parents through 529 Plans.

Allowing \$10,000 per year of K-12 expenses to be paid out of tax-sheltered earnings of a 529 Plan is essentially a school choice or voucher program implemented through the Code to benefit higher income and higher wealth taxpayers who have invested in these plans for a while, and are

⁶⁰ See Daily J. Ed. Bd., *State Should Not Spend Public Money on Private Schools*, DAILY J.: OP. (June 23, 2022), https://www.djournal.com/opinion/editorials/state-should-not-spend-public-money-on-private-schools/article_12db8392-cc27-5d25-8c3c-0ff439e65451.html (arguing that “using public funds for private schools is unfair”); see also Conor Clarke & Edward Fox, *Perceptions of Taxing and Spending: A Survey Experiment*, 124 YALE L.J. 1252, 1279 (2015), https://www.yalelawjournal.org/pdf/j.1252.Clarke-Fox.1293_1kzknrap.pdf (discussing how the public prefers indirect spending, such as tax credits, to direct spending).

⁶¹ See MacLean, *supra* note 39.

⁶² In 1980, Libertarian Vice Presidential candidate David Koch stated, “We advocate the complete separation of education and State. Government schools lead to the indoctrination of children and interfere with the free choice of individuals. Government ownership, operation, regulation, and subsidy of schools and colleges should be ended.” William Raspberry, *Incompetent Teachers*, WASH. POST: ARCHIVE (Nov. 6, 1981), <https://www.washingtonpost.com/archive/politics/1981/11/06/incompetent-teachers/208c55ef-ae94-4f60-88bf-c530f94f88de/>.

generating substantial income such that it can now be used for K-12 private school tuition. It is an example of class power and racial inequity colliding in the worst possible way.