

# THE IMPACT OF VOUCHERS ON EDUCATION EQUALITY

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In the landmark decision *Brown v. Board of Education*, the United States Supreme Court held that separate school facilities deny students equal protection of the laws and are therefore unconstitutional.<sup>1</sup> However, subsequent Court decisions have not precisely defined how equality should be measured<sup>2</sup> and have not recognized a fundamental right to an education for all Americans.<sup>3</sup> While there is no federal right to education, let alone a high-quality education, a right to education does exist under state constitutions and statutes.<sup>4</sup>

All states have a public education system, and many have voucher programs. Each state has a unique voucher system, but generally all voucher systems allow tax revenue that would have been used to pay for a child to attend public schools to be distributed to parents to help offset the costs, and in some cases fully pay, for the child to attend private, charter, or religious schools.<sup>5</sup> Vouchers to attend private institutions have been an option since the 1800s, and today, fifteen states and Washington, D.C. have operating voucher programs.<sup>6</sup> The topic is even more salient today because in the 2018 budget, the Trump administration proposed a \$1.4 billion increase in school choice programs, in addition to the \$20 billion already allocated in the 2017 budget.<sup>7</sup>

Vouchers permit students to attend private and charter schools.<sup>8</sup> These include charter schools that are independently-run public schools, operating under a “charter” contract describing key performance elements.<sup>9</sup> Charter schools may also take the form of former public schools that were converted

<sup>1</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>2</sup> *See id.* at 493 (asserting that race-based segregation deprives children of color of “equal educational opportunities” but failing to provide a definition of equality); *see also* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 23–24, (1973) (“[A]t least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.”).

<sup>3</sup> *Rodriguez*, 411 U.S. at 35.

<sup>4</sup> *See, e.g.*, LA. CONST. art. VIII, § 1 (“The legislature shall provide for the education of the people of the state and shall establish and maintain a public educational system.”).

<sup>5</sup> *Resource Hub: Fast Facts*, EDCHOICE, <https://www.edchoice.org/resource-hub/fast-facts/> (last modified April 24, 2018). The states that have operating voucher programs are Arkansas, Florida, Georgia, Indiana, Louisiana, Maine, Maryland, Mississippi, New Hampshire, North Carolina, Ohio, Oklahoma, Utah, Vermont, and Wisconsin. *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> OFF. OF MGMT. & BUDGET, AMERICA FIRST: A BUDGET BLUEPRINT TO MAKE AMERICA GREAT AGAIN (2017), [https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018\\_blueprint.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf).

<sup>8</sup> EDCHOICE, *supra* note 5.

<sup>9</sup> National Charter School Resource Center, *What Is A Charter School?*, U.S. DEP’T OF EDUC., <http://charterschoolcenter.ed.gov/what-is-a-charter-school#>

to charter schools; new charter schools that were formed to serve specific populations such as minorities, at-risk youth, or disabled children; charter schools that are formed to advance multicultural values and considerations that go beyond just academic achievement; and for-profit institutions.<sup>10</sup> Private schools can also fit into these categories, but a large number of private schools are established and operated by religious organizations.<sup>11</sup> The variety of school choices through voucher systems leads to less revenue in the public school system, in addition to a diminution in the type and quality of education that students receive because they may attend vastly different schools.

This Note will analyze the impact of vouchers on educational equality. Part I briefly discusses current federal laws regarding equality and argues why educational equality is an important issue. Part II addresses the impact of vouchers on educational outcomes for students in three of the states with the largest voucher programs: Indiana, Wisconsin, and Ohio. Because equality in the context of education can be defined in a variety of ways, Part III discusses the various arguments proponents of vouchers make to support their claim that vouchers actually do advance equality and the counterarguments made by voucher opponents. Finally, Part IV argues that because vouchers lead to different levels of student success, their overall exacerbation of social, economic, and racial inequality cannot be ignored. This, combined with the constitutional requirement to avoid excessive entanglements between religion and state, make vouchers to attend religious schools in particular a poor policy decision.

## I. CURRENT LAW AND POLICY

There is no fundamental right to an education enumerated in or implied by the federal Constitution.<sup>12</sup> School districts are permitted to provide unequal access to education, as long as there is a rational relationship to a legitimate state purpose.<sup>13</sup> This standard, known as rational basis review, is the lowest form of constitutional scrutiny, and courts generally afford a great deal of deference to the local or state government that makes a decision subjected to rational basis review.<sup>14</sup> Inequality in access to education is not subject to strict scrutiny unless there is discrimination

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<sup>10</sup> RONALD G. CORWIN & E. JOSEPH SCHNEIDER, *THE SCHOOL CHOICE HOAX: FIXING AMERICA'S SCHOOLS* 22–23 (2005).

<sup>11</sup> *Id.* at 21.

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

<sup>13</sup> *Id.* at 54–55.

<sup>14</sup> Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 *LOY. L.A. L. REV.* 449, 451–52 (1988).

against a constitutionally-protected class.<sup>15</sup> In the same vein, the Supreme Court has held that states are permitted to provide vouchers for students to attend private religious schools.<sup>16</sup> In *Zelman v. Simmons-Harris*, the Ohio state legislature enacted a school choice program that provided taxpayer-funded aid to parents to send their children to private schools, including religious institutions.<sup>17</sup> The Ohio law in question did not violate the Establishment Clause because it neither established nor advanced a particular religion as the state's religion, but was instead enacted for valid, non-religious purposes (Ohio public schools were among the worst in the country).<sup>18</sup>

While a fundamental right to an education may not exist, and courts cannot decide whether the quality of education children receive is sufficient,<sup>19</sup> other provisions of the Constitution and anti-discrimination statutes do apply to schools. Since many voucher-funded schools are affiliated with religious institutions, any taxpayer funds that support students attending these institutions are subject to political and legal scrutiny. This is because the Establishment Clause prohibits the government from establishing a national religion, which has been interpreted to mean that the government cannot fund religious institutions.<sup>20</sup> The Supreme Court in *Everson v. Board of Education* suggested that for a law benefitting religious schools to satisfy the Establishment Clause, there must be a secular legislative purpose and an effect that neither advances nor inhibits religion.<sup>21</sup> In addition to not allowing state and local governments to establish a religion or mandate religious practice, the First Amendment also prohibits them from interfering with the free exercise of religion.<sup>22</sup>

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<sup>15</sup> *Rodriguez*, 411 U.S. at 37–38.

<sup>16</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 645–46 (2002). In holding that the Ohio school choice program did not violate the Establishment Clause, the Court noted that participating private schools were required not to discriminate on the basis of race, religion, or ethnic background.

<sup>17</sup> *Id.* at 642.

<sup>18</sup> *Id.* at 644.

<sup>19</sup> *Rodriguez*, 411 U.S. at 58–59 (“[C]ertainly innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity. These matters merit the continued attention of the scholars who already have contributed much by their challenges. But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.”).

<sup>20</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947).

<sup>21</sup> *See id.* at 13, 17–18 (holding that while states cannot contribute taxpayer funds to support institutions which teach religious tenants, they also cannot exclude members of any faith from receiving public benefits because of their faith. In balancing these two goals, the Court held that it does not prohibit the use of taxpayer funds for busses to parochial schools, if a general program exists to provide transportation to students attending other schools).

<sup>22</sup> *Id.* at 15–16.

The First Amendment protection from government interference with religion is strong, whether it operates to prevent the establishment of religion or to accommodate its free exercise. For example, *Everson* held that states cannot refuse to pay for transportation to parochial schools when there is a general program that pays for students attending public and other schools because this would interfere with citizens' right of free exercise of religion.<sup>23</sup> Furthermore, public school teachers are allowed to teach specific secular courses at religious schools.<sup>24</sup> States are also allowed to provide assistance to disabled students attending religious schools without violating the Establishment Clause.<sup>25</sup> Apart from the Constitution, federal civil rights laws, and education-specific federal laws which preempt local and state laws,<sup>26</sup> state legislation and constitutions are the main sources of education rights.<sup>27</sup>

Education is recognized as an important aspect of the American legal system and the American way of life. Education is "the very foundation of good citizenship" and the principal instrument for later success in a child's life.<sup>28</sup> A person's level of education impacts how that person votes, which in turn impacts education policies.<sup>29</sup> Individuals who have college or advanced degrees are more likely to be registered to vote and to actually vote than those who only have a high school diploma or did not finish high school.<sup>30</sup> Individuals who have a high school degree can expect a nearly \$350,000 increase in median lifetime earnings than those without a high

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<sup>23</sup> *Id.* at 17.

<sup>24</sup> *Agostini v. Felton*, 521 U.S. 203, 234–35 (1997).

<sup>25</sup> *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) (holding that local school districts are not barred by the Establishment Clause from providing sign language interpreters for deaf students attending religious schools, which is a requirement of the Individuals with Disabilities Education Act).

<sup>26</sup> *See, e.g.*, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2012); Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2012 & Supp. 2016); Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2012); No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301–7981 (2012); Section 504 of Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012 & Supp. 2016).

<sup>27</sup> *See* CHARLES J. RUSSON ET AL., THE LAW OF SPECIAL EDUCATION AND NON-PUBLIC SCHOOLS: MAJOR CHALLENGES IN MEETING THE NEEDS OF YOUTH WITH DISABILITIES 54 (2009) (describing the federal and state processes by which parents of disabled schoolchildren can access education services).

<sup>28</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>29</sup> *See Voting and Registration in the Election of November 2016, Table 5*, U.S. CENSUS BUREAU (May 2017), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html> (showing that increasing levels of education increases the likelihood of having registered to vote or voting).

<sup>30</sup> *Id.*

school degree.<sup>31</sup> Moreover, individuals with college degrees will have a nearly \$1,000,000 increase in median lifetime earnings than those without high school degrees.<sup>32</sup> Education impacts the future of a child; thus, it is in the best interests of the nation to ensure that students receive the highest quality education possible.<sup>33</sup>

Even those in the highest positions of government can confuse equality of education with equality of opportunity.<sup>34</sup> Equality of education encompasses the idea that the quality of a child's education should not depend on their parents' ability to pay for that education.<sup>35</sup> Equality of opportunity, on the other hand, concerns the even spread of benefits and burdens amongst all members within a society.<sup>36</sup> While the two concepts are distinct, they are both important considerations in evaluating education. Neither sense of equality requires equal resources to be spent on each individual's schooling because money spent is a poor proxy for evaluating true equality.<sup>37</sup> However, research has shown correlations between funding and universally-accepted measures of student success. For example, "a 20[%] increase in per-pupil spending each year for all [twelve] years of public school for children from poor families leads to . . . 25[%] higher earnings, and a [20 percentage-point] reduction in adult poverty."<sup>38</sup> This increased spending also leads to almost one year more of completed education and can nearly overcome the gap in future educational and

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<sup>31</sup> ANTHONY P. CARNEVALE ET AL., GEO. UNIV. CTR. ON EDUC. & THE WORKFORCE, THE COLLEGE PAYOFF: EDUCATION, OCCUPATIONS, LIFETIME EARNINGS 3 (2011), <https://www2.ed.gov/policy/highered/reg/hearulemaking/2011/collegepayoff.pdf>

<sup>32</sup> *Id.*

<sup>33</sup> See HARRY BRIGHOUSE, SCHOOL CHOICE AND SOCIAL JUSTICE 117–18 (2000) (“[Education] provides competitive advantages in economics which distribute benefits and burdens unequally: being better educated enhances your prospective lifetime income and job satisfaction. It also provides non-competitive opportunities for fulfilling life experiences: not only the reward of executing excellently those tasks which demand the skills one has learned . . . but also the rewards which come from entertaining, executing, and reflecting on those tasks in a social context.”).

<sup>34</sup> See Alia Wong, *Delving Into One of the Questions Betsy DeVos Couldn't Answer*, ATLANTIC (Jan. 20, 2017), <https://www.theatlantic.com/education/archive/2017/01/delving-into-one-of-the-questions-betsy-devos-couldnt-answer/513941/> (last visited Mar. 24, 2018) (discussing the confusion between growth and proficiency in assessments).

<sup>35</sup> BRIGHOUSE, *supra* note 33, at 122–23.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 127.

<sup>38</sup> Kristi L. Bowman, *The Failure of Educational Federalism*, 51 U. MICH. J. L. REFORM 1, 9–10 (2017) (citing C. Kirabo Jackson, Rucker Johnson, & Claudia Perisco, *The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement, and Adult Outcomes* 43–44 (Nat'l Bureau of Econ. Research, Working Paper No. 20118, 2014), <http://www.nber.org/papers/w20118.pdf>).

economic outcomes between children from poor families and those from wealthier families.<sup>39</sup> While this data is promising, it is not conclusive.

Equal outcomes do not measure educational equality either because, like money spent, outcomes such as test scores do not measure the quality or amount of education an individual student received.<sup>40</sup> For example, an average test score in a particular school is not an indicator of how an individual student will perform in that school, so average test scores are not helpful in deciding which schools offer a high-quality education and how they reach that goal.<sup>41</sup> Furthermore, test scores measure specific skills and knowledge and are vulnerable to outside influences, such as test anxiety.

In an ideal environment, educational equality leads to children of equal talent achieving equal results and receiving equal resources, and it also leads to more resources being spent on children with disabilities.<sup>42</sup> Equality in education should be measured as “equal access to an excellent education, [or] the opportunity for all students to attend a high-quality school that enables them to effectively pursue their life goals, to become engaged citizens, and to develop their abilities to their full potential.”<sup>43</sup>

## II. ARE VOUCHERS THE SOLUTION TO EDUCATIONAL INEQUALITY IN THE UNITED STATES, OR DO THEY EXACERBATE THE PROBLEM BY PROVIDING A LOWER QUALITY EDUCATION?

Measuring the outcomes of education is a much more difficult task than it seems. Test scores, achievement per dollar spent per child, parental satisfaction, and other mechanisms are all relatively easy to measure, but no single statistic can provide conclusive evidence or data that can be reliably compared about the quality of education a child received.<sup>44</sup> Schools—even private schools operated by the same religious institutions—are not homogenous, and there is no single best approach to all education,<sup>45</sup> even if the goal is to ensure equality in education.

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<sup>39</sup> *Id.*

<sup>40</sup> CORWIN & SCHNEIDER, *supra* note 10, at 32.

<sup>41</sup> *Id.*

<sup>42</sup> BRIGHOUSE, *supra* note 33, at 122–23.

<sup>43</sup> Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 963 (2015).

<sup>44</sup> *See* CORWIN & SCHNEIDER, *supra* note 10, at 21–23.

<sup>45</sup> *Id.*

In most, if not all states, laws mandate a minimum quality standard that all schools need to meet.<sup>46</sup> But private schools generally are not held to as high a standard as public schools.<sup>47</sup> In California, for example, the Department of Education does not regulate private schools; teachers in private schools are not required to be certified by the state, and private schools are not measured against the statewide Academic Performance Index.<sup>48</sup> In Indiana, accreditation of the school by the state is optional, but private schools that want to be accredited must meet the same standards as public schools.<sup>49</sup> Teachers in Indiana are also required to be certified.<sup>50</sup> In Ohio, private school teachers are held to a low certification standard, and there are no accreditation or registration requirements for schools.<sup>51</sup> Finally, in Wisconsin, accreditation of schools by the state, and certification of teachers, is completely optional.<sup>52</sup> As these examples illustrate, there is no general consensus about the degree to which curriculum and teacher certification at private schools must comply with state standards.<sup>53</sup> Dual enrollment, which allows students to attend private schools but take certain classes or participate in certain activities such as sports at public schools, can alleviate some curriculum discrepancies, but it is optional for students and not always available.<sup>54</sup>

Some cities have shown a statistically significant difference in graduation rates among students attending public and private schools, but this data is not consistent among all school districts, and it does not necessarily prove causation.<sup>55</sup> Rather, “higher on-time graduation rates of private high school students may be the result of many factors, including private high schools’ willingness to shed less motivated students, and the greater focus of some private schools on helping students enter four-year

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<sup>46</sup> *Approved State Accountability Plans*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/admins/lead/account/stateplans03/index.html> (last modified June 8, 2015).

<sup>47</sup> See, e.g., *Frequently Asked Questions*, CAL. DEP’T OF EDUC., <https://www.cde.ca.gov/sp/ps/psfaq.asp#a11> (last updated Nov. 20, 2017).

<sup>48</sup> *Id.*

<sup>49</sup> U.S. DEP’T OF EDUC. OFF. OF INNOVATION & IMPROVEMENT, OFF. OF NON-PUBLIC EDUC., STATE REGULATION OF PRIVATE SCHOOLS 82–83 (2009), <https://www2.ed.gov/admins/comm/choice/regprivschl/regprivschl.pdf>.

<sup>50</sup> *Id.* at 84.

<sup>51</sup> *Id.* at 212.

<sup>52</sup> *Id.* at 306.

<sup>53</sup> Cf. RALPH D. MAWDSLEY, *LEGAL PROBLEMS OF RELIGIOUS AND PRIVATE SCHOOLS* 223 (6th ed. 2013).

<sup>54</sup> *Snyder v. Charlotte Pub. Sch. Dist.*, 365 N.W.2d 151, 157 (Mich. 1984).

<sup>55</sup> MARTIN CARNOY, *ECON. POL’Y INST.*, *SCHOOL VOUCHERS ARE NOT A PROVEN STRATEGY FOR IMPROVING STUDENT ACHIEVEMENT* 8–9 (2017), <http://www.epi.org/publication/school-vouchers-are-not-a-proven-strategy-for-improving-student-achievement/>.



colleges.”<sup>56</sup> In this part, I will discuss three of the largest voucher programs in the nation<sup>57</sup>—Wisconsin, Ohio, and Indiana—to compare educational outcomes between public schools and schools that are funded by students on vouchers.

#### A. CASE STUDY: WISCONSIN

The Wisconsin educational system has one of the oldest and largest school-choice programs in the nation.<sup>58</sup> More than 44,000 students attend 234 charter schools in the state.<sup>59</sup> Of these students, 89% attend a school with a religious affiliation.<sup>60</sup> In Milwaukee, the state’s largest city, nearly 30% of students attend charter schools, which are partially funded by vouchers.<sup>61</sup> According to the Wisconsin Institute for Law and Liberty, a pro-charter school organization, charter school students achieve higher scores on standardized tests, such as the ACT, than their public school peers.<sup>62</sup> The Institute notes that students enrolled in Catholic charter schools are 8% more likely to perform at proficient levels in math, and 15% more likely to perform at proficient levels in English, than students enrolled in public or other non-religious charter schools.<sup>63</sup> However, *The American Prospect*, a liberal magazine, notes that the difference in test performance is not only statistically insignificant, but that Wisconsin students overall score very low on proficiency exams.<sup>64</sup> Nearly 85% of students in Wisconsin are not proficient in math, and 80% are not proficient in English.<sup>65</sup> Thus, the small improvement in scores correlated with attending charter schools may not alone justify their existence because, overall, schools in Wisconsin are not succeeding, as measured by test scores of their students.

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<sup>56</sup> *Id.* at 8.

<sup>57</sup> EDCHOICE, *supra* note 5.

<sup>58</sup> Barbara Miner, *School Vouchers in Milwaukee, Religious Freedom and Discrimination*, MILWAUKEE-WIS. J. SENTINEL (Apr. 17, 2015), <http://archive.jsonline.com/news/opinion/school-vouchers-in-milwaukee-religious-freedom-and-discrimination-b99480751z1-300392801.html>.

<sup>59</sup> *Wisconsin Wins \$95 Million Charter School Grant*, WIS. DEP’T OF PUB. INSTRUCTION (Oct. 6, 2017), [https://dpi.wi.gov/sites/default/files/news-release/dpinr2017\\_83.pdf](https://dpi.wi.gov/sites/default/files/news-release/dpinr2017_83.pdf).

<sup>60</sup> Miner, *supra* note 58.

<sup>61</sup> Erin Richards, *Milwaukee’s Voucher Verdict*, AM. PROSPECT (Jan. 12, 2017), <http://prospect.org/article/milwaukee%E2%80%99s-voucher-verdict>.

<sup>62</sup> WILL FLANDERS, WIS. INST. FOR L. & LIBERTY, APPLES TO APPLES: THE DEFINITIVE LOOK AT SCHOOL TEST SCORES IN MILWAUKEE AND WISCONSIN 8 (2017), <http://www.will-law.org/wp-content/uploads/2017/03/apples.pdf>.

<sup>63</sup> *Id.*

<sup>64</sup> Richards, *supra* note 61.

<sup>65</sup> *Id.*

The racial profile of the Milwaukee area is also relevant.<sup>66</sup> Milwaukee has “the second highest black poverty rate in the nation,” and “black men in Milwaukee are incarcerated at a higher rate than anywhere else in the [United States].”<sup>67</sup> The gap in high school graduation rates between black and white students is higher in Milwaukee than anywhere else.<sup>68</sup> While the school choice program is not solely to blame for these issues, it has not contributed to a solution either.<sup>69</sup> These statistics undermine current political discourse about vouchers providing access to better schools for the poorest individuals in the nation, since one of the largest and oldest school choice programs is clearly not establishing this goal.<sup>70</sup>

While more than \$200 million of taxpayer funds are used to help students attend charter and private schools through the Wisconsin voucher program,<sup>71</sup> charter schools do not have to meet the same obligations as public schools.<sup>72</sup> For example, while nearly 20% of students in Milwaukee public schools receive special education services, fewer than 2% of the students in charter schools receive the same services because charter schools are not required to meet students’ special needs beyond making minor adjustments.<sup>73</sup>

#### B. CASE STUDY: INDIANA

The State of Indiana offers three educational choice programs: the Indiana Choice Scholarship Program, the School Scholarship Tax Credit, and the Private School/Homeschool Tax Deduction.<sup>74</sup> The School Scholarship Tax Credit is available for lower-income families who earn less than 200% of the amount needed to qualify for free and reduced lunches, and its funds can be used for almost all educational expenses.<sup>75</sup> The average

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Miner, *supra* note 58.

<sup>72</sup> DEMOCRACY & EDUC. RESEARCH GRP., WHAT’S THE DIFFERENCE? VOUCHER SCHOOLS, CHARTER SCHOOLS, MILWAUKEE PUBLIC SCHOOLS (2012), <https://aclu-wi.org/sites/default/files/document-library/TheDifference.pdf>.

<sup>73</sup> *Id.*

<sup>74</sup> *School Choice: Indiana*, EDCHOICE, <https://www.edchoice.org/school-choice/state/indiana> (last visited Mar. 24, 2018).

<sup>75</sup> *School Choice: Indiana — School Scholarship Tax Credit*, EDCHOICE, <https://www.edchoice.org/school-choice/programs/indiana-school-scholarship-tax-credit> (last visited Mar. 24, 2018).

scholarship value through the tax credit program is \$1,978.<sup>76</sup> The Private School/Homeschool Tax Deduction had more than 54,000 participants in 2016, who each earned an average tax deduction of \$1,805.<sup>77</sup> The tax deduction covers expenditures on tuition, books, fees and other supplies, and it does not have an income limit for participation.<sup>78</sup>

Indiana's voucher program, the Indiana Choice Scholarship, began in 2011, with approximately 7,500 available vouchers.<sup>79</sup> By 2017, more than 34,000 students were enrolled.<sup>80</sup> Although this is a small percentage of the more than one million students enrolled in all schools in Indiana,<sup>81</sup> the rapid growth in the number of participants should not be underestimated. The average voucher value is \$4,342.<sup>82</sup> Since the 2012–2013 academic year, more than half of the participants in the voucher program have been white,<sup>83</sup> but in a state with a population of more than 85% white individuals, this number is not by itself significant without further empirical analysis.<sup>84</sup> Almost all of the 300 participating private schools are religiously affiliated.<sup>85</sup> However, the Indiana Supreme Court has held that the program does not violate the Indiana Constitution's prohibition against funding

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<sup>76</sup> *Id.*

<sup>77</sup> *School Choice: Indiana — Private School/Homeschool Deduction*, EDCHOICE, <https://www.edchoice.org/school-choice/programs/indiana-private-schoolhomeschool-deduction> (last visited Mar. 24, 2018).

<sup>78</sup> *Id.*

<sup>79</sup> Claire McInerney, *Five Years Later, Indiana's Voucher Program Functions Very Differently*, IND. PUB. MEDIA (Aug. 19, 2016, 5:00 AM), <http://indianapublicmedia.org/stateimpact/2016/08/19/years-indianas-voucher-program-functions-differently>.

<sup>80</sup> Cory Turner et al., *The Promise and Peril of Public School Vouchers*, NPR (May 12, 2017, 6:00 AM), <https://www.npr.org/sections/ed/2017/05/12/520111511/the-promise-and-peril-of-school-vouchers>.

<sup>81</sup> *School Statistics in 2017*, STATSINDIANA, [http://www.stats.indiana.edu/dms4/new\\_dpage.asp?profile\\_id=315&output\\_mode=1](http://www.stats.indiana.edu/dms4/new_dpage.asp?profile_id=315&output_mode=1) (enter "Indiana" for General Area; enter "Indiana Total" for Specific Geography; then enter "2017" for Year) (last visited Oct. 20, 2018).

<sup>82</sup> *School Choice: Indiana — Choice Scholarship Program*, EDCHOICE, <https://www.edchoice.org/school-choice/programs/indiana-choice-scholarship-program> (last visited Mar. 24, 2018).

<sup>83</sup> Niki Kelly et al., *The Academics and Economics Behind School Choice*, HUFFINGTON POST (Oct. 5, 2017, 5:01 AM), [https://www.huffingtonpost.com/entry/school-choice-indiana-vouchers\\_us\\_59d3ddd5e4b06226e3f413c2](https://www.huffingtonpost.com/entry/school-choice-indiana-vouchers_us_59d3ddd5e4b06226e3f413c2) (last updated June 4, 2018).

<sup>84</sup> *Quickfacts: Indiana*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/IN> (last visited Oct. 20, 2018).

<sup>85</sup> Stephanie Wang, *What's a School Voucher? Here's a Primer*, INDYSTAR (March 19, 2017, 5:03 AM), <https://www.indystar.com/story/news/education/2017/03/19/whats-school-voucher-heres-primer/98688344>.

religious institutions.<sup>86</sup> In 2013, the court held that the voucher program is constitutional because it is not assistance to religious schools, but a benefit to lower-income families to permit them to choose their schools.<sup>87</sup> Furthermore, the court held that “religious or theological” institutions providing “primary and secondary education” are not precluded from government assistance.<sup>88</sup>

Unlike most states, Indiana’s voucher program requires that students in participating private or charter schools take the same statewide assessments as students in public schools.<sup>89</sup> This creates accountability and allows for meaningful comparisons.<sup>90</sup> However, the private and charter schools are also allowed to choose which students they admit<sup>91</sup> whereas public schools must serve all students, so any comparison of test scores would be skewed due to potentially different baselines.

### C. CASE STUDY: OHIO

Almost 45,000 students were enrolled in one of the Ohio’s five different school choice programs in the 2016–17 school year.<sup>92</sup> This is a small percentage of the nearly 1.7 million students enrolled in Ohio primary and secondary schools statewide.<sup>93</sup> Ohio has two dedicated programs for students with special needs: the Autism Scholarship Program<sup>94</sup> and the Jon Peterson Special Needs Scholarship Program.<sup>95</sup> The Autism Scholarship Program provides students diagnosed with a disorder on the autism spectrum with up to \$27,000 per year to attend private or charter schools

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<sup>86</sup> IND. CONST. art. I, § 6 (providing that “no money shall be drawn from the treasury, for the benefit of any religious or theological institution”); *Meredith v. Pence*, 984 N.E.2d 1213, 1227 (Ind. 2013).

<sup>87</sup> *Meredith*, 984 N.E.2d at 1227–32.

<sup>88</sup> *Id.* at 1227.

<sup>89</sup> *Turner et al.*, *supra* note 80.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> SCHOOL CHOICE OHIO, 2016 ANNUAL REPORT 5 (2016), <https://schoio.org/2016%20Annual%20Report.pdf>. As of January 2019, this is the most recent annual report available on the School Choice Ohio official website.

<sup>93</sup> *Facts and Figures*, OHIO DEP’T OF EDUC., <http://education.ohio.gov/Media/Facts-and-Figures> (last updated Nov. 4, 2017).

<sup>94</sup> *Autism Scholarship Program*, OHIO DEP’T EDUC., <http://education.ohio.gov/Topics/Other-Resources/Scholarships/Autism-Scholarship-Program> (last visited Apr. 16, 2019).

<sup>95</sup> *School Choice: Ohio*, EDCHOICE, <https://www.edchoice.org/school-choice/state/ohio> (last visited Mar. 24, 2018).

that are designated to meet their needs.<sup>96</sup> The program has more than 3,500 participating students in 290 schools.<sup>97</sup> The Jon Peterson Special Needs Scholarship provides an average scholarship of nearly \$10,000 to each of the almost 5,000 participating special needs students.<sup>98</sup> These programs provide larger funds to non-public schools to account for the increased costs associated with educating individuals with special needs.<sup>99</sup>

Since Ohio started offering vouchers, many students have used them to attend private, religious schools. For example, in Cleveland, “96% of [the] students participating in the [voucher] program attended religiously affiliated schools” within four years of the program’s commencement.<sup>100</sup> Ohio’s Cleveland Scholarship Program was challenged before the Supreme Court in *Zelman v. Simmons-Harris*.<sup>101</sup> The Court held that although state funds were often used for religious education, it was the parents’ voluntary and independent choices to send their children to religious schools.<sup>102</sup> The Court further stated that “[t]he program does not force any individual to submit to religious indoctrination or education. It simply gives parents a greater choice as to where and in what manner to educate their children. This is a choice that those with greater means have routinely exercised.”<sup>103</sup> The dissent pointed out the discrepancy between the *Zelman* decision and *Everson*, arguing that funds going to religious institutions are a violation of the Establishment Clause and are therefore unconstitutional.<sup>104</sup>

#### D. POTENTIAL CONCLUSIONS

None of this data can objectively define the exact role that vouchers play in educational outcomes. The number of students participating in these

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<sup>96</sup> *Ohio Autism Scholarship Program*, SCHOOL CHOICE OHIO, <http://www.schoio.org/school-options/choose-school-options/private-school/ohioscholarships/autism.html> (last visited Mar. 24, 2018).

<sup>97</sup> *School Choice: Ohio — Autism Scholarship Program*, EDCHOICE, <https://www.edchoice.org/school-choice/programs/ohio-autism-scholarship-program> (last visited Mar. 24, 2018).

<sup>98</sup> *School Choice: Ohio — Jon Peterson Special Needs Scholarship Program*, EDCHOICE, <https://www.edchoice.org/school-choice/programs/ohio-jon-peterson-special-needs-scholarship-program> (last visited Mar. 24, 2018).

<sup>99</sup> JESSICA POINER, THOMAS B. FORDHAM INST., OHIO’S VOUCHER PROGRAMS: AN OVERVIEW 7–11 (2017), <http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/Vouchers%20in%20Ohio%20whitepaper%20published%202-16-17.pdf>.

<sup>100</sup> *Id.* at 11–12.

<sup>101</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); POINER, *supra* note 99, at 11–12.

<sup>102</sup> *Zelman*, 536 U.S. at 680; POINER, *supra* note 99, at 12.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 687–88.

programs is too small; the programs are too varied and have not been implemented for a long enough period of time; the measures of assessment are not necessarily valid or reliable; and many of the sources of information have inherent biases for or against voucher programs.

The empirical evidence needs to be further developed, but for the purpose of this Note, based on the information about school accreditation and teacher certification requirements for private schools,<sup>105</sup> I will assume *arguendo* that compared to students who stay in public schools, voucher-using students have diminished learning outcomes. Furthermore, because loss of students leads to less federal funding for public schools, there is indication that even the students who remain in public schools have diminished learning outcomes, since their schools operate with smaller budgets as a result of school vouchers.<sup>106</sup>

### III. THE IMPACT OF VOUCHERS ON EQUALITY IN EDUCATION

Proponents of vouchers argue that school choice—particularly government-subsidized vouchers—is a way to reduce inequality, while opponents of vouchers argue that vouchers exacerbate the problem of inequality. This section will discuss the two lines of arguments in an effort to examine how the idea of equality can be used to support drastically different arguments.

An inequality exists when children have access to significantly better education just because their parents are wealthier, but proponents and opponents of vouchers disagree on the impact of this inequality and on whether it can be mitigated by vouchers.<sup>107</sup> Proponents claim that vouchers allow parents to be treated equally, despite differences in religious beliefs and socioeconomic status.<sup>108</sup> They argue that, by permitting parents to choose to send their children to religious, charter, or non-traditional schools,

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<sup>105</sup> See *infra* Part III.

<sup>106</sup> CORWIN & SCHNEIDER, *supra* note 10, at 5.

<sup>107</sup> *School Vouchers*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/education/school-choice-vouchers.aspx> (last visited Oct. 21, 2018).

<sup>108</sup> *Compare* *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (holding that parents, as those who “nurture” and control a child’s destiny have a right and duty to direct the upbringing of their children) and *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that parents have a “natural duty” to educate their children as they see fit and in accordance with their beliefs) with Robert Pondiscio, *Let Poor Parents Choose Too*, U.S. NEWS & WORLD REP. (Dec. 2, 2016, 11:30 AM), <https://www.usnews.com/opinion/knowledge-bank/articles/2016-12-02/stop-policing-poor-parents-on-school-and-education-choice> (arguing that school choice programs allow parents of lower socioeconomic status to exercise the same parental autonomy in their children’s education as parents of higher socioeconomic status).

the government does not favor one set of beliefs over another.<sup>109</sup> Vouchers allow students to attend institutions they would not have otherwise had access to; in effect, the students' futures are not determined by their zip codes and their parents' wealth. Furthermore, proponents argue, the current public education system in the United States is not only antiquated, but it also holds back children from succeeding by insisting that all students fit the same mold.<sup>110</sup> On the other hand, opponents of vouchers argue that even if vouchers permit poorer individuals to attend better schools (which is contradicted by some data)<sup>111</sup> the students left behind would be subjected to increased inequality, including lower paid teachers and lower-quality educational materials.<sup>112</sup> Furthermore, opponents argue, vouchers do not guarantee equal access to better education, as some empirical data has demonstrated poorer learning outcomes for students who use vouchers to attend private or charter schools.<sup>113</sup>

#### A. EQUALITY OF IDEAS AND BELIEFS UNDER THE LAW

The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>114</sup> Proponents of vouchers also argue that vouchers are constitutionally permitted because of parental rights recognized in cases such as *Meyer v. Nebraska*<sup>115</sup> and *Pierce v. Society of Sisters*.<sup>116</sup> In *Meyer*, the Court held that a Nebraska law that required only English-language education was unconstitutional because it violated the liberty protected by the Due Process Clause of the Fourteenth Amendment by not permitting parents to allow their children to be taught other languages.<sup>117</sup> In this

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<sup>109</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. at 535

<sup>110</sup> Richards, *supra* note 61.

<sup>111</sup> WILLIAM G. HOWELL & PAUL E. PETERSON, *THE EDUCATION GAP: VOUCHERS AND URBAN SCHOOLS* 207 (2d ed. 2006).

<sup>112</sup> CORWIN & SCHNEIDER, *supra* note 10, at 181–87.

<sup>113</sup> Richards, *supra* note 61 (“[O]ne of the most recent studies, a December 2015 evaluation by Duke and MIT scholars on the first year of the expanded Louisiana Scholarship Program, showed that attending a voucher school substantially *reduced* student achievement. The study, which was published by the National Bureau of Economic Research, tracked voucher-school lottery winners and losers in the first year of Louisiana’s new statewide voucher program and found that the winners had lower math scores, and that voucher effects for reading, science, and social studies were also ‘negative and large.’”).

<sup>114</sup> U.S. CONST. amend. XIV § 1.

<sup>115</sup> *Meyer*, 262 U.S. at 400 (holding that parents have a “natural duty” to educate their children as they see fit and in accordance with their beliefs).

<sup>116</sup> *Pierce*, 268 U.S. at 535 (holding that parents, as those who “nurture” and control a child’s destiny, have a right and duty to direct the upbringing of their children).

<sup>117</sup> *Meyer*, 262 U.S. at 401–403.

holding, the Court relied on a concept of liberty, not equality in education, to strike down the law.<sup>118</sup> But the concept can apply to an equality claim: that the government should not prevent individuals from being able to pursue religious objectives, including educating their children in private, religious schools.<sup>119</sup> By allowing parents to make secular decisions about their children's education, and not religious ones, the government is essentially favoring a secular lifestyle, which is a violation of the First Amendment's prohibition against interfering with religion. And when the government favors one belief system over another, there is no equality under the law. Furthermore, when the government favors one belief system over another, even a secular belief system, equality under the law is at risk.

Some opponents of vouchers respond that vouchers are not only bad policy as applied to religious schools, but they should not be used for secular charter or private schools, either.<sup>120</sup> Parents should be free to hold any belief they choose, so long as their actions in pursuing these beliefs do not interfere with the common good. However, when a child leaves the public school system through the voucher program, the funding that the state would have otherwise provided to the public school consequently goes with them, which thereby decreases funds available to public schools, and can lead to poor educational outcomes.<sup>121</sup>

Other opponents of vouchers argue that not all beliefs should be treated equally. The concept of not providing aid to religious institutions is within the text of the Constitution.<sup>122</sup> While a voucher to attend a secular, private school may be permissible, a voucher to attend a religious school is not permissible because it is a direct state contribution to a religious institution.<sup>123</sup> However, this argument is less likely to prevail in light of Supreme Court holdings such as *Board of Education v. Allen*, which held

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 400–402.

<sup>120</sup> See CORWIN & SCHNEIDER, *supra* note 10, at 18–77.

<sup>121</sup> Turner et al., *supra* note 80.

<sup>122</sup> See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”); *Everson v. Bd. of Educ.*, 330 U.S. 1, 13–14 (1947).

<sup>123</sup> See, e.g., *10 Reasons Why Private School Vouchers Should Be Rejected*, CHURCH & STATE MAG. (Feb. 2011), <https://www.au.org/church-state/february-2011-church-state/featured/10-reasons-why-private-school-vouchers-should-be> (“[V]ouchers force Americans to pay taxes to support religion. This runs counter to the First Amendment’s guarantee of religious liberty. In America, all religious activities should be supported with voluntary contributions.”).



that programs that do not coerce individuals to practice religion do not present excessive entanglement of church and state.<sup>124</sup>

#### B. RACIAL AND SOCIOECONOMIC EQUALITY

Opponents of vouchers argue that there is real, measurable inequality in the access to and the quality of education across states,<sup>125</sup> and they argue that vouchers exacerbate this problem. As of 2009, 45% of public school students in the U.S. were minorities, and more than 46% came from low-income families.<sup>126</sup> Empirical data about the impact of vouchers to attend private schools has shown mixed results. While vouchers give low-income families an opportunity to send their children to schools they would otherwise not be able to afford,<sup>127</sup> vouchers could increase the achievement gap between public and charter or private school students because they will in effect take resources away from public schools. Furthermore, not all families that have access to vouchers or tax credits can afford to send their children to private schools; vouchers or tax credits may be insufficient to fund the entire tuition and other expenses.<sup>128</sup> Proponents of vouchers argue that this data, while factually accurate, is not a reason to stop voucher programs because any increase in access to private schools is better than no increase in access.<sup>129</sup> Rather, voucher programs should receive more funding to allow more students to have access to them.

Socioeconomic status is a large factor in educational outcomes throughout the United States. According to the Brookings Institution, the cost of housing is approximately \$11,000 more per year near public schools

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<sup>124</sup> *Bd. of Educ. v. Allen*, 392 U.S. 236, 248 (1968) (holding that state-funded textbooks to parochial schools are not an excessive entanglement of state and religion because the program does not coerce individuals to practice a religion).

<sup>125</sup> SOUTHERN EDUC. FOUND., *NO TIME TO LOSE: WHY AMERICA NEEDS AN EDUCATION AMENDMENT TO THE US CONSTITUTION TO IMPROVE PUBLIC EDUCATION* 3 (2009), <http://www.southerneducation.org/getattachment/43e3f5bb-714f-47c3-85ad-ecce27529f99f/No-Time-Lose-Why-America-Needs-an-Education-Amendm.aspx>.

<sup>126</sup> *Id.*

<sup>127</sup> Nat Malkus, *The Real Problem with School Voucher Programs*, WASH. EXAMINER (May 2, 2017, 7:00 PM), <http://www.washingtonexaminer.com/the-real-problem-with-school-voucher-programs/article/2621897>.

<sup>128</sup> *See, e.g.*, ANNE BEASON, CTR. FOR PUB. POLICY PRIORITIES, *THE FACTS ON SCHOOL VOUCHERS: ENTITLING PRIVATE SCHOOLS TO TAX DOLLARS WITHOUT ACCOUNTABILITY OR BETTER RESULTS* 3 (2017), [https://forabettertexas.org/images/Voucher\\_policy\\_brief\\_and\\_graphic\\_FINAL.pdf](https://forabettertexas.org/images/Voucher_policy_brief_and_graphic_FINAL.pdf) (finding that a proposed voucher system in Texas would have left eligible families liable for thousands of dollars in private school tuition costs).

<sup>129</sup> THOMAS STEWART & PATRICK J. WOLF, *THE SCHOOL CHOICE JOURNEY: SCHOOL VOUCHERS AND THE EMPOWERMENT OF URBAN FAMILIES* 24 (2014).

that have higher average test scores than near low-scoring public schools.<sup>130</sup> That is 240% higher in annual costs and means that home values are \$205,000 higher near higher-scoring schools.<sup>131</sup> These homes are also larger, and 30% fewer families rent their homes in the neighborhoods with the higher-scoring schools.<sup>132</sup>

Proponents of vouchers argue that vouchers are the only way students living in poorer neighborhoods would be able to access the higher-performing schools in more affluent neighborhoods.<sup>133</sup> With access to higher-performing schools, these students have a greater chance of success in school and beyond. Furthermore, vouchers can increase competition among schools. If parents are able to choose where to send their children to school, public schools will need to work harder to ensure that students stay. Public schools would have to prove to parents that they are the best place for their children to learn and grow. This would, in theory, improve learning outcomes in all schools because the free market will create the ideal educational environment.<sup>134</sup>

However, education is not a free market.<sup>135</sup> All students need to be educated somewhere, and public schools cannot discard students who are disabled or do not meet other standards. Therefore, all choices regarding education will be at least partially impacted by the government.<sup>136</sup> The nature of the public education system will always cause public schools to be “obligated to finish whatever other provides prefer not to do...[including] taking care of the most difficult students needing the most costly services.”<sup>137</sup> Because the government funds public schools, it regulates the “market” for education and politicians will always have a role in deciding which schools will benefit.”<sup>138</sup>

Research has shown that statistically significant improvements can be seen in locations where there is a free market for schools in the areas of academic achievement, efficiency in money spent per student, attainment of higher levels of education, and parental satisfaction with the facilities and

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<sup>130</sup> JONATHAN ROTHWELL, BROOKINGS INST. HOUSING COSTS, ZONING, AND ACCESS TO HIGH-SCORING SCHOOLS 14 (2012), [https://www.brookings.edu/wp-content/uploads/2016/06/0419\\_school\\_inequality\\_rothwell.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/0419_school_inequality_rothwell.pdf).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> CORWIN & SCHNEIDER, *supra* note 10, at 21–23

<sup>134</sup> Andrew J. Coulson, *On the Way to School: Why and How to Make a Market in Education*, in FREEDOM AND SCHOOL CHOICE IN AMERICAN EDUCATION 17, 17–20 (Greg Forster & C. Bradley Thompson eds., 2011).

<sup>135</sup> CORWIN & SCHNEIDER, *supra* note 10, at 35.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

orderliness of schools.<sup>139</sup> Social scientists, however, also argue that when certain schools have a monopoly on education in an area, parents who are more sophisticated will help everyone in the area by ensuring that schools provide the highest-quality education possible.<sup>140</sup> Neither argument is conclusive, but both lines of thought indicate that the influence of parents on schools should not be underestimated.

### C. EQUAL OPPORTUNITY TO GAIN A HIGH-QUALITY EDUCATION

In a changing workforce, the United States will need more high skilled workers in the future.<sup>141</sup> Growing technology and an increasingly educated foreign workforce mean that the American economy will need to rely on skilled labor to maintain its global position.<sup>142</sup>

Opponents of vouchers cite information about teacher and school accreditation to argue that it is impossible for students attending private, religious, and charter schools to get the same quality of education as those attending public schools, since they are held to different standards.<sup>143</sup> Students attending schools funded by vouchers have at least sometimes shown statistically significant lower test scores on standardized tests.<sup>144</sup>

Proponents of vouchers also have statistical data to support their claims. In Washington D.C., participants in the D.C. Opportunity Scholarship Program (which was only in effect from 2004 to 2009)<sup>145</sup> received vouchers of up to \$7,500 to attend private schools.<sup>146</sup> Students receiving vouchers had a 91% high school graduation rate, which was 30% higher than the average graduation rate of public schools in the area.<sup>147</sup> In New York, voucher recipients were 24% more likely to enroll in college

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<sup>139</sup> Coulson, *supra* note 134, at 20.

<sup>140</sup> Stephen G. Gilles, *Why Parents Should Choose*, in *LEARNING FROM SCHOOL CHOICE* 395, 403 (Paul E. Peterson & Bryan C. Hassel eds., 1998).

<sup>141</sup> Thomas Bailey, *Implications of Educational Inequality in a Global Economy*, in *THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION* 74, 78–79 (Clive R. Belfield & Henry M. Levin eds., 2007).

<sup>142</sup> *Id.* at 78.

<sup>143</sup> *See supra* Part II.

<sup>144</sup> MARK DYNARSKI, BROOKINGS INST., *ON NEGATIVE EFFECTS OF VOUCHERS* 2 (2016), <https://www.brookings.edu/wp-content/uploads/2016/07/vouchers-and-test-scores.pdf>.

<sup>145</sup> STEWART & WOLF, *supra* note 129, at 114.

<sup>146</sup> CHAD MILLER, AM. ACTION FORUM, *PROVIDING EQUALITY OF OPPORTUNITIES: A REVIEW OF SCHOOL CHOICE* 2015 (2015), <https://www.americanactionforum.org/print/?url=https://www.americanactionforum.org/insight/providing-equality-of-opportunities-a-review-of-school-choice-2015/>.

<sup>147</sup> *Id.*

than non-recipients.<sup>148</sup> Proponents also argue that any time a parent is given a choice between two schools and an opportunity to send his or her child to a private school for the same cost as a public school through vouchers and tax credits, diversity in schools increase because parents are not forced to accept educational services to which they object.<sup>149</sup> They can choose to send their children to a different school, as opposed to fighting for legislation to change all schools in the area to suit their needs. This would reduce conflicts among neighbors and create harmony for individuals with objections to local schools due to ideological, religious, or ethnic concerns.<sup>150</sup>

Furthermore, parents who send their children to private schools, particularly religious schools, are more likely to be involved in the educational process and to participate in the governance of the school, either directly or indirectly through their ability to send their children to a different school at any time.<sup>151</sup> This would, in theory, ensure that parents serve a supervisory role in the schools, such that if the quality of their children's education suffers, they will exercise their free market power to send the children to another school.<sup>152</sup>

But measures of parental satisfaction and involvement are not necessarily the best way to measure the quality of education. These measures do not show how much students learn or what they learn. Rather, they are an assessment of whether the school meets the "values" of the parents.<sup>153</sup> The problem with this justification for access to different schools is that schools are intended to prepare children for the future. If students receive an education that their parents are pleased with, but which is not up to the same standard as other schools, then the graduates of private schools with high parent satisfaction scores but low education standards are potentially being set up to be less successful in their careers and personal lives.

#### IV. ADDITIONAL CONSTITUTIONAL ARGUMENTS

##### A. ESTABLISHMENT OF RELIGION

Vouchers to attend private religious schools are potentially in violation of Establishment Clause of the First Amendment because they are state-

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<sup>148</sup> *Id.*

<sup>149</sup> Coulson, *supra* note 134, at 23.

<sup>150</sup> *Id.* at 34–35.

<sup>151</sup> WILLIAM G. HOWELL & PAUL E. PETERSON, *THE EDUCATION GAP: VOUCHERS AND URBAN SCHOOLS* 115 (2d ed. 2006).

<sup>152</sup> *Id.*

<sup>153</sup> Kelly et al., *supra* note 83.

funded support to religious institutions.<sup>154</sup> This argument is not particularly strong, as case law has shown that funding to religious institutions is not *per se* unconstitutional.<sup>155</sup> The purpose of the funding matters,<sup>156</sup> and case law has established that funding books, transportation, and even salaries for teachers who teach secular subjects at religious schools are all permissible under the Constitution.<sup>157</sup> However, because funds are diverted from public schools to support vouchers that cover all aspects of education—not just the specific ones that the court has deemed constitutional—an argument could still be made that these programs are too far-reaching to not constitute an establishment of religion by the state.

Opponents of vouchers for students to attend religious institutions argue that the vouchers are essentially an unconstitutional establishment of religion by the state.<sup>158</sup> The Supreme Court, in *Lemon v. Kurtzman*, established a three-part test to measure the separation of church and state that the First Amendment's Establishment Clause requires.<sup>159</sup> First, the court looks at whether the government's action has a secular or a religious purpose.<sup>160</sup> Second, the court considers whether the primary effect of the government's action is to advance or endorse religion.<sup>161</sup> Finally, the court asks whether the government's policy or practice fosters an excessive entanglement between government and religion.<sup>162</sup> Opponents of vouchers argue that vouchers fail the second and third prongs because they are a direct payment of tax funds to religious institutions, which helps the institutions, and leads to entanglement between the institutions and the governments that are now funding them.<sup>163</sup> Endorsement of religion through vouchers is essentially direct support of religion because, without voucher funds, religious institutions would have to find other means of funding in order to

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<sup>154</sup> NAT'L CONF. ST. LEGISLATURES, *supra* note 107.

<sup>155</sup> *See supra* Part I.

<sup>156</sup> *See* *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 127 S. Ct. 2012, 2021–22 (2017) (holding that a state cannot disqualify a church from a public benefit program offering reimbursement grants solely because it is a religious institution).

<sup>157</sup> *See supra* Part I.

<sup>158</sup> *See, e.g.*, CHURCH & STATE MAG., *supra* note 123 (“[V]ouchers force Americans to pay taxes to support religion. This runs counter to the First Amendment’s guarantee of religious liberty. In America, all religious activities should be supported with voluntary contributions.”).

<sup>159</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

<sup>160</sup> *Id.* at 612.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 612–13.

<sup>163</sup> *See, e.g.*, *The Legal Case Against School Vouchers*, FREEDOM FROM RELIGION FOUND., <https://ffrf.org/legal/item/16787-the-legal-case-against-school-vouchers> (“A state cannot do through indirect methods what it cannot do directly. Tuition assistance for religious school education is prohibited by the First Amendment—regardless of whether the money goes directly to the school or comes to the school indirectly through the parents.”) (last visited Jan. 27, 2019).

keep their schools functioning. On the other hand, proponents cite the Free Exercise Clause to argue that by not funding vouchers, states are interfering with their ability to practice their faith, as discussed below.

#### B. LIBERTIES PROVIDED BY THE SUBSTANTIVE DUE PROCESS DOCTRINE

The Free Exercise Clause provides that “Congress shall make no law . . . prohibiting the free exercise [of religion].”<sup>164</sup> Through incorporation of the First Amendment to the states, state legislatures are held to the same standard. Proponents of vouchers argue that if states do not enable parents to choose to send their children to religious schools using government funding, then state legislatures thereby interfere with parents’ free exercise of religion.<sup>165</sup> They also argue slippery-slope precautions—if the government can dictate what schoolchildren learn from 8:00 AM to 3:00 PM every weekday, where will the government’s influence and directives end?<sup>166</sup> Will the government eventually be allowed to dictate all aspects of a child’s life, not just education?<sup>167</sup> And if there exists a need to protect children from the choices of their parents, shouldn’t the government’s involvement extend past school hours?<sup>168</sup> Aren’t parents the best agents for ensuring their children receive a better education, instead of government officials who do not know the individual children and their needs?<sup>169</sup>

But the opposite Establishment Clause point can be argued: that vouchers undermine the government’s ability to keep itself out of religion. If parents are permitted to use vouchers to fund their children’s education in any school, the government has no choice but to fund religion through direct payments to religious institutions. Vouchers also infringe upon the rights of taxpayers who have moral or other objections to their tax dollars supporting religious institutions. However, this second argument is not as strong as the first, because taxpayers are already funding religious institutions through the tax deductions that religious institutions receive.

The liberty argument that individuals are free to be unique and to be themselves, cited by proponents of vouchers, is also grounded in case law. In *Pierce v. Society of Sisters*, an Oregon ballot initiative called the Compulsory Education Act required all students to attend public schools in

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<sup>164</sup> U.S. CONST. amend. I.

<sup>165</sup> Jay P. Greene, *The Big Rock Candy Mountain of Education*, in *FREEDOM AND SCHOOL CHOICE IN AMERICAN EDUCATION*, *supra* note 134, at 1, 6.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> See Gilles, *supra* note 140, at 397 (discussing the history, rights, and incentives parents have in making decisions about their children’s lives and education).

the districts in which they resided.<sup>170</sup> The Court held that this was a clear violation of the liberty that parents have to ensure their children are not “standardized.”<sup>171</sup> This argument appeals to one of the core values of the United States: individualism. The basic notion that people have a right to choose who they want to be and how to raise their children is pervasive in American societal discourse. American children should not all be held to the same standards since they are all different. But opponents of vouchers argue that there should be limits to individualism. While all Americans are unique, it is a disservice to children to not give them the opportunity to obtain a high-quality education by permitting them to attend schools that do not need to comply with the same regulatory standards as public schools.

### C. LIBERTY AND AUTONOMY AS AN AMERICAN VALUE

A separate liberty argument that is not grounded in the Constitution, but in an examination of human existence, is the relatively vague idea of “freedom of choice,” or “freedom from coercion.”<sup>172</sup> This argument is attractive to proponents of vouchers because it appeals to individuals’ desire to make the best decision for their children and their children’s futures. Education can be seen, at its core, as just one aspect of child rearing, a task that is the sole responsibility of parents.<sup>173</sup> Since children are not mature or experienced enough to be their own advocates, it is the responsibility of parents to choose what is best for them. Lobbying groups in favor of school choice programs, such as EdChoice, appeal to the general idea that parents should be allowed to choose how to raise their children, including which school their children should attend.<sup>174</sup> Those who fight for the freedom of parents to choose the best education setting for their children appeal to human history—for thousands of years, parents have had the freedom of choice in child-rearing, and this collective human experience deserves deference.<sup>175</sup> This idea is not grounded in the Constitution, but in a general liberty principle about child rearing in the United States. It is a general appeal to the instinct that a free market system will improve the standards

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<sup>170</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 529–31 (1925).

<sup>171</sup> *Id.* at 534–35 (“Standardizing” children would “[force] them to accept instruction from public teachers only.”).

<sup>172</sup> Bowman, *supra* note 38, at 12.

<sup>173</sup> Greene, *supra* note 165, at 3–4.

<sup>174</sup> *Types of School Choice: What Are School Vouchers?*, EDCHOICE, <https://www.edchoice.org/school-choice/types-of-school-choice/what-are-school-vouchers-2> (last visited Oct. 18, 2018).

<sup>175</sup> Greene, *supra* note 165, at 5.

in all schools due to increased competition.<sup>176</sup>

Of course, parents make decisions about their children and their future on a daily basis. There is no data to indicate that those who send their children to private schools make worse decisions about their children in any other aspects of the children's lives, compared to parents who send their children to public schools.<sup>177</sup> At a minimum, voucher programs ensure that parents receive more information because they must take affirmative steps to sign their children up for these programs, as opposed to the more passive mechanisms for enrolling children in public schools. While the quality of this information is difficult to judge, and while parents can choose what to do with this information, an increase in the amount of information used to make a decision is potentially a positive factor.<sup>178</sup>

However, other indicators of parental choice lead to troubling conclusions. For example, African Americans are the most segregated minority in the United States.<sup>179</sup> The average black child attends a school that is 57% black, and the average Latino child attends a school that is more than 50% Latino.<sup>180</sup> The average Asian student attends a school that is 19% Asian, even though Asian students make up only 4% of the elementary-school-age population.<sup>181</sup> Moreover, the percentage of white students in these schools is steadily decreasing.<sup>182</sup> This indicates that parents are choosing to live in neighborhoods and to send their children to schools with children that look like them.<sup>183</sup> Allowing and expanding school choice can only increase this segregation. While liberty and autonomy are American values, protection of racial minorities and equal treatment of all individuals are also American values, which are threatened when self-segregation occurs. When self-segregation is permitted, inequalities such as quality of teachers, facilities and educational materials tends to be exasperated.<sup>184</sup>

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<sup>176</sup> Malkus, *supra* note 127.

<sup>177</sup> Gilles, *supra* note 140, at 402.

<sup>178</sup> *Id.* at 403.

<sup>179</sup> CORWIN & SCHNEIDER, *supra* note 10, at 178.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 178–79.

<sup>183</sup> *Id.* at 177–79.

<sup>184</sup> *Id.* at 167 (“The schools serving [minority] students also tend to be the oldest and generally most rundown. In addition, the students have to use out-of-date textbooks, which are often in short supply. To complicate matters, teachers serving minority and poor children in our society are the least experienced, have the highest turnover, and all too often are teaching subjects for which they hold no teaching credentials.”).



## V. CONCLUSION

In the country's largest voucher programs, educational outcomes for students attending schools funded by vouchers range from slightly worse to slightly better than their peers at public schools. While more empirical research is needed on the effects of vouchers, current data indicates that they are not a means toward improved educational outcomes for all students. Vouchers ultimately take away funds from public schools, increase separation among students, and undermine public faith in public education. Because of these impacts, the current voucher systems play a role in decreasing equality, not because they lead to worse educational outcomes (which has not been definitively proven), but because they lead to further separation among students based on economic, religious, or racial and ethnic backgrounds.

Furthermore, vouchers that allow students to use taxpayer funds to attend religious institutions are potentially an establishment of religion, which is unconstitutional and cannot be overcome by arguments about the importance of liberty. Because of the potential violations of the right to equality and the Establishment Clause, vouchers are more than just a poor policy choice. On the other hand, excluding religious institutions from voucher programs is also unconstitutional, as it would prohibit parents freely exercising their religion. Federal and state case law has shown that courts are more willing to permit entanglement with religion than they are to remove funding for religious schools solely because the schools are religious,<sup>185</sup> so it appears that religious charter and private schools are here to stay. For these reasons, it is up to policymakers and stakeholders to ensure that all schools strive to provide equality in education of all children.

Before arguments about the constitutionality of vouchers are made, policymakers should first evaluate the impact of vouchers on educational outcomes and make a policy decision to eliminate voucher programs. A better policy approach is to focus on improving public schools and to ensure that these schools maintain equality, in all senses of the word. Better funding or legislation that mandates specific test scores and other assessment-based outcomes is not necessarily the solution. The solution is likely to be a combination of several factors that alleviate or at least mitigate pro-voucher arguments. These solutions could include bringing in certain free-market principles, such as an ability to choose from among public schools in a district, and certain liberty-restricting principles, such as an established baseline standard for what is taught. Because states control their own education systems, the United States is likely to continue to have

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<sup>185</sup> See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947).

dozens of different systems producing different results, and as this Note has discussed, there is no constitutionally protected mechanism for standardizing state behavior when it comes to education. Because parents have differing views on what equality and quality mean in the education context, policymakers should base their decisions on empirical data about short and long-term achievement, parental satisfaction, the extent to which the needs of disabled students are met, and other measures of learning outcomes in order to decide how to improve the public school system.