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NOTES

STRUGGLING MIDDLE CLASS: MERIT-BASED SCHOLARSHIPS MEET SCHOOL VOUCHERS

MARGARET E. AZHAR*

I. INTRODUCTION

The American middle class is in the unique income category where each family is making more money than it was a generation ago, yet, after paying the bills, has less for discretionary spending and saving.¹ Consequently, when an emergency arises, whether it be injury, illness, or a job loss, many middle class families find themselves with no savings or safety net of any kind.² In fact, middle class families have been showing increased signs of financial distress for decades, and are often only one disaster or unexpected financial obligation away from bankruptcy.³

One of the biggest expenses for the American middle class is the cost of educating its children.⁴ In this Note, I suggest a system of merit-based school vouchers to be used at primary and secondary schools in the same manner merit-based scholarships are currently used at colleges and universities. I believe such a system would be an ideal and workable solution to the increasing toll educational expenses are taking on the middle class.

Part II discusses the hardships facing the middle class as a result of the rising costs of education, with a brief discussion as to why a voucher program would be helpful in alleviating them. Part III discusses the history of the use of public funds at religious and secular private schools in America, and documents the changes in the Supreme Court's application of the Establishment and Free Exercise clauses of the Constitution. It is important to consider the constitutionality of publicly funding religious

* J.D., 2010, Notre Dame Law School; B.A., 2007, Hillsdale College. I would like to thank Kathryn Azhar, Elizabeth Azhar, and Dennis Czuchaj for all of their support throughout my research and writing. I also want to thank my father, Abolfazl Azhar, for fitting enough love and encouragement into nineteen years to last me a lifetime.

1. See ELIZABETH WARREN & AMELIA WARREN TYAGI, TWO-INCOME TRAP: WHY MIDDLE-CLASS PARENTS ARE GOING BROKE 8 (Basic Books, 2003).

2. *Id.*

3. *Id.* at 6.

4. See *infra* Part II.

institutions when discussing voucher programs because of the large number of private schools that are affiliated with a religion.⁵ While a voucher system could be implemented exclusively within the public school system, expanding the program to private schools would broaden the available choices for parents. Part IV discusses the historic use of voucher programs, as well as their present-day use in American schools, noting the varying uses of vouchers both as a widespread solution and as an individualized remedy. Part V discusses the many similarities between primary and secondary school vouchers, and college and university scholarships. I suggest the possibility of merging the merit-based scholarships used at colleges and universities with the need-based vouchers used at many primary and secondary schools to create a merit-based voucher program at the primary and secondary level. Part VI discusses the potential immediate effects of such a program on the middle class. Finally, Part VII discusses the potential secondary effects of such a program, as well as the various arguments supporting and opposing school voucher programs as they exist today. While current voucher programs are not merit-based, discussing the secondary effects such programs have had on the students and families who have used them may help show the potential benefits of expanding such programs to include merit-based vouchers as well.

II. THE BURDENED MIDDLE CLASS

Because so much of this discussion will focus on the middle class, it is important to establish precisely what the term means. Unfortunately, there is no set definition for what it means to be “middle class,” with different studies alternately stressing income, occupation, or education as the determinant factor.⁶ Demographers have defined the middle class as those living in households whose yearly income is clustered around the nation’s median income,⁷ which in 2007 was estimated to be \$50,740.⁸ Others have defined the middle class by non-financial characteristics, applying the moniker only to those who have reached a certain level of education (generally college), have health insurance, access to credit, a commitment to saving and investing, and a confidence in the

5. See STEVEN P. BROUGHMAN, NANCY L. SWAIM, & PATRICK W. KEATON, U.S. DEPT. OF EDUC., CHARACTERISTICS OF PRIVATE SCHOOLS IN THE UNITED STATES: RESULTS FROM THE 2007–08 PRIVATE SCHOOL UNIVERSE SURVEY 2 (2009), available at <http://nces.ed.gov/pubs2009/2009313.pdf>.

6. Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 967–68 (1997).

7. Susan D. Carle, *Re-valuing Lawyering for Middle-Income Clients*, 70 FORDHAM L. REV. 719, 721 (2001).

8. U.S. CENSUS BUREAU, INCOME, EARNINGS AND POVERTY DATA FROM THE 2007 AMERICAN COMMUNITY SURVEY 3, available at <http://www.census.gov/prod/2008/pubs/acs-09.pdf>.

availability of opportunities for economic advancement.⁹ While not exact, these characteristics give a fairly workable definition of the group of Americans generally referred to as “middle class.”

In recent years, the cost of education has placed an increasing burden on middle-class families.¹⁰ These families have moved in vast numbers to the suburbs to escape failing urban public schools.¹¹ The public school system was intended to provide equal educational opportunity to all children, regardless of income, thereby giving them an equal chance at life’s economic opportunities.¹² However, it has been said that “[f]ailing schools impose an enormous cost on those children who are forced to attend them, but they also inflict an enormous cost on those who don’t.”¹³ The failure of urban public schools to provide safe and quality education has forced middle-class parents to internalize the cost of educating their children, rather than enjoying the benefits of a 100% publically subsidized education system. Middle-class families are often faced with a choice between affordable housing near a poor urban school, and expensive housing near a good, safe, and usually suburban school.¹⁴ Not surprisingly, these families tend to leave the city for the suburbs to have access to better-performing suburban schools, rather than send their children to urban public schools.¹⁵

While public schools are publically subsidized,¹⁶ the nearby housing is not, and middle-class Americans tend to pay for the privilege of attending a high-quality suburban school indirectly through increased housing costs.¹⁷ Parents who are committed to providing their children with a high-quality education are forced into what some have termed a

9. Carle, *supra* note 7, at 720.

10. Elizabeth Warren, *Families Alone: The Changing Economics of Rearing Children*, 58 OKLA. L. REV. 551, 551 (2005).

11. *Id.* at 554.

12. MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 153 (2d ed. 1990); Jason T. Vail, Note, *School Vouchers and the Establishment Clause: Is the First Amendment a Barrier to Improving Education for Low-Income Children?* 35 GONZ. L. REV. 187, 192 (1999-2000). Additionally, many states enacted a public school system for the preservation of free government. See, e.g., ARK. CONST. of 1874, art. XIV, §1 (1968); CAL. CONST. art. IX, § 1; IND. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MASS. CONST. pt. 2, ch. V, § 2; MICH. CONST. art. VIII, §1; MO. CONST. art. IX, § 1(a); N.H. CONST. pt. 2, art. 83; N.C. CONST. art. IX, §1; R.I. CONST. art. XII, § 1; S.D. CONST. art. VIII, § 1; TEX. CONST. art. VII, § 1.

13. WARREN & TYAGI, *supra* note 1, at 23.

14. A. Mechele Dickerson, *Caught in the Trap: Pricing Racial Housing Preferences*, 103 MICH. L. REV. 1273, 1277 (2005).

15. Michael E. Lewyn, *The Urban Crisis: Made in Washington*, 4 J.L. & POL’Y 513, 530-31 (1996).

16. The cost of running public schools is funded indirectly through tax revenues, most of which comes from local taxes, but some of which comes from state and federal governments as well. See FRIEDMAN & FRIEDMAN, *supra* note 12, at 153-55

17. See Warren, *supra* note 10, at 551.

“bidding war” over houses in the “right” neighborhoods, with many of them spending themselves into bankruptcy in the process.¹⁸ As a large number of women have entered the workplace, single-income families with stay-at-home mothers often find it nearly impossible to afford housing in a desirable school district.¹⁹ The free public school system “has transformed into a private system in which families buy admission to a decent school by purchasing expensive homes in a select few neighborhoods.”²⁰ It is not unheard of for the quality of the nearby public school system to be the single most important factor in the price of a home in the suburbs.²¹ As a result, it is easy to imagine a middle-class family essentially being priced out of a “free” public school because the cost of living in a good school district is so high.

In addition to housing costs, middle-class families are paying increased transportation costs.²² Now that they must live further from the city where they often work, middle-class parents are learning that incomes from both parents are necessary to afford the mortgage payments in good-quality school districts.²³ This often requires a second family car and all the accompanying expenses.²⁴

Meanwhile, most Americans consider a college education to be the most important determinant in a young person’s future success.²⁵ This motivation to provide good education for their children begins well before their children are high school age, with many parents struggling to ensure their children get into the best elementary and pre-schools.²⁶ What is considered “adequate” education has been broadened to include not only kindergarten through twelfth grade, but also two years of pre-school and four years of college.²⁷ This means that even a 100% subsidized K-12 public education system now only covers approximately 68% of a middle class child’s educational costs, leaving middle class families struggling to come up with the remaining money.²⁸ Once a middle class family has managed to send its child to a good, safe school, it is confronted with the ever-increasing costs of college tuition, which, in state schools alone has nearly doubled in the past twenty-five years, and continues to rise.²⁹

18. *Id.* at 569–70.

19. *See* WARREN & TYAGI, *supra* note 1, at 31.

20. Warren, *supra* note 10, at 551.

21. WARREN & TYAGI, *supra* note 1, at 24; Warren, *supra* note 10, at 556–57.

22. *See* Warren, *supra* note 10, at 570–71.

23. *Id.* at 567–70.

24. *Id.* at 570–71; WARREN & TYAGI, *supra* note 1, at 47.

25. WARREN & TYAGI, *supra* note 1, at 41.

26. *Id.* at 37–39.

27. Warren, *supra* note 10, at 551.

28. *Id.* at 552.

29. WARREN & TYAGI, *supra* note 1, at 42–43.

Need-based school vouchers have been suggested, and implemented, as one potential solution for providing a viable option to poor and economically disadvantaged students trapped in under-performing public schools.³⁰ However, merit-based vouchers could also increase the quality of non-suburban public school education or reduce the costs to more families of sending their children to private schools. As a result, merit-based voucher programs may also prove to be a substantial financial boon to middle-class families struggling to make the tuition or mortgage payments that are often necessary to gain access to quality schools.

A merit-based voucher program could ease this burden by allowing middle-class families to live in urban areas, or at least more affordable suburban areas, and send their children to nearby private schools.

III. CONSTITUTIONALITY OF PUBLICLY FUNDING RELIGIOUS SCHOOLS

Because of the large number of private schools that are affiliated with a religion, it is important to discuss the effect such affiliation might have on a voucher program that explicitly permits the use of public funds at private, perhaps religious, schools.³¹ State funding has long been used to fund education both at secular and religious private schools.³² However, the use of state funding at religious schools raises constitutional issues, primarily regarding the First Amendment's prohibition of an establishment of religion and its guarantee of freedom to exercise religion.³³ Recently, religious schools that have been denied public funding precisely because they are religious have appealed to the courts under the Fourteenth Amendment's requirement of equal protection under the laws and application of the First Amendment to the states.³⁴

When dealing with the First Amendment's prohibition of an establishment of religion in *Lemon v. Kurtzman*, the Supreme Court developed a litmus test to determine whether a state's private-school voucher statute violated the Constitution.³⁵ First, the statute must have a secular legislative purpose; second, its primary or principal effect must be neutral

30. See *infra* Part IV.

31. See *supra* note 5 and accompanying text.

32. See *infra* note 78 and accompanying text.

33. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.")

34. The Fourteenth Amendment provides that no state shall make or enforce any law that abridges the privileges or immunities of U.S. citizens or denies "to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. See discussion *infra* notes 71–72 and accompanying text.

35. 403 U.S. 602, 612 (1971). *Lemon* involved statutes in Pennsylvania and Rhode Island that provided for state aid to non-public schools or to non-public school-teachers. Although these programs were limited to "secular" school subjects, the Court held them both unconstitutional because they involved "an excessive entanglement between government and religion" in violation of the First Amendment. *Id.* at 603.

(that is, it must neither advance nor inhibit religion); and third, it must not foster “an excessive government entanglement with religion.”³⁶ To determine whether an entanglement was “excessive” the Court examined “the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.”³⁷ The Court explained that “excessive entanglement” might be found if the regulation the statute required involved extensive or invasive inquiry into the way religious schools were run.³⁸

The *Lemon* test’s first two prongs came into the spotlight a few years after the decision when a Kansas court struck down a state statute authorizing the use of state funds at certain religious schools. In *Americans United for Separation of Church and State v. Bubb*, the court determined that giving public funds to “pervasively sectarian” schools in the form of scholarships or educational grants inherently violated the test because such schools served a primarily religious, not secular purpose.³⁹ The court defined a “pervasively sectarian” school as one with a primarily religious purpose rather than a secular one.⁴⁰ The school’s primary purpose could be determined by looking at factors such as whether the school gave preferential admission to students of a certain religion or denomination; whether religion classes were dogmatic rather than academic in nature; whether the school required religious participation such as attending mass or chapel; whether the school imposed religious restric-

36. *Id.* at 612–13. See also *Waltz v. Tax Comm’n of New York*, 397 U.S. 664, 674 (1970) (examining whether a property tax exemption for religious organizations resulted in “an excessive government entanglement with religion”); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963) (“The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.”).

37. *Lemon*, 403 U.S. at 615.

38. *Id.* at 607–609, 620. Specifically in *Lemon*, the Court determined that “[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.” *Id.* at 619.

39. 379 F. Supp. 872, 893 (D. Kan. 1974). In *Bubb*, the Court noted that primary and secondary parochial schools fail this test as their primary purpose is to inculcate religion into their young students. According to the court, “academic freedom and the quest for truth” require a non-sectarian environment making state aid to religious colleges easier to constitutionally validate than similar aid to parochial schools. *Id.* at 891. The Court later mentioned in passing that a “tuition grant program” at the primary and secondary education levels would usually create excessive entanglement issues. *Id.* at 894.

40. *Id.* at 892–93.

tions on faculty members; and whether the school required some affirmation of certain religious beliefs for admission or graduation.⁴¹

Under the *Bubb* rationale, giving state funding to nearly any religious primary or secondary school would seem to violate the *Lemon* test.⁴² However, not all courts rejected state funding of pervasively sectarian schools. Using predominately the same criteria as the court in *Bubb*, a North Carolina court upheld a state statute giving state funds to two private sectarian colleges.⁴³ Although the court found that the colleges involved were pervasively sectarian, it did not believe the schools were pervasively sectarian enough to offend the Establishment Clause.⁴⁴ The district court held that although the state's funding of the *secular* goals of the school was necessarily freeing up more of the colleges' funds to be used for *sectarian* goals, this effect was too indirect to violate the Constitution.⁴⁵ Rather, because the aid primarily benefited the student, not the institution, and the state's supervision of the funds required little government involvement, this statute satisfied the *Lemon* test.⁴⁶ Similarly in 1986, the Supreme Court held that a state vocational rehabilitation program that funded a blind student's education and missionary training at a religious college was not an impermissible advancement of religion.⁴⁷ Rather, because the purpose of the legislation was to benefit the visually handicapped, not provide religious instruction, the funding met the *Lemon* criteria.⁴⁸

In 1985, the Supreme Court also addressed the issue of public funds being used at private schools in *School District of the City of Grand Rapids v. Ball*.⁴⁹ This case involved a supplemental school program for non-public school children, taught at the non-public schools but paid for at public expense.⁵⁰ The Court ultimately struck down the program as unconstitutional under the *Lemon* test, holding that it unduly entangled the government in religious matters and impermissibly promoted relig-

41. *Id.* at 881–82, 885, 892–93.

42. *See id.* at 891.

43. *Smith v. Bd. of Governors of Univ. of N.C.*, 429 F. Supp. 871, 879 (W.D.N.C. 1977).

44. *Id.* at 879. Although these schools required religion courses and trained some students for seminary, the state's contract with the schools required that the scholarships/grants not be used for students "pursuing a course of study primarily designed to prepare the student for a career in a religions vocation." *Id.* at 878–79.

45. *Id.* at 878.

46. *Id.* at 879; *see also* *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 9–11 (1993) (holding that the Establishment Clause does not prohibit the state from furnishing a sign language interpreter under the Individuals with Disabilities Education Act (IDEA) to a deaf child in a sectarian school because the IDEA has a purely secular purpose and the child is the main beneficiary, while the school only benefits incidentally).

47. *Witters v. Wash. Dep't. of Servs. for the Blind*, 474 U.S. 481, 489 (1986).

48. *Id.* at 485–86.

49. *Sch. Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373, 375–76 (1985).

50. *Id.*

ion.⁵¹ In reaching this decision, the Court noted that the “pervasively sectarian nature of the school[]” may influence the state paid instructors to “subtly or overtly indoctrinate the students in particular religious tenets at public expense.”⁵² Notably, by this rationale the mere possibility that providing funds to a religious school “may” result in public funds promoting religion would be sufficient to violate the *Lemon* test.

Fortunately, in *Agostini v. Felton* the Supreme Court clarified the proper application of the *Lemon* test, rejecting the premises on which *Ball* was based.⁵³ *Agostini* involved a federally funded program that provided remedial education on a neutral basis for disadvantaged children by government employees on the premises of sectarian schools.⁵⁴ Up until this point, the Court had relied on four assumptions: (i) “any public employee who works on a religious school’s premises is presumed to inculcate religion in her work”; (ii) “the presence of public employees on private school premises creates an impermissible symbolic union between church and state”; (iii) “any public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decision-making”; and (iv) “public employees who teach on religious school premises must be closely monitored to ensure that they do not inculcate religion.”⁵⁵ In *Agostini*, the Court began by rejecting the assumptions that “placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion,” and that “all government aid that directly assists the educational function of religious schools is invalid.”⁵⁶ Instead, the Court recognized that when public money ends up at a religious institution, it is not a violation of the Establishment Clause if it does so “only as a result of the genuinely independent and private choices of individuals.”⁵⁷ The Court concluded that the federally funded program at issue gave no incentive for anyone to modify their religious beliefs, nor did it result in an excessive entanglement between church and state.⁵⁸

In the same vein, the Court also upheld the constitutionality of a state program that dispensed funds to state and local educational agencies that lend books, media, and computer software to public and private

51. *Id.* at 385.

52. *Id.* at 397.

53. 521 U.S. 203, 205 (1997).

54. *Id.* at 232 (holding that, because services are provided on the basis of religiously neutral criteria, it does not create incentives for anyone “to modify their religious beliefs or practices in order to obtain those services”).

55. *Id.* at 222.

56. *Id.* at 223, 225.

57. *Id.* at 226 (quoting *Witters*, 474 U.S. at 487).

58. *Id.* at 232-33.

primary and secondary schools in *Mitchell v. Helms*.⁵⁹ The Court's new position established that as long as no distinction is made between various religious groups, or between religious and non-religious groups, and the government's secular purpose is adequately furthered, the religious nature of the recipient should not matter.⁶⁰ In *Mitchell*, the Court particularly noted that to exclude religious schools from the program would be to exhibit outright hostility toward those who "take their religion seriously . . . [or] who make the mistake of being effective in transmitting their views to children."⁶¹

In *Mitchell*, the Court in a plurality opinion rejected the dissent's reliance on the pervasively sectarian nature of the school as a factor in its constitutionality analysis.⁶² The relevance of this factor was in "sharp decline," the Court noted, and it "took pains to emphasize the narrowness" of the category.⁶³ Furthermore, the Court determined that the main issue should be the primary purpose of the state in enacting the law, not the religious beliefs of the recipient, and moreover, the inquiry into the recipient's beliefs was not only unnecessary, but "offensive" and "profoundly troubling."⁶⁴ The Court distanced itself from the "shameful pedigree" of the pervasively sectarian factor, officially burying it.⁶⁵

The Supreme Court extended this new rationale in 2002 when it addressed the Establishment Clause's application to state school voucher programs, which dispensed public funds to many religious elementary and high schools.⁶⁶ In *Zelman v. Simmons-Harris*, the Court emphasized the intent of the legislature over the religious or non-religious nature of the school when it held that an Ohio voucher program did not violate

59. *Mitchell v. Helms*, 530 U.S. 793, 801–02, 805 (2000). The Court concluded that if the state makes no distinction between the religious and the irreligious, "it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be." *Id.* at 827.

60. *Id.* at 827.

61. *Id.* at 827–28.

62. *Id.* at 826 ("[T]here was a period when this factor mattered . . . [b]ut that period is one that the Court should regret, and it is thankfully long past."). See *id.* at 886–87 (Souter, J., dissenting).

63. *Mitchell*, 530 U.S. at 826.

64. *Id.* at 827. Additionally, consideration of this factor butted up against the Court's prohibition of discrimination in giving public benefits based on religious status. *Id.* at 828.

65. *Id.* at 828–29. The Court documented the bigoted hostility toward Catholics in the 1870s when the term "sectarian" was code for "Catholic." Because "sectarian" on its face could apply to a religious school of any sect, the Court coined the phrase "pervasively sectarian" which almost exclusively applied to Catholic parochial schools. Both terms were intended as a means of excluding Catholics and Catholic schools from any sort of government aid. Congress even considered a constitutional amendment to bar any aid to sectarian institutions. *Id.*

66. *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002). The Court believed "that the program challenged here is a program of true private choice . . . and thus constitutional." *Id.*

the Establishment Clause because the program was enacted for a purely secular reason: education.⁶⁷ If a few, or even all, of the parents chose to use those funds at religious schools, it would be the parents who were indirectly advancing a religious ideology, not the state.⁶⁸ For proponents of school vouchers, the *Zelman* decision was seen as a landmark case on par with *Brown v. Board of Education* in its “potential to equalize education opportunities for [economically] disadvantaged students.”⁶⁹

Two years later, the Court reaffirmed this position in *Locke v. Davey*.⁷⁰ In *Locke*, a student was denied a state scholarship for which he was otherwise eligible, solely because he chose to be a theology major.⁷¹ The Court reversed the lower court’s ruling, reasoning that although the Establishment Clause permits states to issue public scholarships to students pursuing an exclusively religious degree such as devotional theology, the Free Exercise Clause does not require them to.⁷² Because of this, individual states are left to decide for themselves whether public funding for religious education is permitted by their own constitutions and current voucher programs.⁷³

While the schools at issue in *Zelman* were elementary and high schools, the Court’s decision soon affected the use of grants and scholarships at colleges and universities as well. Based on the *Zelman* holding, the Tenth Circuit Court of Appeals, in *Colo. Christian Univ. v. Weaver*, recently held that because the Establishment Clause allows the even-handed funding of both religious and secular education through student scholarships, *excluding* pervasively sectarian institutions from state scholarship programs was a violation of the Establishment, Free Exercise, and Equal Protection clauses.⁷⁴ In fact, because the statute at issue required an investigation to determine if a religious school was “pervasively sectarian,” and therefore excluded, the court viewed even the investigation itself as an unconstitutionally excessive entanglement.⁷⁵

While it is now well-established that the U.S. Constitution does not prohibit the use of public funds for education in religious institutions, thereby clearing the way for voucher programs, some state courts have

67. *Id.*

68. *Id.* at 652–53.

69. Martha M. McCarthy, *Zelman v. Simmons–Harris: A Victory for School Vouchers*, 171 EDUC. L. REP. 1, 11 (2003) (citing *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954)).

70. 540 U.S. 712 (2004).

71. *Id.* at 717, 719.

72. *Id.* at 718–19, 725.

73. Ellen M. Halstead, *After Zelman v. Simmons–Harris, School Voucher Programs Can Exclude Religious Schools*, 54 SYRACUSE L. REV. 147, 148–49 (2004).

74. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1253, 1257–58 (10th Cir. 2008).

75. *Id.* at 1261–62.

held that it violates their state's constitution.⁷⁶ However, if, as *Zelman* and its progeny held, the federal Constitution allows state voucher programs to be used at religious schools, and as the Tenth Circuit recently held, it actually prohibits the exclusion of religious colleges and universities from state scholarship programs, it may soon be argued that any state voucher program *must* include religious primary and secondary schools. Nevertheless, it is important to note that many state constitutions include clauses, such as "no aid" provisions, that specifically prohibit any public monies from being used to support or aid any sect, church, religious denomination or sectarian institution.⁷⁷ Regardless of how the trending jurisprudence resolves these issues, Supreme Court precedent, and the *Zelman* decision in particular, establish that the First Amendment will not prevent a voucher program from allowing public funds to be used at private religious schools.

IV. HISTORY OF VOUCHER PROGRAMS: ACCEPTANCE AND REJECTION

A. *The Start of School Vouchers*

School vouchers allow parents to use public funds to send their children to private school.⁷⁸ While other means, such as private scholarships, often effectuate the same result, they are not generally considered to be vouchers.⁷⁹ The fundamental characteristics of voucher programs, as opposed to private scholarships, is that vouchers are composed of funding provided by the government and used to enroll a school-age child in a school, usually private, that has been chosen by that child's parent.⁸⁰

While they have not become hotly debated until relatively recently, education voucher programs have existed in the United States in some form since the 1800s, when school districts without public schools paid for the students in those districts to attend the area's existing private

76. David M. Kirkham, *Introduction to Symposium: Educational Choice: Emerging Legal and Policy Issues* 2008 BYU L. REV. 227, 228 (2008).

77. *Id.* For example, Missouri's constitution provides: "[t]hat no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion." MO. CONST. art. I, § 6. Florida has a similar provision. See FLA. CONST. art I, § 3. See also Jason S. Marks, *What Wall? School Vouchers and Church-State Separation after Zelman v. Simmons-Harris*, 58 J. MO. B. 354, 358 (2002) [hereinafter Marks, *What Wall?*]; Emily Wexler, *Privatization of Public Education: An Examination of U.S. and Canadian Policy and Trends Utilizing Vouchers that Indirectly Aid Sectarian Schools*, 12 NEW ENG. J. INT'L & COMP. L. 327, 333-34 (2007).

78. Wexler, *supra* note 77, at 327.

79. See Patrick J. Wolf, *School Voucher Programs: What the Research Says About Parental School Choice*, 2008 BYU L. REV. 415, 417 (2008).

80. *Id.*

schools.⁸¹ The modern concept of the school voucher program first entered the mainstream conscience in the 1950s when Nobel laureate economist Milton Friedman suggested that a more free-market approach to education would invite competition, thereby forcing lower-performing public schools to improve or else lose students and funding.⁸² Friedman believed that vouchers could remedy the two fatal flaws of the public school system: bureaucratic inefficiency and the wide variations in quality between different public schools.⁸³ By placing school funding in the hands of parents, vouchers would put control in the hands of those most capable of, and interested in, securing a good education for the children involved.⁸⁴ By allowing a market structure to distribute funding to schools, children would be able to access better schools and failing schools would be forced to cut out bureaucracy and improve, or else, in a sense, go out of business.⁸⁵

Years later, Professors John E. Coons and Steven Sugarman revived the issue in their book, *Education by Choice*.⁸⁶ They promoted vouchers primarily as a means of ensuring quality education for poor children.⁸⁷ Then, in the 1990s, Professors John E. Chubb and Terry M. Moe wrote a book discussing vouchers further, elaborating on Friedman's idea that the institutional nature of public schools led to their bureaucratization and the resultant inefficiencies, and that it was the free-market approach of private schools that enabled them to be more successful than their public counterparts.⁸⁸ After a while, the popularity of the idea gained support and various states and cities began to implement voucher programs.

B. *The Current State of Voucher Programs*

Florida was the first state to implement a state-wide voucher program that included all schools, even religious private schools.⁸⁹ However,

81. Halstead, *supra* note 73, at 150–51. These programs exist in Maine and Vermont, although Vermont's program began specifically excluding religious schools in 1961 to satisfy its own state constitution. *Id.* at 165.

82. FRIEDMAN & FRIEDMAN, *supra* note 12, at 153; Marks, *What Wall?*, *supra* note 77, at 354; Mark J. Beutler, *Public Funding of Sectarian Education: Establishment and Free Exercise Clause Implications*, 2 GEO MASON IND. L. REV. 7, 13 (1993); Vail, *supra* note 12, at 192–96.

83. FRIEDMAN & FRIEDMAN, *supra* note 12, at 152–58.

84. *Id.* at 160.

85. *See id.* at 161.

86. *See* Ira Bloom, *The New Parental Rights Challenge to School Control: Has the Supreme Court Mandated School Choice?*, 32 J.L. & EDUC. 139, 148–49 (2003).

87. JOHN E. COONS & STEPHEN SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* 11 (1978).

88. *See* JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS AND AMERICA'S SCHOOLS* 3, 28–66 (1990); Bloom, *supra* note 86, at 148–50.

89. Wexler, *supra* note 77, at 341.

in *Bush v. Holmes*, the Florida Supreme Court determined that allowing vouchers to be used at sectarian schools violated the state's constitution.⁹⁰ Interestingly, rather than address the religious nature of the schools, the court took a new route, striking down the program as violating the state's "uniformity clause."⁹¹ Florida is not unique in this, as several other states have "uniformity" clauses as well.⁹² However, many have not interpreted them as prohibiting voucher programs and some even currently have functioning school choice programs.⁹³

Cleveland's voucher program is one that has been widely discussed, as it was the program that *Zelman* upheld.⁹⁴ It was in *Zelman* that the Court looked past the religious nature of schools receiving voucher funds and concentrated on the intentions of the legislature creating the voucher program and issuing the vouchers.⁹⁵ The *Zelman* decision brought the issue of vouchers into the public mind, and the number of school voucher programs in the United States jumped from five to twelve in the five years immediately following the decision.⁹⁶

90. 919 So. 2d 392, 407 (Fla. 2006). See FLA. CONST. art. IX, § 1(a); Jason S. Marks, *Spackle for the Wall? Public Funding for School Vouchers After Locke v. Davey*, 61 J. MO. B. 150, 156 (2005) [hereinafter Spackle for the Wall?].

91. *Bush*, 919 So. 2d at 409–410. Florida's state constitution states that "[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require." FLA. CONST. art. IX, § 1. Some consider the court's analysis to be lacking because it neither addressed the significance of the religious nature of the schools nor established a standard for what "uniform" means. See, e.g., Jamie Dycus, *Lost Opportunity: Bush v. Holmes and Application of State Constitutional Uniformity Clauses to School Voucher Schemes*, 35 J.L. & EDUC. 415, 416 (2006).

92. ARIZ. CONST. art. XI, § 1; COLO. CONST. art. IX, § 2; FLA. CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; IND. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; NEV. CONST. art. XI, § 2; N.M. CONST. art. XII, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 2; OR. CONST. art. VIII, § 3; S.D. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1. See also *Rose v. Counsel for Better Educ., Inc.* 790 S.W.2d 186, 189, 211–12 (Ky. 1989) (interpreting Kentucky's constitutional mandate that the General Assembly provide for an "efficient system of common schools throughout the state" as also requiring schools to be "substantially uniform"); Dycus, *supra* note 91, at 417–18.

93. See, e.g., *Davis v. Grover*, 480 N.W.2d 460, 537 (Wis. 1992) (upholding school choice program because state constitution's uniformity clause requires only uniformity in the "character of instruction"); *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998) (holding that state's attempt to improve education via school choice program does not deny any student the basic education guaranteed in the state constitution); *Idaho Schs. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 730–31 (Idaho 1993) ("[T]he uniformity requirement in the education clause requires only uniformity in curriculum, not uniformity in funding.").

94. See *Zelman*, 536 U.S. at 639.

95. See *supra* notes 63–65 and accompanying text.

96. Wolf, *supra* note 79, at 419.

There are currently twelve school voucher programs in the United States, spanning across nine states.⁹⁷ Eligibility requirements range from those open to students in a public school or public school system that had been determined to be “failing,” to those only open to physically or mentally handicapped students, to those open only to foster children.⁹⁸ Many modern voucher programs are implemented due to the perceived poor condition of the local public schools, and the funds are generally aimed at low-income students who would otherwise be unable to take advantage of the opportunities offered by nearby private schools.⁹⁹

C. *Vouchers as an Individualized Remedy*
(*a.k.a. Court-Mandated Vouchers*)

There is a separate thread of cases addressing the constitutional rights of students who are trapped in public schools that fall below the standards set by their state constitutions.¹⁰⁰ Nearly every state guarantees its citizens the right to education, and more than half include the additional requirement that the education provided be of some quality, ranging from adequate to high.¹⁰¹ Relying on these provisions, individuals have sued their state for failing to provide the quality of that education its constitution guarantees to its citizens.¹⁰² Courts have granted what amounts to private school vouchers on an individual basis for children who are not receiving adequate education in the public schools.¹⁰³ This is not an unusual practice, as courts have created similar voucher-like remedies when finding constitutional violations in cases involving public housing, mental hospitals, and prisons.¹⁰⁴ Alternatively, some state

97. See *id.* at 418; The Foundation for Educational Choice, <http://www.friedmanfoundation.org/schoolchoice/ShowProgram.do>.

98. See Wolf *supra* note 79, at 418; The Foundation for Educational Choice, *supra* note 97.

99. Spackle for the Wall?, *supra* note 90, at 151.

100. Greg. D. Andres, Comment, *Private School Voucher Remedies in Education Cases*, 62 U. CHI. L. REV. 795, 797–802 (1995).

101. Mississippi is the only state whose constitution does not guarantee its citizens' rights to an education. *Id.* at 795, n.1. Of the other states, seventeen only require that a system of free public schools exist; twenty-two add a requirement of quality (adequate, thorough, or efficient); six require a high quality; and four cite education as an important duty of the state. *Id.* at 818, n.116.

102. *Id.* at 797–801.

103. See *Straube v. Fla. Union Free Sch. Dist.*, 801 F. Supp. 1164, 1173–74 (S.D.N.Y. 1992) (noting that under the Individuals with Disabilities Education Act, state funding will provide reimbursement for tuition at an approved private school if public school fails to provide appropriate free public education). See also *Simchick v. Fairfax County Sch. Bd.*, 553 F.3d 315, 323–24 (4th Cir. 2009); *Byrnes v. Riles*, 204 Cal. Rptr. 100, 104 (Cal. Ct. App. 1984).

104. Andres, *supra* note 100, at 809; Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 489 (1980).

courts have held that there is no remedy through the court system for the state's failure to provide the quality of education described in its constitution.¹⁰⁵

V. MERIT-BASED VOUCHERS AND MERIT-BASED SCHOLARSHIPS

A. *Similarities between Vouchers and Scholarships*

While the issue of school vouchers is still hotly debated, there is a much more forgiving mind-set toward publicly funding private education when it is at the post-secondary level.¹⁰⁶ This distinction seems to be primarily one of public opinion, as there does not seem to be any substantive legal difference between the two regimes. Both are programs through which public money is given directly to individuals, who are then free to use those monies at the school of their choice. The differing attitudes toward publicly funded education is notable because the system which currently exists at the post-secondary education level is essentially a voucher program, where the words "scholarship" and "grant" seem to be substituted for the word "voucher."¹⁰⁷ The similarities between these two systems are readily apparent.

Like colleges and universities, education at the primary and secondary level is available at both public and private schools, although there is a much greater number of public primary and secondary school facilities than there are private.¹⁰⁸ The private schools at either education level can be secular or religious.¹⁰⁹ At the post-secondary level, the number of students enrolled at each school is comparable, while at the primary and secondary levels, the private schools tend to be smaller.¹¹⁰ Also, at both levels, the quality of the public schools range from low quality to prestigi-

105. Andres, *supra* note 100, at 818.

106. Mark Strasser, *Death by A Thousand Cuts: The Illusory Safeguards against Funding Pervasively Sectarian Institutions of Higher Learning*, 56 BUFF. L. REV. 353, 353 (2008).

107. Michael E. Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301, 375 (2000).

108. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., FAST FACTS, available at <http://www.nces.ed.gov/fastfacts/display.asp?id=84>.

109. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., Table 255: Degree-granting institutions, by control and type of institution: Selected years, 1949-50 through 2006-07, available at http://www.nces.ed.gov/programs/digest/d07/tables/dt07_255.asp.

110. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., TABLE 225: ENROLLMENT OF THE 120 LARGEST DEGREE-GRANING COLLEGES AND UNIVERSITY CAMPUSES, BY SELECTED CHARACTERISTICS AND INSTITUTIONS: FALL 2005 (2006), available at http://www.nces.ed.gov/programs/digest/d07/tables/dt07_225.asp?referrer=list; NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., CHARACTERISTICS OF PRIVATE SCHOOLS IN THE UNITED STATES: RESULTS FROM THE 2007-08 PRIVATE SCHOOL UNIVERSE SURVEY 2 (2009), available at <http://nces.ed.gov/pubsearch/pubinfo.asp?pubid=2009313>.

ous and highly respected.¹¹¹ And, although perhaps not on the same scale, privately funded scholarships exist at the primary and secondary level as well as at the university level.¹¹²

However, students have much greater freedom in choosing their post-secondary school because, although remaining near to family and friends may be a factor in their decision, their choice need not be directly related to their address to the degree that it is in primary and secondary education. Another important difference is that, whereas it is well-known that university grants and scholarships often factor in athletic or academic performance as well as financial need, a student's academic merit has traditionally not been a factor in primary and secondary level voucher programs.¹¹³ This is because the intention among school voucher advocates is primarily to benefit poor children who lack the funds to leave the public system.¹¹⁴

B. *Merit-Based Vouchers as an Alternative to the Current System*

Because most voucher programs were designed to help lower-income families,¹¹⁵ they are typically dispensed exclusively based on need.¹¹⁶ Accordingly, depending on where the income eligibility line is drawn, middle-class families often find themselves excluded from enrollment in voucher programs. This places them in the unfortunate position of having incomes too high to qualify for need-based voucher aid, but too low to afford quality education on their own. Because of this, a merit-based voucher program would be ideal in alleviating the financial

111. This is evidenced by the struggle of middle-class families to afford houses in areas with "good" schools, and the existence of voucher programs in general as a solution for those children stuck in poor quality or failing schools. See *supra* Part II.

112. See The Foundation for Educational Choice, *supra* note 97. It should be noted that some states (namely Arizona, Georgia, Florida, Iowa, Pennsylvania, and Rhode Island) offer tax credits for donations to privately funded scholarships, while other states (Iowa, Illinois, Louisiana and Minnesota) offer tax credits for educational expenses in general. *Id.* While these may not fit within the traditional definition of "vouchers," an expansion of such programs may well provide an alternate means of achieving the same result.

113. Wolf, *supra* note 79, at 418. Two of the twelve existing state voucher programs provide vouchers for rural areas with no public schools; three programs strictly require a financial means test; five programs only provide vouchers for disabled children; one program admits only foster children; and one program requires attendance at a continually failing public school. See The Foundation for Educational Choice, *supra* note 97.

114. See FRIEDMAN & FRIEDMAN, *supra* note 12; Bloom, *supra* note 86, at 148-49, 155-56.

115. See *supra* note 99 and accompanying text.

116. Spackle for the Wall?, *supra* note 90, at 151. Usually the requirement is financial need, although other voucher programs dispense vouchers based on the unavailability of local public schools, or only to disabled or foster children. See The Foundation for Educational Choice, *supra* note 97.

burden education has placed on the middle class. Although there are many who oppose voucher programs,¹¹⁷ such a program may not be as difficult to achieve as it may first appear. It would only require the marriage of merit-based college scholarships with state need-based voucher programs for primary and secondary schools, both of which are already in place.

Merit-based college scholarships are not a new development. For years, the federal government has been funding the Robert C. Byrd National Honors Scholarship, the first federal merit-based scholarship program, which grants money to states, and allows the states' educational agencies to decide requirements for eligibility.¹¹⁸ Additionally, twenty-two states currently fund completely or partially merit-based college scholarships.¹¹⁹ Some states focus exclusively on qualifications such as grade point average and standardized test scores, while others take family income into account as well.¹²⁰ The states' goals in implementing these programs tend to be the encouragement of higher performance in high schools and matriculation to in-state colleges and universities, while providing financial assistance to middle-class families.¹²¹

We have already established that there are currently several functioning voucher programs.¹²² If these two methods of educational aid are combined into one program, it could provide much-needed support for middle-class families. Any program in which academic merit is a significant factor in determining eligibility would be somewhat helpful to many middle-class families, even if the amount of the voucher were to be phased out depending on the family's income.

However, for such vouchers to provide significant help to the middle class they would have to be primarily based on merit, with any phase-outs or income limitations set at much higher dollar amounts than limitations in the current need-based programs. The current need-based voucher programs in Minnesota, New Orleans, and Washington, D.C., for example, are only available to families making less than 175%, 185%, or 250% of the federal poverty level, respectively.¹²³ The federal poverty

117. See *infra* notes 151–53 and accompanying text.

118. Erin Oehler, *The Door To Higher Education: Accessible to All? Whether State-Funded Merit-Aid Programs Discriminate Against Minorities and the Poor*, 10 SCHOLAR 499, 521–22 (2008).

119. *Id.* at 523–27; Kristen Poe, Note, *Blinded by Results: Is Looking to GPA in Addition to Standardized Test Scores Truly a Less Discriminatory Solution to Merit Scholarship Selection?*, 19 WOMEN'S RTS. L. REP. 181, 184 (1998).

120. See generally Oehler, *supra* note 118, at 523–27 (discussing the HOPE program in Georgia, the MEAP program in Michigan, the Millennium Scholarship Program in Nevada, and the Tennessee Education Lottery Scholarship program in Tennessee).

121. *Id.* at 520–21.

122. See *supra* Part IV.

123. Tax Credits and Deductions for Educational Expenses, The Foundation for Educational Choice, <http://www.edchoice.org/schoolchoice/ShowProgramItem.do?id=24>

level for 2007 was \$20,650 for a family of four.¹²⁴ If we, like most demographers, suppose middle-class families to be those families making approximately the median income in the United States, which, in 2007 was \$50,740,¹²⁵ then the average middle-class family would be earning 246% of the federal poverty level. Under the current need-based voucher programs most, and in some cases all, of the middle class is ineligible for vouchers. Thus, even a voucher partially based on merit would be unhelpful if it was completely phased out below the middle class income level, as are many current need-based vouchers.

It is for this reason that purely merit-based vouchers would be ideal for middle-class families. Currently, a middle-class family can either send its children to a nearby public school, or pay completely out-of-pocket to enroll its child in a private school. A merit-based voucher program would allow those parents to take some of the public school funding with them when they transfer their child to a private school. To be effective, the program need not entirely pay the cost of the private school. Even if middle-class voucher recipients were allowed to take only a percentage of the amount the local public school is spending on their child's education and use that percentage toward private school tuition, these families could save thousands of dollars in educational expenses *per child*.¹²⁶ Additionally, by loosening the tight relationship between address and school quality, a well-designed voucher program could remove a significant financial burden from the shoulders of many middle- and low-income families.¹²⁷ Families that could not previously afford to send their children to private schools could find private education finally within their financial reach.¹²⁸

Were a purely merit-based program politically infeasible, such a program could also be enacted in conjunction with the need-based programs already in effect. There could be one category of vouchers of a certain pre-determined monetary amount available to low-income families, with a phase-out as the family income increased. Once a family's income is

(Minnesota); Student Scholarships for Educational Excellence Program, The Foundation for Educational Choice, <http://www.edchoice.org/schoolchoice/ShowProgramItem.do?id=43> (New Orleans); Opportunity Scholarship Program, The Foundation for Educational Choice, <http://www.edchoice.org/schoolchoice/ShowProgramItem.do?id=13> (Washington, D.C.).

124. Annual Update of the HHS Poverty Guidelines, 72 Fed. Reg. 3147 (Jan 24, 2007). The most recent calculation of the average United States income was for 2007.

125. U.S. CENSUS BUREAU, *supra* note 8, at 3.

126. See FRIEDMAN & FRIEDMAN, *supra* note 12, at 161.

127. See WARREN & TYAGI, *supra* note 1, at 34.

128. While merit-based vouchers would not enable every child from every underperforming school to attain a better education, they are not intended as a cure-all to the problems in American education. This Note suggests them merely as a reasonable way to give more children access to better education and to ease the financial burden on the American middle class.

“too” high, such that the family no longer qualifies for the need-based voucher, the family could apply for a merit-based voucher. Even if the merit-based vouchers are worth a smaller dollar amount than the need-based vouchers, middle-class families would still see a significant reduction in their education expenses.

C. *Constitutionality of Merit-Based Vouchers*

As noted above, the Supreme Court has already determined in *Zelman* that voucher programs, even those that dispensed money to students attending private religious schools, do not violate the U.S. Constitution.¹²⁹ Under the current constitutional analysis, the focus for any new voucher program would be on the intention of the legislature in enacting the program, not the religious or non-religious nature of the schools involved in the program.¹³⁰ It seems this fairly liberal standard would also embrace any new programs, regardless of slightly different requirements for eligibility, as long as they are implemented with essentially the same goal: providing quality education.

Furthermore, as also noted above, the Tenth Circuit recently went so far as to hold that it is unconstitutional to exclude sectarian universities from state scholarship programs.¹³¹ Even if this were not the case, a merit-based voucher program presumably could be successful even if it excluded all religious schools. However, because the vast majority of private schools in the United States are religious,¹³² such exclusion would effectively cut out private schools completely. A merit-based voucher program that excluded all religious schools could potentially exclude all the high-performing schools in disadvantaged urban areas. Consequently, such a voucher program would be of little help to many middle-class parents who reside in urban areas. Additional measures would have to be implemented to make such a limited voucher program effective. Such vouchers could, for example, be supplemented with additional funding either to cover the cost of transporting children to the nearest high-performing schools, or by purchasing additional school buses and hiring more drivers.

A merit-based voucher program could still be beneficial even despite potential legal setbacks. For example, the Supreme Court could reverse the Tenth Circuit's decision in *Colorado Christian*, or other circuits might merely decide the issue differently. This would mean voucher programs would not be required to include the nearby religious schools, but they

129. *Zelman*, 536 U.S. at 653; see also *supra* Part III.

130. *Zelman*, 536, U.S. at 653.

131. *Colo. Christian*, 534 F.3d at 1258, 1269.

132. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., CHARACTERISTICS OF PRIVATE SCHOOLS IN THE UNITED STATES: RESULTS FROM THE 2007-08 PRIVATE SCHOOL UNIVERSE SURVEY 2 (2009), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2009313>.

would also not be barred from such inclusion. Similarly, some states have already held that their own constitutions' "no aid" provisions prevent them from including religious private schools in their voucher programs.¹³³ This means that any voucher program in such a state has to exclude religious schools. Though both situations limit the number of schools in the program, thereby limiting parental choice, they still expand parental choice beyond the local public school in their district. Middle-class families still benefit because parents would not have to live in expensive houses for their children to attend good public schools.

VI. EFFECTS OF A MERIT-BASED VOUCHER PROGRAM ON THE MIDDLE CLASS

A voucher program by its very nature allows parents a greater degree of choice in deciding where their children go to school. Therefore, regardless of whether a given program includes religious and secular private schools, or is limited exclusively to public schools, it takes a step toward breaking down the strong relationship between where a student lives and which school he or she attends. Because of this, even a limited merit-based voucher program would benefit families who cannot afford to live in good school districts, but still seek to provide their children with safe and effective education.

A voucher program that breaks down the relationship between place of residence and the school which is attended would allow middle-class families either to purchase houses in less expensive neighborhoods, thereby reducing mortgage costs, or purchase houses closer to work, thereby reducing transportation costs. By spending a few thousand dollars each year to cover the gap between the amount of the voucher and the full cost of tuition, many middle-class families could potentially save a great deal more in housing and transportation costs. Even a more limited program wherein vouchers could be used exclusively at public schools¹³⁴ would still allow middle-class families to live in lower-cost housing in more affordable neighborhoods and have their children bussed to a better school in a different district. This could be something as simple as allowing any student to attend any public school, then providing a "transportation voucher" to cover costs of transportation up to a certain amount.

Such a program would provide benefits even to those families whose children do not have sufficiently high grades to qualify for a merit-based voucher. These families would still need to live in "good" school districts to attend the better schools. However, the demand for this housing would be lower because many of the parents formerly competing for it would no longer have to do so. Every student who received a voucher

133. See *supra* notes 73-74, 78 and accompanying text.

134. See *supra* Part V.C.

would no longer need to live in “good” school districts, reducing the competition for those houses, and thereby likely reducing the prices for them. The thousands of dollars that could be saved during the course of a child’s primary and secondary education, either from tuition, housing costs, or transportation cost, would enable middle-class families to put more resources away for their children’s college expenses, thereby relieving the pressures associated with rising college tuition costs.

VII. SECONDARY EFFECTS AND POLICY CONSIDERATIONS

Changes to the status quo do not benefit everyone equally. Many middle-class families have already invested huge amounts of time and money to gain access to quality education according to the current “rules.”¹³⁵ There are also plenty of individuals and groups who are hostile to voucher programs because of the changes they expect the programs would effect.

A. *Financial Effects*

Were a school voucher program effectively to divorce school quality from high housing prices, families unable to afford living in expensive school districts would benefit by still having the opportunity to send their children to quality schools. The transportation costs that accompany a house in the suburbs would also be eliminated. Middle-class families who already send their children to private schools would benefit as well because the voucher would remove some of the financial burden of tuition payments. However, those currently living in the expensive districts, including those without children, would likely see the value of their homes decline.¹³⁶ This is not an unsubstantial concern, because the home is the most valuable asset of most Americans.¹³⁷ The early proponent of school vouchers, Milton Friedman, believed the poor would be the primary beneficiaries of a school voucher program, whereas the middle class would only benefit moderately.¹³⁸ However, even if Friedman is correct, given the fact that families with children are now 75% more likely to fail to make timely credit card payments than a family without any children,¹³⁹ it is likely that middle-class families with children, struggling to make tuition (or credit card) payments, would be quite pleased with only “moderate” help.

135. See *supra* Part II.

136. See James E. Ryan, *Charter Schools and Public Education*, 4 STAN. J. C.R. & C.L. 393, 410 (2008) (“Those whose homes’ value currently depend on being in a ‘good school system’ would see a drop in the value of their homes.”).

137. Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121, 123 (2009).

138. See FRIEDMAN & FRIEDMAN, *supra* note 12, at 169.

139. WARREN & TYAGI, *supra* note 1, at 6–7.

Because voucher programs merely redistribute the money each state already spends on education, they do not require any net increase in taxes.¹⁴⁰ However, there could be a significant financial effect on the schools involved in the programs. As students transfer to more desirable schools, they will take with them the funding previously spent at their old school. This would result in a diversion of public funds from the schools students leave to the new schools in which they enroll. Far from being a detriment, this redistribution of funds is precisely the result proponents of voucher programs such as Friedman desire.¹⁴¹ The loss of funding is intended to give failing schools the incentive to improve, while rewarding successful schools for their performance.¹⁴²

At the same time, voucher programs can be structured so that losing the funding associated with a student who transfers to another school can benefit the students who remain behind. If the vouchers are equal to less than the amount the government spends on each student, then, when a voucher recipient leaves one school for another school, he would only be taking a percentage of the funding the state was spending on him. The remaining funds could still be used at the failing school, effectively raising that school's per-student funding.¹⁴³ In the Cleveland program, for example, vouchers issued to be used at private schools were worth up to \$2,250 a student,¹⁴⁴ while the public schools were receiving \$4,167 per student in state funding.¹⁴⁵

B. *Effects on Performance*

Clearly, the allure of a voucher program is the hope that it will enable students to have access to higher quality education. To many, high-performing public schools seem "more like private clubs than public parks when it comes to the issue of access."¹⁴⁶ Proponents of voucher programs look to introduce competition among schools as a means of allowing parents more educational choices, both in terms of quality and type of education.¹⁴⁷ They forecast that "marketplace models . . . will

140. Vail, *supra* note 12, at 199.

141. See *supra* Part IV.A; notes 82–85 and accompanying text.

142. *Id.*

143. See Vail, *supra* note 12, at 195–96, 213–14. Alternately, the remaining funds could potentially also be used as an opportunity to lower taxes or fund even more vouchers.

144. Bloom, *supra* note 86, at 160.

145. *Zelman*, 536 U.S. at 654, n.3. In total, the public schools in *Zelman* were receiving \$7,097 in public funding per student, \$4,167 of which was attributable to the state, not the local government.

146. Ryan, *supra* note 136, at 408.

147. See McCarthy, *supra* note 69, at 1. "If the market should replace the government as the primary regulatory mechanism for schools, then parents would have more discretion to ensure that their children's education is consistent with their personal beliefs and values." *Id.* at 10.

improve public and private education, because inferior schools will be eliminated through competition."¹⁴⁸ In addition to competition, some hope that removing some students from public schools will improve the conditions for those who remain behind because fewer students means smaller class sizes and, therefore, more opportunities for one-on-one instruction.¹⁴⁹

Opponents disagree with many of these predictions, however. Some believe that voucher programs will "create government entanglement with religious institutions, increase economic and racial segregation across schools, or have negative consequences for public schools' democratizing function."¹⁵⁰ Others question the accountability of private schools that must answer primarily to their boards of directors rather than to the American people.¹⁵¹

Another common criticism of voucher programs is that they can exacerbate the poor conditions in schools that are already failing by depriving those schools of students and funding.¹⁵² As more students leave, conditions in failing schools might grow worse, providing motivation for the remaining students to accept vouchers. Followed to its logical conclusion, this process could force many schools to close for lack of students. However, if the failing schools are not providing students with

148. *Id.* at 1.

149. Vail, *supra* note 12, at 199.

150. McCarthy, *supra* note 69, at 1. To combat the concern that voucher programs will further segregate students by race, others claim that this is already the case, with whites fleeing the cities and leaving a disproportionate number of black students behind in the decaying urban schools. See Lewyn, *The Urban Crisis*, *supra* note 15, at 527-529.

151. See American Federation of Teachers, *The Many Names of School Vouchers* (2001), available at <http://www.aft.org/topics/vouchers/index.htm>. The AFT proclaims to "represent the economic, social and professional interest of classroom teachers." American Federation of Teachers, *Who We Are*, available at <http://www.aft.org/about/index.htm> (last visited Nov. 18, 2009). This is worth noting because some have questioned the motives of public school teachers in opposing voucher programs, believing that the opposition stems more from a fear of a drop in union benefits and control rather than a real criticism of the benefits of vouchers or concern for the education of the students involved. See Don Brunell, *School Vouchers Will Cut the Knot of Teacher Union Rules*, COVINGTON REPORTER, Jul. 18, 2009, available at <http://www.friedmanfoundation.org/newsroom/ShowNewsItem.do?id=80397>.

152. See Kirkham, *supra* note 76, at 229 (noting critics' claim that vouchers undermine the education system by removing good motivated students from public schools, when such students often act as mentors to their peers); Vail, *supra* note 12, at 213. Moreover, the actual range of choices could evaporate if the government is allowed to extensively regulate private schools which receive voucher students, especially considering that many parents favor the regulation of private schools should they participate in voucher programs. Robert K. Vischer, *Public Opinion and the Culture Wars: The Case of School Vouchers*, 2002 U. ILL. L. REV. 477, 485 (2002). Were that to happen, it could spread the bureaucratization and inefficiency problems of public schools to the private system, with the result that there would no longer be any real difference between public and private schools. However, these issues are beyond the scope of this note.

the level of education guaranteed by the Constitution, what purpose are they serving? Why keep failing schools open if they are not achieving the purpose for which they were built?¹⁵³

States that are concerned that vouchers may lead to the breakdown of their public school systems should remember that they are in the best position to institute reform by bringing schools up to adequate standards, thereby eliminating any necessity for vouchers. Moreover, the public schools that are satisfying the educational needs of their students will benefit from receiving new students and the voucher funds that come with them. The number of middle-class families that are willing to move to an entirely new neighborhood and pay much higher mortgages and property taxes clearly shows how sought-after public schools can be, as long as they deliver high-quality education.

Other opponents of vouchers consider the public school system as instrumental in “equip[ping] students with the tools of citizenship” and preserving the American ideal of equality.¹⁵⁴ Interestingly, both sides of the debate claim to be interested in equality: the opponents of vouchers assert that voucher programs will increase the already apparent educational disparities between the poor and the wealthy, while the advocates insist that it is the current system that relegates poor students to failing schools.¹⁵⁵ These advocates instead see vouchers as an opportunity for poor students to gain access to better education.¹⁵⁶

Studies of current voucher programs can be used to gain a more objective view of vouchers’ effects. Researchers have been studying the effects of voucher programs on participating parents and teachers for more than ten years and have published ten peer-reviewed, experimental studies thus far.¹⁵⁷ The results of these studies provide significant evidence that at least some of the participating students experience academic improvement due to the voucher program.¹⁵⁸

C. *Other Effects*

Finally, the very nature of vouchers—that they allow parents to choose the mode of their children’s education—is a benefit in and of itself. Research overwhelmingly shows that voucher programs improve the satisfaction of parents whose children are involved.¹⁵⁹ Cleveland’s voucher program, for example, gives parents the choice to “remain in public school as before, remain in public school with publicly funded

153. See Andres, *supra* note 100, at 814.

154. Vischer, *supra* note 152, at 479.

155. *Id.* at 481.

156. *Id.*

157. Wolf, *supra* note 79, at 445.

158. *Id.*

159. Wolf, *supra* note 79, at 435.

tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a non-religious private school, enroll in a community school, or enroll in a magnet school.”¹⁶⁰ This greater flexibility in school choice allows parents to make vital decisions about their children’s education in a way not otherwise available to them.

VIII. CONCLUSION

The struggle of middle-class families to provide their children with quality education will continue to grow as education costs continue to rise. Some of these costs are due to the families investing ever increasing percentages of their income to bid up the cost of housing in “good” school districts. Other costs are due to changing perception among Americans over how vital and necessary it is to obtain a college degree—a fact that has driven and will, in all likelihood, continue to drive up the cost of college tuition. Regardless of the source of the rising costs, middle-class families are feeling the financial squeeze. This financial squeeze could be greatly lessened by combining the long accepted practice of awarding merit-based scholarships to post-secondary students with the more recent practice of awarding vouchers to families living in sub-standard school districts. Middle-class families, the majority of whom have thus far been excluded from the need-based programs, could find a remedy in a merit-based voucher system. Programs such as these would pass the constitutional test delineated in *Zelman*, even if they included religious private schools. Moreover, they would still provide a real benefit to middle-class families even in those states that choose not to include the local religious private schools in the program. Putting educational dollars into the hands of parents has proven beneficial to lower-income families, and the time has come to give middle-class families that same opportunity.

160. *Zelman*, 536 U.S. at 655.

