A Time for Choosing: The Impact of Uniformity Clauses in State Constitutions on School Choice Programs

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Abstract

In response to the rise of the modern school choice movement, opponents of school choice programs have claimed that various constitutional provisions bar school choice programs. Forced to change course after recent Supreme Court decisions, opponents have set their sights on a portion of the education provisions of state constitutions as their new tactic to undermine school choice programs: uniformity clauses. Opponents claim that these clauses prevent states from providing opportunities for parents to choose education options outside the traditional public school systems with public funds. While each clause must be independently analyzed according to its original public meaning, generally, these clauses do not preclude school choice proposals. Advocates of these programs must be aware of their requirements and effects when developing school choice proposals.

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Introduction

Over the past few years, a groundswell of parents concerned about the influence of the education system upon their children has risen up across America.[1] Their concerns range from the prevalence of harmful ideologies, such as Critical Race Theory[2] and Gender Ideology,[3] to the overwhelming politicization even of educational milestones like learning to read, and events at recent school board meetings show the lengths to which parents will go to protect their children.[4] For some parents, Virginia gubernatorial candidate and former governor Terry McAuliffe provided the straw that broke the proverbial camel's back. In the 2021 gubernatorial race, he said, "I don't think parents should be

1 Corey DeAngelis, *Parents Are the New Electoral Power Players*, Wash. Exam'r (Nov. 11, 2021 11:00 PM), https://www.washingtonexaminer.com/restoring-america/community-family/parents-are-the-new-electoral-power-players.

2 Melissa Moschella, *Critical Race Theory, Public Schools, and Parental Rights*, Heritage Found. (Mar. 24, 2022), https://www.heritage.org/education/commentary/critical-race-theory-public-schools-and-parental-rights.

3 Laura Meckler, *Gender Identity Lessons, Banned in Some Schools, Are Rising in Others*, Wash. Post (June 3, 2022, 6:00 AM), https://www.washingtonpost.com/education/2022/06/03/schools-gender-identity-transgender-lessons/.

4 Betsy VanDenBerghe, *Is My School Indoctrinated? Inside the Fight Against Progressive Ideology in Education*, Deseret News (Nov. 3, 2022, 11:00 PM), https://www.deseret.com/2022/11/3/23413478/culture-war-public-schools-book-banning-gender-ideology.

telling schools what they should teach."[5] Such a sentiment stands in stark contrast to how most parents feel according to a poll taken at the time, reporting that seventy-eight percent of parents believe they should call the shots on their children's education.[6] This tension hyper-charged the school choice movement.

School choice programs "make it possible for parents to send their children to the school they feel offers their children the best educational opportunities—not just the one the state says they have to attend."[7] School choice programs can include "public school transfer options, charter and magnet schools, home schooling, scholarships, vouchers and tax credits/deductions."[8]

Some oppose school choice, however, including

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5 The Editors of National Review, *Terry McAuliffe's War on Parents*, Nat'l Rev. (Oct. 1, 2021), https://www.nationalreview.com/2021/10/terry-mcauliffes-war-on-parents/.

6 *New Poll: 78% of Parents Want Influence Over What's Taught in K-12*, Am. Fed'n for Child. (June 28, 2022), https://www.federationforchildren.org/new-poll-78-of-parents-want-influence-over-whats-taught-in-k-12/.

7 Jordan Sekulow, *What Is School Choice?*, Am. Ctr. for L. & Just. (June 23, 2020), https://aclj.org/school-choice/what-is-school-choice.

8 Richard D. Komer & Clark Neily, School Choice and State Constitutions: A Guide to Designing School Choice Programs 2 (Inst. for Just. & Am. Legis. Exch. Council 2017).

those who, like McAuliffe, do not believe parents should be in charge of their children's education. Some of the opposition is political, while some is legal. For example, some opponents still point to their respective states' Blaine Amendments as precluding school choice,[9] even though the Supreme Court's decisions in *Espinoza v. Montana Department of Revenue*[10] and *Carson v. Makin*[11] foreclose this argument. Other opponents claim that various provisions of their respective state constitutions prohibit school choice programs, including "uniformity clauses."[12] Uniformity clauses, found in fourteen state constitutions, require the state to provide residents with a "uniform" system of education.[13] Opponents of school choice claim that state governments violate uniformity clauses when the state diverts funds from traditional brick-and-mortar public schools to school choice

9 *See, e.g.*, Jim Jones, *JONES: Don't Be Fooled by Mountain States Policy Center – Idaho Already Has 'School Choice*,' Times-News (Jan. 19, 2023), https://magicvalley.com/opinion/jones-dont-be-fooled-by-mountain-states-policy-center-idaho-already-has-school-choice/article_b92cd0a6-974e-11ed-b5bf-97872dbf4627.html.

10 140 S. Ct. 2246 (2020).

11 596 U.S. 767 (2022).

12 Preston C. Green, III & Peter L. Moran, *The State Constitutionality of Voucher Programs: Religion Is Not the Sole Determinant*, 2010 B.Y.U. Educ. L.J. 275, 277–79 (2010).

13 *Id.*, at 279.

programs.[14] And some state supreme courts have concluded that these provisions require not a uniformity of funding, school structure, or form, but a uniformity of curriculum—something that should give pause to many in the school choice movement.[15] Thus, it is essential that school choice advocates determine whether school choice programs pass constitutional muster under the original public meaning of their own state's uniformity clause and that the clause does not require participating schools to adopt the very same curriculum they sought to avoid in public schools.

This Note analyzes school choice programs under the uniformity clauses of three states: Wisconsin, Florida, and Idaho. First, this Note provides a general history of uniformity clauses, the backdrop of education litigation against which constitutional analysis in education law takes place,

14 Komer & Neily, *supra* note 8, at 5; *see, e.g.*, Keith Ridler, *Idaho Kills Bill Allowing Public Money for Private Education*, Spokesman-Rev. (Mar. 1, 2022, 5:53 PM), https://www.spokesman.com/stories/2022/mar/01/idaho-kills-bill-allowing-public-money-for-private/. *See generally Private School Vouchers Don't Help Kids*, American Federation of Teachers, AFL-CIO, https://www.aft.org/private-school-vouchers-dont-help-kids (last visited Jan. 3, 2024) ("Private school vouchers take money away from neighborhood public schools . . .").

15 Idaho Sch. for Equal Educ. Opportunity v. State (*Idaho Sch. II*), 976 P.2d 913, 920 (Idaho 1998).

and a brief history of the school choice movement. Then, it analyzes Wisconsin, a state that has specifically upheld a school choice program under its uniformity clause,[16] and Florida, where the uniformity clause's current construction precludes at least one school choice program.[17] Next, this Note analyzes Idaho, a state whose courts have never considered the constitutionality of any school choice program under its constitution's uniformity clause. This Note provides an example of an abbreviated original public meaning analysis of the text of Idaho's uniformity clause. Finally, it provides advocates with recommendations to move school choice forward, noting that each state's constitution must be examined separately to determine its meaning and providing a word of caution to school choice advocates regarding uniformity of curriculum requirements.

I. General History of Uniformity Clauses and State Educational Provisions

Properly understanding state uniformity clauses first requires examining their historical context and the education litigation that informs them. This section first discusses the

16 Davis v. Grover, 480 N.W.2d 460 (Wis. 1992).
17 Bush v. Holmes, 919 So. 2d 392, 407 (Fla. 2006).

history of the school choice movement, then examines the history of uniformity clauses, and finally provides a brief history of the education litigation that forms the legal framework within which future school choice program litigation under uniformity clauses will proceed.

a. History of the Modern School Choice Movement

The modern school choice movement traces its roots to the twentieth century. But parents' ability to direct their child's education existed long before then. In fact, at the time of the founding, no widespread system of public schools existed. Instead, parents chose where and how to educate their children.[18] It was not until the Common Schools movement catalyzed the proliferation of government schools that parental choice in education began to diminish.[19] Then began the modern school choice movement as a response to failing government schools.

School choice programs in America trace their roots to well before the twentieth century. In 1802, Pennsylvania established a voucher program, perhaps the first in the na-

18 *See* Milton Friedman & Rose Friedman, Free to Choose 150 (1980).

19 Jeffrey S. Sutton, 51 Imperfect Solutions 27 (2018).

tion, that provided government reimbursement to church schools and other independent schools to allow poor children to receive an education.[20] New Jersey provided funding for religious schools in the 1840s in "'just and relatable proportion' to the number of children in their care."[21] In 1869, a Vermont law provided that, if a town did not have a public school, town funds would be supplied to pay for the education of that town's children.[22] Maine established the same program in 1873.[23] Fast forward nearly a century to 1959, when Martin and Mae Duggan, parents of five, founded the first national school choice advocacy group in the United States called Citizens for Educational Freedom.[24] The modern school choice movement had begun.

Conservatives and libertarians who sought to return the choice of education to parents soon supported the school choice movement. In 1980, famed economist Milton Fried-

20 Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 Univ. Penn. L. Rev. 111, 162 (2020).

21 *Id.*, at 161.

22 *School Choice Timeline*, Cato Inst., https://www.cato.org/school-choice-timeline (last accessed Jan. 5, 2024).

23 *Id.*

24 James Shuls, *Papists and Pluralists: The Founding of America's First Grassroots School Choice Organization*, 16 J. Sch. Choice 416, 416 (2022).

man and his wife Rose published their revolutionary book *Free to Choose*.[25] In one chapter, they discuss the failure of many public schools due to the "increasing bureaucratization and centralization of the public school system in the United States"[26] and argue that education is no different than any other area of the market in which competition best breeds efficiency and quality.[27] To restore competition and thereby improve the quality of education, the Friedmans contend that parents must be given more control of their child's education.[28] "Parents," they point out, "generally have both greater interest in their children's schooling and more intimate knowledge of their capacities and needs than anyone else."[29] Decrying the educational reformers who "self-righteously" assume that parents have little interest in their child's education and lack the competence to choose

25 Friedman & Friedman, *supra* note 18. This was not the first time Milton Friedman proposed school choice measures, however. Twenty-five years earlier, Friedman wrote about school choice in a short paper entitled "The Role of Government in Education." *See generally* Milton Friedman, *The Role of Government in Education*, *in* Economics and the Public Interest (Robert A. Solo ed., 1955) (discussing government authority for and the proper scope of public education).

26 Friedman & Friedman, *supra* note 18, at 155–56.

27 *Id.*, at 156–58.

28 *Id.,* at 160.

29 *Id.*

their educational path, the Friedmans note that "U.S. history has amply demonstrated that, given the opportunity, [parents] have often been willing to sacrifice a great deal, and have done so wisely, for their children's welfare."[30] Arguing against a system of education that government both compels and provides for, the book quotes free market economist Adam Smith, who wrote "Those parts of education, it is to be observed, for the teaching of which there are no public institutions, are generally the best taught."[31] The Friedmans recommend voucher programs to allow parents the freedom to choose to direct public monies for their children's education at the public or private school of their choice.[32]

The Friedmans' ideas led states across America to implement voucher programs. There are too many examples to list here, but Cleveland pioneered one of the most monumental and exemplary programs. This program led to the Supreme Court's opinion in *Zelman v. Simmons-Harris*, allowing public dollars to be used for children to attend sectarian

30 *Id.*

31 *Id.,* at 171 (quoting ADAM SMITH, WEALTH OF NATIONS II 253 (1776)).

32 *Id.,* at 160.

schools through private choice.[33] Championed by Cleveland native and Ohio Governor George Voinovich, Ohio House Speaker Pro Tem Bill Batchelder, and businessman David Brennan, this program pioneered the use of voucher programs to allow students trapped in failing schools to receive a quality education.[34] Starting with a pilot program that prioritized low-income families, Speaker Batchelder designed a system that, within only three years, was already proving its effectiveness, yielding starkly improved educational outcomes for the thousands of students enrolled in the program.[35] But opponents of school choice challenged this legislation in court,[36] arguing that a program giving public funds to sectarian schools violated the Establishment Clause.[37] This litigation proceeded all the way to the Supreme Court, where Justice Rehnquist recognized the program as one "of true private choice" and, thus, not a violation of the Establishment Clause.[38] Today, due to the courage and foresight of

33 Zelman v. Simmons-Harris, 536 U.S. 639, 643–44, 649–50 (2002).

34 Amul Thapar, The People's Justice: Clarence Thomas and the Constitutional Stories that Define Him 23, 25, 26 (2023).

35 *Id.,* at 30–32.

36 *Id.*

37 *Id.,* at 33.

38 *Zelman*, 536 U.S., at 662–63.

these school choice pioneers, Ohio's school choice programs serve tens of thousands of students across the state.[39]

Support for school choice also found a home beyond conservative and libertarian circles of political thought. Liberals and progressives, including liberal education reformers, leaders in the civil rights movement, and black nationalists, embraced school choice ideology early on in the movement.[40] For example, the 1960s and 1970s saw the rise of "free schools," schools developed by left-leaning reformers and progressive educators with different curricula, structure, and often an overtly progressive political bent.[41] Such schools attracted many, especially members of the African American community, whose children suffered in failing public schools.[42] Progressives also came to support voucher programs.[43] In fact, Cleveland's voucher program developed by Speaker Batchelder was cosponsored by ranking Democrat legislator Patrick Sweeney.[44] On the other side of

39 THAPAR, *supra* note 34, at 43.

40 James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287, 1289 (2005).

41 *Id.*, at 1300–01.

42 *Id.*, at 1301.

43 *Id.*, at 1309.

44 THAPAR, *supra* note 34, at 30.

the country, progressive university professors met with one of California's Democrat congressmen, Rep. Leo Ryan, to strategize bringing a school choice initiative to California.[45] Motivated by the failings of inner city schools to provide education for African American children, many progressive voucher advocates saw these programs as ways to maximize equity and racial justice.[46]

Such broad support catalyzed the implementation of school choice programs from vouchers to tax credits. In 1990, Wisconsin launched the Milwaukee Parental Choice Program, widely considered the first modern private school choice program in the United States.[47] This program is still in operation today.[48] Arizona started the first Individual Income Tax Credit Scholarship Program in 1997.[49] This program, also still in operation, offers tax credits to taxpayers who support School Tuition Organizations (STOs), non-

45 *School Choice Timeline*, *supra* note 22.

46 Forman, *supra* note 40, at 1310–11.

47 *Milwaukee Parental Choice Program*, EdChoice, https://www.edchoice.org/school-choice/programs/wisconsin-milwaukee-parental-choice-program/ (last accessed Jan. 5, 2024).

48 *Id.*

49 *Original Individual Income Tax Credit Scholarship Program*, EdChoice, https://www.edchoice.org/school-choice/programs/arizona-original-individual-income-tax-credit-scholarship-program/ (last accessed Jan. 5, 2024).

profits that offer scholarships to allow students in need to attend private schools.[50] The program withstood an Establishment Clause challenge at the Supreme Court in 2011.[51] Notably, that year was dubbed "the year of school choice" after twelve states passed legislation adding and expanding school choice programs.[52]

In recent years, support for school choice has skyrocketed. In 2008, forty-four percent of Americans supported publicly funded school choice programs, the highest level since the early 2000s.[53] In 2020, sixty-four percent of Americans supported school choice, and,[54] by 2023, support for school choice had risen to seventy-one percent. As the modern leader of the school choice movement and self-described "school choice evangelist" Corey DeAngelis, proclaimed,

50 *Id.*

51 Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125 (2011).

52 Lindsey M. Burke, Jude Schwalbach, & Jack Rosenwinkel, *Free to Succeed: A Brief History of School Choice*, Heritage Found. (Feb. 3, 2020), https://www.heritage.org/education/commentary/free-succeed-brief-history-school-choice.

53 William J. Bushaw et al., *Americans Speak Out – Are Educators and Policy Makers Listening?: The 40th Annual Phi Delta Kappa/ Gallup Poll of the Public's Attitudes Toward the Public Schools*, 90 Phi Delta Kappan 9 (2008).

54 *New Poll: School Choice Support Soars from 2020*, Am. Fed'n for Child. (July 11, 2023), https://www.federationforchildren.org/new-poll-school-choice-support-soars-from-2020/.

"A universal school choice revolution has ignited."[55]

b. History of State Education Clauses

At the time of the American founding, the broader public school system that has since become commonplace did not exist.[56] Instead, such consistency in public school programs became popular only after many states adopted provisions in their own constitutions in the mid-nineteenth century during the "Common Schools" movement.[57] With efforts led by education official and activist Horace Mann, states across the country quickly adopted widespread government operated public school systems.[58] Responding to Mann's influence, many states added education provisions to their state constitutions, requiring their legislatures to establish public school systems.[59] Today, all fifty states now have an education provision in their respective constitutions.[60]

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55 *The Happy Expansion of School Choice Should Continue in 2024*, Wash. Exam'r (Jan. 6, 2024 8:21 AM), https://www.washingtonexaminer.com/restoring-america/community-family/expansion-of-school-choice-should-continue-in-2024.

56 Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 Va. L. Rev. 1963, 1965 (2008).

57 *Id.*

58 Friedman & Friedman, *supra* note 18, at 153.

59 Sutton, *supra* note 19, at 27.

60 Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU Educ. & L. J. 1, 3 (1997).

Some of these provisions, in conspicuous acknowledgement of their roots in Horace Mann's movement, explicitly guarantee that the legislature will provide for a system of "common schools."[61]

Provision language varies from state to state. One of the most common types of provisions requires the public school system to be "thorough and efficient."[62] Others require their public schools to be "free,"[63] "public,"[64] or "general."[65] And, as this article addresses, fourteen states have provisions mandating a system that is uniform.[66]

c. History of Education Litigation

As education grew into an important issue at the state level, it also grew into one at the federal level. Contemporary court opinions regarding education recognized its vitality to the functioning of society and participation in the political process.[67] Justice Brennan clearly articulated this

61 *See, e.g.*, Idaho Const. art. IX, § 1; Nevada Const. Art. 11, § 2; Oregon Const. Art. VIII, § 3.

62 *See, e.g.*, Pa. Const. art. III, § 14.

63 *See, e.g.*, Mich. Const. Art. 8, § 2.

64 *See, e.g.*, S.C. Const. art. XI, § 3.

65 *See, e.g.*, Wash. Const. art. IX, § 2.

66 Green & Moran, *supra* note 12, at 279.

67 *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (holding "separate but equal" schools to be unconstitutional, in large part because the important role that schools play in preparing citizens to

sentiment in his concurrence in *School District of Abington Township v. Schempp*, writing, "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government."[68]

This consistent emphasis on the importance of education led many to believe that a right to education could be read into the Fourteenth Amendment as a fundamental right. In 1971, the California Supreme Court recognized a right to education under the Fourteenth Amendment in *Serrano v. Priest*.[69] Just two years later, however, the United States Supreme Court rejected this rationale in *San Antonio Independent School District v. Rodriguez*.[70] In this case, the Court examined a Texas school funding system with large disparities in funding between districts.[71] In his majority opinion, Justice Powell concluded that this disparity in education funding did not infringe upon the rights of the children living in different school districts because there is no fundamental right to education in the United States Constitution.[72] While

engage in the political process).

68 374 U.S. 203, 230 (1963).

69 487 P.2d 1241 (Ca. 1971).

70 411 U.S. 1, 37 (1973).

71 *Id.*, at 4–6, 8, 11.

72 *Id.*, at 37. Interestingly, Justice Powell, as the former chair-

the Court did not expressly preclude the possibility that there might be a level of disparity so great as to impact the rights of individuals to participate in the political process, thereby implicating other fundamental rights, it noted that the levels in the case before it did not necessitate such considerations.[73] While this analysis foreclosed a door for future recognition of a federal fundamental right to education, it did leave open the possibility that educational disparities at the extreme margins could potentially affect other already recognized fundamental rights.[74] To this day, the Supreme Court has not recognized a fundamental right to education under the Fourteenth Amendment.[75]

man of the Richmond School Board, personally knew the challenges of running a school system. SUTTON, *supra* note 19, at 25.

73 *Rodriguez*, 411 U.S., at 36–37 ("Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [the right to speak or the right to vote], we have no indication that the present levels of educational expenditure in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where - as is true in the present case - no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.").

74 *Id.*

75 *See* Derek W. Black, *The Fundamental Right to Education*,

This was not the end of the story for school funding litigation. In *Rodriguez*, Justice Marshall famously dissented, stating, "[N]othing in the Court's decision today should inhibit further review of state educational funding schemes under state constitutional provisions."[76] Marshall's footnote became the spark that set state courts around the country ablaze with litigation.[77]

This new wave of litigation deluged state supreme courts in arguments for a right to education under their respective state constitutions. As with state constitutional provisions, cases varied but also presented some consistent themes. For example, many states began litigating claims under their thoroughness and efficiency provisions. In Texas, for example, lengthy litigation arose analyzing the state's school funding formula under the efficiency requirement in its constitution.[78] The Texas Supreme Court found the provision to invalidate the funding formula to be unconstitu-

94 Notre Dame. L. Rev. 1059, 1061–62 (2019) (noting that current constitutional jurisprudence does not recognize a federal right to education).

76 *Rodriguez*, 411 U.S., at 133, n.100.

77 *See* Sutton, *supra* note 56, at 1971.

78 Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 391 (Tex. 1989).

tional under that provision.[79] In addition, the California Supreme Court analyzed Article IX, Section 5 of the California Constitution, which requires the California Legislature to "provide for a system of common schools by which a free school shall be kept up and supported in each district ...."[80] The California Supreme Court concluded that these "free schools" and "common schools" clauses did not require the California legislature to allocate equal funding to school districts.[81] Similarly, the New Jersey Supreme Court examined New Jersey's education provision and found that, while it placed certain requirements on the New Jersey legislature, it did not create a right to education under the state constitution.[82] While constitutional terms and language vary between states, the efforts employed to find a state-level constitutional right to education did not.

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79 *Id.*

80 Cal. Const., art. IX § 5.

81 Serrano v. Priest, 487 P.2d 1241, 1248 (Ca. 1971). This case did find, however, a fundamental right to education under the Fourteenth Amendment of the United States Constitution, a premise later rejected in *Rodriguez*. 411 U.S. 1, 37 (1973).

82 Robinson v. Cahill, 69 N.J. 449, 464 (1976). The New Jersey constitutional provision in question in that case states, "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State." N.J. Const. art. VIII, § IV, para. 1.

Emboldened by *Serrano*'s analysis of the Fourteenth Amendment, school funding advocates suggested litigation under state constitutional provisions as the ideal vehicle to equalize school funding among districts,[83] even though the California Supreme Court in *Serrano* had rejected the premise under its state constitution.[84] This decision foreshadowed the losses advocates and litigators suffered in their efforts to get courts to find a right to an "adequate education" in state constitutions after *Rodriguez*.[85]

When school choice programs began proliferating, school choice opponents challenged these programs under the Establishment Clause, arguing that any funds to private, sectarian schools were a violation of the First Amendment.[86] In *Zelman v. Simmons-Harris*, the Supreme Court held that such programs did not violate the Constitution.[87] Opponents of school choice provisions then couched their opposition as

83 John Pincus, *The Serrano Case: Policy for Education or for Public Finance?*, 59 Phi Delta Kappan 173, 173–75 (1977) (noting that *Serrano* provides a basis for pursuing equalization of education funding through litigation).

84 *Serrano*, 487 P.2d, at 1248.

85 Atanu Das, *An "Adequate" Education Needs an "Adequate" Approach to School Funding*, 12 Pub. Int. L. Rev. 81, 81–83 (2007).

86 Green & Moran, *supra* note 12, at 277.

87 *Zelman*, 536 U.S., at 639, 662–63 (2002).

based within state versions of the "Blaine Amendment."[88] These amendments, based in anti-Catholic rhetoric, forbade public funds from going to sectarian schools.[89] However, due to a coordinated litigation effort,[90] the Supreme Court would later declare these provisions violative of the First Amendment in *Espinoza v. Montana Department of Revenue* and *Carson v. Makin*.[91]

Since Justice Marshall's footnote, litigation of state education clauses has increased. Under one theory, state education funding programs violate a minimum level of funding required under state constitutional education provisions.[92] Primarily, these claims have been litigated under thoroughness and efficiency provisions.[93] A surprising nearly

88 *See* Green & Moran, *supra* note 12, at 277.

89 Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 Tex. Rev. L. & Pol. 301, 338 (2000).

90 The Institute for Justice masterfully coordinated and led the litigation efforts for *Zelman*, *Espinoza*, and *Carson*. *See Cleveland, Ohio, School Choice (Federal Case)*, Inst. for Just., https://ij.org/case/zelman-v-simmons-harris/ (last accessed Jan. 6, 2024); *Espinoza v. Montana Department of Revenue*, Inst. for Just., https://ij.org/case/montana-school-choice/ (last accessed Jan. 6, 2024); *Carson v. Makin*, Inst. for Just., https://ij.org/case/maine-school-choice-3/ (last accessed Jan. 6, 2024).

91 Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2262–63 (2020); Carson v. Makin, 596 U.S. 767, 789 (2022).

92 Sutton, *supra* note 19, at 30.

93 *Id.*

two-thirds of these lawsuits have been successful.[94] These challenges owe much of their success to a shift from bringing claims under negative right state equal protection provisions to positive right state education funding provisions.[95]

State voucher programs have also been challenged under state uniformity provisions, but case law in this area is limited due to the small number of suits that have been brought.[96] While many of the suits came down in favor of school choice provisions, results have been mixed—primarily between theories of interpreting uniformity clauses adopted by courts in the course of litigation in Wisconsin and Florida.[97]

II. Wisconsin's Uniformity Clause

The Wisconsin State Constitution provides that "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practica-

94 *Id.*

95 *Id.,* at 35.

96 Green & Moran, *supra* note 12, at 285.

97 *See, e.g.*, Davis v. Grover, 480 N.W.2d 460 (Wis. 1992) (upholding a school choice program under the Uniformity Clause of the Wisconsin Constitution); Bush v. Holmes, 919 So.2d 392, 407 (Fla. 2006) (rejecting a school choice program under the Uniformity Clause of the Florida Constitution and distinguishing it from *Davis v. Grover* because Florida's constitution has a paramount duty requirement which is not present in the Wisconsin constitution).

ble."[98] The original state constitution, ratified in 1848, contained this provision,[99] and its text has remained unaltered since.

a. The General Meaning of Article X, Section 3 of the Wisconsin Constitution

Several broad principles animate Wisconsin's uniformity clause according to the Wisconsin Supreme Court. First, the uniformity clause governs "the character of the instruction given" in district schools, not the creation of school districts.[100] Because the Wisconsin constitution refers to "district schools," not "school districts," it has nothing to say about the creation of school districts themselves.[101] The clause "applies to the districts after they are formed . . . rather than to the means by which they are established and their boundaries fixed."[102] Under the uniformity clause,

98 Wis. Const. art. X, § 3.

99 *Constitution of the State of Wisconsin, Adopted in Convention, at Madison, on the First Day of February, in the Year Our Lord One Thousand Eight Hundred and Forty-eight*, Wis. Hist. Soc'y, https://content.wisconsinhistory.org/digital/collection/tp/id/71790.

100 Larson v. State Appeal Bd., 202 N.W.2d 920, 922 (Wis. 1973) (quoting State *ex rel.* Zilisch v. Auer, 221 N.W. 860, 862 (Wis. 1928)).

101 Wis. Const. art. X, sec. 3; s*ee also Larson*, 202 N.W.2d at 922.

102 *Larson*, 202, N.W.2d at 922 (quoting *Zilisch*, 221 N.W. at 862).

a town could validly adopt the township system of school government—a system of managing public schools that simply substitutes the town's border for "the indefinite and irregular territory known as the school district."[103] The uniformity clause likewise has no implications for the size and population of school districts. Petitioners in *Larson v. State Appeal Bd.* challenged the creation of school districts of grossly unequal population and area.[104] While one district of 159 square miles served over 3,500 students, another of 28 square miles served only 620.[105] The court found no violation of the uniformity clause in these districts' creation.[106]

Second, the uniformity clause sets a minimum floor for the standards the "character of instruction" must meet to pass constitutional muster.[107] It does not require absolute uniformity in education,[108] acting not as "a ceiling but a floor."[109] As the court explains, every Wisconsin student

103 The Township System of School Government: Opinions of the State Superintendents of Wisconsin 3 (Oliver E. Wells, ed., 1894); s*ee also* T.B. Scott Lumber Co. v. Oneida Cnty., 39 N.W. 343, 344 (Wis. 1888).

104 202 N.W.2d at 922.

105 *Id.*, at 921–22.

106 *Id.*, at 922 (quoting *Zilisch* 221 N.W. at 862).

107 Kukor v. Grover, 436 N.W.2d 568, 577–78 (Wis. 1989).

108 *Id.*, at 575.

109 Jackson v. Benson, 578 N.W.2d 602, 628 (Wis. 1998).

has the "right to an equal opportunity for a sound basic education,"[110] but nothing in the state constitution "serv[es] as a mandate that every student attend a public school."[111] And the uniformity clause "does not require the legislature to *ensure* that all of the children in Wisconsin receive a free uniform basic education."[112]

Zweifel v. Joint Dist. No. 1, Belleville illustrates the consequences of treating the uniformity clause as a ceiling mandating absolute uniformity in schools.[113] Appellants sued to force a school district to allow their child early admission to kindergarten.[114] Even though it was not the school district's policy to do so, appellants reasoned, this district must allow early admission for exceptional students because other districts do so, thus preserving the state's constitutionally required uniformity of education.[115] The court's opinion, siding with the school district, rendered the appellants' argument absurd:

110 Vincent v. Voight, 614 N.W.2d 388, 408 (Wis. 2000).
111 Green & Moran, *supra* note 12, at 286.
112 Davis v. Grover, 480 N.W.2d 460, 474 (1992) (emphasis added).
113 Zweifel v. Joint Dist. No. 1, Belleville, 251 N.W.2d 822 (1977).
114 *Id.*, at 823.
115 *Id.*, at 824.

> The logical extension of the appellants' contention would be that any school district within the state could dictate the character of education, services, opportunities, etc., throughout the state simply by adopting something new or different and thus requiring all other districts to conform. The constitution does not mandate such a result.[116]

Instead, Wisconsin's uniformity clause only "requires the legislature to provide the opportunity for all children in Wisconsin to receive a free uniform basic education."[117]

b. School Choice under Wisconsin's Uniformity Clause.

Wisconsin was an early pioneer of the modern school choice program, and its programs have repeatedly withstood challenges in state court.[118] Because the court has construed

116 *Id.*

117 *Davis*, 480 N.W.2d, at 474.

118 Interestingly, Wisconsin allowed public money to go to sectarian education even before *Zelman*, *Espinoza*, and *Carson*. In *Jackson v. Benson*, the Wisconsin Supreme Court held that the Milwaukee Parental Choice Program, the first modern school choice program, allowing public monies to be directed to private sectarian and nonsectarian schools, did "not violate either the state's Compelled Support Clause or its Blaine Amendment because students are not compelled to attend religious schools and any benefits to such schools are incidental." 578 N.W.2d 602 (Wis. 1998).

Wisconsin's uniformity clause only to require the legislature to provide students with the *opportunity* to receive a free uniform basic education in the states' public schools, programs that leave this opportunity undisturbed pass constitutional muster under this clause.

In *Davis*, the Wisconsin Supreme Court concluded that the first modern school choice program, the Milwaukee Parental Choice Program (MPCP), which allowed public funding of private, nonsectarian schools, did not violate the uniformity clause because it did not interfere with "every Wisconsin student ha[ving] an opportunity to attend a public school with a uniform character of instruction."[119] A school financing system did not fail the uniformity requirement for the same reason.[120] Both were "experimental attempt[s]" to build on a foundation of the minimum education the state is constitutionally obligated to provide.[121] When Wisconsin expanded the MPCP to allow sectarian private schools to participate, the court found this minimum education again undisturbed and concluded the MPCP still presented no uni-

119 *Davis*, 480, N.W.2d at 473.
120 Kukor v. Grover, 436 N.W.2d 568, 577 (Wis. 1989).
121 *Davis*, 480 N.W.2d, at 474.

formity issues.[122] Once Wisconsin's "legislature has fulfilled its constitutional duty to provide for the basic education" of Wisconsin's children, it may freely engage in "experimental attempts to improve upon that foundation" without offending uniformity.[123] Critically for Wisconsin's school choice programs, the court has repeatedly held that "the mere appropriation of public monies" does not make a private school into a "district school" governed by the uniformity clause.[124]

Wisconsin courts apply a textualist and originalist framework in analyzing whether the uniformity clause permits school choice programs.[125] When construing a constitutional provision, the court first analyzes the "plain meaning of the words in the context used," then analyzes the debates surrounding that provision's ratification, the relevant practices at the time of ratification, and the "earliest interpretation of this section by the legislature as manifested in the first law passed following the adoption of the constitution."[126] Beyond theoretical definitions, the plain meaning of "uniform"

122 *Jackson*, 578 N.W.2d, at 628.
123 *Id*.
124 *Id.*, at 627; *see also Davis* 480 N.W.2d, at 474.
125 *Kukor*, 436 N.W.2d, 568, 574 (1989).
126 *Id.*

is unclear, and the ratification debates yield no clues as to its meaning: "Unfortunately . . . no debates ensued relating to the draft of art. X, § 3 at either the 1846 or 1848 constitutional conventions because the provision was wholly uncontroversial."[127] With the uniformity clause ratified during the time of the Common Schools movement, contemporary practice included public funding of both public and private schools—a system quite similar to that of modern school choice programs.[128] And finally, statutes passed shortly after the uniformity clause's ratification allowed various systems of school financing, indicating the uniformity clause's compatibility with a modern school choice program.[129] Thus, with Wisconsin's interpretation of its uniformity clause as providing a minimum baseline of a "character in instruction" offered to Wisconsin children, school choice programs have consistently been held to not violate its uniformity clause.

III. Florida's Uniformity Clause

Article IX, Section 1 of the Florida Constitution reads, in part:

127 Vincent v. Voight, 614 N.W.2d 388, 403 (Wis. 2000).

128 *See* SUTTON, *supra* note 18, at 27 (noting that the Common Schools movement began in the mid-nineteenth century).

129 *Vincent*, 614 N.W.2d, at 404.

> The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate 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.[130]

Of note, the "free public schools" must be "uniform."[131] The uniformity requirement first was added to the Florida Constitution in 1868, along with the "paramount duty" language, which was deleted in 1885 and re-added in 1998.[132]

a. The General Meaning of Article XI, Section 1 of the Florida Constitution

The Florida Supreme Court's interpretation of Florida's uniformity clause differs starkly from the Wisconsin Supreme Court's interpretation of Wisconsin's uniformi-

130 Fla. Const. art. IX, § 1.
131 *Id.*
132 *Bush*, 919 So. 2d, 392, 402–03 (Fla. 2006).

ty clause.[133] Like Wisconsin's clause, Florida's uniformity clause and enveloping section protect a right to a free public education for all state citizens.[134] However, while Wisconsin's uniformity clause provides a floor for the state legislature to build upon if it so chooses, Florida's is a ceiling. According to the Florida Supreme Court, the provision containing the uniformity clause does not

> establish a "floor" of what the state can do to provide for the education of Florida's children. The provision mandates that the state's obligation is to provide for the education of Florida's children, specifies that the manner of fulfilling this obligation is by providing a uniform, high quality system of free public education, and does not authorize additional equivalent alternatives.[135]

While the state constitution apparently vests "the legislature . . . with enormous discretion . . . to determine what provision to make for an adequate and uniform system of free public schools,"[136] the legislature may take no action

133 *Compare id. with* Davis v. Grover, 480 N.W.2d, 460 (1992).

134 Scavella v. Sch. Bd. of Dade Cnty., 363 So. 2d 1095, 1098 (Fla. 1978).

135 *Bush*, 919, So. 2d at 408.

136 Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996).

to expand upon this mandatory educational minimum outside of the public school system. Directing public monies to other means of education thus offends the Florida Supreme Court's notion of uniformity.

While the uniformity clause's current construction requires the legislature to work solely within the public school system, the court also acknowledged that some inequities are inevitable even between public schools. For example, "the constitutional mandate [regarding funding] is not that every school district in the state must receive equal funding nor that each educational program must be equivalent. Inherent inequities, such as varying revenues because of higher or lower property values or differences in millage assessments, will always favor or disfavor some districts."[137] Likewise, the uniformity clause requires neither that "each county have the same number of school board members"[138] nor that sources of school funding be "uniform" across counties.[139] Thus, even the court concludes that uniformity cannot

137 St. Johns Cnty. v. Ne. Fla. Builders Ass'n, Inc., 583 So. 2d 635, 641 (Fla. 1991).

138 Sch. Bd. of Escambia Cnty. v. State, 353 So. 2d 834, 837 (Fla. 1977).

139 *St. Johns Cnty*., 583 So. 2d, at 641.

precisely mean equality.

b. School Choice under Florida's Uniformity Clause

Unlike the Wisconsin Supreme Court, the Florida Supreme Court construed its uniformity clause to preclude at least one school choice program directly. The Opportunity Scholarship Program (OSP) provided state funds to any student attending a failing public school so that the student could "attend a higher performing public school or use a scholarship provided by the state to attend a participating private school."[140] In *Bush v. Holmes*, the court invalidated the OSP under the uniformity clause, concluding that the clause prohibited the state legislature from "provid[ing] educational options beyond those in the public schools."[141] In other words, "the state may use public funds only for traditional public schools and may not provide additional educational opportunities outside the traditional public system."[142] The uniformity clause prohibits funding "private alternative[s] to the public school system" like the OSP.[143] Notably, however, *Bush* does not affect programs that are "structurally different

140 *Bush*, 919 So. 2d, at 400.
141 KOMER & NEILY, *supra* note 8, at 23.
142 *Id.*, at 22.
143 *Bush*, 919 So. 2d, at 408.

from the OSP."[144]

The court tried to distinguish Florida's uniformity clause from Wisconsin's uniformity clause because, unlike Florida's education provision, Wisconsin's education provision contains no explicit language denoting the provision of an adequate education as a "paramount duty of the state."[145] Herein lies the difference between the two states' uniformity clauses, according to the Florida Supreme Court: because Florida's duty to provide educational opportunities is a "paramount" one, the court considered the uniformity requirement as a ceiling, not a floor. Unsurprisingly, the Florida Supreme Court also has construed the Florida uniformity clause to govern all schools receiving public funding, including private schools.[146]

IV. Idaho's Uniformity Clause

Article IX, Section 1 of the Idaho Constitution reads, "The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and main-

144 *Id.*, at 412.
145 *Id.*, at 407, n.10.
146 *Id.*, at 410.

tain a general, *uniform* and thorough system of public, free common schools."[147] Opponents of school choice point to the uniformity clause as the primary constitutional hurdle for school choice legislation to overcome,[148] noting that the education provided to children will not be uniform if some students attend traditional brick-and-mortar public schools while others use a school choice program to participate in different forms of education.[149] Alternatively, school choice opponents argue that school choice programs divert funds from traditional public schools[150] or that school choice is unconstitutional because of Idaho's Blaine Amendment.[151] After *Espinoza v. Montana Department of Revenue*[152] and *Carson v. Makin*,[153] however, the latter argument is disingenuous.[154]

147 Idaho Const. art. IX, § 1 (emphasis added).

148 *See, e.g.*, Green & Moran, *supra* note 12, at 27813.

149 *See generally id.* (noting that uniformity provisions may preclude voucher programs because they do not provide a precisely uniform system of education).

150 Jones, *supra* note 9.

151 *See, e.g.*, Jim Jones, *What an Idaho School Funding Lawsuit Might Look Like*, Idaho Capital Sun (Feb. 13, 2023), https://idahocapitalsun.com/2023/02/13/what-an-idaho-school-funding-lawsuit-might-look-like/ (arguing that any school choice legislation will violate Idaho's Blaine Amendment and ignoring changes to current law as reflected by Supreme Court precedent in *Zelman*, *Espinoza*, and *Carson* invalidating such provisions).

152 140 S. Ct. 2246, 2251 (2020).

153 596 U.S. 767, 772 (2022).

154 *Blaine Amendments*, Inst. for Just., https://ij.org/issues/

As of yet, there are no state court cases addressing a school choice program's validity under the uniformity clause.

a. The General Meaning of Article IX, Section 1 of the Idaho Constitution

Idaho case law interpreting Article IX, Section 1 does not specifically address the constitutionality of school choice principles, but it presents several relevant principles. First, there is no fundamental right to education.[155] Rather, parents retain the right to choose how to educate their children. This is one of the highest principles in Idaho law.[156] Second, the uniformity clause requires uniformity in curriculum, not funding for education or school facilities.[157]

First, in *Thompson v. Engelking*, the Idaho Supreme Court made clear that there is no fundamental right to education under the Idaho Constitution.[158] Thus, school choice programs are not subject to strict scrutiny.[159] In making this

school-choice/blaine-amendments/#:~:text=Blaine%20Amendments%20are%20controversial%20state,government%20from%20funding%20Catholic%20schools. (last accessed Jan. 6, 2024).

155 Thompson v. Engelking, 537 P.2d 635, 647 (Idaho 1975).

156 Martin v. Vincent, 201 P. 492, 492 (Idaho 1921).

157 *Idaho Sch. II*, 976 P.2d, 913, 920 (Idaho 1998).

158 *Thompson*, 537 P.2d, at 647.

159 Olsen v. J.A. Freeman Co., 791 P.2d 1285, 1289 (Idaho 1990) (holding that fundamental rights receive strict scrutiny analysis under Idaho law).

determination, the court specifically rejected the framework articulated in *Rodriguez* for determining whether a right is fundamental—namely whether it is "explicitly or implicitly guaranteed" by the United States Constitution.[160] Refreshingly, the Idaho Supreme Court did not march in lockstep with federal jurisprudence and developed its own standard for evaluating fundamental rights.[161] Instead of strict scrutiny, the court used rational basis scrutiny to determine the constitutionality of funding schemes, thereby giving deference to reasonable attempts by the Idaho Legislature to conform to the constitutional requirement.[162] In developing its rationale, the Idaho Supreme Court quotes an important passage from its decision in *Andrus v. Hill*:

> Traditionally, not only in Idaho but throughout most of the states of the Union, the legislature has left the establishment, control and management of the school to the parents and taxpayers in the community which it serves. The local residents

160 *Thompson*, 537 P.2d, at 644.

161 *See generally* SUTTON, *supra* note 19, at 16–21 (arguing that state courts should look to the historical meaning of their constitutional provisions rather than simply looking to federal courts' interpretations of similar provisions in the United States Constitution).

162 *Thompson*, 537 P.2d, at 645.

> organized the school district pursuant to enabling legislation, imposed taxes upon themselves, built their own school house, elected their own trustees and through them managed their own school. It was under these circumstances that the "Little Red School House" became an American institution, the center of community life, and a pillar in the American conception of freedom in education, and in local control of institutions of local concern. In the American concept, there is no greater right to the supervision of the education of the child than that of the parent. In no other hands could it be safer.[163]

This historical information supports the idea that parents making educational decisions for their own children comports with the historical meaning of the uniformity clause. The court's decision in *Thompson* interpreted the uniformity clause according to this state history, reasoning that, because the legislature is the closest political body to the people, rational basis scrutiny is most consistent with the clause's text and original public meaning.[164]

163 *Id.*, at 645 (quoting Andrus v. Hill, 249 P.2d 205, 207 (Idaho 1952)).

164 *Id.* However, even rational basis scrutiny does not prevent

Idaho's uniformity clause does not exist in isolation and is not paramount.[165] It must be interpreted in the context of the entire Idaho Constitution and the principles that undergird it.[166] One such constitutional principle is the importance of parental decision-making in a child's education. In addition to parental control's rich national legacy, discussed in *Andrus* and *Thompson*,[167] the court has expressly noted that Article IX, Section 1's existence does not override the right retained by the people to exercise "supervision and control of the education of their children."[168] The court derived this principle in part from the general principles which undergird and express themselves in Idaho's parental custody laws.[169] This specific language from the custody provisions carried

the court from intervening when it sees a clear violation of the Idaho Constitution. The court left itself that option with a bold statement in support of judicial supremacy, "[W]e decline to accept the respondents' argument that the other branches of government be allowed to interpret the constitution for us. That would be an abject abdication of our role in the American system of government." Idaho Sch. for Equal Educ. Opportunity v. Evans (*Idaho Sch. I*), 850 P.2d 724, 728 (Idaho 1993).

165 *Idaho Sch. II,* 976 P.2d, 913, 921 (Idaho 1998).

166 *See* Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 167 (discussing the whole-text cannon of legal interpretation, mandating that texts be construed as wholes).

167 *Andrus*, 249 P.2d, at 207.

168 Electors of Big Butte Area v. State Bd. of Educ., 308 P.2d 225, 231 (Idaho 1957).

169 *Id.*, (citing Martin v. Vincent, 201 P. 492, 492 (Idaho 1921)).

weight: "The right of a parent to the custody, control, and society of his child is one of the highest known to the law."[170] Idaho law consistently reaffirms the irreplaceable role of parents in their child's life, and this principle informs the court's reasoning in education litigation, as exemplified in *Electors of Big Butte Area v. State Board of Education*.[171]

Second, much like the Wisconsin Supreme Court, the Idaho Supreme Court concluded that Idaho's uniformity clause requires uniform curriculum in state-funded schools, not uniform funding of those schools.[172] Likewise, uniformity does not apply to funding school facilities and other district activities.[173] As is proper, the court interpreted its own constitution instead of relying on other state constitutions, specifically rejecting the Arizona Supreme Court's interpretation of the Arizona Constitution's uniformity clause.[174] Instead, the court remained steadfast in concluding that the Idaho Constitution's uniformity requirement applies to curriculum, not funding.[175]

170 *Martin*, 201 P., at 492.
171 308 P.2d, at 231.
172 *Id.*
173 *Idaho Sch. II*, 976 P.2d, 913, 920 (Idaho 1998).
174 *Id.*
175 *Id.*

b. School Choice under Idaho's Uniformity Clause

Where does this leave the objections to school choice proposals? Are school choice proposals constitutional under the Idaho Constitution? The answer to these questions depends on several factors, but such proposals are most likely at least facially constitutional.

While the Idaho Supreme Court has not addressed the constitutionality of school choice programs directly, the Idaho Attorney General's Office issued an opinion about school choice legislation.[176] The legislation in question provides income tax credits for families who choose not to utilize the public school system but otherwise comply with established compulsory education statutory requirements.[177] The Attorney General specifically distinguished between an income tax credit program and both school vouchers and tuition tax credits.[178] While the state gives school vouchers in advance, tuition tax credits are awarded after the payment has occurred and limited to the amount of tuition actually paid.[179]

176 Idaho Att'y Gen., Attorney General Opinion No. 97-2, *as reprinted in* 1997 Att'y Gen. Ann. Rep., at 13–24.

177 *Id.*, at 13–15.

178 *Id.*, at 14.

179 *Id.*

The Attorney General ultimately concluded, "There appear to be no state or federal constitutional impediments which would prohibit the legislature from granting a tax credit to a parent or guardian who complies with the state's compulsory education law by means other than the public school system and without using public school resources."[180] Presumably, then, many school choice programs do not present a facial constitutional issue under the uniformity clause.

As noted earlier, school choice legislation generally receives two primary objections (besides the now invalid objection under Idaho's Blaine Amendment): (1) the program inherently creates a school system that is not entirely uniform and (2) such a program would pull funding from public schools which would impact the state's ability to maintain uniform public schools.[181]

The first argument clearly contradicts the precedent of the Idaho Supreme Court. As discussed, the court has interpreted this provision specifically not to require uniformity of funding for either education funding distribution schemes

180 *Id.*, at 13.
181 *See* Jones *supra* note 9; Ridler *supra* note 14.

or programs for funding educational facilities.[182] And, logically, there is no system more uniform than one that gives each parent the same amount of dollars to spend for each child's education, as a voucher system does. Arguments that claim funding schemes which assign the same resources to each student are somehow not uniform defy logic and the plain and ordinary meaning of "uniform."

The second objection also falls flat because the uniformity clause contemplates directing public funds to private schools. At the time when states began adding educational provisions guaranteeing access to public education to their constitutions, states without such provisions did not boast systems of widely available private schools.[183] Rather, they directed their education funds to random assortments of private and parochial schools that did not provide for the educational needs of all children within each state.[184] By default, public funds went to private schools. Proponents of adding education provisions to state constitutions sought to create systems of "common schools" that did not already exist.[185]

182 *Idaho Sch. I*, 850 P.2d, 724, 728 (1993).
183 *See* Sutton, *supra* note 56, at 1975.
184 *Id.*
185 *Id.*

School choice programs do not aim to turn time back to the pre-common school proverbial dark ages that required families without access to a school to scrounge up an education from the crumbs of the earth for their children. Far from it. Instead, these programs try to ensure that every child gets the same educational opportunity—regardless of residence, socio-economic status, or any other factor—by offering parents and children access to both public and private schools. The choice is theirs.

School choice programs offer parents educational choice consistently with two principles that animate Idaho's education law. First, education greatly impacts one's ability to engage in the political process.[186] As Article IX, Section 1 of the Idaho Constitution so eloquently puts it, "The stability of a republican form of government depend[s] mainly upon the intelligence of the people."[187] Second, the right of parents to make educational choices for their children is paramount.[188] There is no better system to allow parents to make these choices than empowering school choice legisla-

186 *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

187 Idaho Const. art. IX, § 1.

188 Andrus v. Hill, 249 P.2d 205, 207 (Idaho 1952).

tion. Thus, Idaho's uniformity clause likely does not prohibit school choice programs.

V. The Path Forward for School Choice Advocates

As supporters of school choice programs seek to establish said programs in states across America, they must first look to their state constitutions to ensure that their proposed programs are constitutional. Additionally, advocates should look at how courts have interpreted their respective uniformity clauses so that school choice programs are not forced to teach the same curriculum their public-school counterparts do, thereby defeating much of the program's purpose. These steps are essential to ensure that school choice programs pass constitutional muster and achieve the results desired by advocates.[189]

189 While most courts will review the constitutionality of school choice programs under their uniformity clauses, there is a possibility that a court may deem the issue a non-justiciable political question. In *Citizens for Strong Schools, Inc. v. Florida State Board of Education*, the petitioners alleged that the state's school choice program violated its uniformity clause by diverting funds from its public schools to private schools. 262 So. 3d 127, 131 (Fla. 2019). The trial court not only conceded that "variability necessarily exists between school districts" but also determined that the issues remained "political questions best resolved in the political arena." *Id.*, at 132. On appeal, the First District Court of Appeal of Florida concluded that the education provision, including the uniformity clause, contained no language or authority "that would empower judges to order the enactment of educational policies regarding teaching methods and accountability, the

a. Determining the Meaning of State Constitutional Provisions and the Possibility of Constitutional Amendments

Before putting forth a school choice program, advocates should try to make the particular program constitutional under the state's uniformity clause.[190] One of the most problematic aspects of these uniformity clauses is their

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appropriate funding of public schools, the proper allowance of charter schools and school choice, the best methods of student accountability and school accountability, and related funding priorities." *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, 232 So. 3d 1163, 1166 (Fla. Dist. Ct. App. 2017), *approved*, 262 So. 3d 127 (Fla. 2019). Although the Florida Supreme Court said that they did not agree with the First District that claims under the clause could *never* be justiciable, they affirmed the decision dismissing the challenge as non-justiciable. *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127, 135 (Fla. 2019). Because the legislature is generally tasked with implementing these education clauses, states may be successful in defending their programs by noting that the determination of whether it meets the standard is left by the constitution to the legislature, thus making it a non-justiciable question. Courts will likely receive these arguments with hesitation, but it is worth considering when defending such programs.

190 Of course, uniformity clauses are not the only state constitutional provision school choice advocates should be aware of when drafting legislation. Advocates must look to a broad array of provisions, including thoroughness, efficiency, aid, and other clauses. For example, in Arizona, even though the state has a uniformity provision in its state constitution, the Arizona Supreme Court struck down a voucher program under its Aid Clause, not its uniformity clause. *Cain v. Horne*, 202 P.3d 1178, 1185 (Ariz. 2009). Thus, while this Note serves as a resource about uniformity clauses, school choice advocates and legislators should conduct broad review of their state's constitutional provisions prior to introducing legislation establishing school choice programs.

somewhat vague and imprecise nature, leaving courts who do not carefully seek out their original public meaning with the power to exploit their apparent vagueness and then implement their own policy agendas under the guise of state constitutional interpretation.[191] For almost all states, the question is not whether school choice programs are constitutional but rather how to write them so that they are so.[192]

As illustrated by differences in the Wisconsin and Florida decisions, the fundamental question facing courts in uniformity clause interpretation is whether the clause requires the legislature to provide a baseline level of educational opportunity or create a system that is uniform in its totality.[193] As Richard Komer, the attorney who argued *Espinoza*,[194] and Clark Neily, the senior vice president for

191 *See* David M. Primo & Jake Jares, *Education Innovation, Fiscal Policy, and State Constitutions*, Mercatus Center Geo Mason (Nov. 20, 2017), https://www.mercatus.org/research/policy-briefs/education-innovation-fiscal-policy-and-state-constitutions.

192 Komer & Neily, *supra* note 8, at 2.

193 For example, the Indiana Supreme Court, in a challenge to its voucher system held that the voucher program was in addition to the state's public school system and therefore did not implicate the uniformity clause as it was in addition to the system of public schools. Meredith v. Pence, 984 N.E.2d 1213, 1224–25 (Ind. 2013).

194 Linda Greenhouse, *The Supreme Court's Collapsing Center on Religion*, N.Y. Times (Jan. 30, 2020), https://www.nytimes.com/2020/01/30/opinion/supreme-court-religion.html.

legal studies at the Cato Institute,[195] noted, "[S]chool choice opponents have begun arguing, illogically, that such provisions do not simply require the government to establish public schools for all children within the state, but forbid the government from going beyond that baseline requirement by providing education through means other than the traditional public school system."[196] They proceed to note that almost no states' precedents support this argument—with the notable exception of Florida.[197] Uniformity clauses, they argue, were designed to ensure that public schools possessed certain minimum characteristics, not to impose a limit on the "educational innovation and creativity" of legislators in executing their constitutional duties.[198] "If a state chooses to go above and beyond that constitutional requirement, a uniformity provision should not be a bar."[199]

Of course, no system can be *entirely* uniform.[200] Thus, the question becomes one of which areas must be uni-

195 *Clark Neily*, Cato Inst., https://www.cato.org/people/clark-neily (last accessed Jan. 6, 2024).

196 Komer & Neily, *supra* note 8, at 5, 6.

197 *Id.*

198 *Id.*

199 *Id.*

200 Derek W. Black, *Preferencing Educational Choice: The Constitutional Limits*, 103 Cornell L. Rev. 1359, 1406 (2018).

form and the degree of uniformity required.[201] The options are not a binary choice. Rather, they exist on a continuum; "schools and school systems are neither . . . uniform [n]or not uniform."[202] Requiring all education to be completely uniform in curriculum and structure would necessarily harm students by removing the adaptability necessary to tailor education to each student's needs.[203] Thus, the opportunities need not be uniform across students. The system itself must be uniform, rather than its application to each school or educational experience.[204]

When advocates defend their programs in states in which this question of the extent of uniformity has not been decided, they should argue that their provision merely requires a baseline. If courts follow Florida's reasoning in *Bush*, their decisions will most likely preclude funding for any education outside of the traditional public school system.[205] If, however, courts follow the approach of Wisconsin,

201 *Id.*

202 Aaron J. Saiger, *School Choice and States' Duty to Support Public Schools*, 48 B.C. L. Rev. 909, 937 (2007).

203 *Id.*, at 938.

204 *See, e.g.*, Kiddie Korner Day Sch., Inc. v. Charlotte-Mecklenburg Bd. of Ed., 55 N.C. App. 134, 138, 285 S.E.2d 110, 113 (1981).

205 Green & Moran, *supra* note 12, at 288.

then the state is free to adopt programs that provide for additional educational opportunities above and beyond the minimum requirements of their respective state constitutions.[206] A baseline approach will center the court's consideration of uniformity around a minimum standard of adequacy rather than any attempt to achieve equality.[207] Courts, however, must be careful not to intervene and define what adequacy means—that is the role of the state legislature.[208]

b. Uniformity of Curriculum: A Cautionary Note

A note of caution is in order for school choice proponents. Many states that have upheld these programs have concluded, as explained above, that the uniformity requirement necessitates a baseline, not total uniformity. To which issues that baseline standard applies is a separate question. Some states, like Idaho and Wisconsin, have held that this uniformity requires a certain uniformity in instruction.[209]

206 *Id.*

207 *Cf.* Vincent v. Voight, 614 N.W.2d 388, 406–07 (Wis. 2000) ("Under the adequacy approach, a state generally lists the types of knowledge that a child should possess to guide a legislature in fulfilling its constitutional obligations. This type of standard articulates the content of an adequate education." (cleaned up)).

208 *Id.*

209 Larson v. State Appeal Bd., 202 N.W.2d 920, 922 (1973); *Idaho Sch. I.*, 850 P.2d, 724, 728 (1993).

Wisconsin requires uniformity in the "character of instruction."[210] Idaho requires uniformity in *curriculum*.[211] With much of the push for school choice coming from concerns regarding what is taught in the public school system, perhaps a school funding program that forces everyone to use the *same curriculum* would not advance the educational goals of many parents. The concern that "regulation follows funding" has led many, especially homeschoolers, to oppose school choice measures.[212] After all, if school choice programs using public funds are required by their constitution to be uniform in curriculum, then those who accept program funds will be required to use the same curriculum as the public schools. For many, concerns about faith discrimination,[213] the spread of Critical Race Theory,[214] and the pervasiveness

210 *Larson*, 202 N.W.2d, at 922.

211 *Idaho Sch. I.*, 850 P.2d, at 728.

212 Jeremy Poff, *Why Home School Advocates Are Lobbying Hard Against Universal School Choice Bills*, Wash. Exam'r (March 20, 2023 4:30 AM), https://www.washingtonexaminer.com/policy/education/homeschooling-legal-group-balks-at-school-choice.

213 James R. Mason, *The Civic Virtue of Private Home Education*, Home Sch. L. Def. Ass'n (Aug. 1, 2018), https://hslda.org/post/the-civic-virtue-of-private-home-education.

214 Gary W. Houchens & John Garen, *Why We Should Advance School Choice, Not Critical Race Theory*, Courier J. (Jan. 20, 2022 8:02 AM), https://www.courier-journal.com/story/opinion/2022/01/20/opinion-advance-school-choice-not-crt-give-parents-more-say-education/6518624001/.

of woke ideology[215] in public schools inform the desire for alternative forms of education. Developing a system that requires those same features in curriculum for alternative schools is antithetical to many of the goals of school choice advocates.

Simply because there is a requirement that "curriculum" or the "character of instruction" be uniform does not mean that all school choice programs will lead to the incorporation of such ideology. Rather, if carefully written, school choice legislation should set the basic level of minimum standards for education without imposing regulations upon private schools or homeschoolers who accept program funds. Additionally, these programs should never be compulsory. No program should preclude parents from choosing to educate their children outside any government system, not even one that provides choice. While many express valid concerns that school choice initiatives may lead to more regulation of private schools or homeschools, if structured correctly and made optional, school choice programs can be

215 Jay Greene & Ian Kingsbury, *Empowering Parents with School Choice Reduces Wokeism in Education*, Heritage Found. (Nov. 15, 2022), https://www.heritage.org/education/report/empowering-parents-school-choice-reduces-wokeism-education.

used to break the public school monopoly and provide educational opportunities for all children to excel outside the broken public school system.

Conclusion

With the growth of the modern school choice movement and the increase of Supreme Court precedent favorable to school choice, proponents of school choice should consider their state uniformity clauses when drafting school choice legislation to ensure constitutionality. Contrary to the arguments of critics, these provisions do not generally preclude school choice programs, but some states, like Florida, may interpret them as doing so. Knowing the original public meaning of the uniformity clause in a state is essential to complying with constitutional demands when preparing school choice proposals that have the potential to provide opportunities for parents to give their children the best educational opportunities possible. The time of standardized, one-size-fits-all educational systems is past, and a time for choosing is here.[216]

216 *See generally* Ronald Reagan, *A Time for Choosing Speech Oct. 27, 1964*, Ronald Reagan Pres. Libr. & Museum (Oct. 27, 1964), https://www.reaganlibrary.gov/reagans/ronald-reagan/time-choosing-speech-october-27-1964.