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## The Right to an Education or the Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees

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**THE RIGHT TO AN EDUCATION OR THE  
RIGHT TO SHOP FOR SCHOOLING:  
EXAMINING VOUCHER PROGRAMS IN  
RELATION TO STATE CONSTITUTIONAL  
GUARANTEES**

*Julie F. Mead\**

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**INTRODUCTION**

Recently, the Colorado Supreme Court heard oral arguments in a case contesting the constitutionality of the Choice Scholarship Pilot

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\* Professor of Education, University of Wisconsin-Madison. I am grateful to the participants of the 2014 Cooper-Walsh Colloquium for their insightful reactions and recommendations. I also wish to acknowledge the work and assistance of Shannon Azzaro, Lauren Irby, and all the staff of the Fordham Urban Law Journal for their helpful comments and suggestions in the development of this Article.

Program established by the Douglas County School District.<sup>1</sup> The program is a locally created voucher program that permits the use of public tax dollars to subsidize the tuition costs of private school enrollment.<sup>2</sup> Taxpayers challenged the program alleging it violated the Colorado Constitution's education provisions.<sup>3</sup>

During those arguments, Chief Justice Nancy Rice asked the attorney defending the program: "Is this a paradigm shift? Are you saying public education is just a funding mechanism? . . . Is all education now public [and parents] can just choose?"<sup>4</sup>

As this exchange illustrates, the introduction of publicly funded private school choice provisions calls into question what is "public" about "public education." Distinctions that once were clear—public school versus private school—become blurred. For example, Tony Evers, Wisconsin Superintendent of Public Education, noted that the average private school participating in the Milwaukee Parental Choice Program (MPCP) enrolls more than eighty percent of its students by means of a publicly funded voucher and posed the following question: "If only one in five students enrolled in a choice school pays tuition, then when do choice schools stop being private schools and become something else?"<sup>5</sup> These same statistics prompted the American Civil Liberties Union and Disability Rights Wisconsin to characterize the MPCP participating schools as "private in name only."<sup>6</sup>

Whether voucher programs alter the nature of the participating schools from private school to some quasi-public or quasi-private form of school is a provocative question. However, the more important question is what such programs mean for a child's right to an education. State constitutions uniformly make some provision of

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1. Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist., No. 13SC233, 2014 WL 1046020, at \*1 (Colo. Mar. 17, 2014).

2. Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist., Nos. 11CA1856 & 11CA1857, 2013 WL 791140 (Colo. App. Feb. 28, 2013), *cert. granted* Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist., No. 13SC233, 2014 WL 1046020, at \*1 (Colo. Mar. 17, 2014),

3. *See id.*

4. Nicholas Garcia, *In Douglas County Voucher Case, Supreme Court Wonders What Defines a Public School*, CHALKBEAT COLO. (Dec. 10, 2014, 5:35 PM), <http://co.chalkbeat.org/2014/12/10/in-douglas-county-voucher-case-supreme-court-wonders-what-defines-a-public-school/>.

5. Letter from Tony Evers, Wis. State Superintendent of Pub. Instruction, to Members of the Joint Comm. on Fin. 2 (May 23, 2011).

6. *See* Complaint to the U.S. Dep't of Justice at 27, *ACLU v. Wisconsin* (June 7, 2011), *available at* [https://www.aclu.org/sites/default/files/field\\_document/complaint\\_to\\_doj\\_re\\_milwaukee\\_voucher\\_program\\_final.pdf](https://www.aclu.org/sites/default/files/field_document/complaint_to_doj_re_milwaukee_voucher_program_final.pdf).

public education, sketching the contours of that right and directing state legislatures to provide it.<sup>7</sup> As such, the question becomes whether a state's subsidy of private education compromises that state's ability to fulfill its obligation to establish and fund public schools consistent with each state's constitutional mandates. In other words, at what point, if any, does a state's funding of private education subvert its constitutional obligation to provide adequately for public education, thereby converting a child's right to an education to merely the right to shop for one?

This Article explores that question in relation to state constitutional directives for those states currently operating some form of voucher program. This analysis reviews case law and explores the issues raised by litigation. Given the increased attention by state legislatures being paid to voucher programs and school choice funded by tax credit scholarship programs and education savings accounts, these questions have renewed currency and application. Part I reviews the prevalence of voucher, tuition tax credit scholarship programs, and education savings account programs across the country. Part II briefly describes judicial findings with respect to the constitutionality of the programs under state constitution education clauses. Finally, Part III provides discussion and conclusions regarding voucher and voucher-like programs in relation to state constitutional guarantees of a right to a public education.

## I. PREVALENCE OF VOUCHERS AND VOUCHER-LIKE PROGRAMS

While publicly funded private school voucher programs have not fared well when placed on ballots,<sup>8</sup> school choice proponents have achieved much better success through legislative enactment. In fact, the prevalence of voucher and voucher-like programs has steadily increased since the Wisconsin Legislature enacted the first publicly funded private school voucher plan, the MPCP, in 1990.<sup>9</sup> Publicly funded support for private education typically comes in three forms: (1) publicly funded vouchers; (2) tuition tax credit scholarship

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7. *State Constitutions and Public Education Governance*, EDUC. COMMISSION STATES, <http://www.ecs.org/clearinghouse/17/03/1703.htm> (last updated Oct. 2000).

8. See, e.g., *Utah School Vouchers, Referendum 1 (2007)*, BALLOTPEDIA, [http://ballotpedia.org/Utah\\_School\\_Vouchers,\\_Referendum\\_1\\_\(2007\)](http://ballotpedia.org/Utah_School_Vouchers,_Referendum_1_(2007)) (last visited Mar. 1, 2015) (noting that voters defeated a proposed voucher program 62.14% to 37.86%).

9. 1989 Wis. Act 336 (codified at WIS. STAT. ANN. § 119.23 (West 2014)) (creating the Milwaukee Parental Choice Program).

programs; and (3) education savings account programs.<sup>10</sup> Voucher programs permit the use of public tax dollars to support all or part of the tuition costs of enrolling a child in a private school.<sup>11</sup> Parents of eligible students direct the funds by selecting the private school the child will attend.<sup>12</sup> Tuition tax credit scholarship programs, also called neo-vouchers,<sup>13</sup> permit individuals, corporations, or both to receive a tax credit in exchange for a donation to a state-approved scholarship program that then provides vouchers to eligible children to attend private schools.<sup>14</sup> Education savings accounts allow parents to divert all or part of the state school funding earmarked for their child to an account, which can then be used to pay for various approved educational expenses, including private school tuition.<sup>15</sup> The end, a subsidy for private school tuition, is the same in all three types of programs. In voucher programs, the funds flow directly from state coffers to parents in the form of a voucher that can only be spent at a private school participating in the program.<sup>16</sup> In tuition tax credit programs, funds are funneled to parents through “scholarships” established for the sole purpose of collecting and dispersing educational tax credits.<sup>17</sup> In education savings account programs, state support for a parent’s child is channeled into a special account maintained by the state and established for the purpose of paying educational expenses.<sup>18</sup>

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10. See EXPLORING THE SCHOOL CHOICE UNIVERSE: EVIDENCE AND RECOMMENDATIONS (Gary Miron et al. eds., 2012) [hereinafter EXPLORING THE SCHOOL CHOICE UNIVERSE]; Arianna Prothero, *What’s the Difference between Vouchers and Education Savings Accounts?* EDUC. WK.’S BLOGS (June 9, 2015, 5:17 PM), [http://blogs.edweek.org/edweek/charterschoice/2015/06/school\\_vouchers\\_education\\_savings\\_accounts\\_difference\\_between.html](http://blogs.edweek.org/edweek/charterschoice/2015/06/school_vouchers_education_savings_accounts_difference_between.html); *What States Are Doing*, EDUC. COMMISSION STATES, <http://www.ecs.org/html/IssueSection.asp?issueid=22&subissueid=333&ssID=0&s=What+States+Are+Doing> (last visited June 25, 2015).

11. EXPLORING THE SCHOOL CHOICE UNIVERSE, *supra* note 10; *What States are Doing*, *supra* note 10; see also MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962).

12. See sources cited *supra* note 11.

13. See KEVIN G. WELNER, NEOVOUCHERS: THE EMERGENCE OF TUITION TAX CREDITS FOR PRIVATE SCHOOLING (2008).

14. *Id.*; see also Stephen D. Sugarman, *Tax Credit School Scholarship Plans*, 43 J.L. & EDUC. 1 (2014).

15. See Prothero, *supra* note 10; see also Arianna Prothero, *Some States Put Parents In Charge of Student Spending*, EDUC. WK. (Feb. 24, 2015), <http://www.edweek.org/ew/articles/2015/02/25/some-states-put-parents-in-charge-of.html>.

16. See sources cited *supra* note 11.

17. See sources cited *supra* note 14.

18. See sources cited *supra* note 15.

As Table 1 depicts, twenty-four states now have some type of voucher program or voucher-like program, but only seven programs are more than a decade old,<sup>19</sup> and fifteen programs have been enacted since just 2013.<sup>20</sup> Twelve of the twenty-four states have created two or more choice programs.<sup>21</sup> Three distinct types of traditional voucher programs exist: (1) programs that serve children with disabilities (twelve programs in ten states);<sup>22</sup> (2) programs that are limited to a specific location (three states);<sup>23</sup> and (3) statewide voucher programs (five states).<sup>24</sup> In addition, sixteen states have created tuition tax credit programs that transform tax liability into voucher-like scholarships for eligible children to attend private schools.<sup>25</sup> Arizona adopted the first of this type of school choice program in 1997.<sup>26</sup> It is interesting to note that while voucher programs are older, neo-vouchers (tuition tax credit programs) now equal them in number. Finally, five states have created education savings account programs,<sup>27</sup> the newest voucher-like program to emerge. Once again, Arizona was

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19. *See infra* Table 1: Arizona (Individual Income Tax Credit); Florida (John M. McKay Scholarship; Florida Tax Credit Scholarship Program); Ohio (Cleveland Scholarship and Tutoring Program; Autism Scholarship Program); Pennsylvania (Educational Improvement Tax Credit); and Wisconsin (Milwaukee Parental Choice Program).

20. *See infra* Table 1: Alabama (Alabama Accountability Act Tax Credit); Arkansas (Succeed Scholarship Program for Students with Disabilities); Florida (Personal Learning Scholarship Account Program); Kansas (Tax Credit for Low Income Students Scholarship Program); Mississippi (Mississippi Speech Language Therapy Scholarship (Nate Rogers) Program; Equal Opportunity for Students with Special Needs Scholarship); Montana (Tax Credits for Contributions to Student Scholarship Organizations); Nevada (Nevada Education Savings Accounts; Educational Choice Scholarship Program); New Hampshire (School Choice Scholarship Program); North Carolina (Special Education Scholarship Grants for Children with Disabilities; Opportunity Scholarships); Ohio (Income Based Scholarship Program); South Carolina (Educational Credit for Exceptional Needs Children); Tennessee (Individualized Education Account Program); and Wisconsin (Wisconsin Parental Choice Program).

21. *See infra* Table 1: Arizona, Florida, Georgia, Indiana, Louisiana, Mississippi, Nevada, North Carolina, Ohio, Oklahoma, Pennsylvania, and Wisconsin.

22. *See infra* Table 1: Arkansas, Florida, Georgia, Indiana, Louisiana, Mississippi, North Carolina, Ohio, Oklahoma, and Utah.

23. *See infra* Table 1: Colorado, Ohio, and Wisconsin.

24. *See infra* Table 1: Indiana, Louisiana, North Carolina, Ohio, and Wisconsin.

25. *See infra* Table 1: Alabama, Arizona, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Montana, Nevada, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Virginia.

26. ARIZ. REV. STAT. ANN. §§ 43-1089, 43-1089.01 (2012).

27. *See infra* Table 1: Arizona, Florida, Mississippi, Nevada, and Tennessee.

the first state to enact legislation to create this type of parental school choice.<sup>28</sup>

**TABLE 1: VOUCHER AND VOUCHER-LIKE PROGRAMS ACROSS THE UNITED STATES<sup>29</sup>**

<b>Program Title &amp; Year Enacted</b>	<b>Statutory Reference</b>	<b>Program Type</b>
<b>Alabama</b> - Alabama Accountability Act Tax Credit (2013)	ALA. CODE §§ 16-6D-4 to -9 (2013).	Tax credit scholarship
<b>Arizona</b> - Individual Income Tax Credit (1997)	ARIZ. REV. STAT. ANN. § 43-1089 (2012); ARIZ. REV. STAT. ANN. § 43-1089.01 (2012) (amended 2015).	Tax credit scholarship
<b>Arizona</b> - Low Income Corporate Tax Credit (2006)	ARIZ. REV. STAT. ANN. § 20-224.06 (2010); ARIZ. REV. STAT. ANN. § 43-1183 (2012).	Tax credit scholarship
<b>Arizona</b> - Lexie's Law Corporate Tax Credits (2009)	ARIZ. REV. STAT. ANN. § 20-224.07 (2010); ARIZ. REV. STAT. ANN. § 43-1184 (2012); ARIZ. REV. STAT. ANN. § 15-891 (2014).	Tax credit scholarship
<b>Arizona</b> - Empowerment Scholarship Account (2011)	ARIZ. REV. STAT. ANN. §§ 15-2401 to -2404 (2014).	Education savings account

28. ARIZ. REV. STAT. ANN. §§ 15-2401 to -2404 (2014).

29. This table was compiled from information taken from *School Choice Programs*, FRIEDMAN FOUND. FOR EDUC. CHOICE, <http://www.edchoice.org/School-Choice/School-Choice-Programs> (last visited June 24, 2015) and verified by comparing that list with the databases maintained by the EDUCATION COMMISSION OF THE STATES, <http://www.ecs.org/html/IssueSection.asp?issueid=22&subissueid=333&ssID=0&s=What+States+Are+Doing>. This table omits Maine and Vermont, both of which have had longstanding tuition programs in rural districts that do not operate high schools. Parents may enroll their children in neighboring school districts, and the resident district pays a form of tuition on behalf of the students. This practice was later expanded to allow enrollment in private non-religious schools on the same basis. See ME. REV. STAT. tit. 20-A, § 5204 (2014); VT. STAT. ANN. tit. 16, §§ 821, 822 (West 2014).

<b>Program Title &amp; Year Enacted</b>	<b>Statutory Reference</b>	<b>Program Type</b>
<b>Arizona</b> - Switcher Individual Income Tax Credit Scholarship (2012)	ARIZ. REV. STAT. ANN. § 43-1089.03 (2012).	Tax credit scholarship
<b>Arkansas</b> – Succeed Scholarship Program for Students with Disabilities (2015)	2015 Ark. Acts 1178.	Special education voucher
<b>Colorado</b> – Douglas County School District – Choice Scholarship Pilot Program (2011)	NA <sup>30</sup>	City-specific voucher
<b>Florida</b> - John M. McKay Scholarship (1999)	FLA. STAT. ANN. § 1002.39 (2014); FLA. STAT. ANN. § 1002.421 (2013).	Special education voucher
<b>Florida</b> - Florida Tax Credit Scholarship Program (2001)	FLA. STAT. ANN. §§ 1102.395 (2014), 1002.421 (2013).	Tax credit scholarship
<b>Florida</b> – Personal Learning Scholarship Account Program (2014)	FLA. STAT. ANN. §1002.385 (2014).	Education savings account – Special education only
<b>Georgia</b> – Georgia Special Needs Scholarship Program (2007)	GA. CODE ANN. §§ 20-2-2110 to -2118 (2000–2014).	Special Education voucher
<b>Georgia</b> - Qualified Educational Expense Tax Credit (2008)	GA. CODE ANN. §§ 20-2A-1 to -7 (2011–2013).	Tax credit scholarship

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30. The only voucher program in Colorado exists in the Douglas County School District and was enacted by the school board at the local level. It was not created by the state legislature as were the other programs summarized by Table 1. See *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, Nos. 11CA1856 & 11CA1857, 2013 WL 791140 (Colo. App. Feb. 28, 2013), *cert. granted* *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, No. 13SC233, 2014 WL 1046020, at \*1 (Colo. Mar. 17, 2014).



<b>Program Title &amp; Year Enacted</b>	<b>Statutory Reference</b>	<b>Program Type</b>
<b>Indiana</b> - School Scholarship Tax Credit (2009)	IND. CODE ANN. §§ 6-3.1-30.5 – 30.5, 20-51 (West 2009).	Tax credit scholarship
<b>Indiana</b> - Choice Scholarship Program (2011)	IND. CODE ANN. § 20-51 (West 2011).	State-wide voucher
<b>Iowa</b> - School Tuition Organization Tax Credit (2006)	IA. CODE ANN. § 422.11S (West 2014).	Tax credit scholarship
<b>Kansas</b> - Tax Credits for Low Income Students Scholarship Program (2014)	KAN. STAT. ANN. §§ 72-99a01 to -99a07 (2014).	Tax credit scholarship
<b>Louisiana</b> - Student Scholarships for Educational Excellence Program (2008)	LA. REV. STAT. ANN. §§ 17:4011-4025 (2012).	State-wide voucher
<b>Louisiana</b> - School Choice Pilot Program for Certain Students with Exceptionalities (2010)	LA. REV. STAT. § 17:4031 (2014).	Special education voucher
<b>Louisiana</b> - Tuition Donation Rebate Program (2012)	LA. REV. STAT. § 47:6301 (2014).	Tax credit scholarship
<b>Mississippi</b> - Mississippi Dyslexia Therapy Scholarship for Students with Dyslexia Program (2012)	MISS. CODE ANN. § 37-173 (2012).	Special education voucher
<b>Mississippi</b> – Mississippi Speech Language Therapy Scholarship (Nate Rogers) Program (2013)	MISS. CODE ANN. § 37-175 (2013).	Special education voucher

<b>Program Title &amp; Year Enacted</b>	<b>Statutory Reference</b>	<b>Program Type</b>
<b>Mississippi</b> – Equal Opportunity for Students with Special Needs Scholarship (2015)	2015 Miss. Laws 159.	Education savings account – Special education only
<b>Montana</b> – Tax Credits for Contributions to Student Scholarship Organizations (2015)	2015 Mont. Laws 457.	Tax credit scholarship
<b>Nevada</b> – Nevada Education Savings Accounts (2015)	2015 Nev. Legis. Serv. 332 (West)	Education savings account
<b>Nevada</b> – Educational Choice Scholarship Program (2015)	2015 Nev. Legis. Serv. 22 (West).	Tax credit scholarship
<b>New Hampshire</b> - School Choice Scholarship Program (2012)	N.H. REV. STAT. ANN. §§ 77-G:1 to -G:10 (2012).	Tax credit scholarship
<b>North Carolina</b> - Special Education Scholarship Grants for Children with Disabilities (2013)	N.C. GEN. STAT. ANN. §§ 115C-112.5 to -112.9 (West 2014).	Special education voucher
<b>North Carolina</b> - Opportunity Scholarships (2013)	N.C. GEN. STAT. ANN. §§ 115C-562.1 to -562.7 (West 2013).	State-wide voucher
<b>Ohio</b> - Cleveland Scholarship and Tutoring Program (1995)	OHIO REV. CODE ANN. §§ 3313.975–.979 (West 2013).	City-specific voucher
<b>Ohio</b> - Autism Scholarship Program (2003)	OHIO REV. CODE ANN. §§ 3310.51–.64 (West 2011).	Special education voucher
<b>Ohio</b> - Educational Choice Scholarship Program (2005)	OHIO REV. CODE ANN. §§ 3310.01–.17 (West 2013).	State-wide voucher

<b>Program Title &amp; Year Enacted</b>	<b>Statutory Reference</b>	<b>Program Type</b>
<b>Ohio</b> - Jon Peterson Special Needs Scholarship Program (2011)	OHIO REV. CODE ANN. §§ 3310.41–.43 (West 2014).	Special education voucher
<b>Ohio</b> - Income Based Scholarship Program (2013)	OHIO REV. CODE ANN. § 3310.32 (West 2013).	State-wide voucher
<b>Oklahoma</b> - Lindsey Nicole Henry Scholarships for Students with Disabilities (2010)	OKLA. STAT. ANN. tit. 70, §§ 13-101.1–.2 (West 2010).	Special education voucher
<b>Oklahoma</b> - Oklahoma Equal Opportunity Education Scholarships (2011)	OKLA. STAT. ANN. tit. 68, § 2357.206 (West 2011).	Tax credit scholarship
<b>Pennsylvania</b> - Educational Improvement Tax Credit (2001)	72 PA. STAT. ANN. §§ 8701-F–8713-F (West 2014).	Tax credit scholarship
<b>Pennsylvania</b> - Opportunity Scholarship Tax Credit (2012)	72 PA. STAT. ANN. §§ 8701-F to 8713-F (West 2014).	Tax credit scholarship
<b>Rhode Island</b> - Tax Credits for Contributions to Scholarship Organizations (2006)	R.I. GEN. LAW ANN. §§ 44-62-1 to -7 (West 2007).	Tax credit scholarship
<b>South Carolina</b> - Educational Credit for Exceptional Needs Children (2013)	S.C. Budget Proviso 1.80 of 2014-15 Appropriations Act. <sup>31</sup>	Tax credit scholarship

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31. Memorandum from John R. Payne, Dir., Office of Special Educ. Servs., S.C. Dep't of Educ., to Dist. Special Educ. Dirs. and Coordinators (July 10, 2014), available at <http://ed.sc.gov/agency/programs-services/173/documents/OSES-Memo-7-10-14Proviso1-80.pdf>.

Program Title & Year Enacted	Statutory Reference	Program Type
<b>Tennessee</b> – Individualized Education Account Program (2015)	2015 Tenn. Pub. Acts 431.	Education savings account – Special education only
<b>Utah</b> - Carson Smith Special Needs Scholarship Program (2005)	UTAH CODE ANN. §§ 53A-1a-701 to 53A-1a-710 (West 2005).	Special education voucher
<b>Virginia</b> - Education Improvement Scholarships Tax Credit Program (2012)	VA. CODE ANN. §§ 58.1-439.25 to 58.1-439.28 (West 2013).	Tax credit scholarship
<b>Wisconsin</b> - Milwaukee Parental Choice Program (1990)	WIS. STAT. ANN. § 119.23 (West 2014).	City-specific voucher
<b>Wisconsin</b> - Racine School Choice Program (2011)	WIS. STAT. ANN. § 118.60 (West 2014).	City-specific voucher
<b>Wisconsin</b> - Wisconsin Parental Choice Program (2013)	WIS. STAT. ANN. § 118.60 (West 2014).	State-wide voucher

Given their controversial nature, it is not surprising that voucher programs have been challenged on a number of legal grounds, most notably as a violation of federal and state constitutional provisions regarding religion.<sup>32</sup> Interpreting the Establishment Clause of the First Amendment to the U.S. Constitution, the U.S. Supreme Court in its 2002 decision *Zelman v. Simmons-Harris* settled the federal constitutionality of voucher programs that permit private religious school participation.<sup>33</sup> The Court held that such programs are permissible as long as: (1) the voucher plan serves a legitimate secular

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32. See generally Julie F. Mead, *How Legislation and Litigation Shape School Choice*, in *EXPLORING THE SCHOOL CHOICE UNIVERSE*, *supra* note 10, at 39–64.

33. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

purpose;<sup>34</sup> (2) recipients of the aid (parents and children) are not defined by religious criteria;<sup>35</sup> and (3) parents have available to them a “genuine choice” from among a variety of secular and sectarian schools.<sup>36</sup> Subsequent to this pronouncement, various state voucher enactments have been challenged in state courts as violations of state constitutional religion and education clauses.<sup>37</sup>

Since this study examines vouchers in relation to a child’s right to an education, the discussion concentrates on the issues raised pursuant to the education clauses of state constitutions. The next Part reviews that case law and the reasoning courts applied to declare various voucher, tax credit scholarship programs, or education savings account programs either consistent or inconsistent with state constitution education provisions.

## II. CHALLENGES TO VOUCHERS AND TAX CREDIT SCHOLARSHIPS UNDER STATE EDUCATION CLAUSES

State courts in eight states<sup>38</sup> have considered challenges to voucher programs in relation to state constitutional provisions setting legislative requirements for the education of the state’s children.<sup>39</sup> Additionally, plaintiffs have challenged tax credit programs under education clauses in Alabama,<sup>40</sup> Arizona,<sup>41</sup> Florida,<sup>42</sup> and New

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34. *Id.* at 649.

35. *Id.* at 653.

36. *Id.* at 662.

37. Preston C. Green III & Peter L. Moran, *The State Constitutionality of Voucher Programs: Religion Is Not the Sole Determinant*, 2010 BYU EDUC. & L.J. 275 (2010).

38. (1) Wisconsin: Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998); Davis v. Grover, 480 N.W.2d 460 (Wis. 1992). (2) Ohio: Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999). (3) Colorado: Owens v. Cong. of Parents, Teachers, & Students, 92 P.3d 933 (Colo. 2004); Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist., Nos. 11CA1856 & 11CA1857, 2013 WL 791140 (Colo. App. Feb. 28, 2013), *cert. granted* Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist., No. 13SC233, 2014 WL 1046020 (Colo. Mar. 17, 2014). (4) Florida: Bush v. Holmes, 919 So. 2d 392 (Fla. 2006). (5) Arizona: Cain v. Horne, 202 P.3d 1178 (Ariz. 2009) (en banc); Niehaus v. Huppenthal, 310 P.3d 983 (Ariz. Ct. App. 2013). (6) Indiana: Meredith v. Pence, 984 N.E.2d 1213 (Ind. 2013). (7) Louisiana: La. Fed’n of Teachers v. Louisiana, 118 So. 3d 1033 (La. 2013). (8) North Carolina: Hart v. State, 2014 WL 6724598 (N.C. Super. 2014).

39. Oklahoma’s voucher program was also challenged. *See* Indep. Sch. Dist. No. 5 of Tulsa Cnty. v. Spry, 292 P.3d 19 (Okla. 2012). However, the state’s supreme court ruled that the plaintiffs (two school districts) lacked standing to bring the suit. *Id.* at 20. Accordingly, it made no decision on the merits of the claim. *Id.*

40. Magee v. Boyd, Nos. 1130987, 1131020, & 1131021, 2015 WL 867926 (Ala. Mar. 2, 2015).

Hampshire,<sup>43</sup> though no decision on the merits was reached in either the Florida case or the New Hampshire case, as the reviewing courts determined the challenging taxpayers lacked standing to assert their claims.<sup>44</sup> Not surprisingly, given the recency of their adoption, only one state's education savings account program has been challenged.<sup>45</sup> Decisions concerning all three types of programs are presented here in precedential order by state according to the chronology of that state's first judicial decision interpreting the state constitution in relation to these parental choice programs.<sup>46</sup>

### 1. Wisconsin

The Milwaukee Parental Choice Program (MPCP) was first challenged shortly after its enactment in 1990.<sup>47</sup> The original MPCP permitted up to one percent or approximately 1000 of the enrolled children in Milwaukee Public Schools (MPS) to attend private non-sectarian schools within the city's limits if their family's income was no more than 175 % of the federal poverty level.<sup>48</sup> Participating schools were limited to enrolling no more than forty-nine percent of their overall student population by means of the voucher, which provided approximately \$2500 per student.<sup>49</sup> Among other allegations, the case considered whether the program violated the uniformity clause of the state constitution's education provision.<sup>50</sup>

41. *Green v. Garriott*, 212 P.3d 96 (Ariz. Ct. App. 2009).

42. *McCall v. Scott*, No. 2014-CA-2282 (Fla. Cir. Ct. 2015). <http://www.meyerandbrooks.com/documents/McCall%20vs%20Scott/Notice%20Of%20Appeal.pdf>. Plaintiffs have filed a notice of appeal in the case. See Jeffrey S. Solocheck, *Lawsuit Challenging Florida's Tax Credit Scholarship Program Continues*, TAMPA BAY TIMES (June 15, 2015, 3:45 PM), <http://www.tampabay.com/blogs/gradebook/lawsuit-challenging-floridas-tax-credit-scholarship-program-continues/2233775>.

43. *Duncan v. New Hampshire*, 102 A.3d 913 (N.H. 2014).

44. *McCall*, No. 2014-CA-2282; *Duncan*, 102 A.3d at 925–28.

45. *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. Ct. App. 2013), *review denied* (Mar. 21, 2014).

46. In other words, states are presented in the chronological order of the first case from that state. Cases for a given state are also presented in chronological order.

47. *Davis v. Grover*, No. 90-CV-25765 (Dane Cnty. Cir. Ct. 1990).

48. WIS. STAT. § 119.23(2)(a)(1) (1989-90); *Davis v. Grover*, 480 N.W.2d 460, 463 (Wis. 1992).

49. *Davis*, 480 N.W.2d at 463.

50. In addition to the education clause challenge reviewed here, the trial court was asked to determine whether the private schools had to serve children with disabilities in accordance with the Individuals with Disabilities Education Act; whether the bill had been enacted according to constitutionally required procedures that prohibit the legislature from passing "private" or "local" bills, WIS. CONST. art. IV, § 18; and whether the law comported with the public purpose doctrine, *see*

That provision requires that “[t]he legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years.”<sup>51</sup> The Wisconsin Supreme Court read this mandate to compel the legislature to create “district schools,” but ruled that the private schools participating in the MPCP did not become “district” schools merely because they received public funding.<sup>52</sup> The court reasoned that “[t]he uniformity clause clearly was intended to assure certain minimal educational opportunities for the children of Wisconsin.”<sup>53</sup> The court reasoned that the MPCP “merely reflects a legislative desire to do more than that which is constitutionally mandated,”<sup>54</sup> and that the legislature’s “experimental attempts<sup>55</sup> to improve that

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Warren v. Reuter, 170 N.W.2d 790 (Wis. 1969). *Davis*, No. 90-CV-25765. The trial court upheld the program against all challenges, and all but the ruling regarding the treatment of children with disabilities was appealed and ultimately affirmed by the Wisconsin Supreme Court. *Id.*

51. WIS. CONST. art. X, § 3.

52. *Davis*, 480 N.W.2d at 463.

53. *Id.* at 474.

54. *Id.*

55. The program characterized as experimental by the *Davis* court in 1992 has changed dramatically since then. Both religious and non-religious schools may now register as MPCP participating schools. 1995 Wis. Act 27, §4002 (July 28, 1995) (codified at WIS. STAT. ANN. § 119.23(2)(a) (West 2014)). There are no longer limits on the percentage of students a private school may enroll through the program. *Id.* Likewise, the law now contains no limits on the total number of students from Milwaukee who may participate. 2011 Wis. Act. 32 (June 30, 2011). The schools eligible to participate are no longer limited to those physically located within the city of Milwaukee, but may be located anywhere in the state. *Id.* § 2536. Eligibility for low-income families has been expanded from 175% to 300% of the federal poverty level. WIS. STAT. ANN. §119.23(2)(a)(1)(a). Participation in the program has grown steadily and now includes 112 participating private schools that enroll a total of 26,348 students and cost the state approximately \$191,000,000. WIS. DEP’T OF PUB. INSTRUCTION, MPCP FACTS AND FIGURES FOR 2014–2015 (2015), available at <http://sms.dpi.wi.gov/sites/default/files/imce/sms/pdf/MPCP%20Jan%20Facts%20and%20Figures%202014-15.pdf>. The law was originally enacted by the legislature in 1989 Wis. Act 336. Amendments were adopted through: (1) 1993 Wis. Act 16; (2) 1995 Wis. Act 27; (3) 1995 Wis. Act 216; (4) 1997 Wis. Act 27; (5) 1997 Wis. Act 113; (6) 1999 Wis. Act 9; (7) 2001 Wis. Act 16; (8) 2001 Wis. Act 105; (9) 2003 Wis. Act 33; (10) 2003 Wis. Act 155; (11) 2005 Wis. Act 25; (12) 2005 Wis. Act 125; (13) 2009 Wis. Act 28; (14) 2009 Wis. Act 96; (15) 2011 Wis. Act 32; (16) 2011 Wis. Act 47; (17) 2013 Wis. Act 8; (18) 2013 Wis. Act 20; (19) 2013 Wis. Act 237; (20) 2013 Wis. Act 256). For a full discussion of the MPCP and its statutory history, see Julie F. Mead, *Private in Name Only: A Statutory and Constitutional Analysis of Milwaukee’s Private School Voucher Program*, 21 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 331 (2015).

foundation in no way denies any student the opportunity to receive the basic education in the public school system.”<sup>56</sup>

Six years later, after program amendments permitted private religious schools to participate and removed any limitations on the number of voucher students a school could enroll,<sup>57</sup> the Wisconsin Supreme Court re-examined the MPCP and its relationship to the Uniformity Clause in *Jackson v. Benson*.<sup>58</sup> Opponents had argued that the removal of the cap on the number of students a given school could enroll under the voucher program would allow a school to be supported entirely by public funds, thus making it a public school, not a private school.<sup>59</sup> The court rejected this argument, finding the proportion of voucher students enrolled in a school irrelevant to whether it retained its status as a private school.<sup>60</sup> The majority held that “mere appropriation of public monies to a private school does not transform that school into a district school under art. X, § 3,” and that “[t]his conclusion is not affected by the amount of public funds a private school receives.”<sup>61</sup> The court also reiterated its reasoning that so long as the legislature adequately provided for public education, the state constitutional requirement should be read as “not a ceiling but a floor upon which the legislature can build additional opportunities for school children in Wisconsin.”<sup>62</sup>

## 2. Ohio

In 1999, as the federal case that would eventually lead to the U.S. Supreme Court decision in *Zelman* was wending its way through the federal court system,<sup>63</sup> the Ohio Supreme Court considered a challenge to the same Cleveland voucher program on state constitutional grounds.<sup>64</sup> The Cleveland program permitted up to

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56. *Davis*, 480 N.W.2d at 474. For a discussion of voucher programs and state constitutional provisions, see Green & Moran, *supra* note 37.

57. 1995 Wis. Act 27, § 4002 (July 28, 1995).

58. 578 N.W.2d 602 (Wis. 1998). The case also examined “public purpose” and religion clause challenges. *Id.* at 628–30. The case is best known for the court’s analysis of the Establishment of Religion Clause issues raised by the MPCP’s removal of the requirement that MPCP schools be non-sectarian. The court upheld the law on all state and federal claims. *Id.* at 632.

59. *Id.*

60. *Id.* at 627.

61. *Id.*

62. *Id.* at 628.

63. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

64. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999).



\$2500 of state funds to pay for a child's tuition to any private school.<sup>65</sup> The court employed similar logic to that of the Wisconsin Supreme Court<sup>66</sup> to interpret its state's constitutional mandate that the legislature create "a thorough and efficient system of common schools throughout the State."<sup>67</sup> While recognizing that "[i]t can be argued that implicit within this obligation is a prohibition against the establishment of a system of uncommon (or nonpublic) schools financed by the state," the court rejected such an interpretation.<sup>68</sup> Instead, noting that private schools had long existed in Ohio and served as an alternative to state-operated schools, the court concluded that "[w]e fail to see how the School Voucher Program, at the current funding level, undermines the state's obligation to public education."<sup>69</sup> The court did express one caveat, however. That is that public funding for private school enrollment "should not come at the expense of our public education system or our public school teachers."<sup>70</sup>

### 3. Colorado

In contrast, in *Owens v. Congress of Parents, Teachers & Students*, the Colorado Supreme Court ruled that the Colorado Opportunity Contract Pilot Program violated the state's constitutional mandate that local school boards control publicly funded education.<sup>71</sup> Since students using the vouchers provided by the program would enroll in private schools at public expense, the program created an unconstitutional limitation on school board authority over funds raised through state and local taxes.<sup>72</sup> The court reached this conclusion by interpreting two provisions of the Colorado Constitution.<sup>73</sup> The first provision, article IX, section 2, directs the state legislature to "provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the

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65. *Id.* at 205. Students whose families had incomes less than 200% of the federal poverty level could receive up to 90% of the tuition costs, while children from families with incomes above 200% of the poverty level could obtain 75% of tuition. *Id.* In both cases, the voucher was limited to \$2500. *Id.*

66. *Id.* at 212–13.

67. OHIO CONST. art. VI, § 2.

68. *Simmons-Harris*, 711 N.E.2d at 212.

69. *Id.*

70. *Id.*

71. *Owens v. Colo. Cong. of Parents, Teachers, & Students*, 92 P.3d 933 (Colo. 2004).

72. *Id.* at 943.

73. *Id.* at 938.

state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously.”<sup>74</sup> The second provision, article IX, section 15, grants locally elected school boards the “control of instruction in the public schools of their respective districts.”<sup>75</sup> The court then explained that its earlier precedents had clearly established that “control” included jurisdiction over school funds.<sup>76</sup> As such, the court concluded that the program directly violated the explicit local control requirement established in article IX, section 15 of the Colorado Constitution.<sup>77</sup>

As mentioned earlier,<sup>78</sup> the Colorado Supreme Court is currently considering the latest challenge to a Colorado voucher program.<sup>79</sup> While the *Owens* decision foreclosed a state-enacted voucher program, it did not address whether a local school board could create a voucher program of its own. In 2011, the school board of the Douglas County School District established the Choice Scholarship Pilot Program.<sup>80</sup> The board set aside funds to provide vouchers to local residents who elected to enroll their children in participating private schools.<sup>81</sup> A group of parents and taxpayers challenged the program, and the trial court enjoined the program finding it unconstitutional, though not in relation to article IX, section 15.<sup>82</sup> The Colorado Court of Appeals upheld the program against all challenges.<sup>83</sup> Echoing the reasoning of the Wisconsin and Ohio courts, the Colorado appellate panel determined that “[t]he requirement that the General Assembly create a thorough and uniform system of free public education does not preclude a local school district from providing educational opportunities in addition to and different from the thorough and uniform system.”<sup>84</sup> Likewise, the

74. COLO. CONST. art. IX, § 2

75. COLO. CONST. art. IX, §15.

76. *Owens*, 92 P.3d at 947–50.

77. *Id.* at 943.

78. *See supra* notes 1–4 and accompanying text.

79. *See Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, No. 13SC233, 2014 WL 1046020 (Colo. Mar. 17, 2014).

80. *See Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, Nos. 11CA1856 & 11CA1857, 2013 WL 791140 (Colo. App. Feb. 28, 2013), *cert. granted* *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, No. 13SC233, 2014 WL 1046020, at \*1 (Colo. Mar. 17, 2014).

81. *Id.*

82. *Id.* at \*3. The program was challenged on a variety of grounds including the religion provisions of the state constitution. *Id.* Only the allegations related to the education provisions are reviewed here.

83. *Id.* at \*21.

84. *Id.* at \*9.

court rejected plaintiffs' assertions that the program violated article IX, section 3, the state's constitutional restriction on the use of the state school fund.<sup>85</sup> The court noted that less than two percent of public funding comes from the state school fund and therefore found it insufficient to justify enjoining the program.<sup>86</sup> Finally, the court concluded that since the state had no role in the creation of the program and that article IX, section 15 was intended to protect local school boards from encroachments on their authority by state officials, nothing in the Douglas County voucher program violated the constitutional mandates regarding education.<sup>87</sup> The Colorado Supreme Court heard oral arguments in the appeal of this ruling on December 10, 2014 and a ruling is expected sometime in 2015.<sup>88</sup>

#### 4. Florida

In 2006, the Florida Supreme Court struck down its statewide voucher program, the Opportunity Scholarship Program (OSP), finding it a violation of the state constitution's Education Clause.<sup>89</sup> The program allowed children who attended a public school deemed substandard by the state's accountability system to use state monies to enroll in any private school, using funds that otherwise would have gone to the public school.<sup>90</sup> The Florida Supreme Court determined that the constitutional mandate to the legislature to create a "uniform" system of public education proscribed the OSP because the state lacked the necessary control over the private schools.<sup>91</sup> Moreover, the court found that the constitution limited legislative discretion such that it must fund public schools exclusively.<sup>92</sup> As the court explained:

The second sentence of article IX, section 1(a) provides that it is the "paramount duty of the state to make adequate provision for the education of all children residing within its borders." The third sentence of article IX, section 1(a) provides a restriction on the exercise of this mandate by specifying that the adequate provision required in the second sentence "shall be made by law for a uniform,

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85. *Id.* at \*12.

86. *Id.* at \*11.

87. *Id.* at \*12.

88. Eric Gorski, *Douglas County Vouchers Argued Before Colorado Supreme Court*, DENVER POST (Dec. 10, 2014), [http://www.denverpost.com/news/ci\\_27108990/douglas-county-vouchers-head-colorado-supreme-court](http://www.denverpost.com/news/ci_27108990/douglas-county-vouchers-head-colorado-supreme-court).

89. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

90. *Id.*

91. *Id.* at 409–10.

92. *Id.* at 407.

efficient, safe, secure and high quality system of *free public schools*.” The OSP violates this provision by devoting the state’s resources to the education of children within our state through means other than a system of free public schools.<sup>93</sup>

## 5. Arizona

Although technically not a decision concerning the state’s constitutional provisions governing education, a challenge to Arizona’s tax credit program merits discussion here.<sup>94</sup> The tax credit program at issue provided dollar-for-dollar tax credits for any corporation that gave a donation to a “school tuition organization,” which then provided funds to pay for students’ enrollment at private schools.<sup>95</sup> The case *Green v. Garriott*<sup>96</sup> considered, among other allegations, whether the tax credit program violated Arizona’s Enabling Act, which requires that the legislature provide for “a system of public schools”<sup>97</sup> and that such schools “remain under the exclusive control”<sup>98</sup> of the state and prohibiting funds “for the support of any sectarian or denominational school.”<sup>99</sup> Plaintiffs had argued that providing funds for private schools through the tax credit scholarships violated these provisions of the Enabling Act and therefore the state’s “fundamental constitutional responsibility toward Arizona’s public schools.”<sup>100</sup> The Arizona Court of Appeals rejected this reasoning, refusing to accept the premise that the tax credit program “expends state resources.”<sup>101</sup> Rather, the court reasoned the programs do not “siphon[] funds from the public school system in order to provide for private, sectarian schools, as the tax credit dollars never enter the general fund.”<sup>102</sup> Reading both the

93. *Id.* (emphasis in original).

94. Two other Arizona cases not reviewed here should be noted. Both challenge the state’s tax credit scholarship programs. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (holding that taxpayer plaintiffs lacked standing to challenge the tax credit programs at issue); *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (upholding the tax credit program against challenges on religious grounds).

95. *Green v. Garriott*, 212 P.3d 96, 98 (Ariz. Ct. App. 2009).

96. *Id.*

97. ARIZ. REV. STAT. ANN. ENABLING ACT, § 20 (West 2001).

98. ARIZ. REV. STAT. ANN. ENABLING ACT, § 26 (West 2001).

99. *Id.*

100. *Green*, 212 P.3d at 107.

101. *Id.*

102. *Id.* The U.S. Supreme Court employed a similar logic in finding that taxpayers lacked standing to sue Arizona’s tax credit programs in *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011). As the Court explained, “[w]hen the government declines to impose a tax, by contrast, there is no such connection

Enabling Act and the state's constitution as limited to public schools, the court found them separate from and inapplicable to the programs designed to "provide for educational opportunities in non-public schools."<sup>103</sup>

It was precisely the expenditure of state dollars that caused two Arizona voucher programs, the Arizona Scholarships for Pupils with Disabilities Program<sup>104</sup> and the Arizona Displaced Pupils Choice Grant Program,<sup>105</sup> to run afoul of the state's constitution. In *Cain v. Horne*,<sup>106</sup> the Arizona Supreme Court concluded that the traditional voucher programs were unconstitutional because they violated the so-called "Aid Clause."<sup>107</sup> That provision explicitly directs that "[n]o tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."<sup>108</sup> The court explained that the provision was "primarily designed" by the constitution's framers "to protect the public fisc and to protect public schools."<sup>109</sup> The court reasoned that the Aid Clause "plainly intended that Arizona have a strong public school system to provide mandatory education. The Aid Clause furthers this goal by prohibiting appropriation of funds from the public treasury to private schools."<sup>110</sup> Since both voucher programs spent state funds for attendance at private schools, the court found them unconstitutional.<sup>111</sup>

In a 2013 decision, the Arizona Court of Appeals upheld the current Empowerment Scholarship Account (ESA) when it was challenged on similar grounds.<sup>112</sup> Under provisions of the statute, students with disabilities could receive up to ninety percent of the

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between dissenting taxpayer and alleged establishment. Any financial injury remains speculative. And awarding some citizens a tax credit allows other citizens to retain control over their own funds in accordance with their own consciences." *Id.* at 1447 (citations omitted).

103. *Green*, 212 P.3d at 107.

104. The Arizona Scholarships for Pupils with Disabilities Program provided state funds for a student with a disability to attend a private school of the parents' choosing. *Cain v. Horne*, 202 P.3d 1178, 1180 (Ariz. 2009) (en banc).

105. The Arizona Displaced Pupils Choice Grant Program provided state funds up to \$5000 for children in foster care to attend private schools. *Id.*

106. 202 P.3d 1178.

107. *Id.* at 1182–83. The "Aid Clause" is ARIZ. CONST. art. IX, § 10.

108. ARIZ. CONST. art. IX, § 10.

109. *Cain*, 202 P.3d at 1183.

110. *Id.*

111. *Id.* at 1185.

112. *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. Ct. App. 2013), *review denied* (Mar. 21, 2014).

state funds that would have been provided to a public school in order to enroll at a private school.<sup>113</sup> Funds could be used for tuition or a number of other expenses.<sup>114</sup> The court distinguished the ESA from the programs found unconstitutional by the *Cain* court, reasoning that since the program set up an account for parents, it did not violate the Aid Clause.<sup>115</sup> Likewise, the court found dispositive the fact that the ESA could be used for a variety of purposes, which included but were not limited to private school tuition.<sup>116</sup> Finally, the court rejected the contention that the program was unconstitutional because it conditioned a state benefit on the parents' waiver of their child's constitutional right to a public education.<sup>117</sup> The court reasoned that "[p]arents are free to enroll their children in the public school or to participate in the ESA; the fact that they cannot do both at the same time does not amount to a waiver of their constitutional rights or coercion by the state."<sup>118</sup> Though plaintiffs appealed to the Arizona Supreme Court, it declined to review the case.<sup>119</sup>

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113. *Id.* at 984 (citing ARIZ. REV. STAT. ANN. § 15-2402(C)).

114. *Id.* Eligible expenses included:

- (a) Tuition or fees at a qualified school.
- (b) Textbooks required by a qualified school.
- (c) Educational therapies or services from a licensed or accredited practitioner or provider . . . .
- (d) Tutoring or teaching services provided by an individual or facility accredited by a state, regional or national accrediting organization.
- (e) Curriculum.
- (f) Tuition or fees for a nonpublic online learning program.
- (g) Fees for a nationally standardized norm-referenced achievement test, an advanced placement examination or any exams related to college or university admission.
- (h) Contributions to a coverdell education savings account established pursuant to 26 U.S.C. § 530 for the benefit of the qualified student, except that money used for elementary or secondary education expenses must be for expenses otherwise allowed under this section.
- (i) Tuition or fees at an eligible postsecondary institution.
- (j) Textbooks required by an eligible postsecondary institution.
- (k) Fees for management of the empowerment scholarship account by firms selected by the treasurer.

ARIZ. REV. STAT. ANN. § 15-2402(B)(4)(a)–(k) (West 2013).

115. *Niehaus*, 310 P.3d at 988–89.

116. *Id.* at 988.

117. *Id.* at 989–90. The law requires that the parent "[n]ot enroll the qualified student in a school district or charter school and release the school district from all obligations to educate the qualified student." ARIZ. REV. STAT. ANN. § 15-2402(B)(2).

118. *Niehaus*, 310 P.3d at 989.

119. *See* Order Denying Petition for Review, *Niehaus v. Huppenthal*, CV-13-0323-PR (Ariz. Mar. 21, 2014), available at [http://www.azcourts.gov/Portals/21/MinutesCurrent/PR\\_Min\\_032114.pdf](http://www.azcourts.gov/Portals/21/MinutesCurrent/PR_Min_032114.pdf).

## 6. Indiana

The Indiana Supreme Court likewise sustained the state's "Choice Scholarship" program, which allows public funds to pay for private school tuition.<sup>120</sup> To be eligible for a voucher at that time, a student's family income could be no more than 150% of the federal poverty level.<sup>121</sup> In weighing the meaning of the state's Education Clause,<sup>122</sup> the court specifically rejected the logic of *Bush v. Holmes*, finding more in common with the reasoning of Wisconsin's high court in *Davis v. Grover*.<sup>123</sup> The court noted that the Indiana Constitution's Education Clause, article VIII, section 1, has two sections: (1) establishing "a duty to encourage moral, intellectual, scientific, and agricultural improvement;" and (2) an obligation "to provide for a general and uniform system of open common schools without tuition."<sup>124</sup> The court saw these requirements as separate and distinct, and reasoned that the voucher program satisfied the first obligation, while the public school system satisfied the second.<sup>125</sup> The court concluded that "[t]he school voucher program does not replace the public school system, which remains in place and available to all Indiana schoolchildren in accordance with the dictates of the Education Clause."<sup>126</sup>

## 7. Louisiana

Although challengers to Louisiana's statewide voucher program persuaded the Supreme Court of Louisiana to their view, the decision was narrowly focused on a funding matter that was subsequently amended by the Louisiana Legislature.<sup>127</sup> In this instance, the court's analysis centered on the fact that the program which provided public funds for students to enroll in private schools<sup>128</sup> was originally designed to be funded through the state's Minimum Foundation Program, the state's school funding formula.<sup>129</sup> The court determined

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120. *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013).

121. *Id.*, at 1219. The statute has since been revised to increase the eligibility limit to 200% of the federal poverty level. IND. CODE ANN. § 20-51-1-4.3 (West 2013).

122. IND. CONST. art. VIII, § 1.

123. *Meredith*, 984 N.E.2d at 1223–24.

124. *Id.* at 1221.

125. *Id.* at 1221–22.

126. *Id.* at 1223.

127. *La. Fed'n of Teachers v. Louisiana*, 118 So. 3d 1033 (La. 2013).

128. *Id.* at 1038.

129. *Id.*

that the constitution's Education Clause,<sup>130</sup> which directed school funding and limited the authority of both the state legislature and the State Board of Elementary and Secondary Education, did not permit any diversion of those funds away from public schools.<sup>131</sup> Since the "Student Scholarships for Educational Excellence Program" did precisely that, it violated the Education Clause of the State's constitution.<sup>132</sup> After the court's decision, the legislature passed a budget to fund the program through means other than the state's school funding formula.<sup>133</sup>

## 8. North Carolina

In a case<sup>134</sup> currently pending before the North Carolina Supreme Court,<sup>135</sup> plaintiffs asserted that North Carolina's voucher program, the Opportunity Scholarship Program, violates the state constitutional requirement that state revenues "shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools."<sup>136</sup> The trial court agreed and enjoined the program from operation.<sup>137</sup> The court concluded that the program "appropriates funds for education in a manner that does not accomplish a public purpose," since the private schools are "unaccountable" to the State Board of Education.<sup>138</sup> Moreover, the court determined that by enacting the program the legislature had failed its constitutional mandate to "guard and maintain" the right to an education.<sup>139</sup> The North Carolina Supreme Court heard oral

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130. LA. CONST. art. 8, § 13, ("The State Board of Elementary and Secondary Education, or its successor, shall annually develop and adopt a formula which shall be used to determine the cost of a minimum foundation program of education in all public elementary and secondary schools as well as to equitably allocate the funds to parish and city school systems.").

131. *La. Fed'n of Teachers*, 118 So. 3d at 1056.

132. *Id.*

133. Jeff Adelson, *Louisiana Budget Compromise Sails Through Both Chambers in Last Hours of Session*, TIMES-PICAYUNE (June 6, 2013), [http://www.nola.com/politics/index.ssf/2013/06/louisiana\\_budget\\_compromise\\_sa.html](http://www.nola.com/politics/index.ssf/2013/06/louisiana_budget_compromise_sa.html).

134. *Hart v. State*, 2014 WL 6724598 (N.C. Super. 2014).

135. Matthew Burns, *Supreme Court Weighs NC School Voucher Program* WRAL.COM (Feb. 24, 2015) <http://www.wral.com/supreme-court-weighs-nc-school-voucher-program/14467107/>.

136. N.C. CONST. art. IX, §6.

137. *Hart*, 2014 WL 6724598, at \*3.

138. *Id.*

139. *Id.*, citing N.C. Const. art I, §15, which reads: "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."



arguments in an appeal of the trial court's order in February 2015 and a decision is expected soon.<sup>140</sup>

## 9. Alabama

In the most recent decision reviewed here, while the trial court voided Alabama's tax credit scholarship program, the Alabama Accountability Act,<sup>141</sup> on a number of grounds, the Alabama Supreme Court recently reversed that ruling.<sup>142</sup> The program permits parents whose children attend a "failing school" as identified by the state to claim tax credits to fund tuition at a private school.<sup>143</sup> The majority of the decision considered whether the Alabama Accountability Act was enacted in an unconstitutional manner,<sup>144</sup> but the decision also analyzed its constitutionality under the state constitution's "prohibited appropriation" provision, which forbids funds "to any charitable or educational institution not under the absolute control of the state" unless the measure is passed "by a vote of two-thirds of all the members elected to each house."<sup>145</sup> In invalidating the program, the trial court had reasoned that the creation of the tax credit scholarship was a legislative attempt to "do indirectly that which it is forbidden to do directly"<sup>146</sup> and that "[i]f it were possible for the legislature by this artifice to avoid the Constitution's funding restrictions, Section 73—and numerous other constitutional provisions that place restrictions on the use of public funds—would be rendered toothless."<sup>147</sup> The Alabama Supreme Court, however,

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140. See Burns, *supra* note 135.

141. ALA. CODE § 16-6D-8 (West 2013.).

142. Boyd v. Magee, No. 03-CV-2013-901470, 2014 WL 2404288 (Ala. Cir. Ct. May 28, 2014), *aff'd in part, rev'd in part sub nom.* Magee v. Boyd, Nos. 1130987, 1131020, & 1131021, 2015 WL 867926 (Ala. 2015).

143. Magee, 2015 WL 867926, at \*1.

144. *Id.* at \*6–18.

145. *Id.* at \*31; see also ALA. CONST. art. IV, § 73.

146. Boyd v. Magee, No. 03-CV-2013-901470, 2014 WL 2404288 (Ala. Cir. Ct. May 28, 2014) at \*5 (citing *Ex parte State ex rel. Patterson*, 108 So. 2d 448, 453 (Ala. 1958)).

147. *Id.* Interestingly, this reasoning echoes that of Justice Kagan in her dissent to *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1450 (2011) (Kagan, J., dissenting), where she argued that both tax credits and government expenditures are forms of governmental subsidy that taxpayers should have standing to challenge. *Id.* As she explained in her disagreement with the majority's conclusion that taxpayers lacked standing to challenge a tax credit program as a violation of the Establishment Clause, "[t]axpayers who oppose state aid of religion have equal reason to protest whether that aid flows from the one form of subsidy or the other. Either way, the government has financed the religious activity. And so either way, taxpayers should be able to challenge the subsidy." *Id.*

rejected this reasoning, concluding that “the tax credit is paid to the parents of a child who transfers from a failing public school to a nonfailing public school or nonpublic school for the purpose of offsetting any expenses incurred by the student’s transfer.”<sup>148</sup> Accordingly, the court concluded that “no money is set aside or specified from the public revenue or treasury”<sup>149</sup> to fund the program and therefore it does not offend the state’s constitution.<sup>150</sup>

### 10. Summary

In total, courts in nine states considered thirteen cases examining the constitutionality of vouchers, tax credit scholarship programs, or education savings account programs in relation to the state’s constitutional provisions governing education. Each of the cases reviewed was a direct facial challenge to the propriety of the program under scrutiny. As discussed, plaintiffs won challenges to programs in five cases<sup>151</sup> and programs were upheld in eight cases.<sup>152</sup> The next section discusses themes derived from the cases as a whole.

## III. DISCUSSION AND CONCLUSIONS

As the brief review of cases dealing with the constitutionality of voucher programs vis-à-vis state education clauses shows, the state constitutional right to an education is examined with extreme care by reviewing courts. Beyond the judicial conclusions to the particular legal questions posed in each case, the interpretation of state education clauses brings four distinct issues into focus. First, the cases draw attention to the distinction between a constitutional obligation and a discretionary benefit. Second, the reasoning makes clear the relationship between school funding and legislative fulfillment of

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148. *Magee*, 2015 WL 867926, at \*34.

149. *Id.*

150. *Id.* at \*38.

151. *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009) (en banc); *Owens v. Cong. of Parents, Teachers, and Students*, 92 P.3d 933 (Colo. 2004); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); *La. Fed’n of Teachers v. Louisiana*, 118 So. 3d 1033 (La. 2013); *Hart v. State*, 2014 WL 6724598 (N.C. Super. 2014).

152. *Magee*, 2015 WL 867926; *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. Ct. App. 2013), *review denied* (Mar. 21, 2014); *Green v. Garriott*, 212 P.3d 96 (Ariz. Ct. App. 2009); *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, Nos. 11CA1856 & 11CA1857, 2013 WL 791140 (Colo. App. Feb. 28, 2013), *cert. granted* *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, No. 13SC233, 2014 WL 1046020, at \*1 (Colo. Mar. 17, 2014); *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013); *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999); *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998); *Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992).

constitutional obligations. Third, the cases demonstrate that the source of a school's funding does not define its public-ness or lack thereof. Finally, the cases raise the issue of uniformity in the public sector as one measure of a legislature's execution of its constitutional mandate. This Part examines each of these issues in turn.

Several courts' analyses rest on the notion that a voucher program is an exercise of policy-making discretion beyond that required of the state legislature by the state's constitution.<sup>153</sup> That reasoning, while upholding various voucher programs, also makes clear that the support and maintenance of public education as a means to provide each child with a guaranteed right to an education takes precedence over the creation of a voucher program that permits private school enrollment with public financial support. As the Wisconsin Supreme Court put it, the Education Clause creates "not a ceiling but a floor upon which the legislature can build additional opportunities for school children."<sup>154</sup> The Ohio Supreme Court was even more direct, stating that a voucher program "should not come at the expense of our public education system or our public school teachers."<sup>155</sup> As such, courts make a clear distinction between the right to an education (and the legislature's obligation to ensure it) and the benefit or privilege of a publicly funded private choice. The first is an affirmative obligation; the second is a discretionary option. This logic also suggests that if evidence can be marshaled to demonstrate that maintenance of a voucher program meaningfully threatens or undercuts students' right to a public education, the voucher program would violate state Education Clauses unless or until the vitality of the public school system was restored.<sup>156</sup>

Additionally, this reasoning indicates that constitutional provisions—even in states that upheld voucher programs—are specific rather than general. That is, a legislature does not satisfy its obligations merely by enacting measures relative to education, but only by passing laws ensuring *public* schools and *public* education. Table 2 lists the provisions of each state constitution relative to

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153. *Taxpayers for Pub. Educ.*, 2013 WL 791140, at \*9; *Meredith*, 984 N.E.2d at 1222; *Simmons-Harris*, 711 N.E.2d at 212; *Jackson*, 578 N.W.2d at 628; *Davis*, 480 N.W.2d at 474.

154. *Jackson*, 578 N.W.2d at 628.

155. *Simmons-Harris*, 711 N.E.2d at 212.

156. See *Simmons-Harris*, 711 N.E.2d at 212 n.2 ("It is possible that a greatly expanded School Voucher Program or similar program could damage public education. Such a program could be subject to a renewed constitutional challenge.").

education for each of the states with a voucher or tax credit scholarship program.<sup>157</sup>

**TABLE 2: STATE CONSTITUTION EDUCATION PROVISIONS FOR STATES WITH VOUCHER AND TAX CREDIT SCHOLARSHIP PROGRAMS<sup>158</sup>**

**ALABAMA CONSTITUTION**

ALA. CONST. art. IV, § 73

*“No appropriation shall be made to any charitable or educational institution not under the absolute control of the state, other than normal schools established by law for the professional training of teachers for the *public schools of the state*, except by a vote of two-thirds of all the members elected to each house.”*

ALA. CONST. art XIV, § 256

*“It is the policy of the state of Alabama to foster and promote the education of its citizens in a manner and extent consistent with its available resources, and the willingness and ability of the individual student, but nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature, in furthering or providing for education, to require or impose conditions or procedures deemed necessary to the preservation of peace and order. The legislature may by law provide for or authorize the establishment and operation of schools by such persons, agencies or municipalities, at such places, and upon such conditions as it may prescribe, and for the grant or loan of public funds and the lease, sale or donation of real or personal property to or for the benefit of citizens of the state for educational purposes under such circumstances and upon such conditions as it shall prescribe.”*

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157. As discussed in Part II, courts in nine of the twenty-four states with voucher and/or voucher-like programs have examined the meaning of the language of these provisions, while no ruling has yet occurred interpreting the remaining fifteen states' education clauses in relation to these choice programs.

158. Emphasis is added to indicate those provisions that are specific to *public* schools and systems.

**ARIZONA CONSTITUTION**ARIZ. CONST. art. XI, § 1

“The legislature shall enact such laws as shall provide for the establishment and maintenance of a *general and uniform public school system*, which system shall include:

1. Kindergarten schools.
2. Common schools.
3. High schools . . . .”

ARIZ. CONST. art XI, § 6

“The legislature shall provide for a *system of common schools* by which a free school shall be established and maintained in every school district for at least six months in each year, which school shall be open to all pupils between the ages of six and twenty-one years.”

**ARKANSAS CONSTITUTION**

## ARK. CONST. art. XIV, §1

“Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a *general, suitable and efficient system of free public schools* and shall adopt all suitable means to secure to the people the advantages and opportunities of education. The specific intention of this amendment is to authorize that in addition to existing constitutional or statutory provisions the General Assembly and/or public school districts may spend public funds for the education of persons over twenty-one (21) years of age and under six (6) years of age, as may be provided by law, and no other interpretation shall be given to it.”

**COLORADO CONSTITUTION**COLO. CONST. art. IX, § 2

“The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a *thorough and uniform system of free public schools* throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously.”

**FLORIDA CONSTITUTION**FLA. CONST. art. IX, § 1

“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.”

**GEORGIA CONSTITUTION**GA. CONST. art. VIII, § 1

“*The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia.* Public education for the citizens prior to the college or postsecondary level shall be free and shall be provided for by taxation, and the General Assembly may by general law provide for the establishment of education policies for such public education. The expense of other public education shall be provided for in such manner and in such amount as may be provided by law.”

**INDIANA CONSTITUTION**IND. CONST. art. VIII, § 1

“Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for *a general and uniform system of Common Schools*, wherein tuition shall be without charge, and equally open to all.”

**IOWA CONSTITUTION**IOWA CONST. art. IX, 2d div., § 3

“The general assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement. The proceeds of all lands that have been or hereafter may be, granted by the United States to this state, for the support of schools, which may have been or shall hereafter be sold, or disposed of, and the five hundred thousand acres of land granted to the new states, under an act of congress, distributing the proceeds of the public lands among the several states of the union, approved in the year of our Lord one thousand eight hundred and forty-one, and all estates of deceased persons who may have died without leaving a will or heir, and also such percent as has been or may hereafter be granted by congress, on the sale of lands in this state, shall be, and remain a perpetual fund, the interest of which, together with all rents of the unsold lands, and such other means as the general assembly may provide, shall be inviolably appropriated to the support of common schools throughout the state.”

**KANSAS CONSTITUTION**KAN. CONST. art. VI, § 1

“The legislature shall provide for intellectual, educational, vocational and scientific improvement by *establishing and maintaining public schools*, educational institutions and related activities which may be organized and changed in such manner as may be provided by law.”

**LOUISIANA CONSTITUTION**LA. CONST. art. VIII, § 1

“The legislature shall provide for the education of the people of the state and shall establish and maintain a *public educational system*.”

LA. CONST. art. VIII, § 13

“The State Board of Elementary and Secondary Education, or its successor, shall annually develop and adopt a formula which shall be used to determine *the cost of a minimum foundation program of education in all public elementary and secondary schools* as well as to equitably allocate the funds to parish and city school systems.”

**MISSISSIPPI CONSTITUTION**MISS. CONST. art. VIII, § 201

“The Legislature shall, by general law, *provide for the establishment, maintenance and support of free public schools* upon such conditions and limitations as the Legislature may prescribe.”

**MONTANA CONSTITUTION**MONT. CONST. art. X, §1

“(1) It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.... (3) *The legislature shall provide a basic system of free quality public elementary and secondary schools.* The legislature may provide such other educational institutions, public libraries, and educational programs as it deems desirable. It shall fund and distribute in an equitable manner to the school districts the state’s share of the cost of the basic elementary and secondary school system.”

**NEVADA CONSTITUTION**NEV. CONST. art. XI, § 2

“The legislature shall provide for *a uniform system of common schools*, by which a school shall be established and maintained in each school district at least six months in every year, and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction, and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon *said public schools.*”

**NEW HAMPSHIRE CONSTITUTION**N.H. CONST. pt. II, art. 83

“Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, *to cherish the interest of literature and the sciences, and all seminaries and public schools*, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people: *Provided, nevertheless*, that no money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination.”



<p><b>NORTH CAROLINA CONSTITUTION</b>  <u>N.C. CONST. art IX, § 2</u>          “The General Assembly shall provide by taxation and otherwise for a <i>general and uniform system of free public schools</i>, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.”</p>
<p><b>OHIO CONSTITUTION</b>  <u>OHIO CONST. art VI, § 2</u>          “The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a <i>thorough and efficient system of common schools</i> throughout the State; but, no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.”</p>
<p><b>OKLAHOMA CONSTITUTION</b>  <u>OKLA. CONST. art. XIII, § 1</u>          “The Legislature shall establish and maintain a <i>system of free public schools</i> wherein all the children of the State may be educated.”</p>
<p><b>PENNSYLVANIA CONSTITUTION</b>  <u>PA. CONST. art III, § 14</u>          “The General Assembly shall provide for the <i>maintenance and support of a thorough and efficient system of public education</i> to serve the needs of the Commonwealth.”</p>
<p><b>RHODE ISLAND CONSTITUTION</b>  <u>R.I. CONST. art. XII, §1</u>          “The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, <i>it shall be the duty of the general assembly to promote public schools</i> and public libraries, and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education and public library services.”</p>
<p><b>SOUTH CAROLINA CONSTITUTION</b>  <u>S.C. CONST. art. XI, §3</u>          “The General Assembly shall provide for the maintenance and support of a <i>system of free public schools open to all children in the State</i> and shall establish, organize and support such other public institutions of learning, as may be desirable.”</p>

<p><b>TENNESSEE CONSTITUTION</b>  <u>TENN. CONST. art. 11, §12</u>                  “The State of Tennessee recognizes the inherent value of education and encourages its support. <i>The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools.</i> The General Assembly may establish and support such postsecondary educational institutions, including public institutions of higher learning, as it determines.”</p>
<p><b>UTAH CONSTITUTION</b>  <u>UTAH CONST. art. X, § 1</u>                  “The Legislature shall provide for the <i>establishment and maintenance of the state’s education systems including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system.</i> Both systems shall be free from sectarian control.”  <u>UTAH CONST. art. X, § 2</u>                  “The public education system shall include <i>all public elementary and secondary schools</i> and such other schools and programs as the Legislature may designate. . . . Public elementary and secondary schools shall be free, except the Legislature may authorize the imposition of fees in the secondary schools.”</p>
<p><b>VIRGINIA CONSTITUTION</b>  <u>VA. CONST. art. VIII, § 1</u>                  “The General Assembly shall provide for a <i>system of free public elementary and secondary schools</i> for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained.”</p>
<p><b>WISCONSIN CONSTITUTION</b>  <u>WIS. CONST. art. X, § 3</u>                  “The legislature shall provide by law for the <i>establishment of district schools, which shall be as nearly uniform as practicable;</i> and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein.”</p>

As the emphasized sections demonstrate, the majority of constitutions mandate that legislatures create and fund *public schools*

and *public systems*. Only Alabama<sup>159</sup> and Iowa<sup>160</sup> lack constitutional language specifically directing the legislature to create and fund *public* schools. Georgia's constitution references "public education,"<sup>161</sup> but makes no mention of "schools" or a "system." In fact, a review of a listing of all state constitutional provisions maintained by the Education Commission of the States reveals that only four states (Alabama, Georgia, Iowa, and Vermont<sup>162</sup>) have non-specific, rather than specific constitutional provisions with regard to public education.<sup>163</sup> Why does this specificity matter? It matters because the language creates a constitutional context by which legislatures are bound, whatever discretionary programs of school choice they may elect to adopt.

These cases also clearly show that funding is the visible expression of a state's legislative realization of a constitutional goal. For some states, the constitution enshrines limitations on the use of funds for educational purposes, including explicitly prohibiting state support of private schools.<sup>164</sup> But even for those states that found voucher programs consistent with constitutional mandates, the funding for voucher programs was viewed as an *extra* educational expenditure.<sup>165</sup> Given the expansion of the various programs (e.g. the MPCP)<sup>166</sup> and the fact that many of voucher and voucher-like programs were

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159. ALA. CONST. art. XIV, § 256.

160. IOWA CONST. art. IX, 2d div., § 3.

161. GA. CONST. art. VIII, §1.

162. VT. CONST. art. II, § 68 ("Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth. All religious societies, or bodies of people that may be united or incorporated for the advancement of religion and learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities, and estates, which they in justice ought to enjoy, under such regulations as the general assembly of this state shall direct.").

163. *State Constitutions and Public Education Governance*, EDUC. COMMISSION STATES, <http://www.ecs.org/clearinghouse/17/03/1703.htm> (last updated Oct. 2000).

164. *Cain v. Horne*, 202 P.3d 1178 (Ariz. 2009) (en banc); *Owens v. Cong. of Parents, Teachers, & Students*, 92 P.3d 933 (Colo. 2004); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006); *La. Fed'n of Teachers v. Louisiana*, 118 So. 3d 1033 (La. 2013); *Hart v. State*, 2014 WL 6724598 (N.C. Super. 2014)..

165. *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, Nos. 11CA1856 & 11CA1857, 2013 WL 791140, at \*9 (Colo. App. Feb. 28, 2013), *cert. granted* *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, No. 13SC233, 2014 WL 1046020, at \*1 (Colo. Mar. 17, 2014); *Meredith v. Pence*, 984 N.E.2d 1213, 1223 (Ind. 2013); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio, 1999); *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998); *Davis v. Grover*, 480 N.W.2d 460, 474 (Wis. 1992).

166. For a discussion of the expansion of the MPCP, see Mead, *supra* note 55.

enacted (or expanded) during a period when the same legislatures made deep cuts in educational funding for public schools,<sup>167</sup> the question becomes whether support for vouchers has compromised the state's ability to fulfill its obligation to establish and fund district schools such that they meet the state legislature's constitutional duty to construct appropriate public education opportunities for the state's children. Or, to paraphrase the *Davis* court regarding the Milwaukee program: does the state's expansion and funding of a voucher, tax credit scholarship programs, and/or education savings account programs result in deprivations to public schools and school districts such that the legislature effectively denies students "the opportunity to receive the basic education in the public school system[?]"<sup>168</sup>

If data provided evidence of such damage, the reasoning of these cases would suggest that the voucher or voucher-like program could only be funded when adequate financial resources are first directed to the public schools.<sup>169</sup> It also suggests that future challenges to voucher, tax credit scholarship programs, and education savings account programs may take the form of school finance litigation. That is, rather than challenging the voucher programs or voucher-like programs directly, the litigation strategy may be more indirect, as part of an overall constitutional challenge to the state's public school finance scheme. Plaintiffs may argue that the system of school finance is unconstitutional because of the legislature's commitment to subsidies for private education, and the strongest case would be one that provided statistical evidence of such a link.

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167. For example, the Wisconsin legislature cut a total of \$792 million of state aid to school districts and also reduced local districts' taxing authority by \$1.6 billion over a two-year period. 2011 Wis. Act 32 (June 30, 2011); see also JAMES SHAW & CAROLYN KELLEY, UNIV. OF WISCONSIN-MADISON ELPA POLICY BRIEF, MAKING MATTERS WORSE: SCHOOL FUNDING, ACHIEVEMENT GAPS AND POVERTY UNDER WISCONSIN ACT 32 (2012), available at <http://elpa.education.wisc.edu/docs/elpa-documents/shawandkelleybrief.pdf>. In fact, a recent analysis demonstrates that the Wisconsin State Legislature now spends 15.3% less on support to local school districts when comparing fiscal year 2014 to fiscal year 2008. Michael Leachman & Chris Mai, *Most States Funding Schools Less Than Before the Recession*, CENTER ON BUDGET & POL. PRIORITIES (May 20, 2014), <http://www.cbpp.org/cms/?fa=view&id=4011>. That same analysis found the following cuts for other voucher states: Alabama (-20.1%), Arizona (-17.2%), Arkansas (-5.2%), Colorado (-7.1%), Florida (-3.9%), Georgia (-14.8%), Iowa (-11.7%), Kansas (-16.5%), Louisiana (-4.1%), Mississippi (-13.1%), Montana (-0.9%), North Carolina (-8.6%), Ohio (-0.4%), Oklahoma (-22.8%), Pennsylvania (-5.9%), South Carolina (-15.7%), and Utah (-5.6%). *Id.*

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

169. See *supra* note 156 and accompanying text.

Even if statistical evidence does not substantiate causation, the specificity of the constitutional provisions suggests causation is not necessary. As in past challenges to school finance systems that asserted legislative violations of state constitution education clauses,<sup>170</sup> the claimants would assert that the legislature has neglected its obligation to equitably and/or adequately fund public schools.<sup>171</sup> They could then point to the existence of a voucher program as evidence that the legislature has funds available to support public education, but has elected to fund private education instead of fulfilling the constitution's mandate.<sup>172</sup> In other words, the constitutional obligation to fund public education exists, whether or not the legislature has created a private school voucher or voucher-like program.

Moreover, in states that have such programs, plaintiffs and the judges who may side with them would have new tools available to compel legislative attention to correct the constitutional infirmities.<sup>173</sup> For example, as a remedy for the constitutional violation, plaintiffs could request that the court enjoin the legislature from expanding existing voucher programs, enacting new voucher programs, enrolling new students in existing programs, or even funding existing programs at any level, until such time as re-investments in public schools correct the violations found. Courts may be less inclined to enjoin implementation of tax credits, especially if they view them as a decision not to tax,<sup>174</sup> but judges likewise may be less persuaded by state claims of poverty, since the size of the state fisc was voluntarily reduced by the legislature when it created the tax credits in the first place.<sup>175</sup> As the Ohio State Supreme Court explained:

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170. See, e.g., *DeRolph v. Ohio*, 754 N.E.2d 1184 (Ohio 2001), *vacated* 780 N.E.2d 529 (Ohio 2002); *Fair Sch. Fin. Council of Okla., Inc. v. Oklahoma*, 746 P.2d 1135 (Okla. 1987); *Vincent v. Voight*, 614 N.W.2d 388 (Wis. 2000).

171. See *DeRolph*, 754 N.E.2d 1184; *Fair Sch. Fin. Council of Okla.*, 746 P.2d 1135; *Vincent*, 614 N.W.2d 388.

172. As the outgoing chairman of the Wisconsin Assembly Education Committee, Republican Representative Steve Kestell remarked, “[n]o one has tried to explain how we’re going to fund parallel school programs. Because that’s where we’re heading.” Jason Smathers, *Outgoing Rep. Kestell Reflects on Legislative Career*, SHEBOYGAN PRESS, (Sept. 28, 2014, 10:41 PM), <http://www.sheboyganpress.com/story/news/local/2014/09/28/outgoing-rep-kestell-reflects-legislative-career/16408225/>.

173. For a discussion of the difficulties associated with school finance litigation, even for those plaintiffs who prevail, see Aaron Y. Tang, *Broken Systems, Broken Duties: A New Theory for School Finance Litigation*, 94 MARQ. L. REV. 1195 (2011).

174. See, e.g., *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1447 (2011); *Green v. Garriott*, 212 P.3d 96, 107 (Ariz. Ct. App. 2009).

175. For example, it is estimated that the Alabama Accountability Act will result in up to \$25 million less deposited to the state’s Education Trust Fund (ETF) each year.

We realize that the General Assembly cannot spend money it does not have. Nevertheless, we reiterate that the constitutional mandate must be met. The Constitution protects us whether the state is flush or destitute. The Free Speech Clause of the United States Constitution, the Equal Protection Clause of the United States Constitution, the Thorough and Efficient Clause of the Ohio Constitution, and all other provisions of the Ohio and United States Constitutions protect and guard us at all times.<sup>176</sup>

This link between adequate funding of the public system and fulfillment of constitutional obligations also sheds light on the issue of school accountability. Legislatures and voucher proponents often declare that the voucher program exists to give students a means to exit a substandard public school district.<sup>177</sup> While such an approach is within some states' legislative discretion, the primacy of the constitutional obligation to create "adequate,"<sup>178</sup> "efficient,"<sup>179</sup> "uniform,"<sup>180</sup> public schools that provide a "sound basic education"<sup>181</sup> would indicate that legislatures must do more than provide an alternative in the form of a voucher. Whatever the policy arguments in support of or in opposition to vouchers, tax credits, and education savings accounts, they do nothing to alter the fact that state constitutions obligate legislatures to ensure that the public school options are of sufficient quality to deliver the right to an education envisioned by the framers of the state's constitution.<sup>182</sup> The option to choose through a voucher or tax credit, then, is only permissible if the legislature has ensured through policy and appropriations that the public options are worth choosing. To fulfill state constitutional mandates, a legislature may permissibly have a public school system

*See, e.g.,* Boyd v. Magee, No. 03-CV-2013-901470, 2014 WL 2404288, at \*5 (Ala. Cir. Ct. May 28, 2014), *aff'd in part, rev'd in part sub nom.* Magee v. Boyd, Nos. 1130987, 1131020 & 1131021, 2015 WL 867926 (Ala. 2015).

176. DeRolph v. Ohio, 780 N.E.2d 529, 532 (Ohio 2002).

177. *See, e.g.,* Zelman v. Simmons-Harris, 536 U.S. 639, 644-45 (2002); JOHN CHUBB & TERRY MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS (1990); *see also* Herbert J. Walberg & Joseph L. Bast, *School Choice: The Essential Reform*, 13 CATO J. 101 (1993).

178. *See, e.g.,* FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1.

179. *See, e.g.,* OHIO CONST. art. VI, § 2; PA. CONST. art. III, § 14.

180. *See, e.g.,* ARIZ. CONST. art. XI, § 1; COLO. CONST. art. IX, § 2; IND. CONST. art. VIII, § 1.

181. *See, e.g.,* Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997); Vincent v. Voight, 614 N.W.2d 388, 396 (Wis. 2000).

182. Some courts have concluded that state constitutional provisions create a "fundamental" right to an education. *See, e.g.,* Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973); Clinton Mun. Separate Sch. Dist. v. Byrd, 477 So. 2d 237, 240 (Miss. 1985); *Leandro*, 488 S.E.2d at 255; *Vincent*, 614 N.W.2d at 396.

without choice, but it may not have choice without first ensuring a strong public school system.

The third pattern apparent in a review of these cases is that governance, not funding, dictates whether a school is public or private. Funding alone does not render a school “public” for the purposes of the education clauses of state constitutions.<sup>183</sup> State legislatures may create whatever conditions they wish for private schools to participate in voucher and tax credit scholarship programs, but that participation does not alter the fact that schools remain private schools. These cases demonstrate the rejection of the argument that public funding creates a new form of “district” or “public” school.<sup>184</sup> Even if, as occurs in Milwaukee, *all* of a school’s students are supported by a publicly funded voucher, that school remains private if it was not created pursuant to legislative enactment.<sup>185</sup>

This recognition evokes the final issue these cases illustrate, that of uniformity. Take, for example, the observation of the Indiana Supreme Court that “[t]he voucher program does not alter the makeup or availability of Indiana public or charter schools.”<sup>186</sup> Although the court assumed the veracity of its statement, evidence may suggest that a voucher program does, in fact, “alter the makeup” of traditional public schools.

The recent complaint by the American Civil Liberties Union (ACLU) and Disability Rights Wisconsin (DRW) against the Wisconsin Department of Public Instruction filed with the U.S. Department of Justice provides a case in point.<sup>187</sup> The complaint alleged that the state, through the MPCP, discriminated against children with disabilities in violation of Title II of the Americans with Disabilities Act<sup>188</sup> and Section 504 of the Rehabilitation Act<sup>189</sup> by implementing a state funded voucher program that was not accessible to all children. The complainants pointed to the small proportion (less than two percent) of students with disabilities enrolled in the MPCP as compared with Milwaukee Public Schools (MPS)

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183. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999); *Jackson v. Benson*, 578 N.W.2d 602, 627 (Wis. 1998).

184. *Simmons-Harris*, 711 N.E.2d at 212; *Jackson*, 578 N.W.2d at 627.

185. See Letter from Tony Evers to Members of the Joint Comm. on Fin., *supra* note 5; see also *Mead*, *supra* note 55.

186. *Meredith v. Pence*, 984 N.E.2d 1213, 1220 (Ind. 2013).

187. See Complaint, *supra* note 6.

188. 42 U.S.C. §§ 12131–65 (2006).

189. 29 U.S.C. § 794 (2006).

(approximately twenty percent ),<sup>190</sup> arguing that private schools' lack of services resulted in the effective segregation of children with disabilities in MPS.<sup>191</sup> In April 2013, the Department of Justice issued a letter of finding to the State Superintendent, directing the agency to take more active steps to ensure that its voucher program was implemented in a non-discriminatory manner.<sup>192</sup>

The concentration of children with disabilities in the public system may also weigh in any uniformity calculus. High proportions of children with disabilities will likely compromise the education of children with disabilities because of the high costs needed to meet federal requirements,<sup>193</sup> and may compromise the education of children without disabilities by diverting general funds to meet the costly needs of the special education programming. If a voucher program siphons children without disabilities into private schools, thereby concentrating students with disabilities and other special needs in the public system, has the state effectively constructed a public district or districts that are no longer uniform in comparison to other public schools? Each voucher and voucher-like program, including the conditions the private schools must meet to participate, exists by legislative design. Academics have long cautioned that voucher programs would result in public schools being obligated to serve those students whom private schools rejected because of a lack of adequate programming.<sup>194</sup> However, the means to address this problem is a matter of legislative will. Either the legislature can make adequate special programming a condition of private school participation, or direct (and fund) existing educational authorities to provide those services in private schools that accept vouchers or

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190. At the time of the complaint, the percentage of students with disabilities served in MPCP schools was only 1.6%, while 19.5% MPS students had disabilities. Complaint, *supra* note 6, at 10.

191. *Id.*

192. Letter from Educ. Opportunities Section, Civil Rights Div., U.S. Dep't of Justice, to Tony Evers, Wis. State Superintendent of Pub. Instruction (Apr. 9, 2013).

193. Special education for children with disabilities is governed by the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–82 (2012); 34 C.F.R. § 300 (2014).

194. *See, e.g.*, Julie K. Underwood, *Choice is Not a Panacea*, 71 EDUC. L. REP. 599 (1992).

If a voucher program does not take this into consideration, two things will happen. First, the schools will become segregated in that few handicapped or at-risk students will be served in the private Choice schools. Secondly, the costs for the resident public school district will increase as the children in need of expensive programs remain in the public schools.

*Id.* at 607.



participate in scholarship programs.<sup>195</sup> If the state-created programs do not guarantee non-discriminatory access to children with special needs, it is so because the legislature elected not to attend to the issue.<sup>196</sup> Voucher programs that result in racially isolated public schools may likewise “alter the makeup” of public schools.<sup>197</sup> The history of vouchers as a means to evade desegregation would suggest that legislatures may not turn a blind eye to the predictable outcomes of subsidizing parental choices.<sup>198</sup> Accordingly, the effect of a voucher program over time may provide evidence that it subverts, rather than serves an appropriate public purpose, and it may suggest that “applied” rather than “facial” challenges to voucher programs may better litigate the programs’ constitutionality according to state constitutional education mandates.

### CONCLUSION

In reaching its conclusion in *Meredith v. Pence*, the Indiana Supreme Court found “[t]he plaintiffs proffer no evidence that maximum participation in the voucher program will *necessarily* result in the elimination of the Indiana public school system.”<sup>199</sup> By doing so, the court also signaled the constitutional limitation of any voucher program. If plaintiffs challenging a publicly funded voucher or voucher-like program can proffer the evidence that maintenance of the program results in the elimination of or hinders the delivery of the public school system, or even that it evidences the legislature’s willful neglect of public schools, state constitutional guarantees would suggest the choice program cannot be sustained.

For it is through those constitutional provisions that states have defined what is *public* about public education including dimensions

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195. For a discussion of how that might be accomplished, see Julie F. Mead, *Including Students With Disabilities In Parental Choice Programs: The Challenge of Meaningful Choice*, 100 EDUC. L. REP. 463 (1995).

196. Even though the participation of children with disabilities in the MPCP was raised from the beginning of the program, see *Davis v. Grover*, 464 N.W.2d 220 (Wis. Ct. App. 1990), *rev’d* 480 N.W.2d 460 (Wis. 1992), and the program has been amended twenty times, no changes to the program have addressed this issue. See Mead, *supra* note 55.

197. See KEVIN G. WELNER, NAT’L EDUC. POLICY CTR., UNIV. OF COLO. BOULDER, MUCH ADO ABOUT POLITICS (AND MUCH IGNORED IN RESEARCH EVIDENCE): ANALYZING THE VOUCHER/DESEGREGATION DISPUTE BETWEEN GOV. JINDAL AND THE US DEPARTMENT OF JUSTICE (2013), *available at* <http://nepc.colorado.edu/publication/much-ado>.

198. See Mead, *supra*, note 32.

199. *Meredith v. Pence*, 984 N.E.2d 1213, 1223 (Ind. 2013).

beyond public funding alone.<sup>200</sup> At a minimum, public-ness also includes public purpose,<sup>201</sup> public access,<sup>202</sup> public accountability,<sup>203</sup> and public curriculum.<sup>204</sup> Vouchers and neo-voucher programs preserve public funding, but diminish or eliminate the other four aspects of public-ness. It is certainly true that parents may not be compelled to enroll their children in public schools,<sup>205</sup> but it is equally true that state constitutions compel state legislatures to create and maintain public schools so that they are available to the state's children nonetheless. In the future, the citizens of a state may elect to repeal or revise those specific constitutional mandates and re-define public-ness, but unless or until they do, legislatures are bound by those provisions, for "custom and convenience cannot contravene constitutional constraints."<sup>206</sup> The state constitutional obligation of state legislatures to fund and nurture the common public school is paramount and may not be subordinated to a legislative desire to subsidize the private choices of individual parents. Legislatures *may* enact private school choice provisions, but state constitutions direct that legislatures *must* provide public schools. State constitutions have clearly established that children have a genuine right to a quality public education, not merely the privilege to shop for schooling in the educational marketplace.

200. Garcia, *supra*, note 4 and accompanying text.

201. *See, e.g.*, IND. CONST. art. VIII, § 1 (acknowledging that "[k]nowledge and learning, generally diffused throughout a community, [is] essential to the preservation of a free government . . .").

202. *See, e.g.*, UTAH CONST. art. X, § 1 ("The Legislature shall provide . . . a public education system, which shall be open to all children of the state . . .").

203. *See, e.g.*, OHIO CONST. art. VI, § 2 ("The general assembly . . . will secure a thorough and efficient system of common schools throughout the state . . .").

204. *See, e.g.*, IOWA CONST. art. IX, 2d div., § 3 ("The general assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement.").

205. *See* *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925). It is also clear that while parents cannot be compelled to enroll their children in public schools, states are under no obligation to fund parents' private choices. *Id.*

206. *La. Fed'n of Teachers v. Louisiana*, 118 So. 3d 1033, 1054 (La. 2013). The Florida Supreme Court made a similar observation in finding vouchers inconsistent with the state's education clause. *See* *Bush v. Holmes*, 919 So. 2d 392, 412–13 (Fla. 2006) ("This limit is necessitated by the constitutional mandate in article IX, section 1(a), which sets out the state's responsibilities in a manner that does not allow the use of state monies to fund a private school education. As we recently explained, '[w]hat is in the Constitution always must prevail over emotion. Our oaths as judges require that this principle is our polestar, and it alone.'" (quoting *Bush v. Schiavo*, 885 So. 2d 321, 336 (Fla. 2004))).