NOTES

A UNIFORM CHOICE? ESAs AND THE STATE RIGHT TO EDUCATION

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INTRODUCTION

Education savings accounts (ESAs) are on the rise. Just since 2023, ESAs have been on the legislative docket in Alabama, Georgia, Iowa, Montana, Ohio, Texas, Tennessee, and Wyoming, with ESAs already active in eleven other states.[1] These programs provide funds

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1 *See, e.g.*, Editorial, *School Choice for All in Alabama*, WALL ST. J. (March 10, 2024, 4:59 PM ET), https://www.wsj.com/articles/alabama-school-choice-education-savings-accounts-kay-ivey-e0c87dc4 [https://perma.cc/2UU7-E6WW]; Jeff Amy, *Georgia House Speaker Aims to Persuade Resistant Republicans in Voucher Push,* ASSOCIATED PRESS (March 13, 2024, 5:02 PM EDT), https://apnews.com/article/georgia-education-school-vouchers-savings-accounts-9a1b83ca2a3bd0d1b6bc668a9e1402a4 [https://perma.cc/KNH5-Y8HF]; Tom Barton, *More than 29,000 Apply for Iowa Education Savings Accounts*, GAZETTE (Jul. 6, 2023, 2:57 PM), https://www.thegazette.com/state-government/more-than-29000-apply-for-iowa-education-savings-accounts-majority-of-approved-students-already-at/ [https://perma.cc/4Q9N-43TQ]; Alex Sakariassen, *Montana Prepares to Launch New Education Savings Accounts*, MONT. FREE PRESS (Jan. 11, 2024), https://montanafreepress.org/2024/01/11/opi-education-savings-accounts-steering-committee/ [https://perma.cc/7ZJC-DYSC]; Jo Ingles, *Ohio Bill Would Provide Savings Accounts for Kids Attending Non-Chartered Religious Schools*, STATEHOUSE NEWS BUREAU (Jan. 18, 2024, 4:08 PM EST), https://www.statenews.org/government-politics/2024-01-18/ohio-bill-would-provide-savings-accounts-for-kids-attending-non-chartered-religious-schools [https://perma.cc/GF8T-69NW]; Phil Prazan, *Passing the Texas Senate, Education Savings Accounts Have Tougher Road in House*, NBC 5 DALL.-FORT WORTH (Oct. 15, 2023, 2:14 PM), https://www.nbcdfw.com/news/politics/lone-star-politics/passing-the-texas-senate-education-savings-accounts-have-tougher-road-in-house/3360879/ [https://perma.cc/3KGP-SSLG]; Sam Stockard, *Lawmakers: Governor to Push for Statewide Private School Vouchers in 2024*, TENN. LOOKOUT (Nov. 21, 2023, 2:49 PM), https://tennesseelookout.com/2023/11/21/east-tenn-

directly to parents on a per-child basis which can be used on any number of educational pursuits.[2] While ESAs are relatively young in the world of school choice, they are also the natural outgrowth of a greater push toward educational freedom for parents.[3] They join the ranks of more established programs like school vouchers, tax credits, and charter schools.

Unlike voucher and tax-credit programs where a child's enrollment in school corresponds to a set dollar amount that a school receives, ESAs allow parents to spend each child's funding in any number of ways. Parents may spend the entire amount on traditional schools, devote some money to tutors, or enroll their child in extracurricular activities after hours.[4] And these are just a few of the plethora of options that ESAs allow. Parents don't just choose schools: they choose classes and curricula.

The costs and benefits of ESAs are certainly a matter of live debate among legislators and policy advocates, but the legal viability of these savings plans is a separate pressing question.[5] Even if ESAs are a good idea, are they constitutional? Many states are already facing legal challenges to their ESA programs, but there has been little scholarship on just how viable these claims might be.

ESA challenges often involve the right to education—a right included in most state constitutions. The exact wording of these state educational provisions varies extensively, but they generally require that the state establish "a system of public schools" with a range of adjectives like "uniform," "efficient," "suitable," "adequate," and

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lawmaker-governor-to-push-for-statewide-private-school-vouchers-in-2024/ [https://perma.cc/BMH3-PB9D]; Ryan Lewallen, *Education Savings Accounts Bill Passes Wyoming Legislature*, COUNTY 17 (Mar. 12, 2024), https://county17.com/2024/03/12/education-savings-accounts-bill-passes-wyoming-legislature/ [https://perma.cc/W9Z7-GGHT]; *School Choice Facts & Statistics: About Education Savings Accounts*, EDCHOICE (Apr. 15, 2024), https://www.edchoice.org/school-choice/fast-facts/ [https://perma.cc/6FPH-M96J]. In the past two years, seven states have enacted new universal education savings account programs or have expanded existing program eligibility. NICOLE STELLE GARNETT & MICHAEL Q. MCSHANE, MANHATTAN INST., IMPLEMENTING K–12 EDUCATION SAVINGS ACCOUNTS 2 (2023).

2 GARNETT & MCSHANE, *supra* note 1, at 2.

3 *See* Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 VAND. L. REV. 1, 6 (2017).

4 Many states list out all the ways that parents may spend their ESA dollars. *See, e.g.*, ARIZ. DEP'T OF EDUC., PARENT HANDBOOK: EMPOWERMENT SCHOLARSHIP ACCOUNT PROGRAM SCHOOL YEAR 2023–2024, at 7–20 (2023).

5 For a helpful analysis of some leading concerns, see generally GARNETT & MCSHANE, *supra* note 1. Some of the most pressing pragmatic issues include parent information, school and provider preparation, regulations, program administration within states, and legal challenges. *Id.* at 1.

"thorough"—often lumped together as "uniformity provisions" for the sake of simplicity.[6]

These uniformity provisions have been central to school-choice litigation for a number of years, but it isn't entirely clear how ESAs fit within past state court decisions. In one sense, ESAs are just another form of school choice and perhaps should fit side-by-side with vouchers or tax credit programs. But in another sense, ESAs require a closer look at what it means for a state to fund a "system" of public education when parents no longer just choose a school system. Should courts consider ESA funds to be squarely within a state's system of public education? Should they be considered a separate legislative project? If separate, are ESAs constitutionally suspect if they undermine the existing system of public education? Some of these issues focus on the actual wording of state constitutional provisions; others center on the substantive guarantees underlying the right to education.

This Note uses past court decisions to argue that ESA programs fit well within the structural and substantive parameters of state uniformity clauses. Part I gives a consolidated history of uniformity clauses and the corresponding state right to education. Part II addresses past uniformity litigation and, in particular, the ill-founded use of *expressio unius* as a limiting principle in the state uniformity context. Part III then analyzes the constitutionality of ESAs within the substantive constraints of "adequate instruction" and "equal funding," which have often been used by courts to add substantive weight to uniformity provisions.

ESAs are new. And with any new legislative experiment come new questions of legality. But whether or not ESAs are a good idea should be left to state policymakers—state uniformity provisions are no bar.

I. STATE EDUCATION AND THE RISE OF EDUCATION SAVINGS ACCOUNTS

The U.S. Constitution never mentions education.[7] Even at the height of desegregation, when a federal right to education would have boosted support for a worthy cause, the Supreme Court instead reaffirmed that education is "the most important function of state

6 Garnett, *supra* note 3, at 63 (internal quotation marks omitted).

7 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution."); *see also* Denise A. Hartman, *Constitutional Responsibility to Provide a System of Free Public Schools: How Relevant is the States' Experience to Shaping Governmental Obligations in Emerging Democracies?*, 33 SYRACUSE J. INT'L L. & COM. 95, 95–96 (2005).

and local governments."[8] This statement rings true—states have always been the locus of education in America.[9] As early as 1779, Thomas Jefferson wrote and James Madison presented a bill calling for a system of free public schools, but they focused their efforts specifically in Virginia.[10] Although it would be many years before Virginia added a constitutional provision providing for a system of public schools,[11] state experimentation has been the educational norm.

Even so, the manner and method of state support for education has changed dramatically over time. Long before states existed, families and religious communities were dedicated to the education of the young. The first recorded private school was founded in 1606 by the Franciscan order in St. Augustine, Florida.[12] And as localities developed systems of government, public funds were comingled with those of previously existing private schools.[13] Very early in the Republic, states began their own initiatives to ensure that all children would have access to a system of education within the state. The first six states to reference schools in their constitutions were Pennsylvania (1776), Georgia (1777), Massachusetts (1780), North Carolina (1776), Connecticut (1818), and Rhode Island (1842).[14] Pennsylvania's 1776 constitution established county schools to encourage "useful learning" at "low prices."[15] Later states similarly established schools, and many opined to a greater degree on the good of education.[16] All fifty state constitutions now have a provision ensuring state support for education.[17]

Even though legislative efforts sometimes supplemented private schools in their endeavors to educate the young, this arrangement did not last forever.[18] Eventually states wanted to provide their own education in public schools. The common schools movement of the

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8 Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

9 *See generally* Carter Brace, Note, *Revisiting the "Tradition of Local Control" in Public Education*, 122 MICH. L. REV. 97 (2023).

10 *See A Bill for the More General Diffusion of Knowledge*, *in* 2 THE PAPERS OF THOMAS JEFFERSON 526 (Julian P. Boyd et al. eds., 1950); *see also* THOMAS JEFFERSON AND EDUCATION IN A REPUBLIC 22–23 (Charles Flinn Arrowood ed., 1930).

11 VA. CONST. of 1868, art. VIII, §§ 1, 3.

12 *History of Private Schools*, PARENTS DEFENDING EDUC., https://defendinged.org/resources/history-of-private-schools/ [https://perma.cc/3JXF-3LW6].

13 *Id.*

14 William E. Sparkman, *The Legal Foundations of Public School Finance*, 35 B.C. L. REV. 569, 572 n.9 (1994).

15 PA. CONST. of 1776, § 44.

16 *See, e.g.*, CONN. CONST. OF 1818, art. VIII.

17 EMILY PARKER, 50-STATE REVIEW: CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION 1 (2016).

18 *See* NANCY KOBER & DIANE STARK RENTNER, CTR. ON EDUC. POL'Y, HISTORY AND EVOLUTION OF PUBLIC EDUCATION IN THE US 1, 3 (2020).

nineteenth century dramatically expanded educational provisions in state constitutions. In 1834, fewer than half of state constitutions contained education provisions.[19] Just over thirty years later, every state but one had enacted educational provisions, and the language of the provisions often obligated the state to provide public education to all students.[20] In just a few decades, states transformed local education. Students could now learn reading, writing, and arithmetic at taxpayer expense for the good of the commonwealth. But early public schools often provided an education that differed in funding rather than in kind from their private counterparts.[21] States had no qualms about teaching their students moral and religious principles during the school day.[22]

Once states were thoroughly invested in education, the natural next question became whether all citizens should be required to demonstrate a similar commitment to the project—especially when many private school alternatives were run by disfavored religious sects or immigrant populations. If states could create their own schools on behalf of their citizens, could they also require citizens to participate in those schools? The Supreme Court put these concerns to rest in *Pierce v. Society of Sisters*, which held that parents have a federal constitutional right to send their children to private religious schools.[23] States could not compel participation in public schools. And as taxpayers continued to choose educational alternatives for their children, an inverse question arose: could states still fund private education? What about private *religious* education?

School choice debates have been especially thorny when religion is added to the mix. And these debates are far from settled. Education and religion in America are difficult—if not impossible—to separate.[24] By the time private school funding became a live debate,

19 Sara Aronchick Solow & Barry Friedman, *How to Talk About the Constitution*, 25 YALE J.L. & HUMANS. 69, 83 (2013). Eleven out of twenty-four state constitutions had language about education in 1834. *Id.*

20 *Id.* This meant that thirty-six out of thirty-seven states had educational provisions.

21 *Id.* at 83–84.

22 Ira C. Lupu, David Masci & Robert W. Tuttle, *Religion in the Public Schools*, PEW RSCH. CTR. (Oct. 3, 2019), https://www.pewresearch.org/religion/2019/10/03/religion-in-the-public-schools-2019-update/ [https://perma.cc/Y6R6-U4H5].

23 Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).

24 *See* R. FREEMAN BUTTS & LAWRENCE A. CREMIN, A HISTORY OF EDUCATION IN AMERICAN CULTURE 98 (1953) ("In a society where religious freedom is allowed but where education must be religious, a common public school system for all children is well nigh impossible."); *see also* Derek W. Black, *When Religion and the Public-Education Mission Collide*, 132 YALE L.J.F. 559 (2022) (arguing that religious liberty has been given primacy over public schools); Aaron Saiger, *School Funding Under the Neutrality Principle: Notes on a Post-*Espinoza *Future*, 88 FORDHAM L. REV. ONLINE 213, 224 (2020) (opining that there is "a plausible future—when the twin First Amendment commands that (a) the state not privi-

many states had already enacted constitutional provisions that expressly prevented the use of state funds in "sectarian" schools. Those no-aid provisions, often called "mini-Blaine amendments," were usually the product of virulent anti-Catholic sentiment in the nineteenth century.[25] The provisions often prevented state funding of private religious schools from ever getting off the ground. State governments in the twentieth century also had to consider the impact of the Federal Establishment Clause on school funding.[26]

With this constitutional backdrop, vouchers were the first successful modern school-choice experiment.[27] Vouchers were especially appealing because they provided a standardized approach to school choice that gave the government some distance (even if artificially) from direct funding of religious schools. Each child received a set dollar amount that followed a child to their school of choice.[28] In theory, the government funded parents who funded the private school.[29] And in 2002, the Supreme Court confirmed that the Establishment Clause did not prohibit these programs, even when state money went to religious schools.[30]

Lingering federal questions remained. While *Zelman v. Simmons-Harris* opened the door to school-choice programs with religious schools, the Supreme Court remained silent for almost two decades on whether states could nonetheless choose to exclude religious schools from their programs. In *Espinoza v. Montana Department of Revenue* and *Carson v. Makin*, the Court held that a state could not

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lege irreligion over religion, and (b) state schools themselves can have no religion—might be thought to demand public funding of religious schools, at levels equal to funding for public schools").

25 For a more extensive treatment of Blaine amendments, see Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2268–69 (2020) (Alito, J., concurring). After a federal no-aid provision failed to pass, many states were required to enact mini-Blaine Amendments as a condition of entering the Union. The word "sectarian" often denoted explicitly Catholic education. *Id.*; *see also* 3 W. COLE DURHAM & ROBERT SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 25:14 (2d ed. 2023), Westlaw (database updated Dec. 2023); Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 576 (2003).

26 *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1 (1947).

27 *See School Choice FAQs*, EDCHOICE, https://www.edchoice.org/school-choice/faqs/ [https://perma.cc/6U8L-YZDC] (noting that Wisconsin passed a voucher program in 1991).

28 *See Types of School Choice*, EDCHOICE, https://www.edchoice.org/school-choice/types-of-school-choice/ [https://perma.cc/8BLW-Q5ND].

29 *Id.*

30 Zelman v. Simmons-Harris, 536 U.S. 639, 663 (2002) (finding that Ohio's voucher program did not violate the Establishment Clause).

exclude religious schools from any generally available public benefit—including education.[31]

The *Espinoza* ruling coincided with an increased interest in alternative education during the COVID-19 pandemic.[32] Within the past few years, educational alternatives have increased exponentially in many states.[33] States have continued to enact voucher programs, tax credit programs, and charter schools. And the policy debates over these programs have also continued apace. School choice has been called alternately a vehicle for discrimination[34] or a humane way to build up the urban poor.[35] Some educators have expressed concern about resources for children with disabilities.[36] Others have focused on the societal repercussions of additional schools.[37] And others have focused on the market impact.[38] "[W]hat's best for kids" and educational opportunities drive the arguments on both sides.[39]

As policy debates have fluctuated dramatically, state constitutional questions have solidified. Even though state no-aid provisions are still present in thirty-six state constitutions, they are (or should

31 Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020) ("A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."); Carson v. Makin, 142 S. Ct. 1987, 2002 (2022).

32 *See* Peter Hughes, Note, *School Choice: The Landscape After* Espinoza v. Montana Department of Revenue *and Contemporary Political Polarization*, 45 U. ARK. LITTLE ROCK L. REV. 145, 174 (2022).

33 *See* Karen D'Souza, *Parents Who Switched to Alternative Schools Amid Pandemic Are Sticking*, EDSOURCE (Sep. 13, 2023, 9:14 AM), https://edsource.org/updates/parents-who-switched-to-alternative-schools-amid-pandemic-are-sticking [https://perma.cc/EGW5-3LP6].

34 *See Understanding Vouchers*, P'SHIP FOR THE FUTURE OF LEARNING, https://truthinedfunding.org/about [https://perma.cc/V79C-VWUL].

35 *See, e.g.*, John E. Coons, *School Choice as Simple Justice*, FIRST THINGS (April 1992), https://www.firstthings.com/article/1992/04/school-choice-as-simple-justice [https://perma.cc/D2KA-KYZT].

36 *See, e.g.*, Claire Raj, *Coerced Choice: School Vouchers and Students with Disabilities*, 68 EMORY L.J. 1037 (2019).

37 Nicole Stelle Garnett, *Decoupling Property and Education*, 123 COLUM. L. REV. 1367, 1408 (2023) ("Parental-choice policies therefore serve an economic development function . . . . Decoupling property and education also can help address the troubling and persistent pattern of economic stratification and segregation within U.S. metropolitan areas by reducing barriers to intrametropolitan mobility, including exclusionary zoning.").

38 This argument largely centers on the idea that vouchers are good because they get the government out of education altogether, an argument that follows in line with the libertarianism of John Stuart Mill. In essence, there is an individual liberty interest in teaching the child to be free from state-prescribed orthodoxy. *See* Aaron Tang, *School Vouchers, Special Education, and the Supreme Court*, 167 U. PA. L. REV. 337, 353 (2019).

39 *Id.* at 354.

be) largely defunct after *Espinoza*.[40] But state no-aid provisions were never the only interpretive key to school funding. The primary state right to education usually comes from uniformity provisions that establish public schools while bestowing a right to education that is "uniform," "efficient," "suitable," "adequate," and/or "thorough." And these provisions are the backbone of school-choice debates that run parallel to—and often intersect—the debates over funding for religious schools.

The Federal Constitution does not answer these questions. After *Brown v. Board of Education*, scholars speculated that education might soon be treated as a constitutional right, especially given the Court's concern over segregation and failing schools.[41] *San Antonio Independent School District v. Rodriguez* put this idea to rest.[42] The Court held that state education financing systems required only rational basis review because there is no fundamental right to education in the Federal Constitution.[43] Not only did the Court refuse to second-guess state funding schemes, but it also made Federal Equal Protection claims nonviable. In its own words, the Court lacked "specialized knowledge and experience" in educational policy which "counsels against premature interference with the informed judgments made at the state and local levels."[44] Education clauses have remained under state control ever since.

Although education provisions had been important to establish public schools, state courts did not begin to interpret those clauses until the latter half of the twentieth century. The 1970s, '80s, and '90s saw a rise in school financing cases where plaintiffs would argue that educational funds were being spent in unequal and discriminatory ways.[45] These suits alleged that such an education arrangement was not "minimally adequate" under state education provisions.[46] State courts responded by developing a positive right to education within the state.[47] Whether state judges discovered a new right to education or merely exposited a preexisting right is the subject of legal

40 *See* 3 DURHAM & SMITH, *supra* note 25, § 25:14.

41 Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

42 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

43 *Id.* at 55.

44 *Id.* at 42.

45 *See* Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1325 (1992).

46 *Id.*

47 *Id.* at 1326.

debate and varies by state provision, but state education clauses certainly contain more positive rights language than the Federal Constitution.[48] By 1992, roughly twenty-five state supreme courts had considered the meaning of state constitutional requirements for education.[49] Some courts chose to mirror the Supreme Court's reasoning in *San Antonio School District* and avoided the conclusion that education was a fundamental right within the state constitution.[50] But other states took the opportunity to demonstrate that education was a legally enforceable constitutional guarantee.[51] Those states that considered education a legally enforceable right used inputs like money to signal whether or not a district had an educational deficiency.[52] Once courts embraced their roles as educational arbiters, they could not easily back out even when education suits proliferated.[53] But even for the most aggressive state courts, decisions often cited explicit constitutional language to justify any disagreement with legislative judgments. [54] At least in theory, legislative deference remains an operative principle in education law.

ESAs exist right in the middle of these long-standing school-choice debates and rapidly developing state constitutional law. By the time Arizona created the first ESA in 2011, other school-choice options like vouchers, charter schools, and tax scholarship programs had already been tried in many states.[55] Seventeen states now have active ESA programs, with several other new ESA programs on the legislative docket.[56] But unlike vouchers and tax credit programs, ESAs are almost entirely uncoupled from traditional education institutions and rely on parental choice at every level of education decisions. These "savings accounts" are publicly funded, government-

48 *See, e.g.*, MONT. CONST. art. X, § 1 ("It is the goal of the people to establish a system of education which will develop the full educational potential of each person."); R.I. CONST. art. XII, § 1 ("The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools and public libraries.").

49 *See* Hubsch, *supra* note 45, at 1325 n.1 (citing cases in Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Kentucky, Maryland, Michigan, Montana, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Washington, West Virginia, Wisconsin, Wyoming, New Hampshire, and North Carolina).

50 *See id.* at 1326.

51 *See id.*

52 *See id.* at 1330.

53 *See* Joshua E. Weishart, *Aligning Education Rights and Remedies*, 27 KAN. J.L. & PUB. POL'Y 346, 347 (2018) (describing the escalation of education lawsuits).

54 *See* Hubsch, *supra* note 45, at 1326.

55 *School Choice Facts & Statistics*, *supra* note 1.

56 As of September 2024, these states include Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Iowa, Louisiana, Mississippi, Montana, New Hampshire, North Carolina, South Carolina, Tennessee, Utah, West Virginia, and Wyoming. *Id.*

authorized accounts that may be used by parents to fund multiple educational endeavors but may be restricted to certain types of funds.[57] Parents may be familiar with this sort of arrangement through health savings accounts or other specialized-use cards. Some states allow universal ESAs that are available to every school-aged child, while some states limit ESA accounts based on need or disability.[58] At the time this Note was drafted, the Texas Senate had passed a bill that allocated $500 million to educational programs, including ESAs.[59] Alabama has also recently created a bill to enact an ESA plan into law that was filed in the Senate on February 6, 2024.[60] Many of the school-choice debates have tracked similar ideological lines over the years, but ESAs have tended to draw new lines of division. Texas is a prime example of this mix-up. Even though the bill passed the Texas Senate, rural House Republicans pushed to strike ESAs from the funding package over a concern for rural schools.[61]

The above examples help demonstrate how politically fraught ESA legislation may be on the front end. However, if successfully enacted, these programs are significantly less likely to be overturned on the back end under state uniformity clauses. The next Part examines some of the history and litigation of uniformity clauses in the school choice context.

II. STRUCTURAL UNIFORMITY LITIGATION AFTER *BUSH V. HOLMES*

Any state that enacts an ESA program will almost certainly have to defend it in court. Past challenges to school-choice programs have failed in state court.[62] This trend is perhaps unsurprising, given the

57 *What Is an Education Savings Account (ESA)?*, EDCHOICE, https://www.edchoice.org/school-choice/types-of-school-choice/education-savings-account/ [https://perma.cc/4KQR-XBEU].

58 Arizona, Florida, Utah, Arkansas, and Iowa allow universal ESAs while the other twelve states with ESA programs limit access to a certain subset of students. *See School Choice Facts & Statistics*, *supra* note 1.

59 Prazan, *supra* note 1.

60 Jemma Stephenson, *Bill to Create Education Savings Accounts Filed in Alabama Senate*, ALA. REFLECTOR (Feb. 6, 2024, 6:29 PM), https://alabamareflector.com/2024/02/06/bill-to-create-education-savings-accounts-filed-in-alabama-senate/ [https://perma.cc/EHJ6-HZA2].

61 *See* Monica Madden, Ryan Chandler & Kevin Baskar, *House Republicans Move to Kill Education Savings Accounts in School Finance Bill*, KXAN (Nov. 17, 2023, 8:43 PM CST), https://www.kxan.com/news/house-republicans-to-move-to-kill-education-savings-accounts-in-school-finance-bill/ [https://perma.cc/36YL-8SLC].

62 *See* Garnett, *supra* note 3, at 24, 62. But these litigation trends have the potential to change over time. Just this last year, plaintiffs filed a challenge to Wisconsin's decades-old school-choice program in response to the new composition of the state supreme court. Scott Bauer, *Wisconsin Supreme Court Weighs Case Seeking to End State's School Choice*

legislative deference often shown by state supreme courts. Almost half the state courts addressing educational equity cases have found that "the meaning of public education guarantees is a non-justiciable 'political question' reserved for legislatures to decide."[63] And so far, only Florida's high court has endorsed the argument that a parental-choice program violates a state uniformity guarantee.[64] Florida's decision was later cabined in such a way that multiple school-choice options now flourish in the state.[65] But as school-choice programs proliferate, so do the lawsuits.

ESA lawsuits have been brought on a variety of grounds. Just recently, the South Carolina Supreme Court invalidated a new ESA program based on a state provision that prevented public funds from directly benefiting religious or other private educational institutions.[66] Such state provisions may run afoul of the Supreme Court's holdings in *Espinoza* and *Carson*, but those debates are a subject for another day.[67] In 2022, Tennessee's high court sent back an ESA lawsuit for further review after finding that a lower court improperly held that ESAs implicated a home rule amendment.[68] The same year just one state away, the Kentucky Supreme Court found its state's new ESA program unconstitutional based on a provision that required state voter approval for funding not used for "common schools."[69]

Rather than examine every state constitutional issue that ESAs may face, the scope of this Part is narrow: it will address only the challenges for ESAs presented by state uniformity provisions. And the answer to the question of the constitutionality of ESAs in the uniformity context should be a resounding yes. ESAs fit within state court precedent and jurisprudence, both as a matter of textual interpretation and as part of a larger right to education expounded by some state courts.

Programs, AP NEWS (Nov. 14, 2023, 12:09 PM EST), https://apnews.com/article/wisconsin-school-choice-lawsuit-supreme-court-9a22429adcc029be30eccc6a0b3eaf22 [https://perma.cc/8T4D-A4VD].

63 *See* GARNETT & MCSHANE, *supra* note 1, at 17.

64 Bush v. Holmes, 919 So. 2d 392, 398 (Fla. 2006).

65 *See* Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ., 232 So. 3d 1163, 1171–72 (Fla. Dist. Ct. App. 2017), *aff'd*, 262 So. 3d 127 (Fla. 2019).

66 *See* Eidson v. S.C. Dep't of Educ., 906 S.E.2d 345, 348 (S.C. 2024); S.C. CONST. art. XI, § 4.

67 *See supra* text accompanying notes 31, 40.

68 Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ., 645 S.W.3d 141, 145 (Tenn. 2022).

69 Commonwealth *ex rel.* Cameron v. Johnson, 658 S.W.3d 25, 35–36 (Ky. 2022).

State courts have varying interpretive approaches to their education clauses.[70] In general, state courts have used tactics like looking to "the plain meaning of the constitutional text, . . . historical evidence regarding the intent of the framers, . . . longstanding practice, [and] . . . judicial interpretations of similar language by other courts."[71] And because state courts often look across state lines, past litigation—even from other courts—is a good guide for how ESAs fit within state uniformity provisions on the whole.

To begin, any analysis of uniformity provisions must address *Bush v. Holmes*, a 2006 Florida Supreme Court case that found the state's school-choice program unconstitutional.[72] *Holmes* is uniquely relevant to ESA litigation because it is the first (and only) case to strike down a state school-choice program under a uniformity clause.[73] *Holmes* has been cited extensively by other state courts when addressing similar issues of interpretation, but no other state has adopted Florida's interpretation.[74] In 1999, Florida legislators enacted the Opportunity Scholarship Program, which offered benefits, including vouchers, to a broad group of students.[75] When families challenged the constitutionality of the program, the Florida Supreme Court ruled the entire voucher system unconstitutional, making Florida the first state to institute a statewide school-choice program *and* the first state to have its high court invalidate the program.[76]

In *Holmes*, the court focused on Florida's state Uniformity Clause, which states that "provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools."[77] The court interpreted this provision to exclude school choice by relying on an interpretive canon known as *expressio unius est exclusio alterius* ("the expression of the one is the exclusion of the other").[78] By utilizing *expressio unius*, the court reasoned that this provision is a "comprehensive statement of the state's responsibilities

70 Molly O'Brien & Amanda Woodrum, *The Constitutional Common School*, 51 CLEV. ST. L. REV. 581, 585 (2004).

71 *Id.*

72 Bush v. Holmes, 919 So. 2d 392, 397–98 (Fla. 2006).

73 Richard W. Garnett & Christopher S. Pearsall, Bush v. Holmes: *School Vouchers, Religious Freedom, and State Constitutions*, 17 EDUC. & L. 173, 180 (2005).

74 *See, e.g.*, Meredith v. Pence, 984 N.E.2d 1213, 1223–24, 1224 n.17 (Ind. 2013) (discussing *Holmes* and declining to apply its reasoning); Schwartz v. Lopez, 382 P.3d 886, 898 (Nev. 2016) (finding plaintiffs' reliance on *Holmes* "inapposite").

75 *Opportunity Scholarship Program,* FLA. DEP'T OF EDUC., https://www.fldoe.org/schools/school-choice/k-12-scholarship-programs/osp/ [https://perma.cc/MQ8N-8RC6]; Garnett & Pearsall, *supra* note 73, at 174.

76 Garnett & Pearsall, *supra* note 73, at 180.

77 FLA. CONST. art. IX, § 1(a); *Holmes*, 919 So. 2d at 412.

78 *Holmes,* 919 So. 2d at 407.

regarding the education of its children."[79] In other words, the constitution excluded all education alternatives because it affirmatively provided for "free public schools."[80] In the eyes of the court, paying tuition at private schools was a "substantially different" method of education compared to funding public schools, and thus could not be funded by the state.[81] The *Holmes* court also rejected the idea that Article IX of the Florida Constitution establishes a floor for state education. It reasoned, "The provision mandates that the state's obligation is to provide for the education of Florida's children, specifies that the manner of fulfilling this obligation is by providing a uniform, high quality system of free public education, and does not authorize additional equivalent alternatives."[82] Fascinatingly, the Florida Supreme Court subsequently remained silent ten years later in 2016 when a Florida appellate court allowed a tax-credit scholarship to exist under the legislative tax power.[83] Despite the *Holmes* court's strong stance, the legislature still got its way in the end.

The court in *Holmes* applied *expressio unius* as a canon of construction because it reasoned that the provision was ambiguous, but it gave little direction as to why *expressio unius* should be prioritized over other canons of construction.[84] *Expressio unius* can dramatically limit the scope of a provision, sometimes nonsensically.[85] Precisely because of its power, many state courts have declined to use *expressio unius* to interpret constitutional provisions altogether—especially when it upsets the principle of legislative deference in state constitutional interpretation. The New Jersey Supreme Court has explained, "[*Expressio unius*] 'is not to be applied with the same rigor in construing a state constitution as a statute; . . . only those things expressed in such positive affirmative terms as plainly imply the negative of what is not mentioned will be considered as inhibiting the powers of the legisla-

79 *Id.* at 407–08.

80 *Id.* at 407. The court stated that the choice program "violates [the uniformity] 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."

81 *Id.*

82 *Id.* at 408. The dissent criticized the majority's particular method of statutory construction and lack of deference to legislative authority. *Id.* at 413–14 (Bell, J., dissenting).

83 *See* McCall v. Scott, 199 So. 3d 359 (Fla. Dist. Ct. App. 2016).

84 *Holmes*, 919 So. 2d at 408.

85 Without first establishing the right implementation context, *expressio unius* creates more problems than it solves. *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 940 (2017) ("The *expressio unius* canon applies only when 'circumstances support[] a sensible inference that the term left out must have been meant to be excluded.'" (alteration in original) (quoting Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 81 (2002))).

ture.'"[86] Not only does *expressio unius* upset the balance of power between courts and the legislature, but in this case, it imposes an artificial barrier on experimentation in a constitutional area uniquely poised to accommodate changes and growth, as demonstrated by the long history of systemic change within American education.

Other states have found that *expressio unius* is entirely unnecessary in the state educational context, for good reason. *Expressio unius* should be used only when a provision is ambiguous, and many courts have determined that uniformity provisions have a plain meaning.

Indiana took this approach in 2013 and expressly refused to rely on *expressio unius* when interpreting its own Education Clause.[87] The Indiana Constitution provides that "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."[88] When the Indiana legislature passed a school voucher program for low-income students, several taxpayers sued to prevent dispersal of school funds.[89] The court ruled the voucher program constitutional and did away with any use of *expressio unius* in a single footnote.[90] First, the court reasoned that canons of construction were unnecessary when "our constitutional analysis leads unmistakably to a given result."[91] Second, the court determined that Indiana's constitutional provision "to encourage, by all suitable means" contradicted the idea of an inherent limiting principle, even if the *Holmes* court read the Florida constitution otherwise.[92]

Nevada, likewise, found its state constitution unambiguous and refused to apply *expressio unius* to an ESA program. Article XI, Section 2 of the Nevada Constitution requires the legislature to provide

86 Gangemi v. Berry, 134 A.2d 1, 6 (N.J. 1957) (omission in original) (quoting State v. Martin, 30 S.W. 421, 424 (Ark. 1895)); *see also* State *ex rel.* Jackman v. Ct. of Common Pleas, 224 N.E.2d 906, 910 (Ohio 1967) ("[T]he maxim, *expressio unius est exclusio alterius*, 'should be applied with caution to provisions of constitutions relating to the legislative branch of the government, since it cannot be made to restrict the plenary power of the legislature.'" (quoting 16 C.J.S. *Constitutional Law* § 21(1956))); Dean v. Kuchel, 230 P.2d 811, 813 (Cal. 1951) ("[T]he express enumeration of legislative powers is not an exclusion of others not named unless accompanied by negative terms.").

87 Meredith v. Pence, 984 N.E.2d 1213, 1224 n.17 (Ind. 2013) ("[W]e are not persuaded by the plaintiffs' contention that we apply the canon of construction '*expressio unius est exclusio alterius*.'" (citing *Holmes*, 919 So. 2d at 407)).

88 IND. CONST. art. VIII, § 1.

89 *Meredith*, 984 N.E.2d at 1216–17.

90 *Id.* at 1216, 1224 n.17.

91 *Id.* at 1224 n.17.

92 *See id.* at 1224.

for "a uniform system of common schools."[93] Plaintiffs argued that the court should follow *Holmes*, but the majority declined to draw analogies between the two states' constitutional provisions.[94] The court determined that the Nevada provision is "directed at maintaining uniformity *within* the public school system" rather than among systems of schooling as a whole.[95]

New York's appellate court took a different approach to the state uniformity clause, but still found the school-choice program to be constitutional. The New York Constitution states that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."[96] The court assumed that charter schools were a separate system of education, but that the state constitution allowed multiple systems to exist simultaneously.[97]

The Supreme Court of Ohio narrowly determined that legislation in favor of school choice did not violate Ohio's uniformity provision.[98] Article VI, Section 2 of the Ohio Constitution provides that the General Assembly "will secure a thorough and efficient system of common schools throughout the State."[99] The majority concluded that charter schools were a constitutionally appropriate means of reforming public education and increasing educational options in Ohio, subject, as they were, to many of the same regulations that guaranteed school quality in the traditional public schools.[100] The majority further concluded that nothing in the Ohio Constitution prohibits the reduction in funding of traditional public schools when students exit for other options.[101]

More recently, West Virginia's highest court, the Supreme Court of Appeals, did not follow *Holmes* or apply *expressio unius* in its 2022

93 NEV. CONST. art. XI, § 2.

94 Schwartz v. Lopez, 382 P.3d 886, 898 (Nev. 2016).

95 *Id.* at 896 ("To accept the narrow reading urged by the plaintiffs would mean that the public school system is the *only* means by which the Legislature could encourage education in Nevada. We decline to adopt such a limited interpretation.").

96 N.Y. CONST. art. XI, § 1.

97 Brown *ex rel.* Stevens v. State, 39 N.Y.S.3d 327, 331 (N.Y. App. Div. 2016) ("[The provision's] purpose was to constitutionalize the traditional public school system, not to alter its substance. If that system—'which is what is to be maintained and supported'—offers students a 'sound basic education,' then 'the constitutional mandate is satisfied.'" (first citing N.Y. C.L. Union v. State, 824 N.E.2d 947, 951 (N.Y. 2005); then citing Paynter v. State, 797 N.E.2d 1225, 1229–30 (N.Y. 2003); and then quoting Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 369 (N.Y. 1982))).

98 State *ex rel.* Ohio Cong. of Parents & Tchrs. v. State Bd. of Educ., 857 N.E.2d 1148, 1151 (Ohio 2006).

99 OHIO CONST. art. VI, § 2.

100 *Ohio Cong. of Parents & Tchrs.*, 857 N.E.2d at 1158, 1166.

101 *Id.* at 1160; *see* Garnett, *supra* note 3, at 64.

school-choice case, *State v. Beaver*.[102] West Virginia had enacted the Hope Scholarship Act in 2021 to provide additional options for parents to meet the educational needs of their children.[103] The Act created individual education savings accounts that could be used only for specific educational purposes.[104] Two parents of public school children filed a complaint in early 2022 arguing that the Act was unconstitutional under Article XII, Section 1 of the West Virginia Constitution.[105] The constitutional provision at issue stated that "[t]he Legislature shall provide, by general law, for a thorough and efficient system of free schools."[106] Rather than following *Holmes*, the West Virginia court expressly declined to utilize *expressio unius* as a canon of construction.[107] The majority in *Beaver* never cited *Holmes*, but the dissent argued that West Virginia should have followed *Holmes*'s use of *expressio unius*.[108] The majority reasoned that "[t]he word 'only' does not appear in [the provision]" and "[t]he Constitution of West Virginia being a restriction of power rather than a grant thereof, the legislature has the authority to enact any measure not inhibited thereby."[109] In following the principle of legislative deference, the court also expressly dismissed the idea that they should consider the Act's fiscal soundness.[110]

In each of these states, the high court either expressly or implicitly declined to extend *Holmes*'s reasoning. And for good reason—*Holmes* stands alone in its application of *expressio unius* in the education context. The implications here are important: without *expressio unius*, state courts cannot assume that because a state constitution provides for one form of education (a state-run public school system) that it cannot also provide for other forms of education (like vouchers or ESAs). When states reject *expressio unius* and continue to espouse a principle of legislative deference,[111] new forms of school choice—like ESAs—are already well on their way to constitutionality. Unless a state court can point to another provision that expressly pre-

102 State v. Beaver, 887 S.E.2d 610, 627 (W. Va. 2022).

103 *Id.* at 620.

104 *Id.*

105 *Id.* at 621 & n.7, 623.

106 W. VA. CONST. art. XII, § 1.

107 *Beaver*, 887 S.E.2d at 627–28.

108 *Id.* at 641 (Hutchison, J., dissenting) ("West Virginia, like Florida, adheres to the interpretive canon of *expressio unius est exclusio alterius*.").

109 *Id.* at 619 (majority opinion) (emphasis omitted) (quoting Foster v. Cooper, 186 S.E.2d 837, 837 (W. Va. 1972)).

110 *Id.* at 624.

111 *See* John C. Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education 1776–1900*, 42 AM. J. LEGAL HIST. 1, 33 (1998).

vents legislative experimentation, new forms of school choice will continue to be upheld in court.

III. OTHER HURDLES FOR EDUCATIONAL UNIFORMITY

Even without the application of *expressio unius*, new forms of school choice still face some hurdles in the uniformity context, namely adequacy of instruction and equal funding.[112] Both of these restraints are more substantive than the structural limits artificially imposed by *expressio unius*. These constitutional constraints often arise when state courts determine that modifiers like "thorough," "uniform," or "adequate" are indicative of practical benchmarks inherent in the uniformity clause. Because a positive right to education is at the heart of many state uniformity provisions, litigants have been successful in arguing that a state can't just *have* a system of public education. The system has to be good. Concerns over adequacy of instruction and equal funding may create case-specific hurdles for ESA programs, but well-crafted programs should easily clear these bars.

Adequacy of instruction and equal funding constraints feature heavily in past cases, even though they are not the only possible interpretation of uniformity provisions. But because state courts often analogize their constitutions to those of other states, these requirements will likely feature even more heavily in future ESA litigation. This is especially true given that many states have yet to enact *any* form of school choice and many uniformity clauses lack robust state court analysis. New arguments are likely to resemble the old.

Although the United States Supreme Court declined to interpret state uniformity provisions based on a "lack of specialized knowledge and experience" in state and local matters, states have continued to interpret these provisions themselves.[113] State courts have often turned a nebulous "right to education" into practical benchmarks. The school finance decisions in the 1970s, '80s, and '90s often included allegations that education was not "minimally adequate"[114] and provided an opportunity for state courts to exposit a positive right to education within the state.[115] States have gone both ways. Georgia's high court cited the "inherent difficulty" of judicially man-

112 *See* Jamie Dycus, *Lost Opportunity:* Bush v. Holmes *and the Application of State Constitutional Uniformity Clauses to School Voucher Schemes*, 35 J.L. & EDUC. 415, 417, 441 (2006).

113 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973).

114 *See* Hubsch, *supra* note 45, at 1325.

115 *Cf.* Diane Ravitch, *Education in the 1980's: A Concern for 'Quality,'* EDUCATIONWEEK (Jan. 10, 1990), https://www.edweek.org/policy-politics/opinion-education-in-the-1980s-a-concern-for-quality/1990/01 [https://perma.cc/X456-Y6A8] (noting the shift of educational decisionmaking power from federal and local governments to state governments).

ageable standards when denying a constitutional requirement of educational quality or equality.[116] But in Washington, the high court reasoned that the court has "ultimate power and the duty to interpret, construe and give meaning to words, sections and articles of the constitution."[117] Even today, state views of educational rights remain fragmented in large part because of a desire to avoid judicial overreach into the plenary power of state legislators.[118] ESAs will almost certainly fare better in states with strong judicial deference, but even states that consider education to be a fundamental right will be unlikely to invalidate an ESA regime that takes the considerations below into account.

A. Adequacy of Instruction

In many states, uniformity provisions have been interpreted to require some "adequate" level of education. Adequate education has the primary goal of "prepar[ing] children to function as individual adults who possess a basic understanding of the world, who are capable and self-aware, and who interact with others in a complex and rapidly changing society."[119] These uniformity clauses usually contain relatively general language.[120] For example, California has held that its education system "must be uniform in terms of the prescribed course of study and educational progression from grade to grade."[121] Other state courts have sometimes interpreted adequate education as a foundational knowledge of "mathematics, physical science . . . language arts . . . music, visual art, performance art, and literature."[122] In Montana, the high court refused to treat an equality of education provision as aspirational only. It focused on the fact that the Montana Constitution "guarantees" the right of education (and in fact, this is the only right that Montana guarantees).[123] Arizona, Illinois, New Jersey, Texas, and Wisconsin courts have all held that their uni-

116 McDaniel v. Thomas, 285 S.E.2d 156, 165 (Ga. 1981).

117 Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 87 (Wash. 1978).

118 *See* Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 920 (2016).

119 Regina R. Umpstead, *Determining Adequacy: How Courts Are Redefining State Responsibility for Educational Finance, Goals, and Accountability*, 2007 BYU EDUC. & L.J. 281, 306–07.

120 *See* Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123, 136–38 (2008).

121 Serrano v. Priest, 487 P.2d 1241, 1249 (Cal. 1971).

122 Umpstead, *supra* note 119, at 307.

123 Helena Elementary Sch. Dist. No 1. v. State, 769 P.2d 684, 689 (Mont. 1989).

formity provisions explicitly mean adequate education, rather than equal funding or opportunity.[124]

Adequacy requirements often translate into some form of basic, concrete educational parameters. In Arizona, the court described the minimal constitutional requirements as "uniform, free, available to all persons aged six to twenty-one, and open a minimum of six months per year, . . . rational, reasonable and neither discriminatory nor capricious."[125]

Kentucky's high court in particular has created what has been described as a new "wave" in adequacy litigation.[126] In the 1989 case *Rose v. Council for Better Education*, the Kentucky Supreme Court held that the entire common school system was unconstitutional under the state adequacy provision.[127] The court cited various evidence that included school districts rated in the lower twenty to twenty-five percent in virtually every category and lack of uniformity among the districts.[128] "For the first time, courts invalidated educational finance systems not because the expenditures were unequal (the equity theory), but because some schools lacked the money to meet *minimum standards of quality* (the adequacy theory)."[129] The court cited expert witnesses who emphasized that efficiency should "impose no financial hardship[s] or advantage on any group of citizens," should provide "adequate and uniform" resources throughout the state, and "must not waste resources."[130]

Accountability has been a theme of adequacy litigation.[131] The federal government has been one instigator in this trend. In 2001, Congress enacted the No Child Left Behind Act, which provided both rewards and penalties for certain educational benchmarks.[132] In 2009, Congress revamped its educational approach and enacted the American Recovery and Reinvestment Act that required developing

124 *See, e.g.*, Vincent v. Voight, 614 N.W.2d 388, 411 (Wis. 2000) (stating that Wisconsin's "uniformity clause" guarantees a basic education but not an equal allocation of resources); s*ee also* Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL'Y 569, 572, 575, 577, 605 n.225 (2004).

125 Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973).

126 *See* Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. & C.L. 83, 93 (2010).

127 Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 203 (Ky. 1989).

128 *Id.* at 197.

129 William E. Thro, *Judicial Humility: The Enduring Legacy of* Rose v. Council for Better Education, 98 KY. L.J. 717, 720 (2009–2010) (emphasis added).

130 *Rose*, 790 S.W.2d at 210.

131 *See, e.g.*, Umpstead, *supra* note 119, at 311.

132 No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of the U.S. Code).

and adopting certain common standards.[133] And federal educational requirements through the Spending Clause continue to evolve over time.

Courts have also been influential in the rise of accountability programs. Massachusetts and Ohio have adopted formal accountability systems in response to court decisions, and the New York high court called for the development of some accountability system in 2003.[134] These formalized accountability systems may not directly change the scope of uniformity provisions, but they do provide a way for courts to increase the enforcement power of uniformity clauses by using these additional guidelines as a reference point. They also raise questions about accountability in alternative systems of education, like ESAs.

Adequacy measures always require state enforcement.[135] For states that are especially serious about meeting a set performance bar, school-choice options that reduce state oversight are prime targets for litigation. All school choice removes some level of state oversight in exchange for an increase in school *quantity*, but this trade-off may not be appealing to a state with heavy accountability guidelines when there is a possible decrease in *quality*. This is especially true with ESA programs, which allow maximum parental choice with relatively minimal state guidelines. Funds may go to only certain types of activities or supplies, but parents still have wide discretion over which mathematics textbook or which violin instructor. In the past, Nicole Garnett has noted that "all [private-school choice] programs require, at a minimum, that participating private schools comply with state regulations of private schools generally. Many limit participation to accredited schools and/or establish minimum qualification requirements for teachers—usually a bachelor's degree and/or substantial teaching experience."[136] But these sorts of requirements are not yet in place for ESA funding, which allows parents to directly hire tutors and choose curriculum. ESA advocates who want to avoid overregulation of ESAs may seek to distinguish ESAs from other methods of school choice for precisely this reason. In past litigation,

133 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 14001, 123 Stat. 115, 279 (2009); *see also* Nicole Stelle Garnett, *Post-Accountability Accountability*, 52 U. MICH. J.L. REFORM 157, 178–80 (2018); Janet Y. Thomas & Kevin P. Brady, *The Elementary and Secondary Education Act at 40: Equity, Accountability, and the Evolving Federal Role in Public Education*, 29 REV. RSCH. EDUC. 51 (2005).

134 Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1137–38 (Mass. 2005); DeRolph v. State, 677 N.E.2d 733, 748 (Ohio 1997); Larry J. Obhof, DeRolph v. State *and Ohio's Long Road to an Adequate Education*, 2005 BYU EDUC. & L.J. 83, 115; Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 345–47 (N.Y. 2003).

135 *See* Garnett, *supra* note 133, at 177–184.

136 *Id.* at 183.

plaintiffs have alleged that public school systems must be supervised in a specific way precisely *because* they are public schools.[137] While charter schools may fall under the same "school" category, ESAs simply are not a school in the same way.[138]

In this respect, ESA accountability may be more analogous to state homeschooling regulations than other models of school choice. The debates over homeschooling provoke similar concerns about parental oversight and individual child performance. This similarity is likely a net positive for ESA programs. First, legislators can point to successful homeschoolers to assuage fears of truant children unable to succeed in society. Second, all fifty states currently allow students to be homeschooled.[139] States have no reason to suppose that ESA parents will make worse educational choices for their children when those same parents could homeschool with no funding at all.

But homeschoolers have not been quite as happy to share a platform with ESAs. Regulatory strings have always been a concern for those who have concerns about undue government influence on their children,[140] and homeschoolers are often in this category. Before ESAs, homeschoolers could make a better case that they should have special exceptions to state accountability because of their unique position in the educational landscape. But once every student in the state has the same flexibility, it's harder to make the case for unique exceptions to state regulatory authority. If everyone's special, then no one is, or so the argument goes. The Homeschool Legal Defense Association (HSLDA), a nonprofit that exclusively provides legal support to homeschoolers, has repeatedly opposed ESA bills precisely because of a concern over increased regulation.[141]

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137 Garnett, *supra* note 3, at 64.

138 Garnett has also noted that "[m]ore recently, charter school proponents have begun to argue that the pervasive funding disparities between traditional public schools and charter schools run afoul of state uniformity challenges. Again, these lawsuits have—thus far—been unsuccessful." *Id.* at 65.

139 *Homeschool Laws: Which States Are Supporting Parental Choice?*, STATE POL'Y NETWORK (Mar. 25, 2021), https://spn.org/articles/homeschool-laws/ [https://perma.cc/VE6Z-RJJS].

140 *See* Susan L. DeJarnatt, *Oversight, Charter Schools, and a Thorough and Efficient System of Public Education*, 70 S.C. L. REV. 435, 440 (2018) ("To the extent those in government decide to include charters as one means by which education is provided, they must ensure oversight of the funds provided for charters in order to avoid the use of public funds that are spent to the detriment—not the benefit—of Pennsylvanians.").

141 *See, e.g.*, Jim Mason, *Don't Take the Money? The Risks of ESAs*, HOME SCH. LEGAL DEF. ASS'N, at 8:26 (April 24, 2023), https://hslda.org/post/dont-take-the-money-the-risks-of-education-savings-accounts-ep-110 [https://perma.cc/VLD8-C7CY]; James R. Mason, *The Civic Virtue of Private Home Education: How I Learned to Stop Worrying and Oppose So-Called Education Savings Accounts for Homeschoolers*, HOME SCH. LEGAL DEF. ASS'N (Aug. 1, 2018), https://hslda.org/post/the-civic-virtue-of-private-home-education [https://

This argument is not entirely ill founded, but it misses the legal reality in most states. State governments certainly have a clear interest in making sure their money is well spent. In that sense, ESAs can open the door to government regulation. The most comprehensive ESA bills assuage these concerns by including religious liberty provisions that legally protect the autonomy of schools and individuals.[142] But while state education financing may increase the incentive for regulation, states have power to regulate private choices even in the absence of direct funds. For example, Oregon has no private school choice, but it has stricter homeschool requirements than many states with functioning ESA programs like Iowa.[143] Oregon requires homeschoolers to notify the state of their intent to homeschool and to complete periodic assessments in grades 3, 5, 8, and 10, while Iowa has five different homeschooling options with varying levels of state involvement—none of which require state testing unless students opt into a program called Independent Private Instruction.[144] States also already regulate private schools by requiring state history in certain grades or standardized tests each year.[145] These requirements may or may not be a good idea, but in states with adequacy requirements, courts are unlikely to oppose basic benchmarks like testing, whether or not ESA programs become the norm.

In the federal arena, the unconstitutional conditions doctrine prevents states from creating programs that require individuals to

perma.cc/6ENN-CTDK] (calling ESA programs "poisonous to the homeschooling movement" because they "place the responsibility for *approving* private educational options in the hands of the state"); Dave Dentel, *How ESA Funding Could Undermine Homeschool Freedom*, HOME SCH. LEGAL DEF. ASS'N (Feb. 29, 2024), https://hslda.org/post/how-esa-funding-could-undermine-homeschool-freedom [https://perma.cc/GL46-8GFR]. As of 2023, Arkansas and Utah's ESAs are available to all students; Iowa and Florida allow home education with ESAs but create a separate legal category; Virginia, Idaho, Missouri, and Maine sought to make ESAs available for all students, but these bills were opposed by homeschool advocates and they did not pass; and Oklahoma created a new tax credit with some rebate possibilities. *Id.*

142 *See* GARNETT & MCSHANE, *supra* note 1, at 8.

143 *See Homeschool Laws by State*, HOME SCH. LEGAL DEF. ASS'N, https://hslda.org/legal [https://perma.cc/G3VZ-2FYZ]; *School Choice in America*, EDCHOICE, https://www.edchoice.org/school-choice-in-america-dashboard-scia/ [https://perma.cc/7ZS6-VWHX].

144 *See How to Comply with Oregon's Homeschool Law*, HOME SCH. LEGAL DEF. ASS'N (June 18, 2020), https://hslda.org/post/how-to-comply-with-oregon-s-homeschool-law [https://perma.cc/9AQ9-3WNZ]; *How to Comply with Iowa's Homeschool Law*, HOME SCH. LEGAL DEF. ASS'N (July 27, 2020), https://hslda.org/post/how-to-comply-with-iowas-homeschool-law [https://perma.cc/8236-YJXA].

145 *See, e.g.*, 19 TEX. ADMIN. CODE § 113.19(a)(1) (2024) ("In Grade 7, students study the history of Texas from early times to the present.").

give up constitutional rights to participate. But with rights like education that have no federal analogue, states would benefit from developing their own unconstitutional conditions doctrine.[146] This may also be an area where federal parental rights and the state right to education have conflicting impulses. States may increase regulation in the interest of adequacy, while parents may oppose state requirements that burden their parental choices. Further analysis by state courts will help sort out the boundaries of these impluses in future cases. But whether or not states take a closer look at parental educational deicsions, ESAs are not the source of the state's regulatory power in this area.

For the states that include an adequacy requirement, ESAs are no scarier than homeschooling or other forms of school choice. The liquidity of funds may raise new questions about what level of oversight courts should employ when addressing ESA programs, but adequacy requirements are meant to ensure that state education is indeed "adaquate"—they have never prevented new education models from existing in the first place.

B. Equal Funding

Other states have taken uniformity provisions to require some level of equality in funding. When uniformity provisions are interpreted to mean equal funding, they are often partnered with other state provisions that require uniform property assessment and taxation.[147] Equal funding litigation often uses education outcomes as a metric to determine the appropriate levels of funding, but varying reporting patterns by different schools make this analysis especially fraught.[148] William E. Thro has gone so far as to state that "school finance litigation is in chaos" because courts fail to distinguish facial and applied challenges, refuse to focus on the text, and fail to articulate the rationale behind constitutional violations.[149]

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146 *See* Kay L. Levine, Jonathan Remy Nash & Robert A. Schapiro, *Protecting State Constitutional Rights from Unconstitutional Conditions*, 56 U. CAL. DAVIS L. REV. 247, 251–52 (2022).

147 *See e.g.*, IND. CONST. art. 10, § 1 ("[T]he General Assembly shall provide, by law, for a *uniform and equal rate of property assessment and taxation* and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal." (emphasis added)).

148 *See* Derek W. Black, *Educational Gerrymandering: Money, Motives, and Constitutional Rights*, 94 N.Y.U. L. REV. 1385, 1400 (2019) (arguing that schools use old data, ignore inflation, and exclude certain costs to provide an appearance of equal funding).

149 William E. Thro, *Who, What, Why & How: Reimagining State Constitutional Analysis in School Finance Litigation*, 2020 BYU EDUC. & L.J. 29, 32.

As a historical matter, school funding has relied primarily on property interest and local property taxes.[150] Rich districts were well funded and poor districts were poorly funded. And courts have left this funding scheme alone for a long time. When the Indiana Supreme Court rejected a local property tax scheme for schools in the 1850s, the decision was overruled just thirty years later.[151] No other State even tried to overhaul property tax school funding until California's 1971 decision in *Serrano v. Priest*, where litigants objected to the inequities associated with local property taxes.[152] *Serrano* was a success for the plaintiffs, but the *Serrano* court rejected the idea that the California Uniformity Clause required equal spending and instead relied on the federal Equal Protection Clause in ruling the school funding unconstitutional.[153]

Other states have more directly implicated their uniformity clauses in funding litigation. When the Ohio Supreme Court addressed its state uniformity provision in 1997, it used the provision to hold that many districts were in fact "starved for funds, [and] lacked teachers, buildings, and equipment."[154] The court reached this result by comparing school funding across district lines.[155] But the court was divided on just how far equality of education should extend. The concurrence wrote separately that "[i]t cannot be emphasized enough that a thorough and efficient system of common schools does not require uniformity or equality of all schools."[156] And the dissent emphasized the plain language of the Education Clause, which "makes clear that our Constitution does not include terms expressly requiring equality of educational opportunity" in contrast to states like Montana, North Carolina, and Florida.[157] Texas has also emphasized equality of funding in its state constitutional provision, even during its constitutional ratification.[158] The requirement of "equal and uniform" taxation was the subject of extensive debate at the Texas Constitutional Convention of 1875.[159] Education funding re-

150 *See* Kirk J. Stark, *Rethinking Statewide Taxation of Nonresidential Property for Public Schools*, 102 YALE L.J. 805, 806 (1992); Garnett, *supra* note 37, at 1368.

151 Greencastle Township v. Black, 5 Ind. 557, 564 (1854), *overruled by* Robinson v. Schenck, 1 N.E. 698, 707 (Ind. 1885); *see also* Stark, *supra* note 150, at 811.

152 Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. 1971).

153 *Id.* at 1248–49.

154 DeRolph v. State, 677 N.E.2d 733, 742 (Ohio 1997). *See also* Obhof, *supra* note 124, 600–01.

155 *DeRolph*, 677 N.E.2d at 742–44.

156 *Id.* at 780 (Resnick, J., concurring).

157 *Id.* at 789 (Moyer, C.J., dissenting).

158 Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 396 & n.5 (Tex. 1989).

159 *See* GEORGE D. BRADEN, DAVID A. ANDERSON, R. STEPHEN BICKERSTAFF, DARRELL BLAKEWAY, RON PATTERSON, SETH S. SEARCY III, THORNTON C. SINCLAIR & RICHARD A.

quirements can also extend beyond uniformity clauses. When Washington tried to enact a levy for school funds, its supreme court expressly held that its "general and uniform" system is "neither limited to common schools nor is it synonymous therewith."[160]

Given that ESAs consist entirely of "funds," it's unlikely that ESAs would be able to avoid equal funding challenges. But the transparency of ESA funds may help avoid constitutional hangups in this scenario. It's difficult to imagine a more equally funded system than one where each child receives the exact same amount of money. If anything, ESAs may help remedy some of the funding gerrymandering between districts.[161] Problems are more likely to arise when ESAs appear to pull funds from public schools or districts. The diversion of resources from public schools has been a concern of school-choice detractors for a long time.[162] And although there may be funding disparities between schools if parents use ESA funds to send their children to high-performing schools, the emphasis on educational outcomes means that students should remain the focus of equal-funding cases rather than merely the schools themselves.[163] Fewer funds can certainly translate to decreased educational outcomes, but this is not always the case—further empirical data is needed on this point.[164]

Another potential issue could arise when ESAs are funded in a different manner than other educational options within the state. Many states have tax provisions in their constitutions that create other rights and procedures, but these vary extensively from state to state. When the Kentucky Supreme Court found its ESA program unconstitutional, it relied on a state provision that prevented the raising of sums for education other than in common schools.[165] Given

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YAHR, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 563–65 (1977).

160 Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 96 (Wash. 1978).

161 *See* Garnett, *supra* note 37, at 1368.

162 *See, e.g.*, Valerie Strauss, *NAACP Sticks by Its Call for Charter School Moratorium, Says They Are "Not a Substitute" for Traditional Public Schools*, WASH. POST (July 26, 2017, 8:01 AM EDT), https://www.washingtonpost.com/news/answer-sheet/wp/2017/07/26/naacp-report-charter-schools-not-a-substitute-for-traditional-public-schools-and-many-need-reform/ [https://perma.cc/G4LG-PX2Q].

163 *Cf.* Black, *supra* note 148, at 1389–92.

164 The need for data in equal-funding cases may be another reason states increase their reporting requirements, in which case homeschoolers seeking to avoid regulation may have another justification for pushing back on ESAs in this capacity. *See supra* notes 140–42 and accompanying text.

165 Commonwealth *ex rel.* Cameron v. Johnson, 658 S.W.3d 25, 43 (Ky. 2022); KY. CONST. §184.

that the court explicitly stated that Kentucky's clause is unique, it's unlikely that this decision will be replicated in other states.[166]

Equal funding may also cause more issues for savings accounts that are funded by selective taxes or tax brackets or that have eligibility requirements. The majority of ESAs began with eligibility requirements and included only a subset of student populations like foster children, children with disabilities, or children within a certain range of the poverty line.[167] If funds are distributed to only a subset of the student population, students that don't meet eligibility requirements may decide to file suit under equal funding provisions. But equal-funding claims are always derivative of broader uniformity provisions. If state courts perform a threshold analysis finding that ESAs do not fall within uniformity clauses at all, these equal-funding claims will have no basis.[168] Furthermore, although courts have generally ignored the semantic differences among uniformity clauses, differences in terms may create different ESA outcomes, especially if courts make a textualist shift.[169] This area of litigation has not yet been tested.

The backlash after *State v. Beaver* in West Virginia is another example of the challenges ESAs are likely to face.[170] The *Beaver* court treated the state uniformity provision as a floor rather than a ceiling,[171] which allowed the court to find the state's ESA program constitutional. But some of the backlash to this decision emphasized that *Beaver* should have considered West Virginia's particular funding scheme in order to render funding inadequate.[172] Other states may decide to take a more particularized look at state funding schemes. Litigants may also argue that the right to education means that private educational options can never be privileged over public op-

166 *Cameron*, 658 S.W.3d at 40–41.

167 *See* GARNETT & MCSHANE, *supra* note 1, at 2, 20 n.11.

168 Courts in Indiana, Colorado, Nevada, New York, North Carolina, West Virginia, and Wisconsin have all held that certain school-choice options are not covered by state uniformity clauses. These courts have yet to address ESA programs specifically. *See* Meredith v. Pence, 984 N.E.2d 1213, 1224–25 (Ind. 2013); Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1024–25 (Colo. 1982); Schwartz v. Lopez, 382 P.3d 886, 896 (Nev. 2016); Brown *ex rel.* Stevens v. State, 39 N.Y.S.3d 327, 332 (N.Y. App. Div. 2016); Hart v. State, 774 S.E.2d 281, 289–90 (N.C. 2015); State v. Beaver, 887 S.E.2d 610, 627 (W. Va. 2022); Davis v. Grover, 480 N.W.2d 460, 474 (Wis. 1992).

169 *See* Thro, *supra* note 149, at 62 ("A constitutional provision that speaks of a 'quality education' and 'paramount duty' has a different original public meaning from a constitutional provision stating, 'establish a school system.' The more specific provision imposes greater restrictions on legislative discretion than the more general provision.").

170 *See generally* Recent Case, State v. Beaver, *No. 22-616, 2022 WL 17038564 (W. Va. Nov. 17, 2022)*, 136 HARV. L. REV. 1996, 2000–03 (2023).

171 *Beaver*, 887 S.E.2d at 627.

172 *See* State v. Beaver, *supra* note 170, at 2000–03.

tions.[173] But this argument is an especially poor one given the robust history of state-supported private education in the United States.

When ESAs are challenged under uniformity provisions, those challenges will likely involve some form of equal-funding claim. Unfortunately, equal funding provisions are a nebulous area of state constitutional law, and clear principles are few and far between. It's certainly possible that specific ESA programs may violate portions of state tax provisions, but those funding methods should be treated as an error in legislative drafting rather than a latent problem in ESAs themselves. ESAs have just as good of a chance at defeating equal-funding challenges as other forms of school choice, and may perhaps do even better given the transparency of funds per child. When every child receives the same dollar amount, it's difficult to make a constitutional claim that those funds are unequal.

CONCLUSION

ESAs face many challenges in the coming years, but current caselaw shows that state uniformity provisions should not be one of them. States should feel just as free to experiment with this newest form of school choice as with any other educational endeavor. Just because states have one system of public education does not mean they cannot have alternative systems or even multiple systems. The fallout from *Bush v. Holmes* confirms that limiting principles like *expressio unius* are ill equipped to account for the flexibility inherent in state education. State courts will likely continue to interpret their uniformity provisions with an eye toward adequate education and equal funding, but neither of these substantive requirements should be used as swords to prevent legislative experimentation. Not only do ESAs have the potential to provide the same accountability measures as other school-choice methods, but ESAs can also provide a simpler way for courts to analyze equality of funding arguments.

Only ten years have passed since Arizona enacted the first ESA program. In a very short time, these programs have already begun to dramatically alter the educational landscape. Policymakers should take care to craft ESA programs that fit within state-specific parameters because more litigation is sure to follow. But when it does, plaintiffs should note that state uniformity provisions are a poor vehicle for these challenges.

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173 *See, e.g.*, Derek W. Black, *Preferencing Educational Choice: The Constitutional Limits*, 103 CORNELL L. REV. 1359, 1424 (2018). While some of Black's concerns may apply to a subset of state constitutions, many of the cited state constitutions (e.g., Georgia's constitution) require only that the state make provision for education, not that the education be public. *Id.* at 1364 & n.18.