

LEGAL CHOICES: THE STATE CONSTITUTIONALITY OF SCHOOL VOUCHER PROGRAMS

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INTRODUCTION

Wisconsin's state constitution requires that the state legislature provide a system of free, uniform public schools.¹ Wisconsin is not alone; every state's constitution contains a similar "education article" setting forth some requirement that the state legislature create a system of public schools.² There are some slight variations among them. Wisconsin, like fourteen other states, seeks "uniform" public schools.³ Other states aim for "thorough and efficient" public schools,⁴ or "efficient" and "high quality" public schools.⁵ While the permutations go on, the theme remains consistent.

But Wisconsin is unique. In 1990, its state legislature passed the first modern "school voucher" program, the "Milwaukee Parental

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1. WIS. CONST. art. X, § 3 ("The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable.").

2. Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1335-36 (1992).

3. Jamie Dycus, *Lost Opportunity: Bush v. Holmes and the Application of State Constitutional Uniformity Clauses to School Voucher Schemes*, 35 J.L. & EDUC. 415, 418 (2006).

4. See, e.g., OHIO CONST. art. VI, § 2; W. VA. CONST. art. XII, § 1.

5. See ILL. CONST. art. X, § 1.

Choice Program” (MPCP).⁶ Under the MPCP, students whose family income is below a certain threshold can receive a voucher to spend on private school tuition.⁷ When Wisconsin implemented the MPCP, roughly sixty percent of students enrolled in Milwaukee Public Schools (MPS) either would never graduate from high school, or would not graduate within six years.⁸ A study conducted two decades after the MPCP’s creation found that participating students were experiencing a graduation rate seven percentage points higher than that of their peers enrolled in MPS.⁹ In its first year, the

6. *Empowering Parents by Advocating for High Quality Choice in Education*, SCH. CHOICE WIS., <https://schoolchoicewi.org/about/> [<https://perma.cc/D3JN-3UD9>].

7. *Milwaukee Parental Choice Program*, SCH. CHOICE WIS., <https://schoolchoicewi.org/programs/milwaukee-parental-choice-program/> [<https://perma.cc/CW4X-EX53>]. Note, the MPCP was the first modern school voucher program. Voucher programs have existed in Maine and Vermont since the mid-nineteenth century. See Josh Cuningham, *School Choice: Vouchers*, NAT’L CONF. STATE LEGISLATURES, (Dec. 1, 2016), <https://www.ncsl.org/research/education/school-choice-vouchers.aspx> [<https://perma.cc/83SX-U5YX>]; Kirsten Goldberg, *Vermont’s ‘Tuitioning’ Is Nation’s Oldest Brand of Choice*, EDUC. WK., (May 18, 1988) <https://www.edweek.org/policy-politics/vermont-tuitioning-is-nations-oldest-brand-of-choice/1988/05> [<https://perma.cc/MR4G-RDT6>]. These older voucher programs, however, existed largely out of necessity. Small towns in rural areas did not have enough students to support public high schools. “Modern” voucher programs, in contrast, are generally offered to students coming from low-income families or who live in districts with underperforming public schools. The modern programs supplement existing school systems.

8. *Davis v. Grover*, 480 N.W.2d 460, 470 (Wis. 1992).

9. Joshua M. Cowen et al., *School Vouchers and Student Attainment: Evidence from a State-Mandated Study of Milwaukee’s Parental Choice Program*, 41 POL’Y STUD. J. 147, 154 (2013); see also *Testimony Regarding H.B. 1033: What Research Tells Us About School Vouchers Before the Md. House of Delegates House Ways and Means Committee*, 430th Sess. (Md. 2013) (statement of Michael Q. McShane, Research Fellow, Am. Enter. Inst.) (describing the difference in graduation rates). It is also worth noting that the competitive pressures induced by the MPCP on MPS actually improved MPS students’ test scores. See Patrick J. Wolf, *The Comprehensive Longitudinal Evaluation of the Milwaukee Parental Choice Program: Summary of Second Year Reports*, SCHOLARWORKS@UARK (2009), <https://scholarworks.uark.edu/cgi/viewcontent.cgi?article=1053&context=scdp> [<https://perma.cc/VMR6-MAE9>]; Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Vouchers 1–2*, THE FRIEDMAN FOUND. FOR EDUC. CHOICE (May 2016), <http://www.edchoice.org/wp-content/uploads/2016/05/A-Win-Win-Solution-The-Empirical-Evidence-on-School-Choice.pdf> [<https://perma.cc/YA43-KBMT>].

MPCP served only 341 students. In January 2023, it was serving over 28,000.¹⁰

And yet, there were some who opposed the program's creation. Two years after the MPCP was voted into law, voucher opponents argued before the Wisconsin Supreme Court that the program violated the state's education article, which obligates the state legislature to provide "district schools" that are "as nearly as uniform as practicable."¹¹ The legislature, voucher opponents argued, thus could not provide funds to schools that were not "uniform," such as the private schools that participated in the MPCP and offered their students a "different character of instruction" than traditional public schools would.¹²

In *Davis v. Grover*, the Wisconsin Supreme Court repudiated this argument with a holding that continues to shape the legal debate over voucher programs. Wisconsin's education article, the court explained, "clearly was intended to assure certain minimal educational opportunities for the children of Wisconsin."¹³ It does not require the legislature to *only* provide these uniform schools. The MPCP, therefore, "merely reflects a legislative desire to do more than that which is constitutionally mandated."¹⁴ The Wisconsin Supreme Court thus viewed its state constitution's education article as a floor, rather than a ceiling, on what the legislature should provide for the state's students.¹⁵

10. Milwaukee Parental Choice Program, SCH. CHOICE WIS., <https://school-choicewi.org/programs/milwaukee-parental-choice-program/> [<https://perma.cc/YN83-8F56>].

11. *Davis*, 480 N.W.2d at 473 (citing WIS. CONST. art. X, § 3).

12. *Id.* at 474.

13. *Id.*

14. *Id.* The court also drew a distinction between the private schools that received public funds, and the "district schools" referenced in Wisconsin's education article. "In no case have we held that the mere appropriation of public monies to a private school transforms that school into a public school," the court wrote. *Id.*

15. Six years after *Davis*, the Wisconsin Supreme Court again reached this same conclusion. In *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1999), voucher opponents brought the same "education article" argument against the MPCP, which by then had grown to permit sectarian schools to participate. The court rejected this argument, writing that "[b]y enacting the amended MPCP, the State has merely allowed certain disadvantaged

Not all state supreme courts, however, would have reached this holding. In *Bush v. Holmes*,¹⁶ the Florida Supreme Court found that the state's first statewide voucher program, the Opportunity Scholarship Program (OSP), contravened the education article in Florida's constitution, which requires the legislature to maintain a uniform system of free public schools.¹⁷ The court, invoking *expressio unius*,¹⁸ reasoned that by requiring the state legislature to provide uniform public schools, Florida's education article impliedly prohibited the legislature from doing *more* to promote education.¹⁹

Voucher opponents latched onto the Florida court's reasoning, invoking *Holmes* to challenge voucher programs in Arizona,²⁰

children to take advantage of alternative educational opportunities in addition to those provided by the State under the [education article]." *Id.* at 628.

16. 919 So.2d 392 (Fla. 2006).

17. FLA. CONST. art. IX, § 1(a) ("It is a paramount duty of the state to make adequate provision for the education of all children Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools.").

18. "*Expressio unius est exclusion alterius*" is a semantic canon of construction meaning "the expression of one thing implies the exclusion of another." *Bush v. Holmes*, 919 So.2d 392, 407 (Fla. 2006).

19. *Id.* at 407–08. *But see* Editorial Board, *Rotten Apples*, WALL ST. J. (May 4, 2006), <https://www.wsj.com/articles/SB114670180840643256> [<https://perma.cc/E22U-GZ66>] (describing *Holmes* as "one of the most absurd legal decisions in modern times").

20. *See* Appl. for Prelim. Inj., *Cain v. Horne*, 183 P.3d 1269 (Ariz. Ct. App. 2008), *vacated*, 202 P.3d 1178 (Ariz. 2009) (arguing that, under ARIZ. CONST. art. 11 § 1, the state legislature can only fund a singular, "general and uniform" public school system).

Indiana,²¹ Nevada,²² Ohio,²³ North Carolina,²⁴ and West Virginia.²⁵ These challenges have a unifying feature: they all contend that education articles in state constitutions constitute ceilings, rather than floors, on state legislatures' ability to promote education.

These challenges have also introduced related objections derived from education articles. One closely-related objection, the "diversion of funds" objection, argues that voucher programs divert funding away from public schools, undermining state legislatures' ability to fulfill the obligations set forth in their states' education articles. This argument is almost as longstanding as the *expressio unius* objection.²⁶ Voucher opponents first raised a "diversion of funds" argument against Ohio's "Cleveland Scholarship and Tuition Program" (the country's second-oldest modern voucher program).²⁷ They voiced the objection again in *Holmes*,²⁸ and continue levying it against voucher programs to this day.²⁹

21. See *Meredith v. Pence*, 984 N.E.2d 1213, 1220–1223 (Ind. 2013) (discussing how voucher opponents argued, under IND. CONST. art. 8 § 1, that the legislature can only fund a "general and uniform system of Common Schools.").

22. See *Schwartz v. Lopez*, 382 P.3d 886, 898 (Nev. 2016) (rejecting voucher opponents' argument, under NEV. CONST. art. 11 § 2, that the legislature can only fund "a uniform system of public schools.").

23. Plaintiffs' Memorandum at 33, *Columbus City School District v. Ohio*, No. 22 CV 67 (C.P. Franklin Cnty.) (filed Jul. 1, 2022) (arguing that the legislature could only fund a "thorough and efficient system of common schools").

24. Brief for Plaintiffs-Appellees at 59–62, *Hart v. State*, 774 S.E.2d 281 (N.C. 2015) (filed Feb. 2, 2015) (arguing that the legislature could only fund a "general and uniform system" of free public schools).

25. See Brief for Respondents at 4, 20, *State v. Beaver*, 887 S.E.2d 610 (W.Va. 2022) (filed Sep. 23, 2022) (arguing that the legislature could only fund a "system of thorough and efficient free schools").

26. The objection in *Davis* was an *expressio unius* objection (though the Wisconsin Supreme Court did not invoke this canon by name). The objection, like that in *Holmes*, reasoned that by prescribing one method that the legislature could use to promote education, the state's education article ruled out other available methods.

27. See Jan Resseger, *How the Nation's Two Oldest School Voucher Programs Are Working: Part I – Wisconsin*, NAT'L EDUC. POL'Y CTR. (Mar. 28, 2017), <https://nepc.colorado.edu/blog/how-nations> [<https://perma.cc/C7EV-BM6U>] (observing that the MPCP and CSTP are the country's two oldest voucher programs).

28. *Holmes*, 919 So.2d at 408–09.

29. The Ohio Supreme Court rejected the objection when it was first raised. See *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999) ("We fail to see how the School

Yet another related objection claims that voucher programs impose an unconstitutional condition upon students: to accept a voucher, students must forfeit their constitutional right to a public education. While this objection is newer than the other two, it has recently appeared in a challenge to West Virginia's Hope Scholarship Program.³⁰

The future of constitutional litigation over school voucher programs will likely focus on state education articles, and in particular, the aforementioned "*expressio unius*," "diversion of funds," and "unconstitutional conditions" objections. Voucher opponents previously focused on the federal Constitution. Specifically, voucher opponents argued that the Establishment Clause barred states from offering vouchers that families could spend on tuition at sectarian schools.³¹ But the Supreme Court foreclosed this argument in *Zelman v. Simmons-Harris*,³² when it explained that government aid programs that are neutral with respect to religion and disperse funds in accordance with the independent decisions of citizens (such as parents' decisions about where to send their children) do not violate the Establishment Clause.³³

As a result, voucher opponents have relied on *state* constitutions to challenge the programs. But still, the number of available objections has continued to dwindle. Voucher opponents used to invoke

Voucher Program, at the current funding level, undermines the state's obligation to public education."). Voucher opponents are currently raising a similar objection to Ohio's expanded "EdChoice" statewide voucher program. See Plaintiffs' Memorandum, *supra* note 23, at 21. Voucher opponents also recently raised this objection (unsuccessfully) against West Virginia's "Hope Scholarship" program. See *Beaver*, 887 S.E.2d at 630-31 (W. Va. 2022).

30. *Beaver*, 887 S.E.2d at 610. For another example of this challenge (brought against Arizona's "Empowerment Scholarship Accounts" program), see *Niehaus v. Huppenthal*, 310 P.3d 983, 989-90 (Ariz. App. 1st Div. 2013).

31. For examples of this objection, see *Jackson*, 578 N.W. at 607, 610-620; *Goff*, 711 N.E.2d at 207-211.

32. 536 U.S. 639 (2002).

33. *Id.* at 652 ("Where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.").

“Blaine Amendments,” state constitutional provisions (found in the constitutions of thirty-seven states)³⁴ that expressly prohibit the use of public funds for the aid of religious schools.³⁵ But the Supreme Court foreclosed this argument when, in *Espinoza v. Montana*³⁶ and *Carson v. Makin*,³⁷ it held that applying these amendments to neutral aid programs violates the Free Exercise Clause of the Constitution.³⁸ The Court explained in *Espinoza*, “When otherwise eligible recipients are disqualified from a public benefit ‘solely because of their religious character,’ we must apply strict scrutiny.”³⁹

The legal challenges that remain available to voucher opponents, then, are objections under state constitutions’ education articles. To

34. *Blaine amendments in state constitutions*, BALLOTPEDIA, https://ballotpedia.org/Blaine_amendments_in_state_constitutions [https://perma.cc/JH3P-G58Z]. The states *without* Blaine amendments are: Arkansas, Connecticut, Iowa, Louisiana, Maine, Maryland, New Jersey, North Carolina, Ohio, Rhode Island, Tennessee, Vermont, and West Virginia.

35. Richard G. Bacon, *Rum, Romanism and Romer: Equal Protection and the Blaine Amendment in State Constitutions*, 6 DEL. L. REV. 1, 1 (2003). For examples of this objection, compare *Magee v. Boyd*, 175 So. 3d 79, 135 (Ala. 2015); *Oliver v. Hofmeister*, 368 P.3d 1270, 1277 (Okla. 2016); *Jackson*, 578 N.W.2d at 621-23 (rejecting Blaine amendment challenges), with *Cain v. Horne*, 202 P.3d 1178, 1185 (Ariz. 2009) (sustaining a Blaine amendment challenge).

36. 140 S. Ct. 2246 (2020).

37. 142 S. Ct. 1987 (2022).

38. It is worth noting as well that Blaine Amendments, though ostensibly encouraging neutrality towards religious institutions, were in fact designed to *suppress* Catholic education after waves of Irish-Catholic immigration fueled nativist backlash. See, e.g., Thomas Nast, *The American River Ganges*, HARPER'S WKLY. (Sep. 30, 1871) (describing the Vatican as “Tammany Hall” and referring to the Catholic Church as “The Political Roman Catholic Church”). When the amendments were drafted, public education was grounded in the country’s dominant religious teachings. See Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POLICY 551, 559 (2003). Thus, it was an “open secret” that condemnations of sectarian education were directed towards Catholics. See *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (“Consideration of the [Blaine] amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that ‘sectarian’ was code for ‘Catholic.’”).

39. *Espinoza*, 140 S. Ct. at 2260 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017)); see also *Trinity Lutheran*, 137 S. Ct. at 2021 (“The Free Exercise Clause protects against laws that ‘impose[] special disabilities on the basis of religious status.’” (quoting *Emp. Div., Dep’t of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990))).

be sure, some state constitutions contain additional provisions that could predicate legal challenges to voucher programs (and some states have common law doctrines that may also permit such challenges).⁴⁰ But, because education articles appear in every state's constitution, voucher opponents likely will continue relying on them for legal fodder.

This paper will analyze and refute the *expressio unius*, diversion of funds, and unconstitutional conditions objections that voucher opponents currently raise against the programs.

I. THE “*EXPRESSIO UNIUS*” OBJECTION

Despite the Florida Supreme Court's decision in *Holmes*, no other state high court has adopted an *expressio unius* interpretation of an education article. But voucher opponents continue to invoke the decision, perhaps because no state high court has expressly refuted *Holmes* either. The high courts of Indiana and Nevada each chose to distinguish *Holmes*;⁴¹ the high courts of North Carolina and West Virginia omitted mention of *Holmes* entirely—though each recognized the “plenary” power of their state legislatures, commenting that state constitutions could only restrict this power by doing so expressly.⁴² This section explains why *expressio unius* should not apply to state education articles, and how the Florida court erroneously reached the opposite conclusion.

A. *Education Articles Are Floors, Not Ceilings*

40. For example, in *Davis*, voucher opponents argued that the MPCP was a “local bill,” prohibited by WIS. CONST. art. IV, § 18. 480 N.W.2d at 465–73. The court rejected this argument because the MPCP was a *statewide* voucher program (even though the program's title specified “Milwaukee,” the program was in fact available to families in any Wisconsin city meeting a certain population threshold). *Id.* at 472–73. Voucher opponents in *Davis* also argued that the MPCP violated Wisconsin's common law “public purpose” doctrine. *Id.* at 474. However, the court took as given that education is a public purpose, and argued that the MPCP retained the necessary quality controls to be permissible under the doctrine. *Id.* at 475–77.

41. *Meredith*, 984 N.E.2d at 1223–25; *Schwartz*, 382 P.3d at 898.

42. *Beaver*, 887 S.E.2d at 625; *Hart*, 774 S.E.2d at 287–88.

State legislatures, unlike Congress, have plenary power; they do not need to identify any authority within a constitution in order to legislate. Rather, they must avoid contravening any *limits* on their powers that are expressed or implied by the state or federal constitutions.⁴³ This distinction inheres in the federal Constitution, which restricts Congress to a set of enumerated powers and confers to the states all remaining powers.⁴⁴ But, as this section will argue, the distinction can also be justified on historical and prudential grounds. It is thus inappropriate to apply *expressio unius* to provisions in state constitutions, because doing so would imply that the provisions are grants of legislative authority. The best understanding of education articles, then, is that they impose *duties* on state legislatures, rather than maximum limits on legislative action.

Fueled by revolutionary spirit, Americans designed their state constitutions to prevent encroachments on liberty. Thus, Americans initially designed their state legislatures to have the same plenary power that the British parliament had,⁴⁵ empowering state legislatures in order to reduce the risk of tyranny posed by much-feared governors.⁴⁶ Americans then put their faith in federal and state constitutions to impose the necessary limits to prevent state legislatures from governing similarly tyrannically.⁴⁷

This arrangement is sensible. If state legislatures' powers, like Congress's, were cabined to express grants of power, certain subjects would likely be exempt from regulation entirely. All it would take is for a Framers to overlook, or fail to anticipate, that a certain matter may be in need of regulation.⁴⁸ The matter could then fall

43. Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 292-93 (1998).

44. U.S. CONST. art. I §8.; U.S. CONST. amend. X.

45. See *Thorpe v. Rutland and Burlington R.R. Co.*, 27 Vt. 140, 142 (1854) ("It has never been questioned, so far as I know, that the American legislatures have the same unlimited power in regard to legislation which resides in the British parliament.").

46. Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 914, 923 (1993).

47. *Id.*

48. Cf. *Nat'l Petroleum Refiners Ass'n v. F.T.C.*, 482 F.2d 672, 676 (D.C. Cir. 1973) ("[*Expressio Unius*] is increasingly considered unreliable . . . for it stands on the faulty

into a regulatory “no man’s land,” beyond the purview of both Congress and the state legislatures.

There are additional benefits to concentrating legislative power in state legislatures, which are modular and more localized than Congress. Enabling state governments to be sufficiently powerful and autonomous enables them to restrain federal abuses of power.⁴⁹ If state legislatures attempt to seize excessive power, their ability to do so is checked by the competitive pressures of a “mobile citizenry,”⁵⁰ an effect that is amplified when states can develop their own regulatory identities. Of course, interstate competition may lead to a “race to the bottom” on certain policies, particularly redistributive programs. But this problem is at least partially mitigated by Congress’s own ability to legislate.⁵¹

An overwhelming number of state high courts have recognized that state legislatures’ plenary power renders *expressio unius* inappropriate for interpreting legislative articles in state constitutions. For example, many state high courts have observed that *expressio unius* should not be applied with the same rigor in construing a state constitution as in construing a statute.⁵² Similarly, other state

premise that all possible alternative or supplemental provisions were necessarily considered and rejected by the legislative draftsmen.”).

49. See JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 428 (4th ed. 2021) (citing THE FEDERALIST No. 28 (Alexander Hamilton)).

50. *Id.* (first quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); then citing Michael W. McConnell, *Federalism: Evaluating the Founders’ Design* *Federalism: The Founders’ Design*, 54 U. CHI. L. REV. 1484, 1498–1500 (1987)).

51. For example, Congress can fund national social safety nets, as it deems necessary.

52. See, e.g., *Russ v. Commonwealth*, 60 A.169, 172 (Pa. 1905) (“The [state] Constitution allows to the Legislature every power which it does not positively prohibit.”); *Dean v. Kuchel*, 230 P.2d 811, 813 (Cal. 1951) (“The express enumeration of legislative powers is not an exclusion of others not named unless accompanied by negative terms.”); *State ex rel. Jackman v. Ct. Com. Pl. of Cuyahoga Cnty.*, 224 N.E.2d 906, 910 (Ohio 1967) (“Since the legislative power of the General Assembly is plenary, the judiciary must proceed with much caution in applying [*expressio unius*] to invalidate legislation.”); *Baker v. Martin*, 410 S.E.2d 887, 891 (N.C. 1991) (finding that *expressio unius* may be appropriate in interpreting statutes, but not when interpreting the state’s constitution); *Lyons v. Sec’y of Commonwealth*, 192 N.E.3d 1078, 1093 (Mass. 2022) (“Given the plenary power of the Legislature under our Constitution... we likewise proceed with great caution to consider application of [*expressio unius*] in the [state] constitutional

high courts have held that when there exists any doubt regarding the legislature's power to act, the doubt should be resolved in favor of the legislature.⁵³ Even state courts that would otherwise consider *expressio unius* to be "axiomatic," still apply safeguards against the canon when interpreting constitutional provisions.⁵⁴

But, as voucher opponents might observe, education articles must still impose some *limitation* on state legislatures' power. Otherwise, they would constitute mere surplusage. Why say that a legislature can do *something*, if the legislature already has the power to do *everything*?⁵⁵ Nebraska's Supreme Court, in *Scott v. Flowers*,⁵⁶ made this argument when interpreting a state constitutional provision that the legislature "may provide for the safe-keeping, education, and employment of all children *under* the age of sixteen years, who . . . are growing up in mendicancy or crime."⁵⁷ The court read the provision to imply that the legislature did not have powers to commit children *above* the age of sixteen to reform schools, because "state constitutions are not grants of authority, but limitations of power."⁵⁸

Education articles, however, impose a limitation on legislatures by *commanding* them—specifically, to provide some threshold amount of public education. To give some examples, Florida's

context."); *Gangemi v. Berry*, 134 A.2d 1, 11 (N.J. 1957) ("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 legislature.") (quoting *State v. Martin*, 30 S.W. 421, 424 (Ark. 1895)).

53. See, e.g., *Chiles v. Phelps*, 714 So.2d 453, 458 (Fla. 1998) ("Unless legislation be clearly contrary to some express or necessarily implied prohibition found in the Constitution, the courts are without authority to declare legislative Acts invalid."); *State Rd. Comm'n v. Kanawha Cnty. Ct.*, 163 S.E. 815, 817 (W. Va. 1932) ("The negation of the [state legislature's] power must be manifest beyond reasonable doubt.").

54. Compare *Dunham v. Morton*, 175 S.E. 787, 788 (W.Va. 1934) (declaring the use of *expressio unius* to be "axiomatic" in West Virginia courts), with *State v. Beaver*, 887 S.E.2d 610, 627 (W.Va. 2022) (noting that West Virginia courts should use caution when applying *expressio unius* to state constitutional provisions).

55. *Scott v. Flowers*, 84 N.W. 81, 83 (Neb. 1900), *on reh'g*, 85 N.W. 857 (Neb. 1901) (observing that framers are not presumed to do a "useless and idle thing").

56. *Id.* at 81.

57. NEB. CONST. art. 8 § 12 (1875) (amended 1920) (emphasis added).

58. *Flowers*, 84 N.W. at 83.

education article reads, “It is, therefore, a paramount *duty* of the state to make adequate provision for the education of all children.”⁵⁹ Ohio’s reads, “The general assembly *shall* make such provisions ... [to] secure a thorough and efficient system of common schools.”⁶⁰ West Virginia’s: “The Legislature *shall* provide, by general law, for a thorough and efficient system of free schools.”⁶¹ Even in *Flowers*, the Nebraska Supreme Court drew a contrast between the provision at issue, which used the permissive term “may,” and the state’s education article, which used the imperative term “shall” (and which the court thus described as a command).⁶² In all fifty states, the effect of education articles is to make education a state legislative responsibility.⁶³ It is thus possible to simultaneously treat these articles as limits on legislatures’ power, but not as *maximum* limits.

Framers of state constitutions are perfectly capable of cabining their legislative commands with express restrictions. For example, Florida requires its legislature to enact certain statutes regulating the purchase of handguns, but then adds that these statutes shall not apply to a “trade in of another handgun.”⁶⁴ Ohio requires that its legislature authorize casino gaming at four casino facilities, but adds that the legislature cannot authorize gaming beyond these facilities.⁶⁵ Neither state’s education article contains any similar express restrictions. If the framers of these states’ constitutions

59. FLA. CONST. art. IX, § 1(a) (emphasis added).

60. OHIO CONST. art. VI, § 2 (emphasis added).

61. W. VA. CONST. art. XII, § 1 (emphasis added).

62. 84 N.W. at 82–83 (citing NEB. CONST. art. IX § 1 (1875) (amended 1940)) (“The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years.”).

63. Jon L. Mills, *Setting a New Standard for Public Education: Revision 6 Increases the Duty of the State to Make “Adequate Provision” for Florida Schools*, 52 FLA. L. REV. 329, 343 (2000) (citing a 50-state survey from Hubsch, *supra* note 2, at 1343–48) (“Though [education articles] differ widely, depending on the history of the provision and its intent and scope, the result is to make education a state legislative responsibility.”).

64. FLA. CONST. art. I § 8.

65. OHIO CONST. art. XV, §§ 6(C)(1), (C)(6).

wished to include such restrictions, they presumably would have added them.⁶⁶

Finally, it is worth noting that applying *expressio unius* to imperative provisions of state constitutions can yield absurd results. To illustrate: Florida's constitution provides that the legislature "shall" specify penalties for violations of racing "greyhounds or other dogs," because "the humane treatment of animals is a fundamental value."⁶⁷ Should the legislature thus be prohibited from regulating the racing of cats? Or consider Ohio, whose constitution requires that the state legislature foster and support institutes for the benefit of the "insane, blind, and deaf and dumb."⁶⁸ It strains credulity that this provision was written to bar the legislature from helping people who have other disabilities.

It also strains principles of statutory interpretation. *Expressio unius* has never been a binding rule. Even Justice Scalia, "an avowed devotee of the *expressio unius* canon," acknowledged that "[c]ontext establishes the conditions for applying the canon."⁶⁹ The use of *expressio unius* needs to make sense.⁷⁰

So why, then, did Florida's Supreme Court endorse the *expressio unius* reading of the state's education article?

B. *The Florida Supreme Court Misread its Own Precedent in Holmes*

66. Cf. MANNING & STEPHENSON, *supra* note 49, at 353 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." (quoting 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:06 (6th rev. ed. 2000))).

67. FLA. CONST. art. X, § 32.

68. OHIO CONST. art. VII, § 1.

69. MANNING & STEPHENSON, *supra* note 49, at 338 (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 107 (2012)).

70. See *NLRB v. Sw. Gen., Inc.*, 580 U.S. 288, 302 (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.'" (quoting *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002)); see also MANNING & STEPHENSON, *supra* note 49, at 339 (citing WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW* 79 (2016) (observing that if a parent told a child to stop "pinching" a sibling, this statement surely would not implicitly allow "biting" the same sibling))).

To justify its application of *expressio unius*, the Florida court turned to two of its precedents: *Weinberger v. Bd. Of Pub. Instruction*,⁷¹ and *S & J Transp., Inc. v. Gordon*.⁷² At first glance, these precedents actually seem to support the court's decision in *Holmes*. *Weinberger* held that "when the [Florida] Constitution prescribes the manner of doing an act, the manner prescribed is exclusive,"⁷³ and *Gordon* held that "where one method or means of exercising a power is prescribed in a constitution it excludes its exercise in other ways."⁷⁴ It would seem to follow, as the court wrote in *Holmes*, that Florida's education article "mandates that a system of free public schools is the manner in which the State is to provide a free education."⁷⁵ But the court ignored the relevant context that shaped how *Weinberger* and *Gordon* used the term "prescribed" in their holdings.

In *Weinberger*, "prescribed" referred to a very clear, *express* limitation on legislative power—not an *implied* limitation. There, the court held that a constitutional provision, "[a]ny bonds issued hereunder shall become payable . . . in annual installments," precluded a county board of public instruction from issuing bonds having more sporadic maturity dates.⁷⁶ A constitutional provision regulating "any bonds issued" is an affirmative restriction—it imposes a restriction upon all bond issuance. In its natural reading, this provision certainly "prescribed the manner" in which divisions of Florida's government could issue bonds.⁷⁷ Granted, it would make sense to apply *Weinberger* to Florida's education article if the article read, say: "All state support of education shall be in the form of administering public schools." But the article contains no such language that indicates an affirmative restriction.

In *Gordon*, the presumption of the state legislature's plenary power—the presumption which ordinarily would preclude the

71. 112 So. 253, 256 (Fla. 1927).

72. 176 So.2d 69, 71 (Fla. 1965).

73. *Weinberger*, 112 So. at 256.

74. *Gordon*, 176 So.2d at 71.

75. 919 So.2d at 407 (quoting *Holmes v. Bush*, CV 99-3370, 2000 WL 526364, at *5 (Fla. Cir. Mar. 14, 2000), *rev'd*, 767 So. 2d 668 (Fla. 1st Dist. App. 2000)).

76. *Weinberger*, 112 So. at 256 (citing FLA. CONST. art. XII § 17 (1924)).

77. *Id.*

application of *expressio unius*—was absent. The court in *Gordon* wrestled with an amendment in the state’s constitution granting Dade county “Home Rule” over local affairs.⁷⁸ The key question was whether a constitutional provision stating that “[The Home Rule Amendment] shall not limit, or be construed to limit, the power of the Legislature to enact . . . general laws which shall relate to Dade county and other one or more counties” enabled the legislature to pass legislation relating only to Dade County.⁷⁹ But Dade County had a constitutionally-protected right to legislate for itself. Constitutional provisions take precedence over ordinary state legislation, so unless the state constitution also gave a grant of power to the legislature to pass legislation relating to the county, the legislature would be unable to do so. In *Gordon*, in other words, Florida’s state legislature (like Congress) required an enumerated power to legislate. Thus, when the court wrote that “where one method or means of exercising a power is prescribed in a constitution it excludes its exercise in other ways,” it was operating with a presumption that those “other ways” were, by default, already off-limits.

This presumption was not present in *Holmes*. If a separate constitutional provision had stated, “Matters related to education fall beyond the legislature’s power, unless otherwise provided,” then the court’s application of *Gordon* would have been proper. But no such provision existed.

Next, the court in *Holmes* contended that its invocation of *expressio unius* was appropriate because Florida’s education article was not “clear and unambiguous.”⁸⁰ But this is circular reasoning. The education article was only ambiguous because of the existence of the *expressio unius* interpretation. The court, in effect, was creating the sort of binding interpretive rule that cannot support *expressio unius*: “if an *expressio unius* interpretation is available, use it.”

78. *Gordon*, 176 So.2d at 71 (citing FLA. CONST. of 1885, art. VIII § 11) (“[The Home Rule Amendment] was intended to . . . give the electors of Dade County home rule or autonomy in affairs pertaining solely to Dade County.”).

79. *Id.* (citing FLA. CONST. of 1885, art. VIII § 11(5–6)).

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

The court in *Holmes* also distinguished a prior decision, *Taylor v. Dorsey*,⁸¹ in which it had concluded that *expressio unius* should not be applied to state constitutions' commands to legislatures. In *Taylor*, the Florida Supreme Court declined to apply *expressio unius* to a constitutional provision requiring the state legislature to ensure that the property of married women could be subject to claims in equity.⁸² The court in *Taylor* actually distinguished *Weinberger*, explaining that the primary purpose of the provision at issue was not to "effect the adjudication of *all* claims against married women, but to require positive action on the part of the legislature."⁸³ The court, in other words, recognized that the imposition of a duty is a floor, rather than a ceiling, on legislative action.

In *Holmes*, the court summarily dismissed *Taylor* because, "unlike the constitutional provision at issue in *Taylor*, which had a narrow primary purpose, [Florida's education article] provides a comprehensive statement of the state's responsibilities regarding the education of the children."⁸⁴ That was the entirety of the court's explanation for dismissing *Taylor*. The court never explains why the supposed "narrow primary purpose" of the provision at issue in *Taylor* or the "comprehensive" responsibilities set forth in Florida's education article are valid grounds to distinguish *Holmes* from *Taylor*. And indeed, neither of these factors are.

First, the scope of the "primary purpose" behind a command is immaterial to whether the command implicitly bars additional (not-commanded) actions. If a command states, "Because Y is important, you must do X" then the command is satisfied if the commandee completes "X," regardless of the scope of "Y." For this reason, if the commandee does "X," but *also* actions "A," "B," and "C," the command is still satisfied, even if "Y" is extraordinarily broad.

Second, the comprehensive nature of the state legislature's responsibilities described in Florida's education article does not restrict the legislature to those responsibilities. If a command states

81. 19 So. 2d 876 (1944).

82. *Id.* at 880, 882.

83. *Id.* at 882 (emphasis added).

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

“You must do U, V, W, X” (which, assume is a “comprehensive” command) then the command is satisfied if the commandee completes “U,” “V,” “W,” and “X.” It does not matter whether the commandee *also* completes “A,” “B,” and “C.” Similarly, if Florida’s state legislature fulfills its responsibilities as set forth in the state’s education article, it does not matter if the legislature also does more.

In sum, *Holmes* does not provide a cogent explanation for why the state legislature’s plenary power does not extend to its responsibilities concerning education.

C. Other State High Courts Can Distinguish *Holmes*

As noted earlier, no state high court has directly refuted the Florida Supreme Court’s reasoning in *Holmes*. When courts invoke *Holmes*, they instead tend to *distinguish* the case. The *Holmes* court invited this treatment when it attempted to explain why *Davis*, the Wisconsin Supreme Court case holding that Wisconsin’s education article does not preclude the state legislature from creating the MPCP, was inapposite.

In *Holmes*, the court argued that Florida’s education article is unique. The second sentence of the article explains that the state has a “paramount duty” to “make adequate provision for [students’] education.”⁸⁵ Its third sentence then follows: “[a]dequate provision shall be made by law for a uniform . . . high quality system of free public schools.” To the Florida court, the article’s combined sentence structure implies that the legislature has a paramount duty to provide a uniform system of free public schools.⁸⁶ In a footnote, the Florida court explained that Wisconsin’s education article did not similarly state that the legislature’s obligation to provide public schools was in service of an important duty.⁸⁷ The court did not elaborate further.⁸⁸

85. FLA. CONST. art. IX, § 1(a).

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

87. *Id.* at 407 n.10 (quoting FLA. CONST. art. IX, § 1 and citing WIS. CONST. art. X, § 3).

88. Regardless of the reasoning that the Florida Supreme Court had in mind, a necessary inference is that the provision of vouchers offered no net value in helping the legislature provide a uniform, high quality system of free public schools. This of course, is false; Florida’s voucher programs actually enhanced the quality of the state’s public

Other state high courts took this reasoning as a license to distinguish *Holmes* by drawing narrow distinctions between their own states' education articles and Florida's.⁸⁹ The Indiana Supreme Court, for example, distinguished *Holmes* in two ways. First, the court observed that, like the Wisconsin Constitution, the Indiana Constitution contains no clause labeling the adequate provision of education as a "paramount" duty.⁹⁰ Second, the Indiana court observed that the state's education article contained *two* distinct duties: "to provide, by law, for a general and uniform system of Common Schools," and to "encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement."⁹¹

Although every state's education article imposes a duty upon the state's legislature to provide public schools, the Indiana Supreme Court demonstrated that there are at least two methods by which state courts can distinguish *Holmes*. First, a state court can claim

schools. According to researchers from Harvard, Florida State, and the James Madison Institute, the mere threat of increased competition by private schools and other public schools caused many underperforming public school districts to improve. Editorial Board, *supra* note 19. For example, Florida public schools that were failing state standards (and whose students would therefore be eligible for vouchers) began improving their student test scores at a much faster rate relative to non-failing schools once the voucher program was implemented. Rajashri Chakrabarti, Staff Report, *Impact of Voucher Design on Public School Performance: Evidence from Florida and Milwaukee Voucher Programs*, FED. RESERVE BANK OF N.Y. (2008), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr315.pdf [<https://perma.cc/PH47-C2EV>]. At minimum, "[T]here is absolutely no evidence that the OSP prevents the legislature from making adequate provision for a public school system." *Holmes*, 919 So.2d at 423 (Bell, J., dissenting).

89. Earlier in its decision, the Florida court emphasized that the use of *expressio unius* is applicable to unclear statements. *Holmes*, 919 So.2d at 408. If one applies *expressio unius* to the Florida court's reasoning for distinguishing *Davis*, then the *only* reason why *Davis* was inapposite was because Wisconsin's education article did not describe the provision of district schools as a "paramount duty." By the court's own reasoning, its decision is only relevant for states whose constitutions elevate the provision of public schools to a heightened tier of duty.

90. *Meredith v. Pence*, 984 N.E.2d 1213, 1224 (Ind. 2013).

91. *Id.* (citing IND. CONST. art. VIII § 1). The Nevada Supreme Court, similarly, distinguished *Holmes* by observing that "the Nevada constitution contains two distinct duties set forth [in its education article]—one to encourage education through all suitable means and the other to provide for a uniform system of common schools." *Schwartz v. Lopez*, 382 P.3d 886, 898 (Nev. 2016) (citing NEV. CONST. art. 11 § 1–2).

that its state's education article does not impose any "paramount" duties. Second, a state court could find *another* legislative duty in its state constitution that providing voucher programs could plausibly fulfill.

To summarize, the *expressio unius* objection is mistaken because state legislatures have plenary power. The only state high court to decide otherwise misapplied its own precedents and gave other state high courts quick means to distinguish its reasoning.

II. THE "DIVERSION OF FUNDS" OBJECTION

As the previous section discussed, the existence of a state legislature's support for voucher programs does not *inherently* contravene the legislature's duty to public education. But voucher opponents have a follow-up argument: funding the programs *could* contravene this duty, if the programs reached a certain size. This argument has occasionally found purchase in state courts. To illustrate, the Ohio Supreme Court, while rejecting the contention that Ohio's voucher program necessarily undermined the state's duty to provide a "thorough and efficient system of common schools,"⁹² observed that a greatly expanded voucher program could theoretically divert enough funds to prevent the legislature from fulfilling this duty.⁹³

This section will contend, however, that the "diversion of funds" objection misrepresents the mechanics of voucher programs, which generally increase public schools' total per-pupil funding. Further, this section will argue, courts lack the jurisdiction to mandate *how* states remedy funding deficiencies in public schools. To be sure, state governments incontrovertibly should remedy such funding deficiencies. But state legislatures—not state courts—should choose how to do so.

Public schools receive their funding from local, state, and federal sources. The exact division of this funding differs across states, but, on average, public schools receive 8% of their funding from federal

92. OHIO CONST. art. VI, § 2.

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

sources, 47% from state sources, and 45% from local sources.⁹⁴ When public school districts lose students, via voucher programs or any other reason,⁹⁵ they generally retain all of their locally generated funding, as well as most of their federal funding.⁹⁶ Thus, while in absolute terms public schools' funding decreases as students leave, this funding actually *increases* on a per student basis.

Granted, one should consider that public schools also have fixed costs that are not easily reduced when a few students leave.⁹⁷ But estimates place these costs at about one-third of a school's total costs of educating a student.⁹⁸ Because, when a student departs, a school still typically retains over half of the funding it previously had to educate the student, a student's departure still usually increases public schools' *per student* net funding, even if the school continues to pay the fixed costs of educating that student.⁹⁹

This argument, however, assumes that public schools can reduce their variable costs to account for student departures. Once schools make these changes, vouchers enable more financial resources per student. But for schools, these changes are painful in a very

94. *Public School Revenue Sources*, NAT'L. CTR. FOR EDUC. STAT. (May 2022), <https://nces.ed.gov/programs/coe/indicator/cma/public-school-revenue> [<https://perma.cc/C9A9-KV4J>].

95. Plenty of policies cause students to leave public schools. For example, in the two years following the Covid-19 outbreak, 1.2 million students left public schools nationwide, in part because of families' frustration with mandated remote instruction. See Shawn Hubler, *With Plunging Enrollment, a 'Seismic Hit' to Public Schools*, N.Y. TIMES (May 17, 2022), <https://www.nytimes.com/2022/05/17/us/public-schools-falling-enrollment.html> [<https://perma.cc/PA47-UACX>]. However, no person would seriously argue that the resulting reduction in funding rendered remote learning unconstitutional.

96. Affidavit of Benjamin Scafidi in Support of Parent-Intervenors' Response to Plaintiffs' Motion for Preliminary Injunction at 28, *State v. Beaver*, 887 S.E.2d 610 (W.Va. 2022).

97. For example, the costs of maintaining the school and the salaries of certain personnel. See Heidi H. Erickson & Benjamin Scafidi, *An Analysis of the Fiscal and Economic Impact of Georgia's Qualified Education Expense (QEE) Tax Credit Scholarship Program* 43, EDUC. ECON. CTR. (Nov. 2020), <https://coles.kennesaw.edu/education-economics-center/docs/QEE-full-report.pdf> [<https://perma.cc/LW97-RGX7>].

98. *Id.* at 9.

99. This is a general rule, but there may be exceptions. For example, if a school's fixed costs are high enough, then it is possible that a student departure could reduce the school's per student net income.

meaningful way; they likely involve consolidating classrooms or retaining fewer personnel. The problem that voucher opponents must have in mind, then, is not that voucher programs reduce funding available for each student; it is that the programs force schools who lose students to make difficult changes. But if courts are to determine how state legislatures should promote public education, cutting voucher programs seems like a counterproductive answer.

Further, if voucher opponents had their way and courts could choose which budget items to slash, this might prove to be a pyrrhic victory. What next would be on the chopping block? A 1990 Brookings Institute study analyzed 220 relevant variables to explain what most affects school performance.¹⁰⁰ After surveying 60,000 students across 1,000 public and private high schools, its authors concluded that school autonomy from bureaucratic influences, including state and federal lawmakers and teachers' unions, is the most important prerequisite for school success.¹⁰¹ Courts flexing the newfound power to mandate *how* legislatures promote public education might choose to start by slashing laws that nurture schools' attachment to bureaucratic forces.¹⁰²

The manifest judicial overreach of such a response illustrates the deeper problem with the "diversion of funds" objection: a court can say that a particular level of funding for public schools is insufficient.¹⁰³ A court cannot, however, mandate *how* to fix this problem.

100. JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990). This study proved exceedingly influential in national debates over school choice, garnering the praise of George H.W. Bush and even the Wisconsin Supreme Court in *Davis*. See Dick M. Carpenter & Krista Kafer, *A History of Private School Choice*, 87 PEABODY J. EDUC., 336, 342 (2012); *Davis v. Grover*, 480 N.W.2d 460, 470-71 (Wis. 1992).

101. Chubb & Moe, *supra* note 100, at 20-22, 48.

102. It also bears noting that court-mandated funding lacks any discernible effect on improved school performance. See Eric A. Hanushek & Alfred A. Lindseth, *The Effectiveness of Court-Ordered Funding of Schools*, AM. ENTER. INST. (May 29, 2009), <https://www.aei.org/research-products/report/the-effectiveness-of-court-ordered-funding-of-schools/> [<https://perma.cc/UR3L-FNYV>].

103. See, e.g., *DeRolph v. State*, 728 N.E.2d 993, 1020-21 (Ohio 2000) (holding that the state was inadequately funding its public schools but permitting the legislature discretion in how to resolve this shortfall).

This intuition is supported by precedent. In *Baker v. Carr*,¹⁰⁴ the Supreme Court observed that certain “political” questions fall outside the boundaries of justiciability.¹⁰⁵ Questions that lack judicially discoverable and manageable standards or require complex policy determinations are best reserved for the legislature.¹⁰⁶ Even assuming that education articles offer manageable standards that judges can use to set requisite school funding levels,¹⁰⁷ a legislature’s strategy to meet these funding levels involves complex policy judgments.¹⁰⁸

Voucher programs are merely another item on a state’s extensive balance sheet. A state may fund its voucher programs from a general treasury fund,¹⁰⁹ the same fund that the state would use to pay for roads or bridges. Why should deficiencies in public school funding be resolved through rescinding voucher programs, rather than other expenditures? It costs a state significantly less to provide a voucher to a student than to fund that student’s public education.¹¹⁰

104. 369 U.S. 186, 209 (1962).

105. Though *Baker* was a federal case, state supreme courts also recognize the non-justiciability of political questions. See, e.g., *Harper v. Hall*, 886 S.E.2d 393, 415 (N.C. 2023).

106. *Baker*, 369 U.S. at 217.

107. Even this might be a bold assumption. Education articles generally do not offer clear standards for when a state legislature is fulfilling its obligations towards public education. As one state high court observed, “It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution.” *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996).

108. See *Conn. Coal. for Just. in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 261 (Conn. 2010) (“There is precedent for this court, having determined that a particular legislative scheme is unconstitutional, to leave the remedy to the legislative branch.”).

109. For example, West Virginia’s Hope Scholarship comes out of the state treasury. See W. Va. Code Ann. § 18-31-6 (West 2021).

110. See Michael Q. McShane, *School Choice Critics Try to Have it Both Ways*, AM. ENTER. INST. (Sep. 8, 2015), <https://www.aei.org/articles/school-choice-critics-try-to-have-it-both-ways/> [https://perma.cc/9QC3-HDY7]. In fact, average private school tuition is about one-third less than the cost it takes to educate a student in a public school. See Mark J. Perry, *Private School Tuition: 1/3 to 1/2 Less Than Publics*, AM. ENTER. INST. (Oct. 28, 2007), <https://www.aei.org/carpe-diem/private-school-tuition-13-to-12-less-than-publics/> [https://perma.cc/F9XB-C6EM].

Vouchers, thus, actually leave states with *more* money to spend, per student, on funding public schools.

Further, rescinding voucher programs does not necessarily lead to an increase in public school funding. For example, one year after *Holmes* rescinded Florida's Opportunity Scholarship program, Florida actually *reduced* its per pupil funding to public schools.¹¹¹ Public schools must be appropriately funded. But *how* a state finds these funds is, both descriptively and normatively, a political question.

One final observation: The weight of empirical evidence indicates that the competitive pressures induced by voucher programs improve public schools whose students are eligible for the programs.¹¹² Therefore, if it is truly appropriate for a court to prescribe particular remedies to improve public education, a court could, by the same token, also *mandate* that states provide voucher programs. The "diversion of funds" objection, in other words, is a risky gamble for voucher opponents.

The problem with the "diversion of funds" objection is thus twofold. First, voucher programs generally *increase*, not decrease, the amount of available funds per student enrolled in public schools. Second, regardless of the mechanics of voucher programs, deciding how to promote public education is a complex policy judgment best left to a legislature rather than a court.

III. THE "UNCONSTITUTIONAL CONDITIONS" OBJECTION

Because students are entitled to a public education, voucher opponents also argue that vouchers entail an unconstitutional condition. Under the unconstitutional conditions doctrine, the

111. 1999-2019: *The Political Agenda to Defund & Dismantle Florida Public Schools*, FUND EDUC. NOW (Oct. 5, 2019), <https://fundededucationnow.org/1999-2019-the-political-agenda-to-defund-dismantle-florida-public-schools/> [<https://perma.cc/B8FY-XKTC>].

112. A 2016 meta-analysis of the empirical research regarding voucher programs found that most studies confirm the programs' positive effects. These effects include (1) improved academic outcomes of program participants, (2) improved academic outcomes of affected public schools, (3) financial savings for taxpayers and public schools, (4) reduced racial segregation in schools, and (5) the promotion of civic values, including tolerance for the rights of others. Forster, *supra* note 9; see also Wolf, *supra* note 9; Editorial Board, *supra* note 19.

government cannot condition the provision of a discretionary benefit on an individual's forfeiture of a constitutional right.¹¹³ To accept a voucher, the objection goes, recipients must forfeit their right to a public education.¹¹⁴

As an initial matter, the premise of this objection—that voucher recipients “forfeit” their right to public education—is wrong. A student's right to a public education derives from a state's obligation to provide this education. Even when a student accepts a voucher, the state still fulfills this obligation by also providing public schools. Students attending private schools will always have a public school available in the event that they choose to transfer. Thus, voucher opponents' unconstitutional conditions objection is flawed for the same reason as their *expressio unius* objection: all that a state education article requires is that a state offer public education; there is no implied limitation that the state cannot also offer a voucher.

But, for good measure, assume that voucher opponents are correct that students “forfeit” their right to public education by accepting a voucher. Even then, the unconstitutional conditions doctrine does not preclude a state's provision of vouchers. First, extending the doctrine to one's right to a public education creates irreconcilable obligations for a state government. Further, the principles undergirding the unconstitutional conditions doctrine do not extend to voucher programs. The doctrine exists to protect against coercion,¹¹⁵ but vouchers *enable*—not *coerce*—a choice. Finally, even if a court chooses to evaluate voucher programs under the unconstitutional conditions doctrine, the programs still constitute a

113. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989); *Frost v. R.R. Commn. of State of Cal.*, 271 U.S. 583, 593-94 (1926) (“[O]ne of the [state's] limitations is that it may not impose conditions which require the relinquishment of constitutional rights.”).

114. See, e.g., *Beaver*, 887 S.E.2d at 629; *Niehhaus*, 310 P.3d at 989.

115. This Note does not use “coercion” to refer to an implied threat of the use of force. Cf. Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 12 (1988) (noting that constitutional conditions do not depend upon an implied threat of the use of force). Rather, “coercion” as used here describes an effect of a benefit where, in the absence of the benefit, the would-be beneficiary would *not* have preferred to surrender the right that would be subsequently abrogated by receipt of the benefit.

permissible conditional benefit under the Supreme Court's existing framework for the doctrine,

A. *Extending the Unconstitutional Conditions Doctrine to a State's Provision of Public Education Forces State Governments to Decide Between Irreconcilable Obligations*

The unconstitutional conditions doctrine applies to negative rights, rather than positive rights. Properly understood, a student's claim to public education is a positive right. To extend the unconstitutional conditions doctrine to a student's positive right to public education would force state governments to both ensure that all students receive a public education and enable all families to choose how to educate their children, objectives that can be in contradiction.

To begin, one's entitlement to public education is best understood as a *positive* right, whereas the unconstitutional conditions doctrine emerged to protect *negative* rights. Positive rights include claims to basic public services, like public education.¹¹⁶ Negative rights are those that one would have in the absence of government, and they are rights *against* government regulation. To illustrate, the freedoms of speech and religion are negative rights. In the absence of government, one could still speak or worship as one pleased. These rights thus prevent the government from restricting one's speech or worship.

The history of the unconstitutional conditions doctrine demonstrates its intended application to protect *negative* rights. The *Lochner* court developed the doctrine to protect the economic liberties of corporations from government regulation.¹¹⁷ A paradigmatic example of the early doctrine arose from *Frost & Frost Trucking Co. v. Railroad Commission of California*.¹¹⁸ In *Frost*, the Supreme Court held

116. For an overview of this traditional definition of negative and positive rights, see David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864 (1986).

117. Louis W. Fisher, *Contracting Around the Constitution: An Anticommodificationist Perspective on Unconstitutional Conditions*, 21 U. PA. J. CONST. L. 1167, 1177 (2019).

118. 271 U.S. 583 (1926).

that California could not condition private carriers' public highway access on their conversion into common carriers, as such a condition infringed upon the carriers' autonomy.¹¹⁹ The Warren Court subsequently expanded the doctrine to protect individual liberties,¹²⁰ such as freedom of speech and, famously in *Sherbert v. Verner*,¹²¹ freedom of religion. In *Sherbert*, the court held that the government could not restrict one's religious exercise as a precondition for attaining unemployment compensation.¹²² More recently, the court has held that the government cannot condition funding to non-profit organizations on the organizations' express endorsement of a particular message.¹²³ And indeed, generally when courts and commentators describe the doctrine, they explain that it prohibits the government from conditioning a *benefit* on an individual's forfeiture of a *right*,¹²⁴ a discursive distinction suggesting that the doctrine's typical application is not to a choice between a benefit and a positive right to another benefit.¹²⁵

119. *Id.* at 592, 599.

120. Fisher, *supra* note 117, at 1177.

121. 374 U.S. 398 (1963).

122. *Id.* at 403-06. Further, Carson v. Makin, the Supreme Court case foreclosing Blaine Amendment challenges to voucher programs, was itself an unconstitutional conditions case. 142 S. Ct. 1987 (2022). There, the Court held that Maine could not make private schools choose between maintaining their religious exercise and participating in the state's voucher program. *Id.* at 2002; Nicole Garnett, *Supreme Court Opens a Path to Religious Charter Schools*, EDUC. NEXT (Jan. 12, 2023), <https://www.education-next.org/supreme-court-opens-path-to-religious-charter-schools/> [<https://perma.cc/GYW3-XFEJ>] (“Carson itself is an unconstitutional conditions case. Although the court did not discuss the doctrine, it made clear that Maine could not condition participation on schools shedding their religious identity.”).

123. See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 221 (2013).

124. The language might also be “freedom” or “liberty” instead of “right.”

125. See, e.g., Sullivan, *supra* note 113, at 1421-22 (“Unconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects.”); Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61, 67 (2013) (“[T]he Supreme Court indicated that the sacrifice of constitutional rights could never be a condition for receiving a government benefit.”); *Sherbert*, 374 U.S. at 405 (“Conditions upon public benefits cannot . . . inhibit or deter the exercise of First Amendment freedoms.”); *Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583, 594 (1926)

One might object that the unconstitutional conditions doctrine cannot be limited to negative rights per se, because negative and positive rights frequently overlap. Many positive rights can be construed as negative rights, and vice versa.¹²⁶ For example, the Sixth Amendment ensures that “the accused shall enjoy the right to a speedy trial,” but it could have equivalently read, “the government shall not deny the accused a speedy trial.”¹²⁷ Indeed, Justice Scalia once observed that if the difference between positive and negative rights is to matter in a given context, there must exist a separate legally significant difference between the two.¹²⁸

But, these concerns are not entirely persuasive, particularly in the context of state-provided education. Surely there is some difference between a right that requires government action to exist, and a right that can exist even without government action.¹²⁹ While one might construe the Sixth Amendment’s guarantee of a speedy trial as either a negative or positive right, this ambiguity seems more related to the fact that the guarantee only applies once the government has already taken an affirmative step to restrict a person’s liberty. So, the guarantee is really a restriction on government action, framed as a grant of a service.¹³⁰ Conversely, if states are not actively taking steps to *prevent* students from obtaining an education, then state

(holding that the state may not impose conditions on “a privilege” which require the relinquishment of a “right”).

126. See Currie, *supra* note 116, at 886–87.

127. See Phillip M. Kannan, *But Who Will Protect Poor Joshua DeShaney, A Four-year-old Child with No Positive Due Process Rights?*, 39 U. MEM. L. REV. 543, 567–68 (2009) (quoting U.S. CONST. amend. VI).

128. *Id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025–26 (1992)).

129. See Frank Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 866 (2001) (proposing that the test to distinguish negative and positive rights should be if the right would be automatically fulfilled in the absence of government).

130. For another example illustrating this point, see *Youngberg v. Romero*, 457 U.S. 307, 324 (1982). There, the Court was deciding whether the government must provide training or “habilitation” services to detained individuals that have disabilities. After first observing that the government ordinarily has no constitutional duty to provide such services, *id.* at 317, the Court held that the government does have a duty to provide such services to detainees “as an appropriate professional would consider reasonable to ensure [a detainee’s] safety and to facilitate his ability to function free from bodily restraints.” *Id.* at 324.

education articles cannot be construed as a safeguard against an existing affirmative action.

Turning to Justice Scalia's concern, there is also a legally significant difference between negative and positive rights in the context of education. Families have a positive right to send their children to a public school, but they also have a negative right to choose how to educate their children. This includes the choice to send their children to a private school or to homeschool them.¹³¹ By implication, this also includes the right to accept a voucher, if offered. This right flows from the Constitution's Free Exercise Clause and Due Process Clause.¹³² Pitting a family's positive and negative rights against one another would entail that the state's obligation to public school conflicts with the constitutionally guaranteed right of educational choice.¹³³ A state cannot simultaneously ensure that all of its students are receiving a public education while allowing students to receive their education elsewhere. There must be some sort of hierarchy between the obligations imposed by the federal and state constitutions—and there is, established by the Supremacy Clause. In this situation, a family's negative right to choose how to educate its children, protected by the federal Constitution, comes first.

In fact, because a family's negative right to choose how to educate its children and the family's positive right to send its children to public school may sometimes conflict, voucher opponents may wish to categorically extricate the unconstitutional conditions doctrine away from states' provision of public education. Just as accepting a voucher entails "forfeiting" one's right to a public school, enrolling in public school entails "forfeiting" one's right to choose a private school. But who would seriously argue that this tension deems public schools unlawful? The doctrine is simply out of place here.

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

132. *Meyer v. Nebraska*, 262 U.S. 390, 399–402 (1923).

133. For further discussion on this point, see Jonathan Tavares, *Why Homeschooling Shouldn't Be Banned: The Resurgence of Home Education in the 21st Century*, 56 *NEW ENG. L. REV. F.* 11, 33 (2022).

Even if a court finds the negative rights versus positive rights distinction unpersuasive, there are certainly *some* situations where a citizen can surrender a right in exchange for a government benefit. After all, the government can constitutionally conduct transactions with private citizens. Yet, at least mechanically, such transactions would seem to run against the unconstitutional conditions doctrine; the government provides a discretionary government benefit (a payment of money) that individuals can only receive by forfeiting a right (their claim to their property). How can a court resolve this contradiction?

B. *The Unconstitutional Conditions Doctrine Exists to Prevent Coercion, but a Voucher Program Does Not Coerce Recipients—It Empowers Them*

The unconstitutional conditions doctrine is intended to prevent the government from doing indirectly that which it cannot do directly.¹³⁴ Specifically, it prevents against unlawful government coercion.¹³⁵ To illustrate, in *Sherbert*, the court rejected conditions on unemployment compensation that impeded religious expression because the effect of this condition was functionally to unlawfully regulate the protected religious expression.¹³⁶ Similarly, in *Frost*, the Court determined that California's conditions on corporations' highway usage were impermissible because they equated to unlawfully "compel[ling] the surrender" of constitutional rights.¹³⁷ In

134. Sullivan, *supra* note 113, at 1415.

135. To be sure, courts also sometimes *permit* coercive conditions, provided that the state has requisite interests. *See, e.g.,* *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006) (permitting a government agency to fire an employee for the content of his speech, because doing so was in the agency's interests as an employer). This Note's argument is that *when* courts prevent an unconstitutional condition, it is because the condition is coercive.

136. *See* *Sherbert v. Verner*, 374 U.S. 398, 398 (1963). In *Carson v. Makin*, also, the Court found that Maine's voucher program posed an unconstitutional condition by barring religious schools from participating, because "The Free Exercise Clause of the First Amendment protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" 142 S. Ct. 1987, 1996 (2022) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)).

137. *See* *Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583, 594 (1926).

every instance where the court has deemed a conditional benefit unconstitutionally exacting, the benefit incentivized the beneficiary to pursue an alternative that the beneficiary would otherwise not have preferred. In *Sherbert*, Adell Sherbert would have preferred to observe her Sabbath, but this was not allowed under South Carolina's unemployment compensation scheme. And in *Frost*, the private carriers would have preferred to remain private but for California's conditions on highway access.

But voucher programs, unlike the coercive programs struck down through the unconstitutional conditions doctrine, *empower* recipients. Families have a constitutionally protected right to choose where they send their children for an education.¹³⁸ Public schools are one such choice. There exist alternative schools, but they can be prohibitively expensive, whereas public school is free. Because a voucher does not affect the quality of the two options, it only impacts a family's decision about the education of a child if it sufficiently changes the family's financial situation. Which is to say, families who accept a voucher would have also preferred to attend an alternative school in the absence of the voucher. Thus, vouchers do not *coerce* a choice; they enable one.

Drawing a distinction between "coercive" conditional benefits and "empowering" is also sensible policy. Vouchers are designed to *help* the affected families. This cannot be said for the conditions on unemployment compensation in *Sherbert* or the restrictions on private carriers in *Frost*.¹³⁹

Indeed, at least from a policy perspective, why would a court want to discourage conditional benefits that empower their recipients? Such benefits can give both the government and recipients flexibility. For example, suppose a state has a constitutional obligation to provide and administer quality public shelters for the

138. See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (protecting the rights of parents to choose who educates their children); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1923) (protecting the rights of parents to send their children to private school).

139. This argument also explains why a government can engage in transactions with its citizens. Provided that a transaction is truly voluntary, it faces no obstacle from the unconstitutional conditions doctrine.

homeless, and assume that the state has adequately fulfilled this obligation. Under voucher opponents' interpretation of the unconstitutional conditions doctrine, the state would be prohibited from *also* offering housing vouchers to the homeless, even if recipients could use the voucher to purchase safer housing, because living in this safer housing would entail *not* staying in the public homeless shelter, to which the recipient had a positive right. Who benefits from such an arrangement?

The unconstitutional conditions doctrine is thus legally and pragmatically out-of-place when it comes to voucher programs. But what if the doctrine applied? Would the programs then be in trouble?

C. *Even if the Unconstitutional Conditions Doctrine Applies, Vouchers Still Survive the Supreme Court's Test for Determining if a Conditional Benefit is Constitutional*

In *Dolan v. City of Tigard*,¹⁴⁰ the Supreme Court explained that the government may permissibly attach an otherwise unconstitutional condition to a discretionary benefit if (1) there exists an "essential nexus" between a legitimate state interest and the imposed condition,¹⁴¹ and (2) there is "rough proportionality" between the exaction demanded by the condition and the expected impact of the benefit, meaning that the two are related in both nature and extent.¹⁴²

Even if state governments require that students forfeit their right to public education in order to receive vouchers (and, again, there is no such requirement), this condition has an "essential nexus" to all kinds of government interests. States might not wish to pay for both private and public education for a singular student. States may perceive pedagogical value in having students attend only one school, rather than splitting their day across multiple schools. States may want public schools to fully confront the impacts of losing students to competitive nearby schools. Or simply, states may wish to

140. 512 U.S. 374 (1994).

141. *Id.* at 374, 386 (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987)).

142. *Id.* at 375, 391.

avoid the administrative nightmare of keeping track of students who switch between private and public schools throughout the day.

And there is far more than mere “rough proportionality” between the exaction demanded (sacrificing one’s claim to public education) and the expected impact of the benefit (a voucher to attend private school). While recipients lose one form of education, they gain the financial ability to receive another. What is more, a student would only accept a voucher if she believed the alternative source of education to be superior to the public option.

All to say, extending the unconstitutional conditions doctrine to invalidate voucher programs forces state governments into an untenable legal position, potentially jeopardizes the legality of public schools themselves, disempowers families, restricts the government’s ability to offer flexibility in its benefits, and simply does not align with existing Supreme Court precedent on the subject.

CONCLUSION

The ubiquity of education articles in state constitutions demonstrates the importance and necessity of public education. Indeed, this note is not intended to cast doubt upon the protections that state education articles provide for public schools. The point, however, is that state education articles do not offer these protections at the expense of *other* educational opportunities, like school voucher programs. These articles constitute a floor, rather than a ceiling, on how state legislatures can promote education. They do not require state legislatures to slash particular benefit programs. And they do not prevent state legislatures from enabling families to choose how to educate their children.