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ABSTRACT

This article examines state constitutional provisions relating to publicly-funded voucher programs and determines their susceptibility to non-religious-based arguments. This article organizes the provisions relating to publicly-funded voucher programs into three categories: (1) "uniformity provisions," which require states to provide a uniform system of public schools; (2) "local control provisions," which delegate the authority to control public schools to local entities; and (3) "funding provisions," which contain language that prohibits states from funding non-public schools.

I. INTRODUCTION

This introduction explores a brief history of voucher programs and some of the arguments for and against them. Next, it introduces some of the potential constitutional issues presented by voucher programs. It will explore the Establishment Clause issues triggered by voucher programs and their ultimate resolution by the decision *Zelman v. Simmons-Harris*. The introduction will then discuss potential non-religious constitutional issues triggered by voucher programs. Finally, the introduction introduces the major discussion of this Article and set up analysis of state constitutional issues unrelated to traditional religious arguments.

Voucher programs are initiatives that "allow parents to use all or part of the government funding set aside for their

children's education to send their children to the public or private school of their choice."[1] According to the National School Boards Association, as of early 2009, voucher programs for private school education existed or had been authorized statewide in Arizona, Florida, Georgia, Ohio, and Utah, as well as the cities of Cleveland, Milwaukee, New Orleans, and Washington, D.C.[2]

Although vouchers still face significant opposition, public support for these programs has increased. Recently, the general public has become more supportive of voucher programs. According to a 2008 poll, 44 percent of Americans supported permitting students and parents to choose a private school to attend at the public's expense—the largest level of support since 2002.[3] The issue remains contested as supporters and critics of voucher programs offer contradictory conclusions regarding such a system's merits.

Proponents cite a number of factors in support of voucher programs. They note that parents who use vouchers experience higher levels of satisfaction with their children's schools.[4] Supporters observe that voucher students tend to demonstrate achievement gains in mathematics, and that these programs save money for state governments and local public school districts.[5] Meanwhile, opponents counter that voucher programs withhold sorely needed funds from public school systems.[6] Voucher program critics also indicate that research

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1. THE FRIEDMAN FOUND. FOR EDUC. CHOICE, ABC'S OF SCHOOL CHOICE: 2007-2008 (6th ed.) (2008).

2. National School Boards Association, *Voucher Strategy Center*, http://www.nsba.org/MainMenu/Advocacy/FederalLaws/SchoolVouchers/VoucherStrategyCenter.aspx (last visited Jan. 25, 2010).

3. William J. Bushaw & Alec M. Gallup, *Americans Speak Out — Are Educators and Policy Makers Listening?: The 40th Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes toward The Public Schools*, 90 PHI DELTA KAPPAN 9 (2008).

4. *See, e.g.*, Patrick J. Wolf, *School Vouchers: What the Research Says About Parental School Choice*, 415 BYU L. REV. 446, 434-445 (2008) (reviews existing research on voucher programs).

5. *Id.*

6. *See, e.g.*, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, SCHOOL VOUCHERS: THE RESEARCH TRACK RECORD STUDENT ACHIEVEMENT (2005) *available at* http://archive.aft.org/pubs-reports/teachers/VoucherTrackRecord2005.pdf (reviewing existing research on voucher programs).

fails to prove that voucher programs improve students' academic achievement, and express concerns that private schools are not accountable to the public for publicly provided funds.[7]

A. The Legal Debate

In the legal arena, voucher programs raise a number of potential federal and state constitutional issues. For a number of years, the legal community primarily focused on whether voucher programs violated the Establishment Clause of the U.S. Constitution by authorizing public money for religiously-affiliated schools.[8] The U.S. Supreme Court resolved this issue in *Zelman v. Simmons-Harris*, declaring Cleveland's voucher program constitutional.[9] After *Zelman*, commentators predicted the rise of religious-based state constitutional challenges to publicly-funded voucher programs.[10] For example, Clint Bolick, vice president of the Institute for Justice (a pro-voucher group that argued before the Supreme Court in *Zelman*), stated that "there are some states where it is absolutely clear that we could not promote school choice under the state constitution."[11] Bolick also guaranteed a religious-based strategy, observing that "we're now going to go after those restrictions arguing that state constitutions may not discriminate against religious options."[12]

On the other side of the debate, Robert Chanin, general counsel for the National Education Association (NEA), which

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7. *Id.*

8. *See* Frank R. Kemerer, *The Constitutional Dimension of School Vouchers*, 3 TEX. F. ON C.L. & C.R. 137 (1998); C. Bright, *The Establishment Clause and School Vouchers: Private Choice and Proposition 174*, 31 CAL. W.L. REV. 193 (1995); Comment, *School Choice Vouchers and the Establishment Clause*, 58 ALB. L. REV. 543 (1994).

9. 536 U.S. 639 (2002).

10. *See, e.g.*, Vanessa Blum, *Pro-Voucher Forces Celebrate, Prepare for New Fights*, LEGAL TIMES, Jul. 1 2002, *available at* http://www.law.com/jsp/article.jsp?id=1024078920204 ("The next phase of battle will take place in the states over laws that go further than the Constitution in limiting the way public funds may be spent on religious institutions."); Avi Schick, *Veni, Vidi, Vouchers: Why the Battle for School Vouchers Isn't Over*, SLATE, Sep. 17, 2002, *available at* http://slate.msn.com/?id=2071085 (Discussing the obstacle of Blaine Amendments). *See generally* Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 957–72 (listing likely religious-based constitutional challenges following *Zelman*).

11. Blum, *supra* note 10.

12. *Id.*

opposed vouchers in the *Zelman* case, lamented that "we have lost the establishment clause as a weapon in our arsenal against voucher programs."[13] He further noted that "many state constitutions have related clauses that are more rigorous and more far-reaching than the First Amendment."[14] *Zelman* shows that the battle over the constitutionality of voucher programs was heading to the state courts.

While much of the debate has centered on religious-based challenges, recent decisions in Florida and Colorado suggest that future challenges will be grounded in non-religious provisions. In 2004, the Supreme Court of Colorado found the state's voucher program unconstitutional in *Owens v. Colorado Congress of Parents, Teachers & Students.*[15] The court reasoned that because the program diverted local school funds to schools outside a school district's control, it granted school districts control over instruction in those schools and thus violated the constitutional provision. In 2006, the Supreme Court of Florida held in *Bush v. Holmes* that the state's voucher program violated a state constitutional provision mandating a uniform school system by redirecting public funds to schools outside the uniform system.[16] The two cases reveal potential non-religious-based challenges to voucher programs in other states.

B. Likelihood of Future Non-Religious Constitutional Claims

The purpose of this article is to examine state constitutional provisions relating to publicly-funded voucher programs and to determine their susceptibility to non-religious-based arguments. This article organizes the provisions relating to publicly-funded voucher programs into three categories: uniformity, local control, and funding provisions. Uniformity provisions require states to provide a uniform system of public schools. Local control provisions delegate the authority to control public schools to local entities, such as the board of education of a school district. Funding provisions contain language that prohibits states from funding non-public schools. Educators, legislators, lawyers, and judges within states with such provisions should familiarize themselves with these

13. *Id.*
14. *Id.*
15. 92 P.3d 933 (Colo. 2004).
16. 919 So. 2d 392 (Fla. 2006).

provisions before considering whether to adopt publicly-funded voucher programs.

II. UNIFORMITY PROVISIONS

This section explores uniformity provisions, the first provisions related to publicly-funded voucher programs considered in this Article. It first lists the states with existing uniformity provisions, and then discusses two major state court decisions with antipodal outcomes. The analysis will show that states may have two very different tracks to follow in relation to uniformity provision claims.

Uniformity provisions are state constitutional provisions that compel states to provide a uniform system of public schools. These provisions may disallow voucher programs because they suggest that all schools must have substantially the same educational programming and administrative structure. As Table 1 shows, fourteen states have constitutional provisions that mandate the establishment of a uniform system of public schools: Colorado, Florida, Idaho, Indiana, Minnesota, Nevada, New Mexico, North Carolina, North Dakota, Oregon, South Dakota, Washington, Wisconsin, and Wyoming.

Table 1: States with Constitutional Provisions Requiring the Establishment of a Uniform System of Public Schools

STATE	PROVISION	TEXT
Colorado	COLO. CONST. art. IX, § 2	The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be

		educated gratuitously.
Florida	FLA. CONST. art. IX, § 1(a)	The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.
Idaho	IDAHO CONST. Art. IX, § 1	The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general,

		uniform and thorough system of public, free common schools.
Indiana	IND. CONST. Art. 8, § 1	Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.
Minnesota	MINN. CONST. Art. 13, § 1	The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.

Nevada	NEV. CONST. Art. 11, § 2	The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction, and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools.
New Mexico	N.M. CONST. Art. 12, § 1	A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained.
North Carolina	N.C. CONST. Art. IX, § 2	General and uniform system: term. The General Assembly shall provide by taxation and otherwise for a general and uniform

		system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.
North Dakota	N.D. CONST. Art. 8, § 2	The legislative assembly shall provide for a uniform system of free public schools throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education, except that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education.
Oregon	OR. CONST. Art. VIII, § 3	The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools.
South Dakota	S.D. CONST. Art. 8, § 1	The stability of a republican form of government depending on the morality and intelligence of the people, it shall be the duty of the

		Legislature to establish and maintain a general and uniform system of public schools wherein tuition shall be without charge, and equally open to all; and to adopt all suitable means to secure to the people the advantages and opportunities of education.
Washington	WASH. CONST. Art. 9, § 2	The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.
Wisconsin	WIS. CONST. Art. 10, § 3	The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free

		and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours.
Wyoming	WYO. CONST. Art. 7, § 1	The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade, a university with such technical and professional departments as the public good may require and the means of the state allow, and such other institutions as may be necessary.

The case law is limited with respect to the state constitutionality of voucher programs under uniformity provisions. Both Wisconsin and Florida courts, however, have ruled on the issue. The dissimilar outcomes in those two cases may provide guidelines for potential cases in other states.

In *Davis v. Grover*, the Supreme Court of Wisconsin examined the Milwaukee Parental Choice Program (MPCP), a

program permitting students from low-income families to attend private non-sectarian schools for free.[17] The MPCP paid participating schools directly with the state's school funds.[18] Opponents argued that the MPCP violated the state's uniformity clause, Art. X, § 3,[19] which declares: "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years."[20] The court rejected this argument, finding that, rather than serving as a mandate that every student attend a public school, "the uniformity clause clearly was intended to assure certain minimal education opportunities for the children of Wisconsin."[21] The court found, rather, that the uniformity clause "requires the legislature to provide the opportunity for all children to receive a free uniform basic education."[22]

The Supreme Court of Florida reached a different conclusion under its analysis of Florida's uniformity provision. In *Bush,* the court found that Florida's uniformity provision prohibited the funding of the Florida Opportunity Scholarship Program (OSP), which provided opportunity scholarships in order to give parents the opportunity for their children to attend a public school that is performing satisfactorily or to attend an eligible private school when the parent chooses to apply the equivalent of the public education funds generated by his or her child to the cost of tuition in the eligible private school.[23] The court held that the OSP violated Art. IX, § 1(a) of the Florida Constitution "by devoting the state's resources to the education of children within our state system through means other than a system of free public schools."[24]

The *Bush* court traced the legislative history of the education article and noted that constitutional amendments

17. 480 N.W.2d 460 (Wis. 1992).

18. WISC. STAT. ANN. § 119.23 (amended by 2009-2010 Wisc. Legis. Serv. Act 28 (2009 A.B. 75) (West 2009)).

19. WIS. CONST. art. X, § 3.

20. *Id.*

21. Davis v. Grover, 480 N.W.2d 460, 474 (Wis. 1992).

22. *Id.*

23. FLA. STAT. ANN. § 229.0537 (West 1999) (current version at FLA. STAT. § 1002.38 (2009)).

24. Bush v. Holmes, 919 So.2d 392, 407 (Fla. 2006).

adding the "paramount duty" language to Article IX § 1(a)[25] demonstrated the significance of education to Florida and mandated that the legislature provide a uniform, public system of education.[26] Furthermore, the court stressed that the second and third sentences of Article IX § 1(a) must be read *in pari material*.[27] If read along with the "paramount duty" imposed on the legislature, the court stated that "[t]he 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."[28] The court held that the OSP violates Art. IX, § 1(a) by permitting students to obtain a publicly-funded education outside the uniform system and uses money to support private schools not subject to the requirements of that uniform system.[29] Under this analysis, *Burns* found the OSP system, as constructed, unconstitutional and that students could no longer receive publicly-funded vouchers. The court recognized that parents have "the basic right to educate their children as they see fit,"[30] but not the right to have Florida pay for their children to attend private school.[31]

The *Bush* majority noted in a footnote that the Supreme Court of Wisconsin upheld the constitutionality of the MPCP. The majority, however, stressed that Florida's constitution differs materially from Wisconsin's constitution since Wisconsin's does not contain language making it a "'a paramount duty of the state to make adequate provision for the education of all children residing within its borders.'"[32] In contrast, the dissent in *Bush* found no language to substantiate the majority's interpretation. Similar to Wisconsin's refusal to treat the uniformity clause as restrictive, the dissent found that

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25. FLA. CONST. art. IX, § 1.
26. *See Bush*, 919 So.2d at 398–407.
27. *Id.* at 406–07.
28. *Id.* at 408.
29. *See id.* at 412.
30. *Id.*
31. *Id.* at 413.
32. Bush v. Holmes, 919 So.2d 392, 407 (Fla. 2006), n. 103mk, quoting FLA. CONST. art. IX, § 1(a).

> the text does not provide that the government's provision for education shall be 'by' or 'through' a system of free public schools. Without language of exclusion or preclusion, there is no support for the majority's finding that public schools are the exclusive means by or through which the government may fulfill its duty to make adequate provision for the education of every child in Florida.[33]

If courts in other states with uniformity provisions challenge the constitutionality of voucher programs, the courts likely must determine whether the language of their uniformity provisions preclude their legislatures from funding additional opportunities outside the public schools system. If courts adopt the majority's reasoning in *Bush*, they will treat the public school system mentioned in the systems clause as the sole legitimate recipient of public education funds. On the other hand, if courts follow *Davis*, they will likely determine that, while the state must provide a minimum level of public education, the state legislature may provide additional opportunities beyond that level. The legal community in these states should be aware of any uniformity clause and understand how its interpretation will impact the constitutionality of a publicly-funded voucher program.

III. LOCAL CONTROL PROVISIONS

This section explores local control provisions and their constitutional relevance to publicly-funded voucher programs. The analysis first considers potential unconstitutionality claims from local control provisions because they dilute school boards' authorities to direct education within their district. Next, this section briefly expounds on the one existing state case providing any contours to the scope of a local control provision. The discussion then turns to an analysis of how systems provisions, in which state constitutions require states to establish a system of public schools, may also raise potential constraints on local control.

Local control provisions authorize school boards to supervise education within their districts. Table 2 contains the six states that have local control provisions.

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33. *Id.* at 416.

Table 2: States with Constitutional Provisions Requiring Schools to Be under Local Control

STATE	PROVISION	TEXT
Colorado	COLO. CONST. Art. IX, § 15	The general assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the district. Said directors shall have control of instruction in the public schools of their respective districts.
Florida	FLA. CONST. Art. IX, § 4(b)	The school board shall operate, control and supervise all free public schools within the school district and determine the rate of school district taxes within the limits prescribed herein. Two or more school districts may operate and finance joint educational programs.
Georgia	GA. CONST. Art. VIII, § 5, ¶ . 5	Authority is granted to county and area boards of education to establish and maintain public schools within their limits.
Kansas	KAN. CONST. Art. 6, § 5	Local public schools under the general supervision of the state

		board of education shall be maintained, developed and operated by locally elected boards. When authorized by law, such boards may make and carry out agreements for cooperative operation and administration of educational programs under the general supervision of the state board of education, but such agreements shall be subject to limitation, change or termination by the legislature.
Montana	MONT. CONST. Art. 10, § 8	The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law.
Virginia	VA. CONST. Art. 8, § 7	The supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law.

As *Owens* illustrates, voucher programs in states with local control provisions might be vulnerable to charges of unconstitutionality because local control provisions dilute school boards' authority to direct the education within their districts. In 2003, Colorado enacted the Colorado Opportunity

Contract Pilot Program ("COCPP")[34] with the aim of improving the educational achievement of high-poverty, low-achieving children in the public schools.[35] COCPP accepted children eligible for free or reduced lunches,[36] who also demonstrated a deficiency in a particular area on the Colorado Scholastic Assessment Program or ACT college admissions test.[37] Parents of qualified children admitted to a participating private school entered into contracts with their children's school district.[38] These contracts required the school districts to distribute assistance based on the district's educational cost per pupil[39] to parents, who were then required to endorse the funds to the participating private schools.[40]

> Following the enactment of COCPP in 2003, a group of parents, organizations, and other individuals challenged its constitutionality in district court.[41] The plaintiffs argued that the COCPP violated Art. IX, § 15 of the Colorado Constitution, which states that boards of education established by local school districts "shall have control of instruction in the public schools of their respective districts."[42] The plaintiffs alleged that the COCPP violated this provision by "depriving local school boards of control over instruction in the public schools of their respective districts."[43] The defendants argued that the voucher program did not violate Art. IX, § 15 because the state had extensive control over education as well as how local schools districts utilized funding.[44] The trial court reviewed the Colorado Supreme Court cases that interpreted and applied Article IX, § 15,[45] ultimately concluding that the court

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34. *See* COLO. REV. STAT. § 22-56-101 (2003) (repealed 2006).

35. *See id.* at § 22–56–102(1)(a).

36. *See id.* at § 22–56–104(2)(a).

37. *See id.* at § 22–56–104 (2)(b)(I)(A)-(B).

38. *See id.* at § 22–56–107(1).

39. *See id.* at § 22–56–108(2)(a)–(b)(I-III).

40. *See id.* at § 22–56–109(4)(a).

41. Colo. Cong. of Parents, Teachers & Students v. Owens, 2003 WL 23870661 (Colo. Dist. Ct., Dec. 3. 2003), *aff'd,* 92 P.3d 933 (Colo. 2004).

42. COLO. CONST. art. IX, § 15.

43. *Owens*, 2003 WL 23870661 at *1.

44. *Id.* at *11–12.

45. *See, e.g.,* Belier v. Wilson, 147 P. 355 (Colo. 1915); School Dist. No. 16 in Adams County v. Union High Sch. No. 1 in Adams County, 152 P. 1149 (Colo. 1915); Lujan v. Colo. State Bd. of Ed., 649 P.2d 1005 (Colo. 1982).

> had "consistently interpreted section 15 as requiring that the local board have significant control over the instruction for the district's students."[46] The court held that the COCPP violated Art. IX, § 15 "[b]y stripping all discretion from the local school district over the instruction to be provided in the voucher program."[47]

The defendants appealed to the Supreme Court of Colorado and argued that the COCPP did not interfere with local control because participating students left the district.[48] The defendants also argued that since the state supplied the majority of funding to the public schools, the court should interpret Art. IX, § 15 as permitting COCPP as a matter of public policy.[49] The court reinforced the state constitution's commitment to local control of education, stating, "In that provision, the framers made the choice to place control 'as near the people as possible' by creating a representative government in miniature to govern instruction."[50] After reviewing the same line of cases interpreting Art. IX, § 15 as the district court, the state supreme court found local control indistinguishable from control over the use of funds.[51]

While no other local control state has considered the constitutionality of a publicly-funded voucher program under a local control provision, the Supreme Court of Kansas has identified a limitation in another context. In *Board of Education v. Kansas State Board of Education*, the court found a statute constitutional which granted the state board of education the authority to approve or disapprove interlocal agreements between school districts.[52] The court found that while Art. VI, § 5 did grant school boards the authority to maintain, operate and develop local schools, "this power is qualified, however, in that such authority exists only 'under the general supervision of the state board of education.'"[53] The court also reviewed the legislative history of Kansas' control

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46. Colo. Cong. of Parents, Teachers & Students v. Owens, 2003 WL 23870661, *9 (Colo. Dist. Ct., Dec. 3. 2003), *aff'd,* 92 P.3d 933 (Colo. 2004).

47. *Owens*, 2003 WL 23870661 at *12.

48. Owens v. Colo. Cong. of Parents, 92 P.3d 933, 935 (Colo. 2004).

49. *Id.*

50. *Id.* at 939.

51. *Id.* at 940.

52. Bd. of Educ. v. Kan. State Bd. of Educ., 966 P.2d 68, 85 (Kan. 1998).

53. *Id.* at 83.

provision and found that the legislature intended to expand the authority of the state board of education.[54] One must keep in mind, however, that Kansas has the only control state provision containing language that qualifies local control or explicitly mentions the state board of education.

Systems provisions, in which state constitutions require states to establish a system of public schools, may also raise potential constraints on local control. For example, a recent Florida case upheld the constitutionality of a charter school statute that permits Florida's Department of Education to overrule a local district's denial of a charter school application.[55] The local school board in that case argued that the statute permitted the department of education to open a charter school, which violated Florida's control provision, Art. IX, § 4(b).[56] The court found that the statute did not interfere with local district control because the department of education's approval of an application did not equate to an approval of the opening of a school.[57] Instead, the court found this only began the process and the local district still had the power to deny or reject an application or revoke an existing charter.[58] The court concluded that, in accordance with Florida's system provision, "while the school board shall operate, control and supervise all free public schools within their district, the State Board of Education has supervision over the system of free public education as provided by law."[59] Therefore, local control states must be aware of additional provisions, such as systems provisions, which may restrict local control over public schools.

IV. FUNDING PROVISIONS

This section explores funding provisions and the issues they raise for voucher program initiatives. It lists the states with funding provisions and then introduces relevant case law on voucher programs. The section also discusses the potential issues triggered by publicly-funded voucher programs.

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54. *Id.* at 84.
55. Sch. Bd. v. Acad. of Excellence, Inc., 974 So.2d 1186 (Fla. 2008).
56. *Id.* at 1191.
57. *Id.* at 1192.
58. *Id.*
59. *Id.* at 1193.

Funding provisions include language related to potential limitations on the funding of schools within states. These provisions can be subdivided into four categories: (i) those explicitly barring the funding of private schools; (ii) those barring funding to any school that is not under exclusive control of the state; (iii) those limiting the money raised for education (i.e., school fund) to public, common or free schools; and (iv) those that require public money to be spent for public purposes. The provisions in each category raise unique obstacles to publicly-funded voucher programs.

A. Provisions Explicitly Barring the Funding of Private Schools

Table 3 includes the seven states that have constitutional provisions barring the public funding of private schools: Alaska, Arizona, Hawaii, Michigan, New Mexico, South Carolina and Wyoming.

Table 3: States with Constitutional Provisions Explicitly Barring the Funding of Private Schools.

STATE	PROVISION	TEXT
Alaska	ALASKA CONST. art. XII, § 1	No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.
Arizona	ARIZ. CONST. art. IX, § 10	No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation.
Hawaii	HAW. CONST. art. 10, § 1	[N]or shall public funds be appropriated for the support or benefit of any sectarian or nonsectarian private educational institution . . .
Michigan	MICH. CONST.	No payment, credit, tax

	art. 8, § 2	benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school . . .
New Mexico	N.M. CONST. art. 12, § 3	[N]o part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.
South Carolina	S.C. CONST. art. XI, § 4	No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution.
Wyoming	WYO. CONST. art. VII, § 8	[N]or shall any portion of any public school fund ever be used to support or assist any private school, or any school, academy,

		seminary, college or other institution of learning controlled by any church or sectarian organization or religious denomination whatsoever.

Among these, Arizona is the only state listed with courts that have applied the funding provision to a publicly-funded voucher program.[60] In 2006, the Arizona legislature passed two laws granting vouchers to foster children,[61] and also children with disabilities.[62] In accordance with both statutes, the state would provide money to parents and required them to endorse the funds to participating public and private schools.[63] The Arizona voucher programs made both sectarian and non-sectarian schools eligible to participate in both voucher programs.

In the 2007 case of *Cain v. Horne*,[64] a group of individuals filed suit against the superintendent of schools to enjoin him from implementing the Arizona voucher programs. The plaintiffs alleged that the Arizona voucher programs violated a number of constitutional provisions, including Article IX, § 10, which provides that "no tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation."[65] The trial court disagreed, holding that the Arizona voucher programs were constitutional and stated in reference to both statutes that "no appropriation of public money is being made in aid of any church, or private or sectarian school in violation of Article 9, Section 10 of the Arizona Constitution."[66]

The appellate court vacated the lower court's decision and held that the Arizona voucher programs violated Article IX, § 10.[67] Invoking the plain meaning rule, the court held that the

60. Cain v. Horne, 202 P.3d 1178 (Ariz. 2009).
61. ARIZ. REV. STAT. ANN. § 15–817 (2009).
62. *Id.* at § 15-891.
63. *See id. at* § 15–817.01, 15.891–03(F).
64. Cain v. Horne, 2007 WL 1891530 (Ariz. Super. Ct. June 14, 2007).
65. ARIZ. CONST. art. IX, § 10.
66. *Cain*, 2007 WL 1891530, *1.
67. Cain v. Horne, 183 P.3d 1269, 1276 (Ariz. Ct. App. 2008).

constitutional provision clearly prohibited the provision of tuition to private schools.[68] The appellants argued that the public aid of Arizona voucher programs primarily benefited the students attending private schools, and therefore the Arizona voucher programs avoided the constitution's prohibition on public aid to private schools by dispensing funds directly to students.[69] The court of appeals rejected this argument but acknowledged that courts had been willing to apply the true beneficiary theory in instances in which states provided transportation and textbooks to private schools students.[70] However, the court stressed that tuition payments are undoubtedly a direct benefit to private schools:

> Tuition and institutional fees go directly to the institution and are its very life blood . . . . Surely a payment by the State of the tuition and fees of the pupils of a private school begun on the strength of a contract by the State to do so would be an appropriation to that school.[71]

The court of appeals then remanded the case to the lower court and ordered it to enjoin the superintendent from implementing the Arizona voucher programs.[72] The Supreme Court of Arizona upheld the court of appeals decision, stating that "the language and purpose of the Aid Clause do not permit the appropriations these voucher programs provide; to rule otherwise would amount to 'aid of . . . private or sectarian school[s],' Ariz. Const. art. 9, § 10, and render the clause a nullity."[73]

Although states with funding provisions similar to Arizona's have not considered the constitutionality of publicly-funded voucher programs, the attorneys general of Hawaii and New Mexico have issued similar opinions on the issue.[74] New

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68. *Id.*

69. *Id.* at 1276.

70. *See, e.g.*, Bowker v. Baker, 167 P.2d 256 (Cal. Ct. App. 1946) (transporting students does constitute as aid to students); Chance v. Miss. State Textbook Rating and Purchasing Bd., 200 So. 706 (Miss. 1941) (supplying textbooks does not constitute aid to students). *But see* Matthews v. Quinton, 362 P.2d 932 (Alaska 1961) (transporting students constitutes benefit to private schools); Spears v. Honda, 449 P.2d 130 (Haw. 1968) (transporting students constitutes unconstitutional benefit to private educational institutions).

71. *Cain*, 183 P.3d at 1276.

72. *Id.* at 1278.

73. Cain v. Horne, 202 P.3d 1178, 1184 (Ariz. 2009).

74. *See* N.M. Att'y Gen. Op. 99–01 (1999), *available at* http://www.nmag.gov/pdf/01-29-99_school_voucher.pdf; The Constitutionality of School

Mexico's Attorney General stated that its funding clause forbade the use of public funds to support private schools and, "[a]s a result, we believe that a New Mexico court addressing the issue would likely conclude that tuition assistance under a voucher program constitutes the unconstitutional use of public money for the support of 'sectarian, denominational or private' schools, whether the money is paid directly to the schools, the students or the parents."[75] Similarly, Hawaii's Attorney General noted that Hawaii's courts had found that the public provision of student transportation to private school violated of the state's funding clause prohibiting aid to private educational institutions because

> (1) the bus subsidy "built up, strengthened and made successful" the nonpublic schools; (2) the bus subsidy induced attendance at nonpublic schools, where the school children are exposed to a curriculum that, in many cases, if not generally, promotes the special interests and biases of the nonpublic group that controls the school; and (3) to the extent that the State paid out funds to carriers owned by the nonpublic schools or agents thereof, the State gave tangible "support or benefit" to such schools.[76]

The Hawaii Attorney General concluded that if bus subsidies constituted an unconstitutional form of support of private schools, then publicly-funded voucher programs that provided tuition funds to private schools must also.[77] The *Horne* case and opinions from Hawaii and New Mexico seem to indicate that publicly-funded voucher programs would likely violate the state's constitution, containing a funding provision that explicitly bars funding to private schools.

B. Provisions Barring Funding to Any School That Is Not Under Exclusive Control of the State

Table 4 contains the funding provisions of the three states that prohibit funding schools that are not under exclusive state control. These states include: California, Massachusetts and Nebraska.

Vouchers in Hawaii, Haw. Att'y Gen. Op. 03-01 (2003), *available* at http://hawaii.gov/ag/main/publications/opinions/2003/03-01.pdf.

75. N.M. Att'y Gen. Op. 99–01, 2 (1999) (quoting N.M. CONST. art. 12, § 3).

76. *Id.* (quoting Spears v. Honda, 449 P.2d 130, 137–38 (Haw. 1968)).

77. *Id.*

Table 4: States with Constitutional Provisions Barring Funding to Any School That Is Not Under Exclusive Control of the State

STATE	PROVISION	TEXT
California	CAL. CONST. art. IX, § 8	No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.
Massachusetts	MASS. CONST. amend. art. XVIII, § 2	No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any. . .primary or secondary school . . . which is not publicly owned and under the

		exclusive control, order and supervision of public officers or public agents authorized by the commonwealth or federal authority or both . . .
Nebraska	NEB. CONST. art. VII, § 11	Notwithstanding any other provision in the Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof . . .

The case law in these states is very limited with respect to publicly-funded voucher programs. In *State ex. rel. Rogers v. Swanson*, the Nebraska Supreme Court invalidated a statute that provided public grants to Nebraska students attending private institutions within the state.[78] In rejecting the argument that the funds actually benefit students and not institutions, the court stated that the state legislature could not elude the constitutional prohibition on aiding institutions outside state control by restrictively endorsing tuition payments to parents.[79] Furthermore, "[l]imiting the grants to students attending independent institutions in Nebraska insures that all these funds will inure to the benefit of institutions not owned or controlled by the state."[80]

Similarly, the courts in California and Massachusetts would likely find a statute establishing a publicly-funded voucher program unconstitutional if interpreting their funding provisions in the same manner as Nebraska. Even if

78. 219 N.W.2d 726 (Neb. 1974).
79. *Id.* at 729–30.
80. *Id.* at 733.

legislatures attempt to provide tuition payments directly to parents instead of the private schools, the courts will still likely invalidate the voucher program by focusing on the monetary benefit that eventually passes to the private schools. In operation, the funding provisions prohibiting public funding to schools "not under the exclusive control of the state" appear equivalent to the provisions precluding the public funding of private schools. Based on the decisions in *Horne* and *Rogers*, a voucher program would not be constitutional under either type of funding provision.

C. Provisions Limiting Funds to Public Schools

Nine states have constitutional provisions limiting educational funds to public, free or common schools: Connecticut, Georgia, Missouri, New Jersey, North Carolina, Rhode Island, South Dakota, Texas and Washington. Table 5 provides the pertinent constitutional provisions of these states.

Table 5: States with Constitutional Provisions Limiting Funds to Public Schools.

STATE	PROVISION	TEXT
Connecticut	CONN. CONST. art. VIII, § 4	The fund, called the SCHOOL FUND, shall remain a perpetual fund, the interest of which shall be inviolably appropriated to the support and encouragement of the public schools throughout the state, and for the equal benefit of all the people thereof. The value and amount of said fund shall be ascertained in such manner as the general assembly may prescribe, published,

		and recorded in the comptroller's office; and no law shall ever be made, authorizing such fund to be diverted to any other use than the encouragement and support of public schools, among the several school societies, as justice and equity shall require.
Georgia	GA. CONST. art. VIII, § 6	School tax funds shall be expended only for the support and maintenance of public schools, public vocational-technical schools, public education, and activities necessary or incidental thereto, including school lunch purposes.
Missouri	MO. CONST. art. IX, § 5	[A] public school fund . . . shall be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever.
New Jersey	N.J. CONST. art. 8, § 4, ¶ 2	The fund for the support of free public schools . . . shall be annually appropriated to the support of free public schools, and for the equal benefit of all the people of the State;

		and it shall not be competent, except as hereinafter provided, for the Legislature to borrow, appropriate or use the said fund or any part thereof for any other purpose, under any pretense whatever.
North Carolina	N.C. CONST. art. IX, § 6	[S]hall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.
Rhode Island	R.I. CONST. art. 12, § 2 R.I. CONST. art. 12, § 4	The money which now is or which may hereafter be appropriated by law for the establishment of a permanent fund for the support of public schools, shall be securely invested and remain a perpetual fund for that purpose. The general assembly shall make all necessary provisions by law for carrying this article into effect. It shall not divert said money or fund from the aforesaid uses, nor borrow, appropriate, or use the same, or any part thereof, for any other purpose, under any pretence whatsoever.

South Dakota	S.D. CONST. art. VIII, § 2	[A]nd remain a perpetual fund for the maintenance of public schools in the state. It shall be deemed a trust fund held by the state. The principal shall never be diverted by legislative enactment for any other purpose, and may be increased; but, if any loss occurs through any unconstitutional act, the state shall make the loss good through a special appropriation.
Texas	TEX. CONST. art. VII, § 5	The available school fund shall be applied annually to the support of the public free schools. Except as provided by this section, the legislature may not enact a law appropriating any part of the permanent school fund or available school fund to any other purpose. The permanent school fund and the available school fund may not be appropriated to or used for the support of any sectarian school.
Washington	WASH. CONST. Art. IX, 2	[T]he entire revenue derived from the common school fund and the state tax for

		common schools shall be exclusively applied to the support of the common schools.

In preparing this article, the authors did not discover any case law related to the constitutionality of publicly-funded voucher programs within these states. In a related but not strictly analogous case, a Washington court invalidated a statute that provided public funding for transporting students to private schools for violating the funding clause by utilizing funds for purposes other than common school purposes.[81] The statute in that case required school districts to carry private school students on public school buses free of charge.[82] The court stated that although the statute did not specifically procure funds from the common school fund, the act of busing students free of charge to private school necessitated the use of those funds because they were already used to fund the public school busing system.[83] By extension, a voucher program that used public school funds to pay tuition at private schools would likely violate provisions limiting funds to public schools. To pass state constitutional scrutiny, a voucher program in these states would likely need to use funds from other sources than the prescribed school fund.

D. Public Purpose Provisions

As Frank Kemerer has noted, most states have constitutional provisions requiring states to spend public funds for public purposes, but courts generally defer to the legislature's judgment on the nature of public purposes.[84] However, Kentucky courts have invalidated statutes for violating the state's public purpose doctrine statues[85] which provided for textbook loans to private school students[86] and utilized tax revenues to pay private schools for transportation

81. Mitchell v. Consol. Sch. Dist. No. 201, 135 P.2d 79 (Wash. 1943).

82. *See id.* at 80.

83. *Id.* at 82.

84. *See* Kemerer, *supra* note 8, at 169-70.

85. KY. CONST. § 171 ("Taxes shall be levied and collected for public purposes only . . . .").

86. Fannin v. Williams, 655 S.W.2d 480 (Ky. 1983).

subsidies.[87] Although courts are generally willing to defer to state legislatures, as Kemerer suggests, the statutes establishing voucher programs would likely need to relate the programs to a public interest.[88]

V. CONCLUSION

The state constitutional provisions related to voucher programs are varied and present a number of challenges to potential legislative initiatives. Although the legal community initially anticipated challenges based on religious provisions, recent cases demonstrate that future challenges may be predicated on non-religious provisions. The case law on state constitutional challenges to publicly-funded voucher programs is limited, but increased voucher program legislative initiatives and popularity signal the likelihood of future challenges in the courts. This article suggests that educators, lawyers, and legislators analyze non-religious provisions along the systems, local control, and funding framework in order to determine the susceptibility of potential voucher programs to state constitutional challenges. Finally, future challenges should clarify the distinctions between provisions and reveal whether state constitutions allow publicly-funded voucher programs.

87. Fiscal Court of Jefferson County v. Brady, 885 S.W.2d 681 (Ky. 1994).

88. Kemerer, *supra* note 8, at 69-70.