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Education Innovation, Fiscal Policy, and State Constitutions

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STATE CONSTITUTIONS CAN AFFECT FISCAL

policy either by acting as fiscal restraints that limit the scope of government or by imposing fiscal pressures that expand or place demands on government.¹ One concern with using state constitutions to place demands on government—especially on policy issues that are best handled by legislatures—is that those demands are often vague, which creates an opening for litigation to determine a constitutional clause’s scope.² Here we will focus on how education innovation is threatened by judicial interpretations of state education clauses, with implications for the effectiveness of education and, in turn, the return on investment in education.

BACKGROUND ON EDUCATION PROVISIONS IN STATE CONSTITUTIONS

Some of the most innovative reforms in education finance are voucher or tax benefit systems in which parents can use state funds or tax benefits to offset a portion of private school costs.³ A recent analysis of the economics literature on vouchers concludes,

Our assessment is that the evidence to date is not sufficient to warrant recommending that vouchers be adopted on a widespread basis; however, multiple positive findings support continued exploration. Specifically, the empirical research on small-scale programs does not suggest that awarding students a voucher is a systematically reliable way to improve educational outcomes, and some detrimental effects have been found. Nevertheless, in some settings, or for some subgroups or outcomes, vouchers can have a substantial positive effect on those who use them.⁴

This finding highlights the need for a trial-and-error approach to vouchers as opposed to a one-size-fits-all policy, in order to allow for innovation in education (alongside some failures, to be sure). Vouchers may be beneficial in some states and localities, but not in others, and there may be costs associated with vouchers that make them ill advised in some situations. This is an important policy debate, yet state constitutions often are used to short-circuit that debate, with the risk of stifling education innovation.

Several types of state constitutional provisions have been interpreted by courts to limit voucher or tax benefit systems.⁵ These include Blaine Amendments (related to religion and schools)⁶ and three other types of provisions: uniformity provisions, “which require states to provide a uniform system of public schools”; local control provisions, “which delegate the authority to control public schools to local entities”; and funding provisions, “which contain language that prohibits states from funding non-public schools.”⁷ Here we focus on uniformity provisions, which are the clearest example of how vague and imprecise language gives courts great power to dictate education policy.

UNIFORMITY PROVISIONS IN STATE CONSTITUTIONS

Uniformity provisions rest on a single word—*uniform*—whose meaning is far from clear. The Indiana Constitution’s education clause is typical of such uniformity clauses and reads as follows:

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.⁸

The phrase “general and uniform” is quite common in education clauses around the country: eight state constitutions have education clauses with that exact phrase,⁹ and several others include similar language.¹⁰

Activists in Indiana have tried to leverage the ambiguity of the “general and uniform” requirement to thwart alternatives to traditional public schools. In a case decided in 2013 by the Indiana Supreme Court, the plaintiffs argued that a statewide voucher law—the largest in the country as measured by the number of student participants¹¹—was unconstitutional in part because “it purports to provide those children’s publicly funded education by paying tuition for them to attend private schools rather than the ‘general and uniform system of Common Schools’ the Constitution mandates.”¹² The plaintiffs argued that the “general and uniform system of Common Schools” mandate precluded the provision of schooling in any other manner. The Indiana Supreme Court rejected this argument. Wisconsin’s Supreme Court reached the same conclusion in a similar case, *Davis v. Grover*.¹³

On the other hand, activists have successfully employed the “uniformity” argument in Florida. In *Bush v. Holmes*, the court found the Florida Opportunity Scholarship Program (OSP) to be in conflict with Article IX, Section 1(a) of the state constitution, which states,

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.¹⁴

The court reasoned that in funding education at private schools, the OSP diverted public funds away from “the free public schools that are the sole means

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set out in the Constitution for the state to provide for the education of Florida’s children.” The court also determined that, in addition to depriving public schools of funds, the system funded “private schools that are not ‘uniform’ when compared with each other or the public system.”¹⁵ Legal analysts note that even though the ruling in *Bush v. Holmes* crippled voucher efforts in Florida, courts in other states have so far not followed suit, and the ruling “remains a legal outlier with no impact outside Florida.”¹⁶ Even if it is an outlier, however, the Florida decision demonstrates the discretion available to judges in the presence of vague provisions.

CHARTER SCHOOLS AND STATE CONSTITUTIONS

The lack of clarity in state constitutions extends to another type of school choice, charter schools. A recent case in Washington State illustrates how a constitutional educational provision can be vague in multiple ways. Article IX, Section 2 of Washington’s constitution reads, “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.”¹⁷

This provision has clauses both for uniformity and for funding. The requirement that the common school fund and state tax could be used only to support “common schools” was the basis in 2015 for the Washington State Supreme Court to strike down a law that would have reallocated some of these funds

to charter schools.¹⁸ Common schools are not defined in the state constitution, and the 2015 ruling that charter schools did not qualify as common schools rested on a 1909 court decision defining the term.

The court’s reasoning exemplifies how state constitutions can be used to thwart education innovation. The decision reads, “We begin by noting what this case is not about. Our inquiry is not concerned with the merits or demerits of charter schools. Whether charter schools would enhance our state’s public school system or appropriately address perceived shortcomings of that system are issues for the legislature and the voters. The issue for this court is what are the requirements of the constitution.”¹⁹ But the court had significant leeway in how it interpreted the “common schools” clause, and its decision had significant policy implications.

The court didn’t stop there. It noted in a footnote of the slip opinion (an opinion that is still subject to revisions by the court) that the charter school program also violated the “uniform system” requirement of Article IX, Section 2. It did not explore this further, however, because it found “the invalidity of the Act’s funding provisions as discussed herein to be dispositive.”²⁰ However, in an amended version of the opinion, it dropped this footnote, leaving unclear whether and how the uniformity provision will factor into future decisions.²¹

We may soon find out, though. After the court issued its ruling, the state legislature adjusted the funding mechanism to require that charter schools be funded solely from lottery revenues. The Washington Education Association and other groups have challenged the law on multiple grounds, including that charter schools still violate the uniformity provision

even under the new funding system.²² As this publication goes to press, a King County court has upheld the new funding provision,²³ but the case remains under appeal to the state’s Supreme Court.

CONCLUSION

Given how vague state education clauses are, the battle over school choice will continue in Washington and elsewhere around the country. Regardless of whether one believes that school choice is a desirable policy, it should nonetheless be concerning that battles over school choice are being fought in the courts using vague constitutional provisions rather than in the legislative arena. To the extent that these legal battles result in tax dollars being allocated inefficiently within the education sector—including in the design of school choice systems—state fiscal policy will be harmed.

NOTES

1. Some examples and/or concepts in this paper were first presented in David M. Primo, “State Constitutions and Fiscal Policy” (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, August 2016).
2. Primo, “State Constitutions and Fiscal Policy.”
3. For a state-by-state overview of school choice rules, see National Conference of State Legislatures, “Interactive Guide to School Choice Laws,” accessed October 4, 2017, <http://www.ncsl.org/research/education/interactive-guide-to-school-choice.aspx>; see also Richard D. Komer and Olivia Grady, *School Choice and State Constitutions: A Guide to Designing School Choice Programs* (Arlington, VA: Institute for Justice and American Legislative Exchange Council, September 2016/March 2017).
4. Dennis Epple, Richard E. Romano, and Miguel Urquiola, “School Vouchers: A Survey of the Economics Literature,” *Journal of Economic Literature* 55, no. 2 (2017): 441.
5. Michigan’s constitution is the only state constitution to explicitly bar any type of voucher or tax benefit system. See Komer and Grady, “School Choice and State Constitutions.”
6. For a detailed discussion of Blaine Amendments, see Komer and Grady, “School Choice and State Constitutions.”
7. Preston C. Green III and Peter L. Moran, “The State Constitutionality of Voucher Programs: Religion Is Not the Sole Determinant,” *Brigham Young University Education and Law Journal* 2010, no. 2 (2010).
8. Indiana Const. art. VIII, §1.
9. The seven other states are Arizona, Idaho, Minnesota, North Carolina, Oregon, South Dakota, and Washington. See Molly A. Hunter, “State Constitution Education Clause Language,” undated report of the Education Law Center.
10. States with “uniformity” provisions include AZ, CO, FL, ID, IN, MN, NV, NM, NC, ND, OR, SD, WA, WV, WI, and WY. Green and Moran, “The State Constitutionality of Voucher Programs”; Hunter, “State Constitution Education Clause Language.”
11. EdChoice, “School Choice in America,” July 6, 2017, <http://www.edchoice.org/school-choice/school-choice-in-america>.
12. Quoted in *Meredith v. Pence*, No. 49S00–1203–PL–172 (2013).
13. *Davis v. Grover*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992).
14. Fl. Const. art. IX, § 1(a).
15. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).
16. Komer and Grady, “School Choice and State Constitutions,” 7.
17. Washington Const. art. IX, § 2.
18. *League of Women Voters of Washington v. State*, 184 Wn.2d 393; 355 P.3d 1131; 2015 Wash. LEXIS 1016.
19. *League of Women Voters of Washington v. State*.
20. *League of Women Voters of Washington v. State*, 355 P.3d 1131 (Wash. 2015), slip opinion.
21. Asti Gallina, “The Washington State Constitution and Charter Schools: A General and Uniform Prohibition?,” *Washington Law Review* 92, no. 1 (2017): 371–424.
22. *El Centro v. Washington*, No. 16-2-18527-4 SEA.
23. *El Centro v. Washington*.

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